

(b)(6)



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

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

MATTER OF H-Y-

DATE: JULY 15, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner made an investment into [REDACTED] doing business as [REDACTED] a new commercial enterprise (the NCE). The Petitioner now 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 Chief, Immigrant Investor Program Office (IPO), denied the petition. The Chief concluded that the Petitioner did not document the lawful source of funds she transferred to the NCE, or show that the NCE met the employment creation requirements. On appeal, we found that the Petitioner did not overcome either of the Chief's grounds for denial. In addition, we determined that she did not place her own funds at risk for the purpose of investing in the NCE.

The matter is now before us on a motion to reopen and a motion to reconsider. In support of her motions, the Petitioner submits additional evidence and maintains that she has shown her eligibility for the immigrant investor classification.

We will deny the motions.

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.

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). However, any new facts must relate to eligibility at the time the Petitioner filed the petition. *See* 8 C.F.R. § 103.2(b)(1), (12); *see also* *Matter of Katigbak*,

(b)(6)

Matter of H-Y-

14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A motion to reconsider must offer the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the previous decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider is based on the existing record and the Petitioner may not introduce new facts or new evidence relative to his or her arguments. 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 materials. *Compare* 8 C.F.R. § 103.5(a)(3) *and* 8 C.F.R. § 103.5(a)(2).

II. ANALYSIS

On motion, the Petitioner submits additional evidence, including new translations of previously submitted documents and photocopies of a "Certificate of Accuracy." The record, including documentation she previously filed and additional documentation provided on motion, does not establish the lawful source of funds she sent to the NCE, that the NCE meets or will meet the job creation requirements, or that she has made an at-risk investment of at least \$500,000 in the NCE. We will therefore deny her motion to reopen. Similarly, on motion to reconsider, the Petitioner has not demonstrated that our previous decision was based on an incorrect application of law or USCIS policy. We will thus deny her motion to reconsider.

A. Translations of Foreign Language Documents

In our dismissal of the Petitioner's appeal, we discussed the translated documents in the record. The Petitioner submitted photocopies of several certifications of accuracy, identifying different translators. These photocopies, however, did not specifically list the translated documents that the translators were certifying. On motion, the Petitioner provides photocopies of a certificate of accuracy, identifying [REDACTED] as the translator. Like the ones previously offered, the photocopies presented on motion do not reference the translated foreign language documents, other than referring to them as "the attached document[s]." Without additional information, the Petitioner has not demonstrated that the certificates relate to foreign language documents in the record, or to which foreign language documents they refer. As we stated in our initial decision: "A single certification, even if photocopied, is more probative of the accuracy of each translation when it identifies the translations it is certifying." Notwithstanding these concerns relating to the accuracy and completeness of translated documents in the record, including those filed on motion, we will consider them below as limited probative value of her claims.

B. Lawful Source of Invested Funds

In our previous decision, we concluded that the Petitioner did not document the complete path of her funds, and thus did not demonstrate that the funds she sent to the NCE as capital investment were her own. *See 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). [REDACTED] transferred \$501,000 to the Petitioner. The Petitioner then remitted \$500,150 to the

(b)(6)

Matter of H-Y-

NCE. We found that the Petitioner did not establish the funds that originated from [REDACTED] were hers. In the decision, we also noted that she offered a Personal Banking Business Voucher to show that she remitted 3,154,500 Renminbi (RMB) to [REDACTED] director. The Petitioner, however, did not provide a translator's certificate for the foreign language voucher, as required under 8 C.F.R. § 103.2(b)(3).¹

On motion, the Petitioner submits a certificate from [REDACTED] stating that its "Board of Director Resolution approved and agreed that [REDACTED] to receive RMB 3,154,500 for the company to do wire transfer for [the Petitioner.]" The Petitioner again provides: (1) an Application for Funds Transfers (Overseas), indicating that [REDACTED] sent \$501,000 to the Petitioner; (2) a Customer Advice, providing that the Petitioner remitted \$500,150 to the NCE; and (3) the NCE's bank statement, showing a \$500,150 credit.

