U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-D-

DATE: AUG. 16, 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 pursuant to the Immigration and Nationality 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 (NCE) 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, concluding that the record did not establish, as required, that the NCE, was doing business in a targeted employment area or that the Petitioner was actively in the process of investing the required funds. He further determined that the Petitioner had not documented that the invested funds derived from law sources or that the business would create the necessary number of jobs. He reaffirmed part of that decision in his denial of a motion to reopen, determining that the Petitioner had still not satisfied the job creation requirements or demonstrated the lawful source of her funds. Finally, he reaffirmed that motion decision in his denial of combined motions to reopen and reconsider.

On appeal, the Petitioner submits additional documentation and asserts that the Chief erred in his job creation calculation and mischaracterized information about the source of her funds. We subsequently issued a request for evidence (RFE) to resolve concerns relating to how the NCE used the Petitioner's invested funds and she responded.

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 an NCE. 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.

The invested capital must not derive, directly or indirectly, from unlawful means. 8 C.F.R. § 204.6(e) (defining capital). To show the lawful source of the capital, a petitioner must submit evidence such as foreign business and tax records or documentation identifying any other source(s)

of funds. 8 C.F.R. § 204.6(j)(3). Bank letters or statements corroborating the deposit of funds, by themselves, are insufficient. *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). The record must trace the path of the funds back to a lawful source. *Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195.[1]

Regarding job creation, a petitioner who has not created the necessary number of jobs must submit a "comprehensive business plan" which demonstrates that, due to the nature and projected size of the NCE, the need for not fewer than 10 full-time qualifying employees will result within the next two years. 8 C.F.R. § 204.6(j)(4)(i)(B). Moreover, the full amount of investment must be made available to the business(es) most closely responsible for creating jobs. *Izummi*, 22 I&N Dec. at 179.

II. ANALYSIS

The Petitioner and a co-investor each contributed $500,000[2] in capital to the NCE. According to the Executive Summary of the business plan, the company provides business process outsourcing and document management outsourcing services to commercial and government entities. In addition to opening an office in New York, the NCE purchased the properties, rights, assets, and business of an existing company in Kentucky. The Petitioner's investment capital ultimately derive from her former spouse, who transferred 1 million Renminbi (RMB) to her in 2007 and another RMB 1 million to the NCE through conduits in 2013. She invested the 2007 funds into a partnership, at , which her brother owns and manages. He then purchased her share in 2013 for RMB 5 million.

In his final decision, the Chief questioned the legality of the Petitioner's partnership with her brother, the number of the NCE's new full-time employees, and the comprehensive nature of its business plan. On appeal, the Petitioner offers materials to show the NCE's business activities. One of these exhibits is an August 2013 letter of intent whereby the NCE agreed to loan $1 million to fund its purchase of an interest in We requested that the Petitioner provide additional evidence confirming that she had placed her full investment at risk in the NCE for job creation purposes. Specifically, we requested the following:

- A breakdown of the NCE's initial capital expenses and evidence that her capital financed those items;
- An explanation of how funds loaned to were made available for job creation purposes at the NCE;

[1] These requirements confirm 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), *aff'd*, 345 F.3d 683 (9th Cir. 2003) (holding that a petitioner had not established the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

[2] The Petitioner indicates that the NCE is located in a targeted employment area, and that the requisite amount of qualifying capital is downwardly adjusted from $1,000,000 to $500,000. *See* 8 C.F.R. § 204.6(f).

- If the funds for the $1 million loan do not derive in part from her capital investment, evidence showing how the NCE acquired cash to loan to or
- Any other documentation that she believed demonstrates her eligibility for the classification.

In response, the Petitioner maintains that the $1 million loan never occurred as decided not to purchase an interest in She resubmits Schedule L of the NCE's 2013 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, which does not reflect a $1 million trade note or other evidence confirming the loan.

A. Job Creation

In 2015, the NCE purchased the assets of Payroll records from show that it employed two workers at the time of the sale. As the Petitioner is one of two investors seeking the immigrant investor classification through the NCE, for them to qualify, the NCE must create at least 20 new full-time jobs. 8 C.F.R. § 204.6(g)(2). Thus, the Petitioner must create the requisite number of jobs in addition to maintaining the two positions that already existed at *Matter of Soffici*, 22 I&N Dec. 158, 167-68 (Assoc. Comm'r 1998); *Matter of Hsiung*, 22 I&N Dec. 201, 204-05 (Assoc. Comm'r 1998).

In his initial denial, the Chief concluded that while the NCE employed 27 individuals in May 2015, only 20 of them worked at least 35 hours per week[3] or were salaried. The Chief then determined that previously had between four and six workers, reducing the number of new, full-time jobs to no more than 16. Subsequently, in his motion decision, the Chief acknowledged that only retained two staff members prior to the sale but found that the new evidence only documented that three of the seven part-time employees actually worked full-time during the period covered by the new materials. On appeal, the Petitioner correctly notes that, using the Chief's calculations, the NCE has created a sufficient number of full-time positions. Specifically, as only paid two workers prior to the purchase, the calculation in the denial amounts to 18 new full-time jobs (20 full-time ones minus the 2 preexisting ones). If another three employees originally thought to be part-time actually worked full time, then the total number of qualifying positions the NCE has created is 21. Accordingly, the NCE has created the requisite number of jobs.

