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U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF X-W-

DATE: APR. 5, 2016

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). 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. Foreign nationals may invest in a project associated with a United States Citizenship and Immigration Services (USCIS) designated regional center. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (Appropriations Act) § 610, as amended.

The Chief, Immigrant Investor Program Office, denied the petition. Specifically, the Chief found that the Petitioner had not: (1) shown the employment creating entity met the job creation requirements under 8 C.F.R. § 204.6(j); (2) established that the job creating entity qualified as a troubled business under 8 C.F.R. § 204.6(e); and (3) documented that job creation was determined by an acceptable methodology. The Chief subsequently denied the Petitioner's motion to reopen, finding that her investment in , a limited partnership associated with the [1] did not constitute an investment in a new commercial enterprise, as defined under 8 C.F.R. § 204.6(e). The Chief also concluded that the Petitioner did not demonstrate that her funds were placed at risk for the purpose of generating a return. *See* 8 C.F.R. § 204.6(j)(2).

The matter is now before us on appeal. In her appeal, the Petitioner submits two briefs, stating that the Chief erred in denying her petition and motion to reopen. Specifically, she indicates that (1) constitutes a new commercial enterprise; (2) she has placed at least $500,000 at risk for the purpose of generating a return; and (3) she meets the employment creation requirements because the job creating entity, where her funds will be deployed, is a troubled business.

Upon *de novo review*, we will dismiss the appeal.

[1] The was formerly known as the

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 new commercial enterprise. The commercial enterprise can be any lawful business that engages in for-profit activities. 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. This job creation should generally occur within two years of the foreign national's admission to the United States as a Conditional Permanent Resident. Specifically, section 203(b)(5)(A) of the Act, as amended, provides that a foreign national may seek 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. RELEVANT FACTS

According to a February 2015 Business Plan, intends to assemble $6,000,000 from 12 foreign national investors. Each of whom, including the Petitioner, would invest $500,000, and become a limited partner holding a five percent interest in with counsel serving as its president, is general partner. plans to invest the entire investment amount and receive a 24 percent interest in remaining owners are the , owning 38.75 percent; the owning 38.75 percent; and counsel, owning 22.5 percent. As there are 12 foreign nationals involved in this project, the Petitioner must demonstrate that investment in will create at least 120 new full-time positions for qualifying employees, 10 for each individual seeking immigrant investor classification.

operates and manages the which it leased from the in 2002. The lease is for a 20-year term, under which pays the $5,000 a month. IRS Forms W-2, Wage and Tax Statements, indicated that as of 2012, staffed the hospital primarily with employees from A 2008 Management Service Agreement reflected that hired , to provide management services for the hospital. As the Petitioner noted, is located within a USCIS designated regional center, and its investment in is a regional center associated project.

III. ANALYSIS

The record supports the Chief's findings that the Petitioner has not demonstrated her eligibility for the petition. Specifically, while we find that [redacted] constitutes a new commercial enterprise, the Petitioner has not shown that she placed at least $500,000 in [redacted] for the purpose of generating a return. In addition, she has not established that PRMC or the [redacted] is a troubled business. Nor has the Petitioner exhibited the requisite job creation of at least 120 qualified employees; 10 for each of the 12 foreign nationals seeking immigrant investor classification through [redacted] the new commercial enterprise, and [redacted] the job creating entity. Accordingly, we will dismiss the appeal.

A. Due Process Issues

The Chief denied the Petitioner's motion to reopen on the bases that she did not invest in a new commercial enterprise, and her funds were not placed at risk for the purpose of generating a return. On appeal, pointing to the USCIS Policy Memorandum PM-602-0085, *Requests for Evidence and Notices of Intent to Deny*, June 3, 2013, https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/June%202013/Requests%20for%20Evidence%20(Final).pdf, the Petitioner states that the Chief erred in denying her motion to reopen, because the decision was based on issues not previously noted in the request for evidence (RFE) or the initial decision denying the petition. The Petitioner maintains that the matters discussed in the Chief's denial of the motion constitute derogatory information that must have been communicated to her before the Chief denies her motion.

