U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-L-

DATE: JULY 27, 2018

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 (the Act) section 203(b)(5), 8 U.S.C. § 1153(b)(5). This fifth preference (EB-5) 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 the Petitioner's eligibility for the classification. On appeal, the Petitioner submits additional evidence and asserts that he is eligible.

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. *See generally* section 203(b)(5) of the Act; 8 C.F.R. § 204.6.

II. ANALYSIS

The Petitioner indicated on page 2 of the petition that in May 2012, he invested $500,000[1] in 81Doc Inc., the NCE, in return for 1% of its interest. He offered a May 2012 stock certificate, showing that he owned 10,000 of the NCE's shares. According to the business plan, the NCE "is devoted to providing bilingual prepaid legal service plans to Chinese owned business[es] and Chinese American families in the United States." For the reasons we discuss below, the record lacks sufficient evidence demonstrating the Petitioner's eligibility for the classification.

[1] The Petitioner claims that the minimum required amount of capital is downwardly adjusted from $1,000,000 to $500,000 because he has made an investment in a targeted employment area. *See* 8 C.F.R. § 204.6(f)(2).

A. Capital Placed At Risk

To establish eligibility for the EB-5 classification, a petitioner must demonstrate, among other requirements, that he or she has placed the required amount of capital at risk for the purpose of generating a return. 8 C.F.R. § 204.6(j)(2). 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. *Id.* In addition, *Matter of Ho*, 22 I&N Dec. 206, 209 (Assoc. Comm'r 1998), held that a "petitioner cannot meet his [or her] at-risk requirement by merely depositing funds into a corporate account." *See also Al Humaid v. Roark*, No. 3:09-CV-982-L, 2010 WL 308750, *3-4 (N. D. Tex. Jan. 26, 2010) (concluding that capital contribution that "is sitting idle, kept in a passive reserve account" has not been placed at risk). Moreover, a petitioner must establish that all eligibility requirements for the visa have been satisfied from the time of filing the petition and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

In this case, the Petitioner has not demonstrated that he placed at least $500,000 at risk in the NCE at the time he filed the petition in September 2012. *See* 8 C.F.R. § 103.2(b)(1); 8 C.F.R. § 204.6(j)(2). In his initial filing, he claimed that remitted $500,000 to the NCE's account on his behalf. He presented documents showing that the NCE rented a space for $1,000 a month, made purchases in office supply, electronics, as well as furniture stores, and hired one employee.

While the documents confirmed that the NCE had incurred some expenses and planned to employ additional employees, neither the business plan nor other evidence in the record at the time the Petitioner filed the petition explained why the NCE would need $500,000. The "Sales Personal [*sic*] Table" accompanying the business plan provided that within the first year of operation, the NCE would be fully staffed and would pay $17,700 a month in salaries. The "Sales Income Projection" indicated that around the same time, the NCE would begin to have a positive net profit after paying all expenses including salaries. Page 4 of the business plan stated that by year two of the NCE's operation "membership sales should escalate up to $988,000." The record illustrated that the NCE would use a portion of the Petitioner's investment within the first year of its operation, but beginning in year two, its sales would fully cover its expenses. The documentation the Petitioner presented at the time of filing the petition, therefore, did not establish that he placed the entire amount of $500,000 at risk in the NCE.

On appeal, citing 8 C.F.R. § 204.6(j)(2), the Petitioner asserts that he has satisfied the at-risk requirement, because "the required capital was deposited in the business account and made available

[2] The record – including an April 2017 statement from the NCE's manager, and the Petitioner's response to the Chief's notice of intent to deny the petition – references a criminal investigation which has resulted in the United States Attorney's Office charging and with conspiracy to defraud the United States and a number of related crimes in connection with a scheme to fraudulently obtain EB-5 visas. *See* https://www. accessed on July 17, 2018, and a copy of the online material has been incorporated into the record of proceedings. The criminal case is pending as of the date of this decision. This decision does not rely on the allegations made against or

to the business." The referenced regulation offers a non-exhaustive list of documents that a petitioner may present, but does not state that the submission of such material, without additional corroboration, would conclusively confirm that the investor has placed the funds at risk. As discussed, a petitioner depositing funds into a corporate account without sufficient evidence on how the NCE will use the capital to carry out its business does not demonstrate that he or she has made an active, at-risk investment. *Ho*, 22 I&N Dec. at 209-10.

