U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Y-H-

DATE: OCT. 11, 2019

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 Petitioner did not establish eligibility for the EB-5 classification. Specifically, the Chief determined that the Petitioner did not document that she had invested or was in the process of investing at least $500,000[1] in [redacted], the NCE, whose general partner is [redacted] Regional Center (the Regional Center), a United States Citizenship and Immigration Services (USCIS) designated regional center.[2] In addition, the Chief determined that the Petitioner did not demonstrate the lawful source of the funds that she allegedly acquired to invest in the NCE; that she made impermissible material changes to her petition; and that the English translations of the foreign language documents in the record did not comport with regulatory requirements. On appeal, the Petitioner submits additional evidence and maintains that she has shown eligibility for the EB-5 classification.

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 a NCE. 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. An immigrant investor may invest the required funds directly in an NCE or through a regional center. Regional centers apply for designation as such with USCIS. Designated regional centers identify and

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

[2] A regional center is an economic unit involved with the promotion of economic growth, "including . . . improved regional productivity, job creation, and increased domestic capital investment." *See* 8 C.F.R. § 204.6(e).

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

The Petitioner indicates that she had invested $500,000 in the NCE. According to pages 6 through 9 of the November 2016 business plan, the NCE seeks to raise up to $15,000,000 EB-5 funds from 30 foreign national investors to loan to [redacted] the JCE. The JCE plans to use the EB-5 capital and other funds for "the development, construction and subsequent operation of [redacted]' in [redacted] New York. Upon construction completion, the project, known as the [redacted] Project, will be a "25-story building" with "182 residential units" and "12,462 [square feet] of retail space."

The record includes a copy of a check, dated March 11, 2017, indicating that [redacted] whom the Petitioner has referred to as "an agent," "an exchanger," and "a friend," issued a $500,000 check to the Regional Center. [redacted] wrote on the memo line of the check "[redacted] [the Petitioner]." In a March 2017 letter, the Regional Center acknowledged the receipt of the funds as the Petitioner's EB-5 investment in the [redacted] Project. The Petitioner has submitted a copy of another check, dated March 17, 2017, showing that the Regional Center issued a check to the NCE, noting "Loan to [redacted], INV #1013" on the memo line.

A. Investment of Funds

To establish eligibility for the EB-5 classification, a petitioner must demonstrate, among other requirements, that he or she "has invested or is actively in the process of investing the required amount" in a NCE that "results in the creation of at least ten full-time positions for qualifying employees." 8 C.F.R. § 204.6(g)(1); *see also* 8 C.F.R. § 204.6(j). The regulation explains:

> To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. 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. The alien must show actual commitment of the required amount of capital . . . .

8 C.F.R. § 204.6(j)(2); *see also Matter of Ho*, 22 I&N Dec. 206, 210-11 (Assoc. Comm'r 1998); *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 regulation provides the following relevant definitions:

> *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 . . . .
>
> . . .
>
> *Invest* means to contribute capital. 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 for the purposes of this part.

8 C.F.R. § 204.6(e).

Moreover, a petitioner must establish that he and she satisfies all eligibility requirements for the immigration benefit from the time he or she filed the petition and continuing through the adjudication of the petition. 8 C.F.R. § 103.2(b)(1).

In this case, the Petitioner filed her petition on March 24, 2017. She therefore must establish her eligibility for the EB-5 classification from that date and through the adjudication of her petition. She has not made such a showing by a preponderance of the evidence.[3] The record shows that on March 7, 2017, she remitted 3,481,550 Renminbi (RMB) to [redacted]'s China [redacted] Sub-branch account ending in 7269, and that [redacted] sent a $500,000 check, dated Mach 11, 2017, from her [redacted] Bank account ending in 2251 to the Regional Center. [redacted] noted on the memo line of the check that the funds were for the Petitioner's EB-5 investment.

