



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF H-K-G-

DATE: AUG. 16, 2016

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

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

The Petitioner seeks classification as an immigrant investor based on her investment in a truck stop business. *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 Chief, Immigrant Investor Program Office, denied the petition. The Chief concluded that the Petitioner had not established that she had invested or was actively in the process of investing the required amount of funds from a lawful source, or that the funds were invested in a commercial enterprise meeting the regulatory definition of “new.” Finally, the Chief determined that the Petitioner had not demonstrated that her investment had created or would create the necessary jobs.

The matter is now before us on appeal. In her appeal, the Petitioner submits additional evidence and maintains that the new materials resolve the Chief’s misconceptions about the investment.

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 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).

Section 11036(a)(1)(B) of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), which implemented the current version of section 203(b)(5) of the Act, eliminated an earlier requirement that the Petitioner personally establish the new commercial enterprise. This amendment did not, however, eliminate the requirement that the commercial enterprise be "new." The implementing regulation at 8 C.F.R. § 204.6(e) defines "new" as established after November 29, 1990.

Further, the regulation at 8 C.F.R. § 204.6(h) states that the establishment of a new commercial enterprise may consist of the following:

- (1) The creation of an original business;
- (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
- (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 CFR 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 CFR 204.6(j)(4)(ii).

With respect to documenting a qualifying investment, the regulation at 8 C.F.R. § 204.6(j) states, in pertinent part:

- (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

- (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
- (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
- (iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;
- (iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or
- (v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

With respect to employment creation, the regulation at 8 C.F.R. § 204.6(j)(4)(i) states:

To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

- (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
- (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

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Finally, the regulation at 8 C.F.R. § 204.6(e) offers the following definitions:

Employee means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise. . . .

Qualifying employee means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

II. ANALYSIS

The Petitioner documented her equity interest in [REDACTED] which she identifies as the new commercial enterprise (NCE). The company does business as [REDACTED]. She maintains that she invested a \$1,000,000² gift from her uncle, [REDACTED] one of the managing members of [REDACTED]. The Chief found that while [REDACTED] and his spouse, [REDACTED] organized the limited liability company in 2012, it purchased an existing company for which the establishment date was unknown. Accordingly, the Chief questioned whether the investment vehicle was a new commercial enterprise as defined in the regulation. The Chief next determined that the investment funds derived from [REDACTED] not [REDACTED] and that the Petitioner remitted them to a law firm, [REDACTED] rather than to [REDACTED]. Based on these observations, the Chief concluded that the Petitioner had not corroborated that [REDACTED] was the source of her investment or that she transferred those funds to the relevant commercial enterprise.

On appeal, the Petitioner first affirms that the truck stop did not exist prior to November 29, 1990, noting that in 1996 it was described as a "vacant property" in a Resolution of Findings and Conclusions on an application by [REDACTED]. Second, the Petitioner references a statement from [REDACTED] confirming that he, and not [REDACTED] was the source of the investment. Third, the Petitioner documents [REDACTED] relationship with [REDACTED]. Fourth, and finally, the Petitioner maintains that the existing employment at [REDACTED] and her business plan meet the job creation requirements at this stage.

For the reasons discussed below, we find that the Petitioner has met her burden of showing that the truck stop did not exist prior to November 29, 1990, such that it is new as defined at 8 C.F.R.

¹ Documents and letters in the record alternately state that [REDACTED] does business as [REDACTED] and [REDACTED].

² As the Petitioner does not rely on an investment in a targeted employment area, the minimum investment amount is \$1,000,000. 8 C.F.R. § 204.6(f).

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§ 204.6(e). The Petitioner, however, has not resolved the Chief's other concerns. Specifically, the record documents that at least \$405,000 of the funds, if not the full \$1,000,000, came from the business accounts of [REDACTED]. While the Petitioner has demonstrated that this corporation is a separate entity from [REDACTED], the funds did not derive from [REDACTED] as the Petitioner has averred. In addition, while [REDACTED] may have a relationship with [REDACTED], the transactional evidence does not trace the path of funds from the Petitioner to [REDACTED]. Finally, without information about whether the gas station was operational at the time of purchase by the company and, if so, how many individuals it employed, the Petitioner has not demonstrated that it has created or will create at least 10 new jobs.