B. Lawful Source of Funds

The business license for lists the ownership type as "Proprietor," and the manager as the Petitioner's brother. a Chinese attorney, explained that registered the business as a proprietorship using only his name to limit the Petitioner's liability, noting that at the time, Chinese law did not expressly allow for limited partnerships. The Chief concluded that the partnership, therefore, was illegal. On appeal, the Petitioner offers a legal opinion from of the Court in response to the Chief's conclusion. The record does not support the Chief's finding.

[3] Full-time employment is defined as working at least 35 hours per week. 8 C.F.R. § 204.6(e).

affirms that 2007 Partnership Operation Agreement was legal and valid. He explains that a silent or *de facto* partner is one who is neither registered with the government nor involved with the partnership's business management. While China previously did not classify limited partners, it acknowledged and protected their legal status and rights. Had not paid the Petitioner the RMB 5 million specified in the dissolution agreement, states, a Chinese court would have enforced the contract under a rule that provides that those who contribute capital but do not participate in the management are deemed partners.

The record does not support the Chief's conclusion that the Petitioner's business arrangement with her brother was illegal. The Petitioner offered a partnership agreement and a dissolution agreement. The Chief did not question the authenticity of these documents. His determination that the lack of an explicit limited partnership law renders the agreements illegal and nullifies the Petitioner's ownership interest in is not in accord with the statements from Chinese law experts. Rather, they sufficiently explain the absence of the Petitioner's name as a manager on the business license. The Chief does not cite any Chinese legal authority suggesting that a partnership is required to include all partners as managers on the business license. Moreover, has affirmed that even if we find the Petitioner was not entitled to her share of the business in 2013, he would not seek the return of the funds and we should consider them a gift. For these reasons, we find that the capital the Petitioner invested in the NCE traced back to and thus, derived from a lawful source.

A separate issue that the Chief raised in his decision denying the Petitioner's first motion to reopen, however, remains unresolved. While the Voluntary Divorce Agreement requires the Petitioner's former spouse, to pay RMB 2 million by April 9, 2018, the second million he transferred to the NCE on her behalf in 2013 was not part of that agreement. Rather, according to her statement in support of her first motion, she reimbursed him for what she characterized as a bridge loan. As part of her second combined motions to reopen and reconsider, she explained that by "loan," she meant money he transmitted to the NCE that did not go directly through her. Instead, transferred RMB 1 million to who then assigned that amount to the NCE through two other conduits. The record does not resolve, however, where she acquired the RMB 1.3 million she remitted to in 2013 as repayment for his RMB 1 million "bridge loan." For example, while the dissolution agreement specified that would pay her RMB 5 million, she has only documented that he transferred RMB 3.15 million to her for her share of Thus, she has not demonstrated the lawful source of her funds, specifically, the RMB 1 million her ex-spouse remitted on her behalf, through conduits, to the NCE.

C. Funds Available for Job Creation

Finally, the Petitioner has not resolved the issue we raised in our RFE. The full amount of her investment must be made available to the NCE for job creation purposes. *Izummi*, 22 I&N Dec. at 179. Moreover, funds invested in a grossly overcapitalized company with no capital expenditures forecasted are not at risk. *See Al Humaid v. Roark*, No. 3:09–CV–982–L, 2010 WL 308750 (N. D. Tex. Jan. 26, 2010). For the reasons discussed below, the record does not confirm that her investment was or will be used for capital expenses or otherwise placed at risk for job creation.

The Petitioner has not resolved our concerns regarding the NCE's loan offer to which she submitted on appeal to document the NCE's business activities. Specifically, in our RFE, we noted that if the NCE loaned $1 million to another company, then those funds were not available for job creation purposes. In response to our RFE, the Petitioner provided the NCE's 2013 tax return, which does not reflect a $1 million loan. In addition, the initial business plan projected some equipment, furniture, supplies, and facility renovation costs. Of the start-up expenses, $300,000 were to serve as the NCE's working capital over the first 12 months. In fact, the NCE did declare a loss of $259,803 in 2013, its first year. According to the same plan, in year two, the NCE would receive up to another $1 million from two additional investors, although only one other individual actually invested. While the Petitioner has now offered its 2013 tax filing, which did not list a $1 million loan on its Schedule L, the NCE's offer to loan $1 million in August 2013 was good through August 2014. She has not supplied the NCE's complete tax returns after 2013. Instead, for 2014, she submits the statements accompanying the 2014 return, which list $249,887 in other deductions and a taxable income of -$671,206 (including a net operating loss of $259,803 from the previous year). While this information shows that the NCE had expenses which the Petitioner's capital might have covered, without Schedule L, it does not resolve whether the NCE has issued a large loan to

In addition, although the loan document is a letter of intent, chief operating officer of signed the letter, thereby accepting its terms.[4] In response to our RFE, however, chief executive officer of the NCE, maintains that the loan did not occur. Nevertheless, the Petitioner has not corroborated this statement with evidence, such as confirmation from that the NCE did not loan $1 million. Further, she did not present evidence that her capital financed the $249,887 in other deductions in 2014. According to the NCE's stock ledger, another investor contributed an additional $500,000 in June 2014, which could have covered the deductions. Finally, she also does not explain why, if the 2013 loan did not occur, she included the letter of intent as verification of the NCE's business activities on appeal in 2016.

III. CONCLUSION

The Petitioner has not demonstrated the lawful source of her funds or sufficiently documented how the NCE utilized her capital such that she has established that the full amount of those funds were made available to the NCE for job creation purposes.

ORDER: The appeal is dismissed.

Cite as *Matter of H-D-*, ID# 240757 (AAO Aug. 16, 2017)

[4] The letter concludes that it "may be accepted by by having an authorized representative sign a copy of the letter below and returning the original signature to [the NCE]."