U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-C-H-

DATE: JAN. 30, 2018

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

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

The Petitioner seeks EB-5 classification as an immigrant investor based on a $500,000[1] investment in a new commercial enterprise (NCE). *See* Immigration and Nationality Act (the Act) section 203(b)(5), 8 U.S.C. § 1153(b)(5). She made her investment through a U.S. Citizenship and Immigration Services (USCIS)-designated regional center, *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, section 610, Pub. L. No. 102-395, 106 Stat. 1828 (Oct. 6, 1992). This fifth preference classification makes immigrant visas available to foreign nationals who invest the requisite amount of qualifying capital in an 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 Petitioner did not establish her eligibility. On appeal, the Petitioner provides a brief and maintains that the Chief erred. She states that the project has been completed and that new jobs have been created.

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 NCE. The NCE 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 full-time jobs for qualifying employees. 8 C.F.R. § 204.6(j).

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[1] 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).

[2] On appeal, the Petitioner acknowledges that in March 2017, the Securities and Exchange Commission filed a complaint against and associated individuals and business entities, alleging misappropriation of EB-5 funds. The proceedings remain pending before the U.S. District Court for the District of Washington. Our decision does not rely on allegations specified in the complaint.

An immigrant investor may invest the required funds directly in an NCE or through a regional center,[3] as the Petitioner has done in this case. Regional centers apply for designation as such with USCIS. Designated regional centers identify and work with NCEs, which in turn are associated with a specific investment project, taken on either directly by the NCE or by one or more separate entities known as the "job creating entity" (JCE). Regional centers can pool immigrant (and other) investor funds for qualifying projects that create jobs directly or indirectly. 8 C.F.R. § 204.6(j)(4)(iii).

II. ANALYSIS

According to the NCE's business plan and other supporting documents, the NCE will pool up to $15,500,000 EB-5 capital from 31 foreign national investors to make loans to North American the JCE, to construct a 100,000 square foot facility in Washington, which will be used for manufacturing, wholesale trade, or distribution. The project is known as The NCE's Limited Liability Agreement indicates that "is comprised of plus the proposed building." The agreement explains that the EB-5 funds will be used to "finance and develop the [b]uilding and including, but not limited to, refurbish, remodel, and refinance the existing buildings on site (as well as extend/upgrade industrial infrastructure to the site."

In response to the Chief's notice of intent to deny (NOID) the petition, the Petitioner stated that the NCE did not attract 31 foreign national investors. Instead, she was one of 20 investors "who pooled their funds to expand the from three to four buildings by improving the park, refinancing buildings and adding a 100,000 square foot building She also indicated that as of March 2017, the project was "fully complete" and "all jobs were created." She offered a lease, showing that the JCE leased the building to a distribution business. On appeal, she maintains that upon the approval of her petition, her "funds will in fact just be paid from the NCE to the JCE who has already borne all the costs" of the project.

A. Deference Policy

On appeal, citing the deference policy, the Petitioner maintains that USCIS may not deny her petition, because it has approved the petitions of other foreign nationals who invested in the NCE.[4] As an initial matter, we note that, on appeal, we exercise *de novo* review of all issues of fact, law, policy, and discretion. *See Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). This means that we look at the record anew and are not required to defer to previous findings. Furthermore, our decision may address new issues that were not raised or resolved in prior decisions.

[3] A regional center is "any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." 8 C.F.R. § 204.6(e).

[4] The Petitioner indicates that USCIS has approved the petitions of 10 of the 20 foreign national investors.

With respect to the deference policy asserted by the Petitioner, it is true that for efficiency and predictability, USCIS will not, generally, reexamine deference determinations made earlier in the EB-5 process, presuming them to have been properly decided. USCIS Policy Memorandum PM-602-0083, *EB-5 Adjudications Policy* 23 (May 30, 2013), http://www.uscis.gov/laws/policy-memoranda; *see also* 6 *USCIS Policy Manual* G.6, https://www.uscis.gov/policymanual. However, previously favorable decision may not be relied on where facts have materially changed, when evidence of fraud or misrepresentation is discovered, or if the prior decision is determined to have been legally deficient. USCIS Policy Memorandum PM-602-0083, *supra*, at 23; 6 *USCIS Policy Manual*, *supra*, at G.6.

Here, however, facts relevant to the adjudication materially changed between the approval of the earlier petitions associated with the NCE and the instant adjudication, such that affording deference is not warranted.[5] Specifically, although the NCE's business plan was predicated on lending investor funds to complete construction of the [redacted] building, as the Petitioner indicated in her response to the Chief's NOID, the JCE completed the project without the use of the Petitioner's EB-5 capital. Thus, the previous approvals occurred under a different set of facts than those before us, and do not warrant deference.