A. New Commercial Enterprise

[REDACTED] and [REDACTED] organized [REDACTED] on November 20, 2012. The business licenses list the company's address as [REDACTED]. On November 30, 2012, [REDACTED] secured approval for a \$1,180,000 mortgage to finance the purchase of "a [REDACTED] located" on that property. [REDACTED] modified the approval on January 15, 2013, to reflect the borrower as [REDACTED] and [REDACTED] served as the guarantors for the ultimate mortgage. In response to the Chief's request for evidence (RFE), the Petitioner offered a Resolution of Findings and Conclusions relating to an application by [REDACTED] to seek approval for a planned gas station on a vacant property on [REDACTED]. The resolution references a January 1996 letter raising concerns about the initial plan and the applicant's response in March 1996. The Chief noted that the resolution involved an application from [REDACTED] rather than [REDACTED] and concluded that the Petitioner's response did not resolve when [REDACTED] was formed. On appeal, the Petitioner acknowledges that [REDACTED] is a separate entity from [REDACTED] but notes that in 1996 the resolution referenced the property [REDACTED] now owns as a vacant lot.

[REDACTED] purchased a gas station at [REDACTED]. It is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. *Matter of Soffici*, 22 I&N Dec. 158, 166 (Assoc. Comm'r 1998). As the jobs will be created at the [REDACTED] business, whether a station at that location existed prior to November 29, 1990, is the relevant question. The 1996 resolution confirms that the location was vacant as late as 1996. Accordingly, the Petitioner has met her burden of establishing that [REDACTED] is a new commercial enterprise as defined by regulation and relevant precedent decision. We will therefore refer to it as the NCE going forward.

B. Source of Funds

A petitioner cannot corroborate the lawful source of funds merely by submitting bank letters or statements confirming the deposit of funds. *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). Without documentation of the path of the funds, the Petitioner cannot meet her burden of showing that they are her own. *Id.* Affirmations, unsubstantiated by supporting evidence, are insufficient to satisfy the Petitioner's burden of proof. *Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of*

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California, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). These requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Calif. 2001) *aff'd* 345 F.3d 683 (9th Cir. 2003) (upholding a finding that a petitioner had not established the lawful source of her funds due to the absence of five years of tax returns).

The initial submission contained wire transfer documents for funds the Petitioner received to her account ending in [REDACTED]. A February 26, 2013, [REDACTED] Outgoing Wire Authorization reflects a debit of \$600,000 from an account ending in [REDACTED] credited to the Petitioner's account. The depositor for the account ending in [REDACTED] is [REDACTED] with [REDACTED] added in handwritten ink. The reference is "GIFT OF FUNDS TO FAMILY MEMBER." The Petitioner also initially supplied an Account Summary for [REDACTED] listing the account ending in [REDACTED] as a [REDACTED] account for a corporation. A February 28, 2013, [REDACTED] Outgoing Wire Detail shows the transmission of \$405,000 from a [REDACTED] account ending in [REDACTED] to the Petitioner's same account. The Audit Trail Information includes the notation "GIFT OF FUNDS TO FAMILY MEMBER."

In response to the Chief's concern in the RFE that the funds derived from the NCE, which does business as [REDACTED] the Petitioner offered an affidavit from [REDACTED] discussing his gift to the Petitioner. In his statement, [REDACTED] notes the gift to a family member notation on the transfer documents and attests that the funds originated from a personal account belonging to him and his spouse. According to [REDACTED] the reference to [REDACTED] "is incorrect." The Chief declined to consider [REDACTED] affirmation as evidence because it was inconsistent with the plain language of the transfer records and concluded the funds derived from the NCE.