Upon reviewing the evidence, the Chief issued a notice of intent to deny the petition (NOID), stating, in part, that the Petitioner had engaged in a currency exchange or swap, but did not present sufficient documents tracing the $500,000 [redacted] sent to the Regional Center to the 3,481,550 RMB she remitted to [redacted]. In her NOID response, the Petitioner revealed additional information about the transaction that purportedly involved an advancement of funds and a repayment that occurred many months after the Petitioner had filed her petition.

Specifically, the Petitioner claimed that after she sent 3,481,550 RMB to [redacted]'s China [redacted] Bank account (7269), [redacted] which owns the JCE,[4] remitted $500,000 to [redacted]'s [redacted] Bank account (2251), and that [redacted] then sent the $500,000 from

[3] If a petitioner submits relevant, probative, and credible evidence that leads USCIS to believe that the claim is "more likely than not" or "probably true," the petitioner has satisfied the "preponderance of the evidence" standard of proof. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010); *see also* 6 *USCIS Policy Manual* G.2(E), https://www.uscis.gov/policymanual/HTML/PolicyManual.html.

[4] According to pages 18-19 of the NCE's November 2016 business plan, the JCE "is owned by [redacted] which is owned 99% by [redacted] and 1% by [redacted]." In addition, the Petitioner states on page 4 of her appellate brief, that [redacted] who manages and owns [redacted] "is also the Principal of the Regional Center."

[redacted] to the Regional Center as the Petitioner's EB-5 investment. The Petitioner alleged that [redacted] had advanced to her, through [redacted], her EB-5 capital.

The Petitioner then claimed that she had repaid [redacted]'s advancement of funds approximately five months after she had allegedly invested in the NCE and filed the petition in March 2017. She stated that after [redacted] received 3,481,550 RMB from her, [redacted] remitted the sum to a business in China, [redacted][5] on March 14, 2017. She alleged that subsequently, in April 2017, [redacted] sent $4,850,000 (equivalent to 33,547,935 RMB according to bank records) to [redacted] a business in the United States. She maintained that the transfer included the 3,481,550 RMB she had transferred to [redacted] in March 2017. She offered a copy of a check, dated August 27, 2017, indicating that [redacted] issued a $500,000 check to [redacted] with the annotation "eb-5 Repayment for [the Petitioner]" on the memo line.

On appeal, the Petitioner acknowledges that she had engaged in a currency swap with [redacted] but maintains that the transaction establishes her EB-5 eligibility because "[t]he funds were transferred into Regional Center's bank account after reaching [redacted] and [redacted]'s bank accounts." We disagree. Rather, based on the documentation in the record, we find that the Petitioner has not demonstrated that, at the time she filed the petition, she "ha[d] invested or [was] actively in the process of investing" or had actually committed at least $500,000 of her own funds in the NCE, as required under the regulation. *See* 8 C.F.R. § 204.6(g)(1); *see also* 8 C.F.R. § 204.6(j); 8 C.F.R. § 103.2(b)(1); *Soffici*, 22 I&N Dec. at 164-65 n.3.

According to the Petitioner, at the time she filed the petition on March 24, 2017, the 3,481,550 RMB she sent to [redacted] was in [redacted]'s account. She has not shown that placing funds, through an intermediary, in a Chinese business's bank account constitutes evidence that she "ha[d] invested or [was] actively in the process of investing" or had actually committed at least $500,000 in the NCE. At most, her action reflected her intent to invest. As the regulation specifies, however, "[e]vidence 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." 8 C.F.R. § 204.6(j)(2). As the Petitioner has not demonstrated her "actual commitment of the required amount of capital" in the NCE at the time she filed the petition, she has not established her eligibility for the EB-5 classification. *See id.*; *see also* 8 C.F.R. § 103.2(b)(1).