B. Res Judicata and Equitable Estoppel

In addition, on appeal, the Petitioner cites the doctrines of *res judicata* and equitable estoppel, maintaining that the Chief erred in denying her petition because he approved the petitions of other foreign nationals who invested in the NCE. We have no authority to apply judicially devised doctrine such as *res judicata* or equitable estoppel to preclude the Chief from undertaking a lawful course of action that he is empowered to pursue by statute and regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338-39 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The Petitioner has not pointed to any delegation of authority, statute, regulation, or other law that permits us to apply such doctrine to the cases before us. *Id.* Rather, when "any person makes application for a visa or any other document required for entry, or makes application for admission, . . . the burden of proof shall be upon such person to establish that he [or she] is eligible" for the benefit. Section 291 of the Act, 8 U.S.C. § 1361. Thus, the Petitioner may not rely upon determinations made in other cases involving different individuals to overcome eligibility concerns in her own petition.

C. Job Creation

In this case, the Petitioner has not shown her eligibility for the classification because she has not satisfied the job creation requirements.

[5] A change in fact is material if the changed circumstances would have a natural tendency to influence or are predictably capable of affecting the decision. *See Kungys v. United States*, 485 U.S. 759, 770-72 (1988).

1. Availability of Funds

To demonstrate eligibility for the EB-5 classification, a petitioner must establish that his or her investment has created or will create at least 10 full-time jobs for qualifying employees. *See* 8 C.F.R. § 204.6(j). As discussed in *Matter of Izummi*, 22 I&N Dec. 169, 179 (Assoc. Comm'r 1998), "where indirect employment creation is being claimed, and the nexus between the [investment] money and the jobs is already tenuous, [USCIS] has an interest in examining, to a degree, the manner in which funds are being applied." *Izummi* explains that it is insufficient for a petitioner to show that he or she has remitted funds to a NCE that plans to offer loans to a JCE. *Id.* n.7. Rather, the foreign national investor must demonstrate that "[t]he full amount of [his or her] funds [are] made available to the business(es) most closely responsible for creating the employment upon which the petition is based." *Id.* at 179; *see also* USCIS Policy Memorandum PM-602-0083, *supra*, at 16, 25. In summary, the investor must demonstrate that his or her investment, in its entirety, is made available to the JCE. Here, the Petitioner has not made such a showing.

At the time the Petitioner filed the petition, documentation in the record did not show, by a preponderance of the evidence, that the NCE would make the full amount of her $500,000 available to the JCE. *See* 8 C.F.R. § 103.2(b)(1).[6] Specifically, page 9 of the NCE's Confidential Program Description Memorandum stated that upon the approval of the petition, the Petitioner's $500,000 would be "released from Escrow to the [NCE]"[7] and "placed in the pool for [the NCE's] use." Page 2 of the document provided that the NCE would "loan *portions* of the pooled funds" to the JCE. (Emphasis added.) Other documents similarly did not confirm that the NCE would be required to make the entire amount of the Petitioner's funds available to the JCE. For example, page 1 of the Business Loan Agreement between the NCE and the JCE specified that the NCE had the sole discretion to determine the loan amount, stating: "the granting, renewing, or extending of any Loan by Lender [the NCE] at all times shall be subject to Lender's sole judgment and discretion."

As the Chief discussed in his decision, under this loan agreement, "the NCE as the lender had no apparent obligation to fund the loan to the JCE." The record does not establish, by a preponderance of the evidence, that "[t]he full amount of [her] funds [would be] made available to the business(es) most closely responsible for creating the employment . . . ." *Izummi*, 22 I&N Dec. at 179; *see also* USCIS Policy Memorandum PM-602-0083, *supra*, at 16, 25. While on appeal, the Petitioner has stated that upon the approval of this petition, the NCE would loan the entire amount of her investment to the JCE, the record nonetheless shows that the agreements that the parties have executed do not obligate the NCE to do so.[8]

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[6] The regulation provides: a petitioner "must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication." 8 C.F.R. § 103.2(b)(1).

[7] On appeal, the Petitioner repeatedly states that her funds remain in an escrow account. She, however, makes contradictory statements under sections (C)(1)(b) and (E) of her appellate brief, claiming that "proof has been provided showing that all of [her] capital went to the JCE" and that "the full amount of [her] investment capital went to the [NCE] which loaned the capital to [the JCE]." She has not explained if her funds remain in an escrow account or have been loaned to the JCE. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[8] In his decision, the Chief also noted that under the Business Loan Agreement between the NCE and the JCE, "at least

2. Bridge Financing

On appeal, the Petitioner maintains that notwithstanding the documents referenced above, "the project is complete and all jobs were created," and that "[u]pon approval of the present I-526 petition, [her] funds will move from escrow into the JCE." Assuming *arguendo* that the JCE had completed the project and created new jobs, the Petitioner has not sufficiently explained why the JCE would still need her $500,000, or how the funds would create any jobs.

