MATTER OF T-Z-

DATE: MAY 5, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-526, IMMIGRANT PETITION BY ALIEN ENTREPRENEUR

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

The Director, California Service Center, denied the petition. The Director concluded that the Petitioner had not demonstrated her eligibility. The Director also entered a "finding of fraud" based on the Petitioner's filing of a false sublease for the new commercial enterprise (NCE). We dismissed a subsequent appeal, making a finding that the Petitioner had willfully misrepresented a material fact. We subsequently denied two additional motions, reaffirming our finding of material misrepresentation.

The matter is now before us on a third motion, a motion to reopen and reconsider. In her motion, the Petitioner acknowledges that she is ineligible for the classification, but maintains that she did not make a willful misrepresentation of a material fact. She supplies additional evidence, including a transcript of a sworn statement, her personal statement and correspondence and other documents pertaining to her former attorney.

We will deny the motion to reopen and reconsider.

I. LAW

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *Abudu*, 485 U.S. at 110. A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentation. 8 C.F.R. § 103.5(a)(2).

Motions for reconsideration must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the original decision was based on an incorrect

application of law or United States Citizenship and Immigration Services (USCIS) policy. 8 C.F.R. § 103.5(a)(3). In essence, a motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new evidence. *Compare* 8 C.F.R. § 103.5(a)(3) and 8 C.F.R. § 103.5(a)(2).

Regarding both motions to reopen or reconsider, the regulation at 8 C.F.R. § 103.5(a)(1)(ii) states in relevant part: "The official having jurisdiction is the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction." The latest decision was our November 6, 2014, dismissal of the Petitioner's second motion.

II. ANALYSIS

The petition is based on an investment in the NCE. We dismissed the Petitioner's appeal, concluding that she did not establish her eligibility and had sought to procure a benefit provided under the Act through the willful misrepresentation of a material fact. While the finding of misrepresentation was limited to the submission of a sublease that contained demonstrably false information, we noted numerous other inconsistencies in the record pertaining to company names, the Petitioner's risk, and the NCE's finances, customers, business plans, and employees. We subsequently adjudicated the Petitioner's first motion to reopen, and affirmed our appellate decision.

Finally, we denied the Petitioner's second motion, a motion to reopen and reconsider. Specifically, we denied the motion because: (1) she did not establish that she met the procedural requirements under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988), *reaff'd in Matter of Compean*, 25 I&N Dec. 1 (A.G. 2009), for an ineffective assistance of counsel claim; (2) she did not show that she lacked knowledge of the material misrepresentation, or in the alternative, her deliberate avoidance of material facts in her case did not absolve her responsibility of knowing the contents of her petition and supporting material; (3) she submitted inconsistent evidence on motion relating to the ownership and formation of the NCE; and (4) she filed insufficient documentation reflecting that a motion to reopen is warranted. In addition, we concluded that she did not specifically identify any law or USCIS policy that we had applied incorrectly in our February 4, 2014, decision. Accordingly, we similarly denied her motion to reconsider.

With her current motion, the Petitioner submits: (1) a transcript of a November 24, 2014, videotaped sworn statement of Chief Executive Officer (CEO) of which owns 59 percent of the NCE; (2) the Petitioner's December 2, 2014, statement regarding her claim of ineffective assistance of counsel against her former counsel, (3) correspondences she mailed to and (4) documents she sent to and received from the Supreme Court of New York, relating to her grievance against For the reasons discussed below, the Petitioner has not overcome our material misrepresentation finding, her sole challenge of our most recent decision.

A. Motion to Reopen

Similar to her second motion, in the Petitioner's current motion, her sole challenge is our finding of material misrepresentation. She states that she lacked actual knowledge of the contents of the fraudulent sublease. Specifically, she maintains that "at no time did she ever provide false information or documentation to the U.S. government. Nor did she deliberately avoid learning of any misrepresentation in her petition." For the reasons discussed below, we deny the motion to reopen, and affirm our previous decision, including the material misrepresentation finding.

First, even assuming that the Petitioner did not have actual knowledge of the contents of the fraudulent sublease, at issue is whether she may be absolved of her responsibility of the fraudulent sublease submitted in support of her petition. As noted in our April 17, 2012, and November 6, 2014, decisions, by signing her Form I-526 on January 24, 2010, she certified, under penalty of perjury, that the petition and all materials filed with it, either at the time of filing or thereafter, are true and correct. *See* section 287(b) of the Act; 8 U.S.C. § 1357(b); 8 C.F.R. § 103.2(a)(2); 28 U.S.C. § 1746; 18 U.S.C. § 1621. Her statement that she lacked actual knowledge of the fraudulent sublease does not nullify the certification she made on the Form I-526, under penalty of perjury.

