U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-Y-

DATE: DEC. 4, 2015

APPEAL OF IMMIGRANT INVESTOR PROGRAM 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) § 203(b)(5), 8 U.S.C. § 1153(b)(5). The Chief, Immigrant Investor Program Office (IPO), denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. RELEVANT LAW AND REGULATIONS

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

II. PERTINENT FACTS AND PROCEDURAL HISTORY

The Petitioner filed the petition on November 26, 2012, with supporting materials. The Petitioner indicated that she created [redacted] doing business as [redacted] as a new commercial enterprise (NCE) through the creation of a new business. As the NCE is within a targeted employment area, the required amount of capital in this case is $500,000. The NCE is engaged in printing and related services, such as printing business forms, carbonless forms and documents, letterhead, and labels. The Director, California Service Center, issued a request for evidence (RFE) on January 28, 2014. The Petitioner responded to this request on April 18, 2014, with additional information. The Chief determined that the Petitioner had not established the lawful source of her invested funds, and that the Petitioner had not met the relevant job creation requirements. On April 28,

2015, the Petitioner filed an appeal with U.S. Citizenship and Immigration Services (USCIS). On appeal, the Petitioner submits a brief with additional exhibits.

III. ANALYSIS

A. Translations of Foreign Language Documents

Several of the items on record that were originally in a foreign language were not accompanied by a translation that complies with the regulation at 8 C.F.R. § 103.2(b)(3). This regulation first requires that foreign language documents be accompanied by a full English language translation, rather than a summary or extract. Further, the regulation requires the translator to certify the translation as complete and accurate, as well as certifying that he or she is competent to translate from the foreign language into English. Several of the initially submitted translations were either not full English translations, or were not accompanied by a sufficient translator's certification.

In response to the Director's RFE, the Petitioner provided certified translations dated April 3, 2014, listing as the translator. The certifications of the accuracy of the translations were identical photocopies, and did not list the translations she was certifying or the Petitioner. On appeal, the Petitioner resubmits some of the previous translations in addition to translations from that are also accompanied by photocopies of the same certification that does not identify the translations or the Petitioner. A single certification, even if photocopied, is more probative of the accuracy of each translation when it identifies the translations it is certifying. Moreover, the translations themselves contain some language that is not entirely clear. For example, the contracts whereby the Petitioner's spouse purchased two pieces of property in 2007 both contain an Annex 1 with the terms of payment. Both annexes indicate that there are "no loans," but include a "down payment loan" amount and reflect that the buyer, the Petitioner's spouse, would be "paid back the principal." The amount to be repaid to the buyer is more than the down payment. Therefore, according to the translations, the buyer is receiving more funds than he is paying. The Chief, however, did not raise any concerns regarding these translations and we will consider them below.

B. Lawful Source of Invested Funds

The regulation at 8 C.F.R. § 204.6(j)(3) lists the type of documentation a petitioner must submit, as applicable, including foreign business registration records, business or personal tax returns, or evidence of other sources of capital.

The Petitioner asserts that she and her spouse purchased two properties in 2007, which they subsequently sold in 2011, utilizing the proceeds of the sale to invest in the NCE. The Chief determined that the Petitioner had not demonstrated how her spouse lawfully earned the funds, which he used to purchase two properties. On appeal, the Petitioner offers additional items relating to how her spouse obtained the funds he used to purchase the property in 2007. These foreign language documents submitted on appeal are accompanied by the certifications. If we were to accept the translations, the evidence she provides on appeal would likely be sufficient to

show that her spouse lawfully obtained the funds she invested in the NCE. Specifically, the Petitioner's company received a significant sum for confiscated property and debit vouchers confirm the company paid the seller of two properties to the Petitioner, [redacted] the amounts listed as down payments on both Annexes on January 12, 2007 and the remaining balance of both purchase prices[1] on February 2007.

The Petitioner, however, must establish the full path of her funds in order to meet her burden of demonstrating that the funds are her own. *Matter of Izummi*, 22 I&N Dec. 169 (Assoc. Comm'r 1998); *see also Matter of Soffici*, 22 I&N Dec. 158, 165 n.3 (Assoc. Comm'r 1998). The Petitioner has not documented the path from the subsequent buyer of these two properties from the Petitioner's spouse to the NCE. The Petitioner provided a Remittance Entrustment Agreement dated February 21, 2012, in which she and a friend, [redacted], agreed on a method to remove the Petitioner's funds from China through the friend's account. In response to the RFE, the Petitioner asserted that on February 28, 2012, she transferred 3,154,500 Chinese Yuan Renminbi (RMB) from her account to [redacted]. She offered a Personal Banking Business Voucher reflecting a transfer of that amount from the Petitioner's account ending in 0078 into [redacted] account ending in 6838. The voucher, however, is in a foreign language, and its translation is not accompanied by any translator's certification. Also in response to the RFE, the Petitioner included a fund transfer receipt reflecting that a company named [redacted] transferred $501,000 from an account ending in 1596 to the Petitioner's account ending in 5772. While [redacted] is a director of [redacted] the Petitioner did not show how the funds moved from [redacted] account ending in 6838 to the account ending in 1596. The Petitioner subsequently transferred the funds from her account ending in 5772 into the NCE's account ending in 7049.