On appeal, the Petitioner suggests her funds could replace bridge financing as a way of receiving credit for job creation. The USCIS Policy Memorandum provides two situations where a JCE may use EB-5 capital to replace bridge financing and credit a foreign national investor with the jobs it had already created:

> Generally, the replacement of bridge financing with EB-5 investor capital should have been contemplated prior to acquiring the original non-EB-5 financing. However, even if the EB-5 financing was not contemplated prior to acquiring the temporary financing, as long as the financing to be replaced was contemplated as short-term temporary financing which would be subsequently replaced, the infusion of EB-5 financing could still result in the creation of, and credit for, new jobs.

USCIS Policy Memorandum PM-602-0083, *supra*, at 15-16.

In this case, the Petitioner has not offered sufficient documentation showing that the JCE obtained temporary or bridge financing to complete the project. While she maintains on appeal that due to USCIS processing delays of NCE's investors' petitions, the JCE had "already borne all the costs" of the project, she has not presented documents confirming that the JCE had actually obtained temporary or bridge financing to complete the project. Moreover, assuming *arguendo* that the JCE's alleged expenditures qualified as temporary or bridge financing, she has not established that before such "financing," the JCE had contemplated replacing it with EB-5 capital, or that such "financing" was seen as short term and soon to be replaced. The record does not reveal the JCE's intentions when it purportedly funded the project. As such, the Petitioner has not shown that her $500,000 would replace any bridge financing or that she could be credited with jobs the project had allegedly created.

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16 investors' I-526 [petition] must be approved before the borrower [the JCE] may draw any money from the loan." The Petitioner offers a document entitled "Report of Coordinating Member Manager to Member Managers of [the NCE]," which she claims has allowed the NCE to lend 10 investors' funds to the JCE. We will not decide whether this amendment constitutes an impermissible material change to the Petitioner's petition. *See Izummi*, 22 I&N Dec. at 175; 6 *USCIS Policy Manual*, *supra*, at G.4(C). The petition is not approvable based on the reasons discussed in the decision.

3. Credibility of the NCE's Business Plan

In the alternative, assuming *arguendo* that the Petitioner could be credited for the JCE's purported job creation, she would not be eligible for the classification. The regulation provides that to establish job creation, a petitioner must submit:

> (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
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> (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.

8 C.F.R. § 204.6(j)(4)(i). The regulation further states that if a petitioner makes an investment through a USCIS-designated regional center, then he or she must submit:

> . . . [E]vidence that the investment will create full-time positions for not fewer than 10 persons either directly or indirectly through revenues generated from increased exports resulting from the [EB-5] Program. Such evidence may be demonstrated by reasonable methodologies . . . .

8 C.F.R. § 204.6(j)(4)(iii).

While the Petitioner maintains on appeal that the JCE has created the required number of jobs for all of the NCE's investors seeking immigrant investor classification, she has not offered "photocopies of relevant tax records, Form I-9, or other similar documents" to substantiate the alleged employment creation. 8 C.F.R. § 204.6(j)(4)(i)(A). As such, we will examine the business plan to determine if it is comprehensive and credibly shows that the JCE will need not fewer than 10 full-time qualifying employees for each immigrant investor due to its nature and projected size. 8 C.F.R. § 204.6(j)(4)(i)(B). A comprehensive business plan "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). *Ho* concludes, "[m]ost importantly, the business plan must be credible." *Id.*

The Petitioner has not sufficiently demonstrated that the business plan is credible. The business plan indicates that the NCE will loan the JCE up to $15,500,000 EB-5 capital to "finance and develop the [redacted] [b]uilding" and to "refurbish, remodel, and refinance the existing buildings on site ([redacted] as well as extend/upgrade industrial infrastructure to the [redacted] site." While the business plan includes a "Development Cost/Budget Summary" stating that the development of the [redacted] building will require $15,546,382, it does not offer information on the costs associated with [redacted] and [redacted] buildings. In addition, the figures specified in the "Development Cost/Budget Summary,"

which includes a "building construction" subtotal of $9,236,160, are inconsistent with information provided by [redacted] Pages 5 and 7 of [redacted] letter state that constructing [redacted] building as a "manufacturing facility is expected to cost approximately $12,500,000," while constructing it as a "wholesale trade/distribution facility will be approximately $10,000,000." Neither amount matches figures in the "Development Cost/Budget Summary."