On appeal, the Petitioner maintains that [REDACTED] "is the owner of several [REDACTED] gas stations. Therefore naturally [he] wrote 'fuel one' when he issued the wire transfers." The Petitioner points out that [REDACTED] and [REDACTED] are two separate entities. The Petitioner offers substantial documentation regarding the existence of multiple [REDACTED] entities, including New Jersey Business Registration Certificates for various addresses, Retail Dealer of Motor Fuels approvals, and [REDACTED] 2011 and 2012 IRS Forms 1040, Individual Income Tax Returns.

While we acknowledge that the funds did not necessarily originate with the NCE, they did derive from a corporation rather than from [REDACTED] personal account as he attested. While the [REDACTED] authorization lists both [REDACTED] and [REDACTED] as the depositor of the account ending in [REDACTED] the record contains a bank document expressly identifying that account as a [REDACTED] account of a corporation. Here, verification of [REDACTED] affidavit is particularly crucial because of the inconsistency between his affirmations and the bank's information for the account ending in [REDACTED]. Similarly, [REDACTED] Outgoing Wire Detail unambiguously identifies [REDACTED] as the originator. The Petitioner has not offered bank statements or other official information from either bank relating to the [REDACTED] account ending in [REDACTED] or the [REDACTED] account ending in [REDACTED]. Without such corroborating evidence resolving the account holder for those accounts, the Petitioner has not met her burden of proof in establishing the

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truth of her position that [REDACTED] transferred \$1,000,000 to her from his personal account as a gift. For this reason, the Petitioner has not demonstrated the lawful source of her funds.

C. Funds Made Available to the NCE

The initial evidence consisted of two Bills of Sale of Membership Interests in the NCE, two checks the Petitioner issued, and two bank statements for the Petitioner's account ending in [REDACTED]. Specifically, the membership sales documentation reflects that in February 2013, the Petitioner purchased two 20 percent interests, one each directly from [REDACTED] and [REDACTED] for a total of \$1,000,000. In addition, the Petitioner offered copies of the front of two \$500,000 checks she issued to [REDACTED]. The check numbered [REDACTED] is dated February 26, 2013, and the check [REDACTED] is dated February 27, 2013, both of which predate the above-discussed \$405,000 deposit on February 28, 2013. The copies do not contain any indicia that the checks were cancelled and the February 2013 bank statement only shows that check [REDACTED] was cashed. The second statement for this account displays a balance of \$6,756 as of July 1, 2013, but the destination of the funds remaining after check [REDACTED] was cashed is not documented in the record.

In response to the Chief's concern in the RFE that the Petitioner had not tracked the transmission of the funds to the NCE, the Petitioner affirms that the checks to [REDACTED] "were for the Membership Interest in the NCE." The earliest bank statements in the record for accounts held by the NCE are from July 2015, and none of them confirm that the NCE received \$1,000,000 from the Petitioner through the law firm. The Chief concluded that the Petitioner had not corroborated [REDACTED] affiliation with the NCE.

On appeal, the Petitioner maintains that [REDACTED] "was retained to handle the legalities for the NCE." The Petitioner notes that among the original exhibits, [REDACTED] an attorney at the firm, signed the operating agreement and several documents relating to the NCE's mortgage. The Petitioner offers a printout from the law firm's website. The full amount of money must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Izummi*, 22 I&N Dec. at 179. The Petitioner has not documented that the NCE ever received the Petitioner's investment and used those funds for start-up or other capital costs.

First, the Petitioner has not shown that the purchase of someone's business interest from that individual necessarily involves making the investment available to the job creating entity. [REDACTED] and [REDACTED] formed the NCE in November 2012. The Operating Agreement does not contain terms explaining how the company might accept new members other than the sale of an interest by a current member to a future member. Both [REDACTED] and [REDACTED] sold a portion of their interests to the Petitioner. The bills of sale reveal that [REDACTED] and [REDACTED] each personally "sold" an interest to the Petitioner "in exchange for" \$500,000. These terms suggest that the Petitioner owed the funds to [REDACTED] and [REDACTED]. Any funds the Petitioner paid to [REDACTED] or [REDACTED] would not constitute funds made available to the job-creating business, the NCE.

³ In which case, the Petitioner would have returned the gift to the source she identifies.