On page five of this motion, the Petitioner maintains that Chinese is "a language she spoke and understood best." This statement might be true, but it does not demonstrate that when she signed her Form I-526 on January 24, 2010, she did not understand English or did not understand that by executing the petition she was certifying, under penalty of perjury, that the Form I-526 and all evidence submitted in support of it, either at the time of filing or thereafter, are true and correct. By signing the Form I-526, she accepted the responsibility of apprising herself of the contents of the petition as well as materials filed in support of her petition.

The Petitioner also maintains that she understands little to no English, and thus did not know the significance of her signature on the Form I-526 or the contents of the form. As discussed in our November 6, 2014, decision, her statement is contradicted by other applications she filed with USCIS. Specifically, according to part five of a Form I-539, Application to Extend/Change Nonimmigrant Status, which she signed on August 30, 2010, seven months after she signed the Form I-526, she "can read and understand English, and ha[s] read and understand each and every question and instruction on this form, as well as [her] answer to each question." Similarly, in part five of a Form I-485, Application to Register Permanent Residence or Adjust Status, she signed and confirmed being able to "read and understand English and understand each and every question and instruction on this form, as well as [her] answer to each question." She executed these two forms certifying, under penalty of perjury, that the "application[s] and the evidence submitted with [them are] all true and correct." These forms do not substantiate that she knew little to no English at the time she signed the Form I-526. In the instant motion, she has not challenged our conclusion that she knew and understood English at the time she executed the Form I-526.

The evidence the Petitioner has submitted in support of this motion similarly verifies that she understands English. As shown on page 27 of the transcript of videotaped sworn statement, which is in a question and answer format, when had trouble recalling when he first met the Petitioner, she reminded him the date of their first meeting. This exchange, conducted entirely in English, demonstrated her English proficiency, proving that during the videotaping of sworn statement, she understood the question her counsel asked from answer she realized that he had trouble recalling their first meeting; and she reminded him of the date of their first meeting in English.

Second, the evidence the Petitioner submitted in support of this motion does not absolve her of the responsibility to know the contents of her petition and supporting materials. As noted in page 11 of the instant motion, the fraudulent sublease between the NCE and contains a "misleading reference . . . suggesting that the sublessor, had rights to the entire 11,044 square feet of space . . . [when it] had a written lease for only 375 square feet . . . ." The Petitioner maintains in this motion, as she did in her second motion, that she did not have actual knowledge of the contents of the fraudulent sublease, and she did not learn about the submission of the fraudulent sublease, until after February 4, 2014, when we issued our decision on her first motion to reopen. The record does not support the Petitioner's statement. Specifically, in response to our July 22, 2011, notice of intent to dismiss (NOID), she filed an August 3, 2011, letter, in which she specifically discussed the fraudulent sublease, stating that there had been a "misunderstanding" arising from the sublease. Her August 2011 letter demonstrates that she had been aware of this material misrepresentation issue at least as early as August 2011, contradicting her remark in the instant motion that she first learned about the issue after we adjudicated her first motion in February 2014.

Third, the transcript of videotaped sworn statement is insufficient to show that we should withdraw our material misrepresentation finding. Specifically, the Petitioner has not established that statements are credible or reliable. As discussed in our November 6, 2014, decision, we concluded that the transcript of a recorded telephone conversation between the Petitioner and was insufficient to support a motion to reopen. We noted in our last decision that the Petitioner created a recording of a telephone conversation and transcript of the recording after we issued two decisions explaining the bases of our material misrepresentation finding. The timing of both the telephone conversation and videotaped sworn statements do not bolster their credibility or reliability.

Moreover, on page four of the instant motion, the Petitioner maintains that "the transcript [of the telephone conversation] was replete with statements against self-interest of an evidentiary rule indicating reliability was disregarded." The Petitioner, however, has not pointed to any statements that has made either in the telephone conversation or in the videotaped sworn statement that is against his interest. At no time did take responsibility for the contents or offering of the fraudulent sublease. Instead, he provided that the submission of the false lease was a misunderstanding in which he was not personally involved. In light of the timing and

the contents of the telephone conversation and videotaped sworn statement, the Petitioner has not shown that they are credible or reliable.

Furthermore, even if the Petitioner did not know about the fraudulent lease, the next issue is whether she is absolved of the responsibility of knowing the contents of supporting evidence submitted on her behalf. As discussed in our previous decision and in more detail below with respect to the motion to reconsider, we conclude that she is not absolved of the responsibility. *See Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005); *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993).