Moreover, we have other concerns over the currency exchange. For example, although the Petitioner claims that the $4,850,000 [redacted], sent to [redacted] in April 2017 included the 3,481,550 RMB she had transferred to [redacted] in March 2017, the record is insufficient to confirm this allegation. On appeal, she presents several screenshots of a bank's website, purportedly showing [redacted]'s banking activities between November 2016 and June 2017. The screenshots indicate that the funds from the Petitioner, through [redacted] had been commingled with sums from many other sources. This evidence, thus, does not adequately confirm that the Petitioner's funds, in their entirety, were part of [redacted]'s $4,850,000 remittance to [redacted] Additionally, according to a May 2017 Certificate

[5] According to an organizational chart entitled [redacted]," which the Petitioner offers on appeal, [redacted] is a wholly owned subsidiary of [redacted]

of [redacted], [redacted], remitted the large sum to [redacted] to engage in overseas investment. This document does not support the Petitioner's statement that the purpose of the remittance was to facilitate her personal investment in the NCE.

Furthermore, we have concerns over the $500,000 that [redacted] purportedly advanced, through [redacted] to the Petitioner to use as her EB-5 capital. Initially, the Petitioner has not pointed to any legal authority that supports her position that [redacted]'s remittance of the $500,000 advancement to the NCE qualifies as her contribution of EB-5 capital to the NCE. Even if we were to accept the advancement as her EB-5 capital, which we do not, the Petitioner had not presented sufficient documentation, such as bank statements, verifying how [redacted] acquired the funds for the advancement. According to page 5 of its U.S. Return of Partnership Income, Internal Revenue Service (IRS) Form 1065, the company had $111 in cash in the beginning of 2016, and $323,036 in cash at the end of 2016. This information does not support a finding that [redacted] had enough funds to make the $500,000 advancement.

On appeal, the Petitioner maintains that the advanced funds originated from a shareholder equity contribution to [redacted]. She, however, has not offered sufficient evidence, such as bank records, confirming an equity contribution of cash of at least $500,000 or how the shareholder had obtained the funds to finance the purported contribution. *See* 8 C.F.R. § 204.6(g)(1) (requiring a petitioner to identify all sources of capital invested and demonstrate they have been derived by lawful means); *see also* 8 C.F.R. § 204.6(j)(3)(iii).

In short, based on the reasons we have discussed above, the Petitioner has not established, by a preponderance of the evidence, that at the time she filed the petition on March 24, 2017, she "ha[d] invested or [was] actively in the process of investing" or had actually committed at least $500,000 of her own funds in the NCE. 8 C.F.R. § 204.6(g)(1); *see also* 8 C.F.R. § 204.6(j)(2); *Soffici*, 22 I&N Dec. at 164-65 n.3.

B. Lawful Source of Funds

In addition, the Petitioner has not sufficiently documented the lawful source of the 3,481,550 RMB she remitted to [redacted] which she claims financed her EB-5 investment. To be eligible for the EB-5 classification, a petitioner must establish, among other requirements, that his or her invested capital did not derive, directly or indirectly, from unlawful means. 8 C.F.R. § 204.6(e) (defining capital). Bank letters or statements corroborating the deposit of funds by themselves are insufficient to demonstrate their lawful source. *Ho*, 22 I&N Dec. at 210-11; *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.[6] *Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195.

[6] These requirements "serve a valid government interest; i.e., to confirm that the funds utilized in the [EB-5] program are not of suspect origin." *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Cal. 2001) (holding that a petitioner had not established the lawful source of her funds because, in part, 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).

The Petitioner alleges that her EB-5 capital derived from an irrevocable monetary gift of 3,800,000 RMB from her father, [redacted] who obtained the funds from the proceeds of a mortgage loan secured by real property owned by [redacted]. She claims that after [redacted] received the proceeds of the loan, he remitted RMB 3,800,000 RMB to her on February 24, 2017, and she then sent the sum to [redacted]. According to the [redacted] Real Estate Mortgage Contract and [redacted]'s bank statements for his account ending in 7918, [redacted] received a total of 3,800,000 RMB on February 23, 2017, from the mortgagee.

