



U.S. Citizenship
and Immigration
Services

Non-Precedent Decision of the
Administrative Appeals Office

In Re: 09709175

Date: MAR. 11, 2021

Appeal of Immigrant Investor Program Office Decision

Form I-526, Immigrant Petition by Alien Entrepreneur

The Petitioner seeks classification as an immigrant investor pursuant to the Immigration and Nationality Act (the Act) section 203(b)(5), 8 U.S.C. § 1153(b)(5). This fifth preference (EB-5) classification makes immigrant visas available to foreign nationals who invest the requisite amount of qualifying capital in a new commercial enterprise (NCE) that will benefit the United States economy and create at least 10 full-time positions for qualifying employees.

The Chief of the Immigrant Investor Program Office denied the petition, concluding that the Petitioner did not establish eligibility for the EB-5 classification. Specifically, the Chief determined that the Petitioner did not document the lawful source of the funds she remitted to [redacted] the NCE, which is affiliated with [redacted] (the Regional Center), a United States Citizenship and Immigration Services (USCIS) designated regional center.¹ On appeal, the Petitioner maintains that she has shown eligibility for the EB-5 classification.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Upon de novo review, we will dismiss the appeal.

I. LAW

A foreign national may be classified as an immigrant investor if he or she invests the requisite amount of qualifying capital in a NCE. The foreign national must show that his or her investment will benefit the United States economy and create at least 10 full-time jobs for qualifying employees. An immigrant investor may invest the required funds directly in an NCE or through a regional center. Regional centers apply for designation as such with USCIS. Designated regional centers identify and work with NCEs, which in turn are associated with a specific investment project taken on either directly by the NCE, or by one or more separate entities known as the "job creating entity" (JCE). Regional centers can pool immigrant (and other) investor funds for qualifying projects that create jobs directly or indirectly. 8 C.F.R. § 204.6(j)(4)(iii).

¹ A regional center is an economic unit involved with the promotion of economic growth, "including . . . improved regional productivity, job creation, and increased domestic capital investment." See 8 C.F.R. § 204.6(e).

In addition, a petitioner must show that his or her invested capital did not derive, directly or indirectly, from unlawful means. 8 C.F.R. § 204.6(e). To show the lawful source of the funds, an investor must submit evidence such as foreign business and tax records or documentation identifying sources of the capital. See 8 C.F.R. § 204.6(j)(3). Bank letters or statements corroborating the deposit of funds by themselves are insufficient to demonstrate their lawful source. Matter of Ho, 22 I&N Dec. 206, 210-11 (Assoc. Comm'r 1998); Matter of Izummi, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998). The record must trace the path of the funds back to a lawful source.² Ho, 22 I&N Dec. at 210-11; Izummi, 22 I&N Dec. at 195.

II. ANALYSIS

The Petitioner indicates she invested \$500,000 in the NCE.³ According to the business plan, the NCE seeks to raise up to \$18,500,000 in EB-5 funds from 37 foreign national investors to loan to [redacted] the JCE. The JCE plans to use the EB-5 capital and other funds to finance the development of a [redacted] in [redacted] Florida. For the reasons discussed below, we find the Petitioner has not demonstrated, by a preponderance of the evidence, that her invested capital did not derive, directly or indirectly, from unlawful means.

In this case, the Petitioner alleges that her EB-5 capital derived from a 3,900,000 renminbi (RMB) mortgage loan secured by real property owned by the Petitioner. The record indicates the loan proceeds were deposited in the Petitioner's [redacted] Bank account on November 2, 2016. According to the Statement of Capital Exchange dated November 7, 2016, the Petitioner agreed to exchange capital with her friend, [redacted] due to the currency exchange restrictions imposed on mainland China. The record indicates the Petitioner remitted the loan proceeds to [redacted]'s account at [redacted] Bank account in mainland China on November 3, 2016, and, in return, [redacted] remitted \$562,060 from his [redacted] Bank [redacted] account to the Petitioner's [redacted] Bank [redacted] account. The Petitioner then remitted her investment fund to the NCE escrow account on November 14, 2016.

The Petitioner has failed to demonstrate, by a preponderance of the evidence, the path and lawful source of the funds used in the informal currency exchange. In response to the Chief's request for evidence (RFE), the Petitioner provided a declaration from [redacted] stating he had "a habit of doing wealth management in [redacted] and also would like to purchase some [redacted] insurance for my families" and he "exchanged USD 562,060 accumulated from my income from [redacted] [redacted]." In support of [redacted]'s declaration, the Petitioner provided an income certificate indicating [redacted] earned 4,761,400 RMB while employed from June 2003 to June 2011. However, the record does not contain sufficient documentary evidence to support [redacted]'s assertions that he exchanged his retained RMB earnings into USD or that he had retained sufficient lawful earnings to cover the \$562,060 exchange. While the record contains bank statements showing the [redacted] received the Petitioner's RMB funds and then transferred USD

² These requirements "serve a valid government interest; i.e., to confirm that the funds utilized in the [EB-5] program are not of suspect origin." *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Cal. 2001) (holding that a petitioner had not established the lawful source of her funds because, in part, she did not designate the nature of all of her employment or submit five years of tax returns), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

³ The Petitioner indicates that the NCE is located in a targeted employment area, and that the required amount of qualifying capital is downwardly adjusted from \$1,000,000 to \$500,000. See 8 C.F.R. § 204.6(f)(2).

funds to the Petitioner's [redacted] bank account, this evidence does not document any currency exchange taking place nor does it indicate [redacted] retained his earnings as USD funds. Bank letters or statements corroborating the deposit of funds by themselves are insufficient to demonstrate their lawful source. Matter of Ho, 22 I&N Dec. 206, 210-11 (Assoc. Comm'r 1998); Matter of Izummi, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998). Here, the Petitioner has not sufficiently documented the path or source of the swapped funds which were later remitted to the Petitioner as her EB-5 investment fund.