Fourth, the evidence is insufficient to demonstrate that the Petitioner lacked actual knowledge of the fraudulent sublease. As an immigrant investor, the Petitioner must engage in an active, rather than passive, management of the NCE. *See* 8 C.F.R. § 204.6(j)(5) (a petitioner must show that she "is or will be engaged in the management of the new commercial enterprise, . . . as opposed to maintaining a purely passive role in regard to the investment . . . .") According to an organizational chart that she initially offered in support of the petition, she is the Chairman and President of the NCE. Part five of the petition noted that she would receive an annual salary of $50,000 and benefits in the amount of $6,000 as the Chairman and President of the NCE. Page two of the January 22, 2010, cover letter that she initially filed in support of the petition provided: "[a]s the Chairman and President of the company, she is going to be actively involved in the management and decision-making." As the record reflects that she had an active management role in the NCE, she has not established that she lacked actual knowledge of the fraudulent sublease and the related failure to disclose that four identical businesses, including the sublessor, would be operating as joint ventures in this same location.

Fifth, the record does not support the Petitioner's ineffective assistance of counsel argument. In page six of the instant motion, she indicates her former counsel, Mr. Lu, did not inform her that her petition had been denied. According to her December 2, 2014, statement relating to her claim of ineffective assistance of counsel, Mr. Lu did not inform her "of the Request for Evidence sent by USCIS to the Attorney Lu's office, the Notice of Intent to Deny and the subsequent Denial Notice." She further maintained that "[a]t no point, after [her] January 2010 meeting [with Mr. Lu], did attorney Lu communicate with [her] (his client) any updates on [her] case." The submissions do not substantiate these statements. In support of her appeal, she signed a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, on March 3, 2011. The Form G-28 specifically noted that the form was related to her filing of a Form I-290B, the form that initiated her appeal, and provided that Mr. Lu was her attorney on appeal.

Additionally, in response to our NOID, before we issued the April 17, 2012, decision dismissing the appeal, the Petitioner, through Mr. Lu, submitted an August 3, 2011, letter explaining the fraudulent sublease as part of her NOID response. This letter signifies her knowledge of the appeal and the Chief's denial of her petition. As such, the record does not substantiate that Mr. Lu did not communicate with the Petitioner regarding the status of her case, or a finding of ineffective assistance of counsel. Moreover, at issue here is whether the Petitioner is responsible for the

evidence, including the fraudulent sublease, filed in support of her petition. As discussed, she is not absolved of this responsibility by not availing herself of the basic operations of a business for which she was the Chairman and President.

Finally, on motion, the Petitioner has addressed the inconsistencies we noted in our November 6, 2014, decision, relating to the ownership and formation of the NCE, and our reference to [redacted] Her statements relating to these issues, however, do not address her responsibility of knowing the contents and submission of the fraudulent sublease, which is the basis of our material misrepresentation finding. As such, these issues do not demonstrate that we should withdraw our material misrepresentation finding. Based on the above stated reasons, we will deny the motion to reopen. *See* 8 C.F.R. § 103.5(a)(2).

B. Motion to Reconsider

In her motion to reconsider, the Petitioner challenges our reliance on *Hanna v. Gonzales*, 128 F. App'x 478, 480 (6th Cir. 2005), in our November 6, 2014, decision. In *Hanna*, the federal circuit court found that an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents. We noted in our decision that the fact that the Petitioner did not apprise herself of evidence submitted in support of her own petition constituted deliberate avoidance and did not absolve her of the responsibility of knowing the contents of her petition or the supporting exhibits. *See Hanna*, 128 F. App'x at 480; *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533 (1991) (finding that a represented party who signs his or her name to documents filed in court bears personal, non-delegable responsibility to certify truth and reasonableness of the materials and failure to meet that duty subject signor to Rule 11 sanctions). The law generally does not recognize deliberate avoidance as a defense to misrepresentation. *See Bautista*, 396 F.3d at 1301; *Puente*, 982 F.2d at 159.

The Petitioner maintains that her case is distinguishable from *Hanna*, 128 F. App'x at 480. We disagree. In *Hanna*, the court concluded that even if the applicant had no actual knowledge of the contents of his application, because he "signed, under oath, his 1982 adjustment-of-status application . . . [h]is failure to apprise himself of the contents of this important document constituted deliberate avoidance – an act the law generally does not recognize as a defense to misrepresentation." *Id.* In this case, the Petitioner indicates that she lacked actual knowledge of the contents and offering of the fraudulent lease and thus should not be held responsible for it. The same rationale in *Hanna* applies in this case, in that a showing of actual knowledge is not needed to hold a petitioner responsible for a finding of material misrepresentation. Rather, by signing and certifying the petition, under the penalty of perjury, the Petitioner has accepted and is charged with the responsibility of knowing the contents of the submissions and that even if she did not apprise herself of the documentation does not absolve her of this responsibility. Significantly, the Petitioner has not cited any case law demonstrating that she is absolved of this responsibility after she signed and certified the Form I-526 under the penalty of perjury.