In light of the aforementioned documentation, including the NCE's expense and earnings forecasts, the Petitioner has not offered sufficient evidence verifying that the NCE would need, or how it would use, the $500,000 in the entirety. As such, he has not established that at the time he filed the petition, he placed at least $500,000 at risk in the NCE. *See* 8 C.F.R. § 103.2(b)(1); 8 C.F.R. § 204.6(j)(2); *Ho*, 22 I&N Dec. at 209-10; *Al Humaid*, 2010 WL 308750, *3-4.[3]

B. Lawful Source of Funds

To establish eligibility for the EB-5 classification, the record must demonstrate, among other requirements, that the petitioner has placed his or her own capital at risk in the NCE. *See Ho*, 22 I&N Dec. at 213; *Matter of Soffici*, 22 I&N Dec. 158, 164-65 n.3 (Assoc. Comm'r 1998) (stating that "[a] petitioner must . . . establish, pursuant to 8 C.F.R. § 204.6(e), that funds invested are his [or her] own"). In addition, the petitioner must document the complete path of his or her capital, and cannot establish the lawful source of funds merely by submitting bank letters or statements reflecting the deposit of funds. *Ho*, 22 I&N Dec. at 210-11; *Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998). Without documentation of the path of capital, an investor cannot show that the funds are his or her own. *Izummi*, 22 I&N Dec. at 195.

On appeal, the Petitioner argues that because the Chief indicated in the notice of intent to deny the petition that "[t]he Petitioner has provided evidence of the source of his funds," the Chief was "barred by [redacted] to later make an adverse finding regarding this requirement in the decision. We disagree. We have no authority to apply a judicially devised doctrine such as equitable estoppel or laches 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). [redacted] 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 . . . , the burden of proof shall be upon such person to establish that he [or she] is eligible to receive such visa . . . ." Section 291 of the Act,

[3] On appeal, the Petitioner offers the NCE's May 2013 bank statement, asserting that its balance of $106,713.33 illustrates that the NCE has used the Petitioner's funds in its operation. At issue, however, is whether he had placed at least $500,000 at risk in the NCE at the time he filed the petition in September 2012, which, as discussed, he has not. Also, a lower account balance, without documentation detailing the missing amount, is insufficient to confirm that the NCE has used the funds in its operation.

8 U.S.C. § 1361. Thus, the Petitioner has not shown that the Chief was precluded from finding that the record failed to verify the lawful source of the Petitioner's capital.

Moreover, while the Petitioner claims that he obtained a 3,000,000 renminbi (RMB) loan to finance his EB-5 investment, he has not presented sufficient documentation to substantiate this assertion. The [redacted] and the [redacted] indicate that he received the loan proceeds on March 1, 2012. The bank record, however, shows that he remitted $530,000 to [redacted] business account, purportedly to invest in the NCE, on December 9, 2011, approximately three months before he received the loan proceeds. The evidence relating to the 3,000,000 RMB loan therefore does not establish the lawful source of his EB-5 investment.[5]

C. Regulatory Definition of Capital

As a related matter, even had the Petitioner shown that his EB-5 captial derived from the 3,000,000 RMB loan, the record would be insufficient to establish that the loan proceeds qualified as capital under the regulation. The regulatory definition of "capital" at 8 C.F.R. § 204.6(e) includes indebtedness, as well as cash, and provides:

> Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness . . . .

The same provision also defines "invest," stating: "[a] contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital . . . ." 8 C.F.R. § 204.6(e). Similarly, the regulation at 8 C.F.R. § 204.6(j)(2)(v) explains that a petitioner may provide:

> 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.

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[4] As the Chief pointed out in his decision, the English translation of the [redacted] appears to contain typographical and grammatical errors.

[5] In addition, the Petitioner has not submitted documentation, such as bank records, explaining how he converted the 3,000,000 RMB into $530,000, which he purportedly remitted to [redacted] in December 2011, or confirming that at least $500,000 remained in her business account before she transferred the funds to the NCE in May 2012.

The regulation thus illustrates that a contribution of loan proceeds constitutes an investment of indebtedness, and a petitioner must demonstrate that his or her personal assets sufficiently secure the loan. *See Soffici*, 22 I&N Dec. at 162; *see also* 8 C.F.R. § 204.6(e), (j)(2)(v).

In this case, even had the Petitioner established that his EB-5 captial derived from the 3,000,000 RMB loan, he would not have demonstrated that his personal assets sufficiently secured the loan. He claims that he used two of his real properties in China to secure the loan. The record, however, does not substantiate his assertions. According to article 7 of the [redacted] the "pledgor provides the pledge guaranty with the pledge property listed on the attached pledge property statement." The loan contract, including its first page, does not identify a pledgor. Instead, it lists only the lender and the borrower, who is the Petitioner. The "Personal Pledge Loan Contract," thus, does not confirm that the Petitioner secured the loan with his personal assets. Similarly, although the loan contract references a "pledge property statement," the Petitioner acknowledges in an April 2017 statement that he "cannot find the List of Mortgaged Properties attachment to the mortgage loan" because he had signed the loan contract "over 5 years [ago]." He does not explain what effort, if any, he has undertaken to obtain a copy of the relevant documents, either from the lender or another source.[6] Accordingly, even had the Petitioner shown that the 3,000,000 RMB loan funded his EB-5 captial, the record would be insufficient to verify that he secured the loan with his personal assets, or that the funds qualified as capital under the regulation.

