



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

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

MATTER OF I-E-

DATE: APR. 26, 2017

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 his investment in [REDACTED] a new commercial enterprise (NCE) that intends to finance and operate a hotel and restaurant in [REDACTED] Texas. See Immigration and Nationality Act (the Act) section 203(b)(5), 8 U.S.C. § 1153(b)(5). This fifth preference classification (EB-5) 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 of the Immigrant Investor Program Office denied the petition, determining the record did not establish that the Petitioner is actively in the process of investing lawfully obtained capital in the NCE. Specifically, the Chief found that the Petitioner changed the source of his investment capital from one company to another after the filing of the petition, constituting a material change to the initial petition.¹ On appeal, the Petitioner submits a brief and additional documentation. He maintains that the Chief erred in denying his petition.

The Petitioner did not respond to our Notice of Intent to Dismiss (NOID) the appeal, in which we afforded him an opportunity to provide additional evidence to establish the lawful source of the funds used to invest in the NCE, and to demonstrate that the pooled investment in the NCE will create the requisite jobs for the EB-5 investors within two years.

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

I. LAW

A foreign national may be classified under section 203(b)(5)(A) of the Act 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 investor must show that his or her investment will benefit the United States economy and create at least 10

¹ A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See *Matter of Izummi*, 22 I&N Dec. at 175.

full-time jobs for qualifying employees. This job creation should generally occur within two years of the investor's admission to the United States as a conditional permanent resident.

The regulation at 8 C.F.R. § 204.6(j)(4)(i)(A) lists the evidence required to show the necessary job creation: photocopies of relevant tax records, Forms I-9 (Employment Eligibility Verification), or other similar material for 10 full-time positions for qualifying employees. Alternatively, if the NCE has not yet created the requisite 10 jobs, a petitioner must offer a comprehensive business plan demonstrating the NCE's need for not fewer than 10 full-time employees. 8 C.F.R. § 204.6(j)(4)(i)(B). A comprehensive business plan as contemplated by the regulation should contain, at a minimum, a description of the business, its products or services, and its objectives. *Matter of Ho*, 22 I&N Dec. 206, 210 (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.* at 213.

The definition of *capital* at 8 C.F.R. § 204.6(e) includes cash, and other tangible property, and indebtedness secured by assets owned by an investor who is personally and primarily liable, if the new commercial enterprise's assets are not used to secure any of the indebtedness. Additionally, *invest* means to contribute capital. A debt arrangement between the NCE and an investor does not constitute a contribution of capital. *Id.*

II. LAWFUL SOURCE OF INVESTMENT CAPITAL

The regulations at 8 C.F.R. § 204.6(j) and (e) provide that a petitioner must show his investment funds are lawfully obtained, and that assets "acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital" under the Act. In addition, without evidence of the complete path of the funds, a petitioner cannot meet his burden of establishing that the funds are his own funds. *Izummi*, 22 I&N Dec. at 195. 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. Cal. 2001).

Additionally, the regulation at 8 C.F.R. § 204.6(j) sets forth the types of documentation to show the lawful source of invested funds, including but not limited to foreign business records and tax records. The Petitioner stated in the petition that the lawful source of his capital was his investment in [REDACTED] which is part of [REDACTED]

[REDACTED] A foreign language Company Prospectus from the Ministry of Economics in [REDACTED] accompanied by an English translation prepared by [REDACTED] was initially provided. It reflected that [REDACTED] was incorporated in May 1998 as a joint stock company, and was registered in the Commercial Registry at the Egyptian government office in [REDACTED] under registration number [REDACTED]. The Petitioner held 50% of the joint stock in the company. A foreign language extract of the Commercial Register number [REDACTED] and an accompanying English translation of the company registration show the same information as the company prospectus.

The Chief concluded that the Petitioner changed the source of his investment capital from one company to another after the filing of the petition, constituting a material change to the initial petition. The Chief's determination was based on the Petitioner's submission of conflicting information regarding the identity of the business entity that provided the Petitioner with his investment capital. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. *Izummi*, 22 I&N Dec. at 175.