The record, including materials the Petitioner has presented on motion, does not demonstrate the complete path of the funds she transferred to the NCE. The Petitioner has submitted bank documents indicating that she sent 3,154,500 RMB to [REDACTED]. She stated on motion that "[REDACTED] received the funds and delivered [them] to [REDACTED]. She, however, has not substantiated her statement. She has not illustrated that [REDACTED] deposited the funds in a [REDACTED] account or actually delivered them to the company. While the entity's certificate reflects that [REDACTED] received funds from the Petitioner "for the company to do wire transfer for [the Petitioner]," the Petitioner has not offered documentation, such as bank records, showing [REDACTED] actual receipt of funds from [REDACTED]."

Significantly, an individual and a corporation are not generally recognized as the same entity. *See Soffici*, 22 I&N Dec. at 162 (finding that a loan obtained by a corporation is not the same as a loan obtained by an individual who is the sole shareholder of the corporation). Funds that an individual received, without further evidence, do not become funds that a corporation received. Furthermore, the Remittance Entrustment Agreement, which specified how the parties were to remove the Petitioner's funds from China through [REDACTED] account, made no mention of [REDACTED] involvement. As the Petitioner has not shown that [REDACTED] transferred funds to [REDACTED] she has not established how the company acquired the \$501,000 that it later remitted to her, or whether she owned the funds that originated from the entity.

As the Petitioner has not documented the full path of the funds, she has not shown by a preponderance of the evidence that the \$500,150 she sent to the NCE were her own assets. Accordingly, she has not demonstrated the lawful source of the investment capital as required under 8 C.F.R. § 204.6(j)(3).

¹ The Petitioner did not initially present a translation certificate for the voucher, but did offer an Affidavit of Translation on motion. She, however, had previously filed the same affidavit for the Remittance Entrustment Agreement. This underscores our concern that the Petitioner has not shown which, if any, of her foreign language documents were seen and translated by a qualified translator.

(b)(6)

Matter of H-Y-

C. Employment Creation at the NCE

In our previous decision, we found that the NCE did not meet the job creation requirements of at least 10 full-time positions. Specifically, we concluded that the NCE took over an existing business's operation, and hired some of that business's former employees. The existing entity, [REDACTED] is located next to the NCE, and like the NCE, operates a printing business. We determined that the Petitioner did not show that the NCE had created 10 new full-time positions or include a comprehensive business plan, demonstrating the NCE's need for at least 10 new full-time employees. On motion, the Petitioner has not specifically challenged our finding that the NCE took over [REDACTED] operation, or at least some portion of it, or that at least nine of the NCE's employees were [REDACTED] former employees, and thus would not constitute evidence of the NCE's employment creation.

On motion, the Petitioner acknowledges that to meet the employment creation requirements, the NCE must create 10 new full-time positions for qualifying employees, in addition to the nine former employees of [REDACTED] that it had hired. The Petitioner indicates that the NCE has not yet created 10 new positions, but maintains that the business plan, which she offers for the first time on motion, demonstrates that the NCE will reach its goal of hiring "ten (10) new full-time employees." Page 4 of the business plan stated that the NCE employed seven new full-time employees and planned to hire for three additional full-time positions.

The regulation at 8 C.F.R. § 204.6(j)(4)(i)(B) provides that if a new commercial enterprise has not yet created the requisite 10 jobs, the petitioner must offer a comprehensive business plan demonstrating the new commercial enterprise's need for not fewer than 10 new full-time employees. A comprehensive business plan, as contemplated by the regulations, should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). Elaborating on the contents of an acceptable business plan, *Ho* states that the plan should contain a market analysis, the pertinent processes and suppliers, marketing strategy, organizational structure, personnel's experience, staffing requirements, timetable for hiring, job descriptions, and projections of sales, costs, and income. The decision concludes: "Most importantly, the business plan must be credible." *Id.*

The business plan that the Petitioner has offered on motion does not constitute a comprehensive business plan, and does not credibly show the NCE's need for at least 10 new full-time employees. Specifically, the business plan did not provide information on [REDACTED] operation or discussed [REDACTED] as one of the NCE's competitors. [REDACTED] is an adjacent business that, like the NCE, is in the printing industry. Given the close proximity between the two businesses and their operation in the same industry, the business plan should have explained how or if [REDACTED] affects the NCE, specifically, as it relates to projected revenues and profits, because these figures are relevant to the NCE's staffing plan.

