U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-Y-

DATE: OCT. 17, 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 he 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 he allegedly acquired to invest in the NCE; that he made impermissible material changes to his 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 he 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 work with NCEs, which in turn are associated with a specific investment project taken on either

[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).

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 he had invested $500,000 in the NCE. According to pages 6 through 9 of the September 2018 updated 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 [redacted] bank account statement for [redacted], whom the Petitioner has referred to as "an agent," "an exchanger," and "a friend," indicating that he wired $500,000 to the Regional Center on April 14, 2017. In an April 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 a check, dated April 16, 2017, showing that the Regional Center issued a check to the NCE, noting "Capital Contribution to LP – [the Petitioner]" 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 or 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 his petition on April 19, 2017. He therefore must establish his eligibility for the EB-5 classification from that date and through the adjudication of his petition. He has not made such a showing by a preponderance of the evidence.[3] The record reflects that in March 2017 the Petitioner obtained 3,500,000 renminbi (RMB) from a mortgage loan secured by property he owned. On March 23, 2017, the Petitioner transferred 3,500,000 RMB to [redacted] Bank [redacted] (BOC) account ending in 8424, and that [redacted] transferred $500,000 on April 14, 2017, from his [redacted] bank account ending in 8938 to the Regional Center. The Regional Center stated in a letter 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 3,500,000 RMB he remitted to [redacted] In his NOID response, the Petitioner revealed additional information about the transaction that purportedly involved an advancement of funds and a repayment that occurred months after the Petitioner had filed his petition.

Specifically, the Petitioner claimed that after [redacted] received from him 3,500,000 RMB in his [redacted] account (8424), [redacted] which owns the JCE,[4] remitted $340,000 to [redacted]'s [redacted] account (8938), and [redacted] sent $160,000 to [redacted] same account. The Petitioner alleged that [redacted] and [redacted] had advanced his EB-5 capital through [redacted]

[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 page 21 of the NCE's September 2018 updated 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 his appellate brief, that [redacted], who manages and owns [redacted], "is also the Principal of the Regional Center."

The Petitioner claimed that he had repaid [redacted] and [redacted]'s advancement of funds approximately three, and four months, respectively, after he had allegedly invested in the NCE and filed the petition in April 2017. He stated that after [redacted] received 3,500,000 RMB from him, he remitted the sum to a business in China, [redacted],[5] on March 24, 2017. He 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. He maintained that the transfer included the 3,500,000 RMB he had transferred to [redacted] in March 2017. He offered copies of two checks, dated July 26, 2017, and August 27, 2017, respectively, indicating that [redacted] issued a $160,000 check to [redacted] and a $340,000 check to [redacted]. We note that the check to [redacted] includes the annotation "eb-5 Repayment for [the Petitioner]" on the memo line, while the check to [redacted] does not include any annotations.

On appeal, the Petitioner acknowledges that he had engaged in a currency swap with [redacted] but maintains that the transaction establishes his EB-5 eligibility because "[t]he funds were transferred into [the Regional Center's] escrow [account] after reaching Exchanger [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 he filed the petition, he "ha[d] invested or [was] actively in the process of investing" or had actually committed at least $500,000 of his 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 he filed the petition on April 19, 2017, the 3,500,000 RMB he sent to [redacted] was in [redacted]'s account. He has not shown that placing funds, through an intermediary, in a Chinese business's bank account constitutes evidence that he "ha[d] invested or [was] actively in the process of investing" or had actually committed at least $500,000 in the NCE. At most, his action reflected his 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 his "actual commitment of the required amount of capital" in the NCE at the time he filed the petition, he has not established his 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 3,500,000 RMB he had transferred to [redacted] in March 2017, the record is insufficient to confirm this allegation. On appeal, he 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 March 2017 Certificate

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

of Overseas Investment of Enterprise [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 his personal investment in the NCE.

Furthermore, we have concerns over the $340,000 that [redacted] and the $160,000 that [redacted] purportedly advanced, through [redacted] to the Petitioner to use as his EB-5 capital. Initially, the Petitioner has not pointed to any legal authority that supports his position that [redacted]'s remittance of the $500,000 advancement in total to the NCE qualifies as his contribution of EB-5 capital to the NCE. Even if we were to accept the advancement as his EB-5 capital, which we do not, the Petitioner has not presented sufficient documentation, such as bank statements, verifying how [redacted] and [redacted] acquired the funds for the advancement. For example, according to page 5 of its 2016 and 2017 U.S. Return of Partnership Income, Internal Revenue Service (IRS) Forms 1065, though the company had $323,036 in cash at the end of 2016, no cash amounts were listed in the beginning or end of 2017. This information does not support a finding that [redacted] had enough funds to make the $340,000 advancement in April 2017. In regard to [redacted] the submitted 2016 and 2017 IRS Forms 1065 and audit report, without corroborating documentation such as bank statements, are insufficient to verify how it acquired the $160,000 advancement funds.

On appeal, the Petitioner maintains that the advanced funds originated from a shareholder equity contribution to [redacted] and a capital contribution to [redacted] He, however, has not offered sufficient evidence, such as bank records, confirming an equity contribution to [redacted] or how the shareholder had obtained the funds to finance the purported contribution. Further, the submitted remittance receipt indicating [redacted] received $196,784 in April 2016 from [redacted] is insufficient to establish the funds remitted to the NCE one year later on behalf of the Petitioner derived from lawful means. *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 he filed the petition on April 19, 2017, he "ha[d] invested or [was] actively in the process of investing" or had actually committed at least $500,000 of his 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. The Petitioner has not demonstrated that the $500,000 remitted to the NCE derived from his March 2017 mortgage loan proceeds. In addition, he has not documented the lawful source of the funds [redacted] remitted to the Regional Center, which he claims financed his EB-5 investment in the NCE.

B. Other Issues

In the decision denying the petition, the Chief also concluded that the Petitioner had made impermissible material changes to his 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 he filed the petition, he "ha[d] invested or [was] actively in the process of investing" or had actually committed at least $500,000 of his 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, he has not documented the lawful source of the funds [redacted] remitted to the Regional Center, which he claims financed his 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 G-Y-*, ID# 4380579 (AAO Oct. 17, 2019)