D. Job Creation

To establish eligibility for this classification, a petitioner must show, among other requirements, that his or her contribution to the NCE results in employment creation. The regulation at 8 C.F.R. § 204.6(j)(4)(i) provides that to show 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,[7] and when such employees will be hired.

[6] Under certain circumstances, the regulation permits a petitioner to submit secondary evidence or affidavits to establish facts at issue, if the primary evidence does not exist or cannot be obtained. *See* 8 C.F.R. § 103.2(b)(2)(i)-(ii). In this case, however, the Petitioner has not shown that the relevant documents, including those relating to the collateral, do not exist or cannot be obtained.

[7] The two-year job creation period described in 8 C.F.R. § 204.6(j)(4)(i)(B) commences six months after the adjudication of the petition. USCIS Policy Memorandum PM-602-0083, *EB-5 Adjudications Policy* 19 (May 30, 2013), https://www.uscis.gov/legal-resources/policy-memoranda; *see also* 6 *USCIS Policy Manual* G.2(D)(5), https://www.uscis.gov/policymanual/HTML/PolicyManual.html.

Prospective job creation must be demonstrated through submission of a comprehensive business plan. The precedent decision *Matter of Ho* held that, to be "comprehensive," a business plan "must be sufficiently detailed to permit [U.S. Citizenship and Immigration Services (USCIS)] to draw reasonable inferences about the job-creation potential." 22 I&N Dec. at 213. "Mere conclusory assertions[, however,] do not enable [USCIS] to determine whether the job-creation projections are any more reliable than hopeful speculation." *Id.* The decision concludes: "Most importantly, the business plan must be credible." *Id.*

In this case, the Petitioner has not met the job creation requirement. The NCE's payroll documents and Employment Eligibility Verifications (Forms I-9) indicate that it has created less than 10 jobs. The record, however, does not include a comprehensive and credible business plan confirming that it will create the requisite number of jobs within two years. In his response to the Chief's request for evidence (RFE), the Petitioner disclosed that the NCE has undergone multiple corporate structure changes. Under the heading "4. Creation of at Least 10 Full-time Positions for Qualifying Employees," the Petitioner stated that merged into [the NCE] as a subsidiary on March 9, 2013"; the NCE "merged into as a subsidiary on June 26, 2013"; and that subsidiaries [included] and

On appeal, the Petitioner states that there are at least eight foreign nationals who are seeking the EB-5 classification based on their investment in businesses that have merged with the NCE.[9] He claims that the "business plan clearly and credibly explains how at least 80 jobs can be created" within two years. *See* 8 C.F.R. § 204.6(j)(4)(i)(B); *see also* 8 C.F.R. § 204.6(g)(2) (discussing employment creation allocation when there are multiple investors). Even if we were to accept the Petitioner's assertion that there were eight investors, we would not conclude that the NCE and related entities would create a sufficient number of jobs.

The record contains only one business plan, and it does not discuss any of the other entities referenced in the Petitioner's RFE response. Significantly, according to the NCE's "Sales Personal [*sic*] Table," the NCE will create a total of 10, not 80, positions during its first two years of operation. Even if we were to accept this projection as credible, the Petitioner has not explained how 10 positions would satisfy the job creation requirement for eight foreign national investors.

To the extent that the Petitioner argues that the other entities will also create positions which might satisfy the other foreign nationals' job creation requirement, neither the business plan nor any other

[8] The multiple corporate structure changes may constitute an impermissible material change to the petition, and it should be addressed in any future proceedings. *See Kungys v. United States*, 485 U.S. 759, 770-72 (1988) (stating that 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 also Izummi*, 22 I&N Dec. at 175-76 (finding that 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 USCIS requirements).

[9] The Chief noted in his decision that there might be as many as 18 foreign nationals who are seeking the EB-5 classification upon investing in the NCE or its associated entities.

evidence in the record provides sufficient information about these entities or explains how the mergers might have changed the nature of the NCE's business or its job creation projection. The Petitioner claims that the NCE is now a subsidiary of . This means that if the NCE is a wholly owned subsidiary of some of the NCE's 10 projected new jobs might be allocated to the foreign national(s) who have invested in *See* 8 C.F.R. § 204.6(e) (the definition for a NCE "includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries"). Without additional evidence on the nature of the associated entities and how the mergers might have affected the NCE's job creation projection or allocation, the sole business plan in the record – which is neither credible nor comprehensive in light of the corporate structure changes – is insufficient to demonstrate that the Petitioner satisfies the employment creation requirement. *See Ho*, 22 I&N Dec. at 213.

III. CONCLUSION

The Petitioner has not shown that he has placed at least $500,000 of his own capital at risk in the NCE, as claimed in the petition. In addition, he has not satisfied the employment creation requirement. Based on these reasons, he has not established his eligibility for the EB-5 classification.

ORDER: The appeal is dismissed.

Cite as *Matter of G-L-*, ID# 1365127 (AAO July 27, 2018)