Moreover, as discussed in our previous decision, evidence shows that the NCE and [REDACTED] operations might be connected. For example, [REDACTED] also known as [REDACTED] is [REDACTED] agent according to the California Secretary of State's website. He also serves as the NCE's secretary, chief financial officer, and director. The NCE's workers' compensation application listed [REDACTED] address, the

(b)(6)

Matter of H-Y-

NCE's September 2012 and November 2012 lease agreements referenced [redacted] address, and phone calls made to [redacted] and to the NCE both resulted in the same person answering the phone as an [redacted] representative. The NCE also leased equipment from [redacted] and hired at least nine of its former employees. On appeal, the Petitioner offered explanations, which, as noted in our previous decision, did not fully address these concerns regarding whether or how these businesses are connected. Without additional information on [redacted] the Petitioner has not demonstrated that the business plan is credible or comprehensive. The Petitioner has not established whether the 10 additional full-time positions referenced in the business plan are new positions or positions moved over from [redacted] as the NCE takes over a portion of [redacted] operation. Accordingly, the Petitioner has not shown that the NCE has created or will create at least 10 new full-time positions, as required under 8 C.F.R. § 204.6(j)(4)(i).

D. At-Risk Investment

In our previous decision, we concluded that the Petitioner did not place the required amount of capital at risk. Four months after the Petitioner sent \$500,150 to the NCE, approximately \$390,000 remained in the NCE's accounts. The Petitioner did not explain how these funds would be used. *See Ho*, 22 I&N Dec. at 209-10 (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) (determining that a petitioner cannot meet the "at risk" requirement by simply depositing funds into a corporate account). In addition, the Profit and Loss Statement covering September 1, 2012, through October 17, 2012, illustrated that the NCE had begun to generate revenue. In light of these figures, the Petitioner has not demonstrated that the NCE might require her entire investment capital.

On motion, the Petitioner offers a Profit and Loss Statement covering September 2012 through November 2015, and other supporting evidence, such as tax and payroll documents. The Petitioner maintains that during this period, the NCE's total expenses were approximately \$2.69 million, and "far exceed the Petitioner's investment of \$500,000." Notwithstanding the stated expenditures, the record, including documentation the Petitioner has filed on motion, does not establish that the Petitioner has placed at least \$500,000 at risk in the NCE.

Specifically, the business plan provided that the NCE had a net loss of \$3,500 between September 2012 and December 2012, and a net loss of \$21,204 in 2013. The financial document indicated that the NCE began to have a net income in 2014, meaning its revenue or gross profit fully covered its expenses. [redacted] stated in his letter that the NCE's sales in 2012 were \$405,390; \$1,631,494 in 2013; \$2,092,576 in 2014; and \$2,004,635 in the first 11 months of 2015. He estimated that sales would reach \$2,200,000 by the end of 2015. Documents entitled "Sales by Customer Summary" and the business plan included the same or comparable figures. This financial data, including the NCE's net income, do not show that at least \$500,000 of the funds the Petitioner sent to the NCE will be spent on job creation.

The Petitioner points to the NCE's total expenses of approximately \$2.69 million between September 2012 and November 2015. The Profit and Loss Statement, however, indicated that during the same period, the NCE's gross profit was approximately \$2.67 million. According to the Profit and Loss Statement, although the gross profit is not sufficient to cover the entire amount of expenditures, it left the NCE with a "Net Ordinary Income" of -\$26,511.92, which is much less than \$500,000. Page 2 of the Profit and Loss Statement included the NCE's "Other Income" and "Other Expense," and stated that the NCE's Net Income between September 2012 and November 2015 was -\$30,011.64. The evidence the Petitioner submits on motion shows both the NCE's expenses and revenue, and demonstrates that the NCE's revenue covers its expenses, or at least a substantial portion of them. The various net loss and net income figures the Petitioner has presented do not establish the NCE's would utilize a capital investment of at least \$500,000 for job creation. As such, the Petitioner has not illustrated that she has committed or placed at risk at least \$500,000 in the NCE.

III. CONCLUSION

We have considered the evidence offered on motion, along with previously filed documentation, and conclude that the Petitioner has not shown her eligibility for the immigrant investor classification. We will therefore deny her motion to reopen. In addition, the Petitioner has not demonstrated that our previous decision was based on an incorrect application of law or USCIS policy. We will thus deny her motion to reconsider.

The motions will be denied 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. Accordingly, we will deny the motions.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of H-Y-*, ID# 16972 (AAO July 15, 2016)