As the Petitioner has not documented the full path of the funds to establish the investment funds are her own, she has not demonstrated the lawful source of the funds pursuant to the regulation at 8 C.F.R. § 204.6(j)(3). We find that the Petitioner has not shown that she has invested, or is actively in the process of investing capital obtained through lawful means.

C. Employment Creation at the NCE

The regulation at 8 C.F.R. § 204.6(j)(4)(i)(A) lists the evidence that a petitioner must submit to corroborate employment creation, including photocopies of relevant tax records, Forms I-9 Employment Eligibility Verification, or other similar documents for ten qualifying employees. Alternatively, if the new commercial enterprise has not yet created the requisite ten jobs, the petitioner must file a copy of a comprehensive business plan showing the need for not fewer than ten qualifying employees. 8 C.F.R. § 204.6(j)(4)(i)(B). The regulation at 8 C.F.R. § 204.6(e) defines employee as an individual who provides services directly to the commercial enterprise and excludes independent contractors. The same regulation defines a qualifying employee as a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be

[1] The translations of the Annexes characterize these balances as principal to be repaid to the buyer, but the debit vouchers confirm that the spouse's company paid these amounts to the seller on behalf of the Petitioner.

employed in the United States. The definition excludes the petitioner, the petitioner's spouse, sons, or daughters, or any nonimmigrant. Section 203(b)(5)(D) of the Act defines full-time employment as "employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position." Full-time employment also means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1039 (E.D. Calif. 2001) *aff'd* 345 F.3d 683 (9th Cir. 2003) (finding this construction not to be an abuse of discretion).

On the Form I-526, Immigrant Petition by Alien Entrepreneur, the Petitioner indicated that the NCE was the result of creating a new business, which correlates with the regulation at 8 C.F.R. § 204.6(h)(1). The Petitioner provided evidence of ten employees, and has consistently asserted that a comprehensive business plan is not required. The Director's RFE discussed several issues relating to the NCE's employees and officers, and those of an adjacent printing business named . The Director acknowledged that the NCE has leased equipment from but also noted agent listed on the California Secretary of State's website is the NCE's secretary, chief financial officer, and director. Other concerns included the NCE's worker's compensation application listing address, and the reference to address in the NCE's September 2012 lease agreement. Specifically, while the lease covers , subparagraph 15.26 explains that the lease for these two properties in addition to shall terminate as of August 31, 2012, implying that the prior lease covered all three addresses. The Chief also pointed out that filed an immigrant petition for a foreign national who is listed as the NCE's manager. Lastly, the Director noted that phone calls made to and to the NCE both resulted in the same person answering the phone as an representative.

The Director deduced that the NCE took over business and employees and, as such, any personnel that previously employed would not count towards the required ten new employees. The Petitioner responded to the Director's concerns by asserting the NCE did not takeover business and employees, but instead that it leased equipment from and rehired nine employees that needed to lay off. The Petitioner also indicated in the RFE response that the NCE did not take over any accounts receivable or accounts payable from The Petitioner explained that address was included on the lease due to the landlord requesting a personal guarantee for the rent, therefore the NCE's secretary, , represented the NCE and provided the personal guarantee relating to the rent. The Petitioner submitted a November 2012 lease that is identical to the September 2012 lease, accompanied by a November 6, 2012, personal guarantee from . The Petitioner does not explain why the landlord requested this guarantee only in November 2012, and not in September 2012 at the time of the first lease.

Regarding the worker's compensation application listing the address for instead of the NCE, the Petitioner asserted this was a typographical error that she had remedied. In reference to the same person answering both phones as an representative, the Petitioner indicated that someone from the maintenance staff mistakenly answered the NCE's phone. However, the Petitioner has not explained how the maintenance staff from a separate business would have access to the NCE's

phones, or why an employee of a separate business would answer the NCE's phone. The Chief ultimately determined that the NCE did not create new employment.

On appeal, the Petitioner references 8 C.F.R. § 204.6(j)(4)(i)(B) for the proposition that she is not required to demonstrate job creation until six months after the adjudication of the Form I-526, or at the stage when she files the Form I-829, Petition by Entrepreneur to Remove Conditions. That provision, however, requires the submission of a comprehensive business plan, which the Petitioner has not included. Accordingly, the Petitioner must comply with the regulation at 8 C.F.R. § 204.6(j)(4)(i)(A), which states the Petitioner must provide evidence that ten qualifying employees have already been hired.