On appeal, the Petitioner argues we erroneously treat the path of funds analysis as an independent evidentiary requirement and improperly imposed a heightened evidentiary burden on the Petitioner by requiring she document the lawful source of [redacted]'s USD funds. In support, the Petitioner argues that the path of funds analysis is only used to show the ownership of the Petitioner's investment funds which, she contends, was shown by documenting the lawful source of her mortgage sale proceeds. The Petitioner argues that her mortgage sale proceeds is her invested capital and need not show the lawful source of the currency exchange funds because her capital is not fungible. We disagree. The record must trace the path of the funds back to a lawful source. Ho, 22 I&N Dec. at 210-11; Izummi, 22 I&N Dec. at 195. Here, the documented path of the Petitioner's lawful source of funds stopped when she remitted her loan proceeds to [redacted]'s [redacted] Bank account in mainland China and, as discussed above, the Petitioner did not document the path of the USD funds prior to them being remitted to the NCE.

Additionally, at the time of filing her petition, the Petitioner was required to show that her invested capital did not derive, directly or indirectly, from unlawful means and must submit evidence such as foreign business and tax records or documentation identifying sources of the capital. See 8 C.F.R. § 204.6(e) and 8 C.F.R. § 204.6(i)(3). As discussed above, the Petitioner did not provide sufficient evidence demonstrating [redacted] had retained enough lawful earnings to cover the \$562,060 he remitted to the Petitioner or that [redacted] exchanged his RMB funds into USD. Notwithstanding the Petitioner's arguments that requesting third party documents is unreasonable, it is the Petitioner's burden to show that her invested capital did not derive from unlawful means. In this case, the Petitioner has not made such a showing. Here, for the reasons discussed, the Petitioner has not made such a showing.

Next, the Petitioner argues on appeal that USCIS failed to properly apply its deference policy which, she contends, compels the approval of her petition since other I-526 petitions have been approved. As discussed, under Matter of Dhanasar, 26 I&N Dec. 884 (AAO 2016), we exercise de novo review on appeal of all issues of fact, law, policy, and discretion. Moreover, USCIS' deference policy specifies that there are distinct eligibility requirements at each stage of the EB-5 immigration process and will generally defer to favorable determinations at a later stage in the process. USCIS Policy Memorandum PM-602-0083, EB-5 Adjudications Policy 23 (May 30, 2013), <https://www.uscis.gov/legal-resources/policy-memoranda>; see also 6 USCIS Policy Manual G.6, <https://www.uscis.gov/policymanual/HTML/PolicyManual.html>. For example, if USCIS approves an Application For Regional Center under the Immigrant Investor Program (Form I-924) or an Immigrant Petition by Alien Investor (Form I-526) presenting a Matter of Ho compliant business plan and a specific economic methodology, USCIS will defer to the earlier finding that the methodology was reasonable in subsequent adjudications of Form I-526 presenting the same related facts and methodology. However, USCIS will still conduct a de novo review of each prospective immigrant

investor's lawful source of funds and other individualized eligibility criteria. *Id.* Here, the Petitioner has not demonstrated that the deference policy would apply to this case. The Petitioner only claims that counsel's office has had 250 I-526 petitions approved involving similar currency swaps but, as mentioned in the policy manual, USCIS does not apply deference to individual investor's lawful source of funds criteria. As such, we find we did not fail to apply the USCIS deference policy in this case.

Lastly⁴, the Petitioner argues USCIS acted arbitrarily and capriciously by denying her petition when "it presented the same set of facts as hundreds of previously approved cases." In support of her argument, the Petitioner cites to *Doe v. USCIS*, Civil Action No. 15-273 (CKK) (March 10, 2017) which involved a number of plaintiffs whose EB-5 petitions were based on their investments into the same NCE. Here, the Petitioner has not specified which facts from hundreds of previous cases are identical to the Petitioner's petition nor has she shown that these previous petitions relied on an investment into the same NCE as was the case in *Doe v. USCIS*. Additionally, we are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988); see also *Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). In this case, we conducted a de novo review of the facts of the Petitioner's specific case and determined they did not meet the evidentiary standards by a preponderance of the evidence. *Chawathe*, 25 I&N Dec. at 376. Finally, as stated above, the USCIS deference policy explicitly excludes the lawful source of funds analysis from being given deference. See, *supra*.

III. CONCLUSION

Based on the reasons stated above, we conclude that the Petitioner has not documented the lawful source of her EB-5 capital. See 8 C.F.R. § 204.6(e), (j)(3); *Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195. Specifically, she has not demonstrated, by a preponderance of the evidence, the lawful source or path of the funds used in an informal currency swap.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁴ The Petitioner also argued that the denial of her petitioner regarding [redacted]'s ability to provide funds to the Petitioner while maintaining his own living expenses violated her constitutional due process rights. However, we lack jurisdiction to rule on the constitutionality of laws enacted by Congress or of regulations promulgated by DHS. See, e.g., *Matter of Fuentes-Campos*, 21 I&N Dec. 905, 912 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992).