As discussed below, we agree with the Petitioner that [redacted] the business that received her $540,000, constitutes a new commercial enterprise. As such, the issue of proper notice as relating to this point is moot. In addition, page three of the Chief's RFE specifically noted that the "current record does not demonstrate that the [P]etitioner has placed the required amount of capital at risk for the purpose of generating a return on the investment." Among other matters, the Chief indicated that the "petition must be accompanied by evidence describing . . . profit generating activity." Accordingly, the record shows that the Chief informed the Petitioner of the deficiency relating to the at-risk issue.

Moreover, the matters discussed in the Chief's denial of the Petitioner's motion were not derogatory information that was unknown to the Petitioner. The USCIS Policy Memorandum and regulation at 8 C.F.R. § 103.2(b)(16) state that the Chief must inform a petitioner of derogatory information that the Chief uncovered during the course of the adjudication that is unknown to the petitioner. In the motion decision, the Chief evaluated items that the Petitioner filed. Neither the USCIS Policy Memorandum nor the regulation mandates that the Chief provide notice to the Petitioner about information within evidence she submitted, as these documentations are known to her. In short, we find that the Chief did not violate the Petitioner's due process rights, the regulation or USCIS policy.

B. New Commercial Enterprise

The regulation at 8 C.F.R. § 204.6(e) provides that a commercial enterprise can be "any for-profit activity formed for the ongoing conduct of lawful business," and that "new" means "established after November 29, 1990." Relying on *Matter of Soffici*, 22 I&N Dec. 158, 166 (Assoc. Comm'r 1998), and 8 C.F.R. § 204.6(h)(3), the Chief concluded that did not constitute a "new commercial enterprise" because its planned investment in PRMC would not result in an "expansion" of the , a hospital that had been in operation since the 1960s.

We disagree with the Chief's analysis. *Soffici*, unlike this case, did not involve a regional center project. Rather, it dealt with a single investor who purchased a hotel that was not associated with a regional center. Here, the relevant precedent is *Matter of Izummi*, which, like the instant matter, involved a petition based on an investment in a regional center project. 22 I&N Dec. 169, 198-200 (Assoc. Comm'r 1998). In *Izummi*, when determining what constituted a "new commercial enterprise," we reviewed the date of creation of the entity in which a petitioner had invested or intended to invest, not the job creating entity where the funds were ultimately to be deployed.[2] *Id.*

Under 8 C.F.R. § 204.6(h)(1), the establishment of a new commercial enterprise, among other methods, may consist of the "creation of an original business." is a for-profit and original business, created in September 2012 and the entity to which the Petitioner wired $540,000 on June 7, 2013. It plans to purchase 24 percent of which operates and manages the under a 20-year lease. However, cannot be considered to be the same entity as the hospital, nor has it purchased the job creating entity, in its entirety, as was the case in *Soffici*. therefore constitutes a new commercial enterprise under the Act and the relevant regulations. Accordingly, the Chief's finding that was not new commercial enterprise is withdrawn.[3]

C. Capital Placed at Risk to Generate a Return

In his decision denying the Petitioner's motion to reopen, the Chief concluded that the Petitioner's funds were not placed at risk for the purpose of generating a return. Under the regulation at 8 C.F.R. § 204.6(j)(2), a petitioner must demonstrate 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."

The Petitioner has not shown that she wired funds to for the purpose of generating a return. Specifically, based on the pro forma income statements in the 2015 Business Plan, after a $6,000,000 investment from the foreign nationals, the "anticipates being cash flow positive" in 2015; and will have an estimated "net gain" at around $500,000 in

[2] *Izummi* examined what constituted a "new commercial enterprise" under an earlier version of the statute that included the creation of a new commercial enterprise requirement. *Id.*, 22 I&N Dec. at 198-200.

[3] Having resolved this issue in the Petitioner's favor, we need not consider whether the Petitioner and other foreign nationals' funds will be used to restructure or expand either

2019, the last year listed in the document. Significantly, however, the pro forma income statements did not appear to accurately reflect [redacted] total operating expenses. The pro forma income statements provided that the operating expenses increased by approximately $3,500 between 2011 and 2012. The Balance Sheets of the financial statements, however, noted that "Advance from related parties," which was listed under current liabilities (those that come due within one year), increased by more than $3.5 million between 2011 and 2012. This substantial increase of current liabilities, however, did not appear to have been incorporated in the pro forma income statements. As such, the Petitioner has not confirmed that the pro forma income statements correctly presented amounts of funds available for distribution to [redacted] or its limited partners.