In response to the Chief's NOID, the Petitioner offered construction budget proposals from four companies. These proposals indicate that the final costs of construction of [redacted] building will be between $8,011,243 and $13,160,430. As the Chief discussed in his decision, the Petitioner has not credibly shown that the "construction proposals [are] from the companies claimed [because] they are identically formatted and lack company identifiable information." Regardless, the figures in the proposals are inconsistent with other documents in the record, including the "Development Cost/Budget Summary" and [redacted] letter. As the construction costs affect data relied upon to determine job creation, the Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). She, however, has not done so.

The Petitioner also submitted to the Chief a 2017 EB-5 economic analysis of [redacted] building, which lowers the projected new jobs from 474.9 to 235.8. The document explains that the construction of the building will create 20.9 "construction/development" jobs and 214.9 "operations" jobs. It further states that the JCE has completed construction of the building, and incurred a total cost of $7,760,196. This number does not match any previously offered construction figures.

Moreover, assuming that the information in the updated economic analysis is accurate, including the claim that the JCE has completed the project with its own funds, neither this analysis nor any other documents in the record discuss why the JCE would obtain a loan from the NCE. As the Chief noted in his decision, the Petitioner has not explained "why the JCE would still need this [EB-5] capital and to what use it would be put by the JCE in light of the completion of the project."

Even if we were to accept that the JCE's purported expenditures in construction costs constituted bridge financing, the proposed loan amount is more than the alleged construction costs.[9] The record does not specify how the JCE would use the excess funds on a property that the Petitioner claims it has leased to another business. Without additional explanation and corroboration on the JCE's needs for a loan from NCE, the Petitioner has not established that the business plan, as well as the multiple versions of the economic analysis, credibly demonstrates that her and other investors' funds will create the requisite number of jobs for qualifying employees.

[9] The loan amount would be between $15,500,000, from 31 foreign national investors as specified in the business plan, and $10,000,000, from 20 foreign national investors who the Petitioner claims have invested in the NCE.

D. Lawful Source of Funds

In addition to not establishing the job creation requirements, the Petitioner has also not documented the lawful source of the $500,000 she remitted to the NCE. A petitioner's invested capital must not derive, directly or indirectly, from unlawful means. 8 C.F.R. § 204.6(e). To show the lawful source of the funds, an investor must submit, for example, foreign business and tax records or documentation identifying any other sources of funds. 8 C.F.R. § 204.6(j)(3). Bank letters or statements corroborating the deposit of funds by themselves are insufficient. *Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195. The record must trace the path of the funds back to a lawful source.[10] *Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195.

In this case, the Petitioner indicates that her funds derived from a NTD $15,000,000[11] loan her spouse obtained from A contribution of loan proceedings constitutes an investment of indebtedness, for which a petitioner must demonstrate that his or her personal assets sufficiently secure the loan. *See Matter of Soffici*, 22 I&N Dec. 158, 162 (Assoc. Comm'r 1998); *see also* 8 C.F.R. § 204.6(e) (defining "capital"). The Petitioner presented to the Chief an April 2017 letter from stating: "[i]n regards to the loan of TWD [NTD $]15,000,000, a sum of USD 1,200,000 foreign deposit was made to the bank [by her spouse] as guarantee." The record, however, does not sufficiently demonstrate that the Petitioner or her spouse lawfully acquired the amount used as collateral for the loan. While she offered several certificates of her spouse's account balances, these documents did not confirm that she or her spouse had $1,200,000. Evidence relating to their income similarly did not illustrate the source(s) of the $1,200,000. Moreover, as discussed in *Izummi*, 22 I&N Dec. at 192, "funds in bank accounts can easily be dissipated." As such, the Petitioner has not established the funds in her spouse's bank accounts will not decrease and will remain sufficient to secure the NTD $15,000,000 loan after the bank distributed the proceeds. In light of the above, the Petitioner has not documented the lawful source of her investment funds.

III. CONCLUSION

The Petitioner has not established her eligibility for the classification. Specifically, she has not satisfied the job creation requirements or documented the lawful source of the funds she remitted to the NCE.

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[10] 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. Cat 2001) (holding that a petitioner had not established the lawful source of her funds because she did not designate the nature of all of her employment or submit five years of tax returns), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

[11] In a document entitled "Investment Capital Obtained through Lawful Means," the Petitioner states that NTD $15,000,000 is equivalent to $510,031.

ORDER: The appeal is dismissed.

Cite as *Matter of F-C-H-*, ID# 781421 (AAO Jan. 30, 2018)