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Second, the Petitioner has not traced the funds to the NCE. For cash investments in the NCE, the Petitioner should provide bank statements showing amounts deposited with the NCE or document that such funds are committed to be transferred to the NCE. 8 C.F.R. § 204.6(j)(2)(i), (iv). While we recognize that [REDACTED] has performed legal services for the NCE, such information does not establish that any funds the Petitioner remitted to [REDACTED] were subsequently credited to the NCE. As discussed above, the terms of the Bill of Sale suggest payment was owed to [REDACTED] and [REDACTED] rather than the NCE. The Petitioner did not submit cancelled checks, wire transfer receipts, or similar evidence confirming that [REDACTED] transmitted the \$1,000,000 to the NCE or as payment of the NCE's expenses. In addition, the record does not contain an escrow or other agreement whereby [REDACTED] is committed to turning over the funds to the NCE.

Third and finally, the record lacks evidence of how the NCE had or would use the invested funds such that the Petitioner has established an at-risk investment. The initial Business Plan, page 3, listed projected start-up costs of \$2,377,577, including \$2,000,000 for the purchase of land and the facility. The same page projects \$1,000,000 in "EB-5 investment" and \$1,400,000 in "Private Financing." The Petitioner also initially supplied a mortgage for the acquisition of the property for \$1,180,000. The revised Business Plan lists \$377,577 in start-up costs in addition to \$1,277,550 in acquisition costs consisting of the cash deposits above the \$1,180,000 mortgage. While the March 7, 2013, Uniform Settlement Statement reflects that the NCE had already paid a \$300,000 deposit and owed \$977,550.28 at closing, the record contains no corroboration that these funds derived from the Petitioner's \$1,000,000 remittance to [REDACTED]. Similarly, the record does not show that the NCE applied the Petitioner's funds to any of the \$377,577 in start-up expenses or contain invoices verifying those amounts other than the proposal for \$59,705 in tank servicing. For all three reasons, the Petitioner has not documented that she made the full \$1,000,000 she received available to the job creating entity, the NCE.

D. Employment Creation

The Petitioner has offered two Business Plans and employment documentation for the NCE's current employees. The initial Business Plan indicated that the gas station opened in April 2013 and would reach 10 employees in year three of operation. Accompanying the initial filing were lists of 11 employees and their wages and IRS Forms W-4, Employee's Withholding Certificates.

The Chief noted in the RFE that the Petitioner had not projected at least 10 employees within two years, had listed wages for employees that could account for only nine of them being full-time at minimum wage, and had not documented that all employees were qualifying. In response, the Petitioner noted that the revised Business Plan projected 10 employees starting in year two. The Petitioner offered a list of eight employees; Forms I-9, Employment Eligibility Verification; and a 2015 third quarter IRS Form 941, Employer's Quarterly Federal Tax Return, listing eight employees. The Chief noted that the Petitioner had not included the employer certification section of the Forms I-9 and had not amended the employment costs to account for the additional employee now projected for year two. On appeal, the Petitioner supplies new projected employment costs and the

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employer certification portions of the Forms I-9. The Petitioner notes that it is not required to show that the NCE has already hired 10 employees.

While the Petitioner has overcome the Chief's specific findings, the mortgage approval reflects that the NCE purchased "a [REDACTED] Station." The proposal for renovations that the Petitioner offers on appeal references existing diesel dispensers and islands, indicating that a gas station previously existed at that location. Although the Petitioner states on appeal that the property was vacant at the time of purchase, she did not provide sufficient documentary evidence to support that contention. Statements made without supporting documentation are of limited probative value and are not sufficient for meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The record does not resolve whether the gas station was operational at the time of sale. Even with a break for renovations, any jobs at the renovated station would not necessarily be new. *Matter of Hsiung*, 22 I&N Dec. 201, 204-05 (Assoc. Comm'r 1998). As the record does not resolve how many employees the prior station had, the Petitioner has not demonstrated the creation of 10 new jobs.

III. CONCLUSION

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, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of H-K-G-*, ID# 17668 (AAO Aug. 16, 2016)