A March 1, 2013, document entitled "Equity Investment Agreement, [redacted] and [redacted]" provides that [redacted] will invest up to $6,000,000 in exchange for a 24 percent interest in [redacted] plus a six percent preferred rate of return on the capital account, or an annual preferred return of $360,000 to be shared among the 12 limited partners within [redacted]. The Petitioner, however, has not shown when or if the hospital will have funds to distribute any return, because she has not accounted for other expenses associated with the partnership. Specifically, she has not demonstrated that the pro forma income statements reflected the true financial status of the hospital for the relevant years. As the Petitioner has not presented a comprehensive analysis of the potential net profit available for distribution to [redacted] and to each of the [redacted] limited partners, she has not sufficiently established that there is a reasonable chance for gain, especially within the foreseeable future. Accordingly, she has not proven that she has placed her funds at risk for the purpose of generating a return. *See Izummi*, 22 I&N Dec. at 184-85 n. 16 (noting that for the capital to be "at risk" there must be a risk of loss and a chance for gain); *see also* USCIS Policy Memorandum PM-602-0083, *EB-5 Adjudications Policy* 5 (May 30, 2013), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20%28Approved%20as%20final%205-30-13%29.pdf.

D. Troubled Business

On appeal, the Petitioner states that [redacted] which was constructed in [redacted] constitutes a troubled business. If it is a troubled business, then the Petitioner may meet the job creation requirements by showing preservation, as well as creation, of jobs. The regulation at 8 C.F.R. § 204.6(e) provides:

> Troubled business means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve- or twenty-four month period prior to the priority date on the alien entrepreneur's Form I–526, and the loss for such period is at least equal to twenty percent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

The 2013 USCIS Policy Memorandum provides that "in a regional center context, if the new commercial enterprise is not the job-creating entity, then the full amount of the capital must be first invested in the new commercial enterprise and then made available to the job creating entity." USCIS Policy Memorandum PM-602-0083, *supra*, at 16. We therefore examine the financial status of and the rather than to determine if the Petitioner's investment has been made in a troubled business.

The priority date in this matter is July 12, 2013. Thus, the relevant 12- and 24-month periods prior to that date begin in July 2012 and July 2011. The Petitioner submitted financial statements to the Chief in support of her motion to reopen. These filings, including 2011 and 2012 Balance Sheets, entitled indicated that in 2012, the business began with a net worth of $165,951, and suffered a net loss of $3,213,524, which was more than 20 percent of the net worth prior to that loss.[4] The financial documents further stated that as of June 30, 2013, a few days after the Petitioner wired $540,000 to the hospital had a net gain of $555,924 during the first six months in 2013. That said, the net gain does not outweigh the prior net losses. Therefore, the hospital, according to these figures, still suffered an overall loss during the two-year period prior to the filing date.

Although these figures support a finding that qualifies as a troubled business, the Petitioner has not shown that the statistics are reliable or credible. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Specifically, the figures in the financial materials were different from numbers provided in 2012 IRS Form 1065, U.S. Return of Partnership Income (tax return). For example, according to the Income Statements of the financial statements, net loss was ($3,213,524) in 2012. Pages one and five of the tax return, however, indicated a net loss, labeled "Ordinary business income (loss)," of ($764,491), and "Net income (loss) per books" before depreciation of ($1,048,355). Likewise, the amounts listed as net worth and liabilities varied considerably between the financial statements and tax return. Finally, the financial statements and the 2011 tax return presented similarly different information relating to net loss, net worth, and total liabilities.