The Petitioner has not demonstrated that [redacted] lawfully accumulated enough funds to purchase the property which was later used as collateral in the mortgage loan used to finance the Petitioner's EB-5 investment. The Real Estate Purchase and Sales Contract indicates [redacted] bought the property for 510,000 RMB on March 7, 2006, and he was the sole owner of the property. According to the Petitioner, the property was purchased using the accumulated income from [redacted] and her mother, [redacted]. She has submitted multiple documents relating to the employment and income earned by her parents as evidence that they had bought the property, in part, with their earnings.

[redacted]'s resume stated that he had been engaged in power automation product design, research and development, and power automation engineering services since July 1985 but most recently worked at [redacted] as vice general manager and senior engineer. The Petitioner also presented a February 2017 Income and Position Certificate from [redacted] stating that [redacted] worked for that entity since March 2004 and earned 283,560 RMB in total annual income from 2014 - 2016. [redacted]'s resume stated that she taught history in middle school from July 1987 and now works in [redacted] High School as senior teacher of middle school. The Petitioner presented a February 2017 Income and Position Certificate from [redacted] High School stating that [redacted] has worked for that entity since July 2005 and earned 333,300 RMB in total annual income from 2014 to 2016. As discussed in the Chief's RFE, this documentation did not demonstrate the property was purchased with [redacted] and [redacted]'s accumulated income.

In her RFE response, the Petitioner submitted a Certificate of Salary Income and Employment, dated August 2018, from the [redacted] Research Institute, stating that [redacted] worked for the entity from July 1985 to February 2004 as a principal engineer and earned 465,200 RMB in total income from 1998 to 2003. The Petitioner also submitted letters from two former work colleagues stating that senior engineers working for the entity made an average yearly salary of 60,000 to 80,000 RMB during the time of [redacted]'s employment. Additionally, the Petitioner submitted an undated[7] Certificate of Salary Income and Employment from [redacted] Middle School, stating that [redacted] worked for the entity from July 1993 to June 2005 as a senior teacher and earned 251,700 RMB from 1999 to the first half of 2005. The Petitioner also submitted her parents' individual income tax certificates from 2012 to 2018.

While these documents provide a consistent account of [redacted] and [redacted]'s work history, they are not sufficient to show they had retained enough earnings to finance the property purchased in 2006. Evidence of earnings, without additional corroboration demonstrating they had saved their income, is insufficient to establish that they had lawfully accumulated adequate funds to purchase the property.

[7] The date is listed as "210003" on the certificate.

Based on the reasons we have discussed above, the Petitioner has not documented the lawful source of the 3,481,550 RMB she remitted to [redacted] in March 2017, which she alleges financed her EB-5 investment. *See* 8 C.F.R. § 204.6(e), (j)(3); *Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195. Specifically, she has not demonstrated, by a preponderance of the evidence, that [redacted] or [redacted] had lawfully accumulated enough funds to purchase that property, the mortgage of which purportedly financed her remittance to [redacted].

C. Other Issues

In the decision denying the petition, the Chief also concluded that the Petitioner had made impermissible material changes to her petition and had not submitted English translations of foreign language documents that comported with regulatory requirements. In light of our discussion and reasons above in support of our dismissal of the Petitioner's appeal, we will not address these two additional grounds of denial.

III. CONCLUSION

The Petitioner has not demonstrated, by a preponderance of the evidence, that at the time she filed the petition, she "ha[d] invested or [was] actively in the process of investing" or had actually committed at least $500,000 of her own funds in the NCE. 8 C.F.R. § 204.6(g)(1); *see also* 8 C.F.R. § 204.6(j)(2); *Soffici*, 22 I&N Dec. at 164-65 n.3. In addition, she has not documented the lawful source of the funds she remitted to [redacted], which she claims financed her EB-5 investment in the NCE.

The appeal will be dismissed 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 Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of Y-H-*, ID# 4408897 (AAO Oct. 11, 2019)