Prior to his denial, the Chief issued a request for evidence regarding the lawful source of the Petitioner's investment capital. The Petitioner responded by providing the same foreign language documents with updated English translations issued by a new translation service. The new translations indicated that [REDACTED] not [REDACTED] was the company actually identified on the foreign language documents. The Chief then issued a NOID the petition explaining that there was a change in the Petitioner's source of investment funds, which appeared to constitute a material change to the investment. The Petitioner responded to the NOID by submitting a certification from [REDACTED] in which [REDACTED] the project manager for [REDACTED] indicated that the company improperly identified [REDACTED] in the English translations accompanying the documents rather than [REDACTED]. He affirmed that this error occurred due to confusion as [REDACTED] is a client of the translating service.

The record included translated minutes from a directors meeting, which documented the approvals to disburse \$500,000 and \$300,000 respectively, from the Petitioner's profit account at [REDACTED]. A bank certification and bank statements from the [REDACTED] show that these transactions occurred in November 2011 and December 2012. The Petitioner then transferred his funds to the NCE. Audited financial statements for 2008 through 2014 for [REDACTED] were also provided.

The Petitioner has shown by a preponderance of evidence that the identification of [REDACTED] on the initially submitted English translations was due to a translation error, and that the entity from which the petitioner derived his investment capital was [REDACTED]. The record contains documentation explaining the circumstances surrounding the errors that occurred in the creation of the English translation documents that identified [REDACTED] as the source of the Petitioner's investment capital. Additionally, the materials provided to show the transfer of funds from the Petitioner's foreign business to his personal bank accounts reflect that the company that transferred the funds was [REDACTED] not [REDACTED]. We therefore find that the Petitioner did not effect a material change in the source of his investment capital after the date of filing of the petition. Rather, he provided additional supporting evidence to clarify the name of the company from which he obtained his EB-5 investment capital. However, as we will explain, the record still does not resolve the lawful source of the funds used to invest in the NCE.

The Petitioner stated that he started [REDACTED] around 2000 through money earned during his engineering and management career from 1983 to 1989. His résumé, however, notes that he has been employed at [REDACTED] since 1990, and that [REDACTED] was first established in [REDACTED].

Saudi Arabia in 1976, under the name [REDACTED]. Accordingly, [REDACTED] appears to have existed under a different name prior to 1998, the year in which the company was organized as a joint stock company in Egypt. A letter of employment from [REDACTED] owner, [REDACTED] dated August 1985, indicates that at that time the Petitioner had resided in [REDACTED] Saudi Arabia since 1976, and that he was employed by [REDACTED] from December 1983 through August 1985.

Based on this documentation, it appears that while [REDACTED] was incorporated in [REDACTED] Egypt, in 1998 as a joint stock company, it was a successor company to [REDACTED] which was started in 1976. Thus, the record is inconsistent as to whether the Petitioner started [REDACTED] around 2000 through monies earned as an engineer and manager, or that he acquired [REDACTED] and created [REDACTED] as a successor company to [REDACTED]. In our NOID, we asked the Petitioner to provide evidence regarding the purchase of [REDACTED] and the source of funds used for this acquisition if [REDACTED] was a successor company to [REDACTED]. The Petitioner provided no response to our NOID.

As the record does not resolve the inconsistencies regarding how the Petitioner came to acquire his ownership in [REDACTED] we find that the Petitioner has not shown that he invested, or is in the process of investing, lawfully obtained funds of at least \$500,000 in the NCE as required by the regulation at 8 C.F.R. § 204.6(j)(2). Additionally, the regulation at 8 C.F.R. § 204.6(g) provides that an NCE may be used as the basis for a Form I-526 petition even though there are several owners of the enterprise, as long as the source(s) of all capital investment is identified and all invested capital has been derived by lawful means. Although requested in our NOID, the Petitioner did not provide information regarding the lawful source of funds for the capital contributions made by the other investors in the NCE. Therefore, the Petitioner has not demonstrated that the source of all capital invested in the NCE was obtained through lawful means. *Id.*