Differences in accounting methodology, for example accrual versus cash, can result in some differences in amounts between the financial statements and income tax returns. Nevertheless, the Petitioner has not sufficiently explained the very large differences outlined above. In light of the substantial variance in information presented in the financial statements and tax returns as relating to

[4] Net worth equals total assets less total liabilities. *Barron's Dictionary of Accounting Terms* 313 (5th ed. 2010). As of December 31, 2011, the business' total assets were $5,231,317, and its total liabilities were $5,065,366. This means that on December 31, 2011, its net worth was $165,951. As of December 31, 2012, the hospital's total assets were $4,767,373, and its total liabilities were $7,814,946. This means that on December 31, 2012, the hospital had a net worth of -$3,047,573. Its net loss during 2012, defined as the amount by which total costs and expenses exceed total revenue, *id.* at 312, was -$3,213,524.

net loss, net worth, and liabilities, the Petitioner has not shown that the figures provided in these documents are reliable or credible. Consequently, she has not demonstrated that along with its hospital operation, constitutes a troubled business.

E. Job Creation

As noted in the Chief's decision denying the petition, the Petitioner has not shown that she meets the job creation requirements. Specifically, she has not exhibited that along with its hospital operation, is a troubled business, and she has not demonstrated that the foreign nationals' investment will create no fewer than 10 full-time positions for each individual seeking immigrant investor classification. The regulation at 8 C.F.R. § 204.6(j) provides that the Petitioner must prove that her capital "will create full-time positions for not fewer than 10 qualifying employees." In addition, the regulation at 8 C.F.R. § 204.6(g)(2) notes that in cases involving multiple investors, "[t]he total number of full-time positions created for qualifying employees shall be allocated solely to those [immigrant] entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526."

In her initial filing, the Petitioner submitted a Business Plan, stating that the "employs a total of 248 personnel" and that "205 are full time employees." These figures, however, contradicted information in the February 2015 updated Business Plan, which the Petitioner filed in support of her motion to reopen before the Chief. The updated Business Plan indicated that the $6,000,000 investment from foreign nationals will preserve 112 jobs and create 61 new jobs. In addition to the different data presented in the Business Plans, as relating to the number of existing jobs, the two Economic Reports similarly included inconsistent employment statistics. The first Economic Report, which the Petitioner provided in her initial submission, projected 138 direct jobs saved at the hospital, and a total of 204 direct and indirect jobs saved upon investment in The updated Economic Report, however, estimated 112 jobs saved and 61 new jobs created. The Petitioner has the burden to clarify inconsistent evidence with independent, objective documentation that resolves the discrepancy. *Ho*, 19 I&N Dec. at 591-92. Here, the Petitioner has not explained or offered materials resolving the inconsistencies.

Moreover, assuming the data the Petitioner offered in support of her motion to reopen are reliable, she has nonetheless not met the job creation requirements. As the Petitioner is one of 12 foreign nationals invested in she must demonstrate that the investment will create at least 120 new full-time positions for qualifying employees, 10 for each individual seeking immigrant investor classification. *See* 8 C.F.R § 204.6(g). An additional 61 new positions, as stated in the updated Business Plan, does not satisfy the employment creation requirements.

On appeal, the Petitioner maintains that even if along with its hospital operation, is not a troubled business, the creation of 61 additional positions "demonstrates that at least some [of the 12 foreign national] investors in this project are entitled to I-526 approval." Assuming the additional job creation estimate is credible and reliable, the Petitioner has not submitted any "reasonable agreement made among the [immigrant] entrepreneurs," who are seeking the immigrant investor

classification, allocating job creation among them in this project. *See* 8 C.F.R. § 204.6(g)(2). Consequently, even if jobs were created, the Petitioner has not established that the requisite minimum of 120 new full-time jobs would result, and we cannot conclude that this Petitioner would receive credit for any of the new positions. As the Petitioner has not shown that the investment from her and the 11 other foreign nationals will create at least 120 jobs, she has not demonstrated that $6,000,000 planned investment in meets or will meet the job creation requirements.

IV. CONCLUSION

The Petitioner has not demonstrated by a preponderance of the evidence that she is eligible for the immigrant investor classification. She has not submitted sufficient material establishing that she has placed the requisite amount of capital at risk for the purpose of generating a return, or that she meets the employment creation requirements. The Petitioner, therefore, has not shown her eligibility pursuant to section 203(b)(5) of the Act and the petition may not be approved.

The appeal will be dismissed 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

Cite as *Matter of X-W-*, ID# 16028 (AAO Apr. 5, 2016)