The Petitioner cites case law relating to deliberate avoidance, and maintains that she could not be found to have committed it, because she had no reason to suspect problems relating to the operation of the NCE. Her statement, however, is not substantiated. The record contains a number of inconsistent and less than credible documents relating to the NCE and its operation. As noted in our April 17, 2012, decision, there are conflicting expense and financial statements relating to the NCE. For example, according to one of the business plans, the Petitioner projected that the NCE would purchase 150 televisions in its first year of operation and provided that each television would cost between $1,000 and $2,000. The financial projection, however, only budgeted $135,000 for the purchases, which would underfund the projected expenditures between $15,000 and $165,000. In addition, there is conflicting information on the NCE's annual rental expenditure, and inconsistent filings showing that in 2009, the NCE received payments for rendering services that do not correspond to the NCE's tax or bank records. Furthermore, there are Form I-9s with multiple line disturbances that raise serious doubts on the legitimacy and probative value of the information. In short, the record as a whole does not support the Petitioner's statement on motion that she, as the Chairman and President of the NCE, had insufficient knowledge of the company to suspect problems relating to the operation of the NCE.

Moreover, the Petitioner's educational and professional background does not support a finding that she had not deliberately avoided learning about the fraudulent sublease. The record shows that she is well-educated and is experienced in running and managing a number of businesses. The evidence does not support her statement that once she wired $539,000 to the NCE in December 2009, she would be completely unaware of the NCE's business operation until we issued the decision adjudicating her first motion to reopen. According to a and , which the Petitioner initially submitted in support of the petition, she completed four-year undergraduate courses for international taxation and holds a Bachelor's Degree of Economics. A Form G-325A, Biographic Information, which she offered in support of her Form I-485, indicated that she was a manager from January 2002 through January 2010 for , in , China. A January 22, 2010, cover letter that she initially filed in support of the petition, stated that she had worked for the Taxation Bureau; served as the general manager, which she provided constituted the chief executive officer position in the United States, for ; and served as the general manager for The cover letter affirmed that she had a "successful business career" and "[g]iven her business instinct and subtle skills, her investments [in the stock and real estate markets] have received fairly high returns." The Petitioner's education and employment history do not support a conclusion that, as the Chairperson and President of the NCE, she would be unaware of the NCE's business operation, including the location of the business operation and size of its office as contemplated in the fraudulent sublease, for four years after she wired over $500,000 to the NCE.

On page 7 of the motion, the Petitioner maintains "[e]ven today, [she] still does not known the detailed contents of the Request for Evidence, the Notice of Intent to Deny and some of the supporting documents purportedly submitted on her behalf, such as Exhibit A to the rental agreement." Assuming her statement is true, she has not shown that her lack of knowledge is

reasonable, or does not constitute deliberate avoidance. At the time she filed this motion, it had been over three years since we denied her appeal, with a material misrepresentation finding; and over a year since we issued our decision on her first motion to reopen. She has had ample time to request documentation from USCIS, through her former attorneys, and/or through individuals and entities associated with the NCE. Her stated ignorance relating to filings is not reasonable, and supports a finding of deliberate avoidance. Based on the above discussed reasons, we will deny the motion to reconsider. *See* 8 C.F.R. § 103.5(a)(3).

III. CONCLUSION

The Petitioner has not shown that we should grant the motion to reopen, because she has not stated new facts overcoming our prior decisions that are supported by affidavits or other documentary evidence. *See* 8 C.F.R. § 103.5(a)(2). She has also not provided reasons for reconsideration that are supported by pertinent precedent decisions to establish that our last decision was based on an incorrect application of law or USCIS policy. *See* 8 C.F.R. § 103.5(a)(3).

The motion to reopen and reconsider will be denied for the above stated reasons, with each considered as an independent and alternate basis for the decision. The burden is on the Petitioner to show eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The Petitioner in this case has not established that she qualifies for the immigrant investor classification, or that our material misrepresentation finding should be withdrawn. Accordingly, the motion will be denied.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of T-Z-*, ID# 14645 (AAO May 5, 2016)