III. JOB CREATION

The regulation at 8 CFR 204.6(j)(4) explains that evidence the NCE has created or will create the necessary jobs can include documentation of existing new jobs or a comprehensive business plan. The Petitioner provided a business plan and a list of employees as of June 2014. The NCE proposed to invest capital and create jobs through the purchase and operation of an existing hotel under a new [REDACTED] franchise agreement, and to build a restaurant on property next to the hotel, which would operate under a [REDACTED] franchise agreement. The restaurant was estimated to open in the fall of 2016. A credible, comprehensive business plan should, among other things, explain the business' staffing requirements and contain a timetable for hiring employees. The plan should also contain sales, cost and income projections, and detail the bases for these projections. *Matter of Ho*, 22 I&N Dec. at 213.

A. Credibility of Business Plan

The NCE's business plan provides substantial detail regarding the local business and economic conditions in the location of the hotel and proposed restaurant, and includes a timetable for hiring employees, and projected sales, cost, and income projections. However, in order to be credible, the

business plan should recognize and consider the NCE's existing assets and their associated costs when making projections regarding job creation, and business expense and income. *See id.* We noted in our NOID that the evidence provided to document the purchase of the hotel property and the NCE's hotel franchising agreement present information that appears to be inconsistent with that used as the basis for the projections in the business plan.

The hotel franchising agreement, executed by the franchisor and the NCE in December 2013, included a mandatory property improvement plan that required an estimated investment of \$1,003,523 in developments to be completed by June 2014. Section 7 of the business plan, entitled Project Financing and Capitalization, provides a high-level outline of the capital expenditures and sources of capital to fund the hotel and restaurant projects. The \$1,003,523 in estimated capital improvements to the hotel are not contained in the list of expenditures in the business plan, even though the franchising agreement required the completion of these improvements to the property three months prior to the date of the business plan. Additionally, while the business plan lists a bank loan of \$350,000 under the operational expenses of the NCE, the first and second mortgage itemized on the warranty deed and settlement statement for the purchase of the hotel property, totaling \$5,191,000, do not appear as liabilities in the business plan. An amortization schedule for the first mortgage provided with the petition shows that the principal balance for that loan would be \$4,910,570 as of September 2014, the date of the business plan.

The business plan further indicates that \$900,000 was used to purchase land for the restaurant and was included in the NCE's purchase of the hotel in December 2013. However, the warranty deed executed for the transfer of the hotel property to the NCE, and the real estate property appraisal provided to the [REDACTED] in support of the NCE's commercial loan application, do not mention that the transaction included the purchase of the adjacent empty lot where the restaurant is to be built. In fact, the appraisal notes on page 2-1, Description of the Real Estate, that the real property is a two-acre lot that does not contain any portion of land that could be developed with site or building improvements.

In light of these discrepancies, the projections regarding the prospective job creation through the proposed capital investment activities in the construction of a restaurant do not appear to be credible. Currently, the business plan does not credibly demonstrate how the NCE will prospectively create at least 10 jobs through the Petitioner's capital investment. *See* 8 C.F.R. § 204.6(j)(4)(i)(A); *Matter of Ho*, 22 I&N Dec. 206, 213.

B. Preexisting Jobs and Job Allocation among EB-5 Investors

As the hotel was an ongoing concern with employees at the time of purchase, the number of full-time employees that were employed by the hotel prior to the NCE's acquisition of the property must be identified in order to ultimately determine the number of full-time employees that can be credited to the EB-5 investors through new jobs created at the hotel, if any. Specifically, the Petitioner must show that the NCE has a reasonable prospect of creating at least 10 new full-time positions for each EB-5 investor through the operation of the hotel and restaurant as outlined in the business plan, in

addition to the number of full-time positions that existed before the acquisition of the hotel. *See Matter of Soffici*, 22 I&N Dec. 158, 167-68 (Assoc. Comm'r 1998); 8 C.F.R. § 204.6(e); 8 C.F.R. § 204.6(g)(2).