Within the appeal and in response to the RFE, the Petitioner asserts that the NCE did not take over accounts receivable or its accounts payable. However this statement only relates to debts and funds it is owed. It does not address regular accounts, operations, or its employees. Regarding employees, the Petitioner indicated that the NCE hired nine employees that needed to lay off. She did not suggest that actually laid off or fired these employees. It is the Petitioner's position that even if USCIS views her situation as a takeover of business, she would continue to qualify as the NCE has made a substantial change in the number of employees that amounts to at least 140 percent of its pre-expansion number of employees. *See* 8 C.F.R. § 204.6(h)(3). That provision, however, relates to whether the Petitioner has created an original business through the expansion of an existing business, and does not satisfy the job creation requirements. She must still create at least 10 new positions. Regardless, although the Petitioner provided payroll summary for the period between January and December of 2011, this exhibit does not show the number of full time and part time employees on the date she established the NCE, March 5, 2012, or made her initial investment in the NCE, May 2, 2012. As a result, it is not possible to calculate the pre-expansion number of employees to determine if the Petitioner meets the regulation at 8 C.F.R. § 204.6(h)(3).

The preponderance of the evidence is consistent with the NCE taking over employees and operations, or at least those associated with , which appear to have been previously covered under the same lease along with current address). This determination is based on the numerous factors discussed within the Director's RFE noted above, notwithstanding the Petitioner's explanations. Notably, of the 10 employees the Petitioner included on its initial employee list accompanying the petition, nine of them are former employees reflected on that company's 2011 payroll summary. It is more likely than not that the Petitioner acquired some portion of operations, to include some of its employees. USCIS determines the truth not by the quantity of evidence alone but by its quality. *Matter of Chawathe*, 25 I&N Dec. at 376 citing *Matter of E-M-*, 20 I&N Dec. 77, 80 (Comm'r 1989). Using this standard, we agree with the Chief's ultimate conclusion that the record does not establish the Petitioner's eligibility.

D. Commitment of Funds

1. Authority

The regulation at 8 C.F.R. § 204.6(e) defines capital and investment. The regulation at 8 C.F.R. § 204.6(j)(2) explains that a petitioner must document that he or she has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of only an intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that a petitioner is actively in the process of investing. A petitioner must establish actual commitment of the required amount of capital. The regulation then lists the types of documentation a petitioner may submit to meet this requirement.

2. Analysis

We conduct appellate review on a *de novo* basis. *See Siddiqui v. Holder*, 670 F.3d 736, 741 (7th Cir. 2012); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). For the reasons outlined below, a review of the record of proceeding does not reflect that the Petitioner submitted sufficient documentary evidence establishing that she committed the requisite funds to the NCE. After the Petitioner transferred $500,183.57 into the NCE account ending in 7049 on May 2, 2012, the NCE incurred $184.054.48 in expenses from September 1, 2012, through October 17, 2012, according to the company's Profit and Loss Statement for that period. The NCE had already begun earning revenue at that time, such that normal operating expenses after that are not necessarily capital expenditures.

The Petitioner did not establish how the remaining funds were committed to the NCE, although she submitted statements relating to two of the NCE's bank accounts. The business savings account ending in 9929 contained approximately $150,000 during the month that the Petitioner filed the petition. The second account ending in 7049 contained approximately $240,000 during the same month. It is this second account into which the Petitioner transferred her investment.

The petition was not accompanied by a business plan or a detailed analysis from the Petitioner explaining any future capital expenses. Further, according to the minutes of the NCE's organizational meeting, these funds were made available to the Petitioner and the NCE's Vice President. The minutes did not specify that removal of the funds required the signature of both parties. *See Ho*, 22 I&N Dec. at 209-210 (finding that depositing funds into a corporate account under a petitioner's control does not qualify as an at-risk investment); *see also Al-Humaid v. Roark*, Civ. Act. No. 3:09–CV–982–L., 2010 WL 308750, at *4 (N.D. Tex. Jan. 26, 2010) (finding that a petitioner cannot meet the "at risk" requirement by simply depositing funds into a corporate account). On appeal the Petitioner asserts that she is negotiating with the landlord regarding a future expansion of the business into a facility adjacent to one of its current offices, but does not break down the necessary capital needed for the expansion. Financial projections would bolster the Petitioner's position that she has placed the entire $500,000 at risk. *See Al-Humaid*, 2010 WL 308750, at *4.

IV. CONCLUSION

For the reasons discussed above, the Petitioner has not established the lawful source of her funds, that she met the job creation requirements, or that her invested capital is fully at risk through actual commitment to the NCE.

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 Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of H-Y-*, ID# 14716 (AAO Dec. 4, 2015)