The copies of federal tax returns for the former owner of the hotel reflect non-officer payroll of \$390,510, \$334,712, \$270,883, and \$225,523 for the years 2012, 2011, 2010, and 2009, respectively. While these documents assist in determining the overall payroll volume for the hotel prior to acquisition, these aggregate payroll figures do not identify the number of full-time individuals who were employed by the hotel prior to its acquisition by the NCE. The business plan addressed hotel staffing and prospective job creation. Hotel staffing included 14 individuals as of December 2013, when the NCE purchased the property, and 19 individuals as of August 2014. While a list of employees in the business plan includes the names and social security numbers of employees as of June 2014, no payroll documentation for these individuals is in the record to show whether the hotel has maintained the number of full-time jobs at the pre-acquisition level and has also created new jobs since the hotel was purchased.

Additionally, USCIS records show that at least three EB-5 investors have filed Form I-526 petitions based on investments in the NCE. Therefore, we asked the Petitioner to provide a statement that identifies the total number of EB-5 investors that are to invest in the NCE to establish the total number of jobs that must be created by the NCE for EB-5 purposes. As previously indicated, the Petitioner did not respond to our request.

The record does not currently show the pre-acquisition level of employment at the hotel, that those positions have been maintained, and whether new qualifying employment positions have been created. Further, the Petitioner has not clarified how many EB-5 investors are to invest in the NCE and how the new jobs created, if any, are to be allocated between the EB-5 investors. Therefore, the Petitioner has not shown that sufficient jobs have already been created to establish eligibility for the EB-5 investors as a result of the NCE's acquisition and operation of the hotel. *See Matter of Soffici*, 22 I&N Dec. 158, 167-68 (Assoc. Comm'r 1998); 8 C.F.R. § 204.6(e); 8 C.F.R. § 204.6(g)(2); and § 204.6(j)(4)(i)(A).

C. Development of a Restaurant

The business plan outlines high-level proposals for the operation of a new franchise restaurant adjacent to the hotel, and indicates that the NCE had a pending franchise application with [REDACTED] at the time of filing the petition. The construction of the restaurant was to be completed and operations were to start in the fall of 2016. Estimated employment growth within the NCE is to be 55 new employees in the restaurant and 11 new employees in the hotel by the end of 2019. The business plan makes clear that the majority of the job creation in the NCE will come through the operation of a restaurant franchise on a property next to the hotel.

We asked the Petitioner in our NOID to provide an updated business plan, supported by documentary evidence that would identify the progress made to date in the construction and operation of the new franchise restaurant. Specifically, we asked that the business plan offer

adjusted job creation projections taking into account any changes in the restaurant project completion timeline and the anticipated business operations of the restaurant and hotel, in order to show how the NCE will create the requisite jobs for the EB-5 investors within two years. *See* 8 C.F.R. § 204.6(j)(4). As the Petitioner did not respond to our NOID, the evidence in the record does not show that the construction and operation of the restaurant has progressed in the manner outlined in the business plan in order to create the requisite jobs for the Petitioner and the other EB-5 investors.

For these reasons, the Petitioner has not established that the NCE has met or will meet the employment creation requirements. While the Petitioner need not demonstrate the creation of all 10 jobs at the Form I-526 petition stage, the relevant regulation requires specific evidence of the jobs created so far and a credible business plan, establishing the NCE's need for not fewer than 10 jobs. *See* 8 C.F.R. §§ 204.6(j)(4)(i), 216.6(a)(4)(iv); *see also* Section 216A of the Act, 8 U.S.C. § 1186b; *Ho*, 22 I&N Dec. at 210-11.

IV. CONCLUSION

The Petitioner has not demonstrated that he is eligible for the immigrant investor classification.

ORDER: The appeal is dismissed.

Cite as *Matter of I-E-*, ID# 167778 (AAO Apr. 26, 2017)