U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-Z-

DATE: SEPT. 19, 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] (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 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 check, dated November 21, 2016, 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 "EB5 Fund for [the Petitioner]." In a November 2016 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 November 23, 2016, 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 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 November 28, 2016. 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 November 15, 2016, she remitted 3,450,000 Renminbi (RMB) to [redacted]'s [redacted] Bank account ending in 6888, and that [redacted] sent a $500,000 check, dated November 21, 2016, from his [redacted] Bank account ending in 6815 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 3,450,000 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 [redacted] received from her 3,450,000 RMB in his [redacted] Bank account (6888), [redacted] which owns the JCE,[4] remitted $500,000 to [redacted] Bank account (6815), 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 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 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 nine months after she had allegedly invested in the NCE and filed the petition in November 2016. She stated that after [redacted] received 3,450,000 RMB from her, he remitted the sum to a business in China, [redacted][5] on November 17, 2016. 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 thetransfer included the 3,450,000 RMB she had transferred to [redacted] in November 2016. 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 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 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 November 28, 2016, the 3,450,000 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 3,450,000 RMB she had transferred to [redacted] in November 2016, 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

[5] According to an organizational chart entitled [redacted] which the Petitioner offers on appeal, [redacted] has an ownership interest in both [redacted] and [redacted]. The document also shows that [redacted] is a wholly owned subsidiary of [redacted]

$4,850,000 remittance to [redacted]. Additionally, according to a May 2017 Certificate 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 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 November 28, 2016, 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 3,450,000 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 the sale of a property in [redacted], China, that she and her spouse, [redacted], jointly owned. She claims that after [redacted] received the proceeds of the sale, he remitted 3,450,000 RMB to her in November 2016, and she then sent the sum to [redacted]. According to the Intermediary Contract of Real Estate Business, the Supplementary Agreement, and [redacted]'s bank statements for his accounts ending in 2852 and 5815, [redacted] received a total of 3,915,000 RMB between May 2015 and July 2015 for the property. The bank statements list many expenses, withdrawals, and debits, indicating that as of July 9, 2015, his account ending in 2852 had a balance of 828,351.14 RMB, and that as of October 21, 2015, his bank account ending in 5815 had a balance of 279.48 RMB.

According to the Petitioner, [redacted]'s account ending in 2852 was replaced by an account ending 3366 in August 2016. The bank statements for the account ending in 3366 show that [redacted] received large sums in November 2016, which financed, in part, the 3,450,000 RMB he remitted to the Petitioner. Some of these deposits' include the abstract "Retail inward remittance RYTB" or "Bank-securities transfer (third-party deposit) SKRD." While [redacted] alleged in a September 2018 statement that these deposits were repayments of loans that he had made to individuals, neither he nor the Petitioner has offered sufficient evidence corroborating his claims that he had loaned proceeds of the property sale to others or that the borrowers had repaid the loans. Without additional corroboration, the record is insufficient to show the 3,450,000 RMB the Petitioner remitted to [redacted] derived from the sale of the couple's property or a lawful source.

Moreover, although the Petitioner asserts that she and [redacted] used their income to purchase the [redacted] property, which they later sold purportedly to finance her EB-5 investment, the record contains inconsistent information relating to [redacted]'s employment and earnings history. The Commodity House Purchase and Sales Contract indicates that the couple bought the property for 775,070 RMB. The Petitioner claims that they used savings, earnings, and a 240,000 RMB loan that they had agreed to repay in full by 2008 for the purchase. She has submitted multiple documents relating to [redacted]'s employment and income as evidence that they had bought the property, in part, with his earnings.

The first resume provides that [redacted] had worked for [redacted] Construction Headquarters between September 1992 and July 1997; [redacted] Construction Bureau (formerly known as [redacted] Construction Headquarters) between July 1997 and June 2005; and [redacted] Company Limited between June 2005 and August 2015. The Petitioner has also presented a November 2016 Income Statement from the [redacted] Construction Bureau, stating that [redacted] worked for that entity from September 1996 to December 2003; such information, is inconsistent with the employment history listed in his first resume. In addition, as discussed in the Chief's NOID, [redacted] declared in his 2016 nonimmigrant visa application that he had begun working for the [redacted] Company Limited in August 2005, not June 2005, as noted in his first resume.

In her NOID response, the Petitioner submitted [redacted]'s second resume, which provides different dates of employment than those listed in the first one. The second resume indicates that he had worked for [redacted] Construction Headquarters between October 1992 and August 1996 (not September 1992 to July 1997); [redacted] Construction Bureau between

September 1996 and July 2005 (not July 1997 to June 2005); and [redacted] Company Limited between August 2005 and August 2015 (not June 2005 to August 2015). She also provided a second Income Certificate, dated September 2018, from the [redacted] Construction Bureau, stating that [redacted] had worked for the entity from September 1996 to July 2005, not September 1996 to December 2003, as specified in the November 2016 Income Certificate. In a September 2018 statement, [redacted] stated that "[d]ue to long time ago and my inaccurate memories, the starting or ending month of my working period indicated on my [first] resume is not accurate and precise."

The record includes inconsistent evidence relating to [redacted]'s employment and earnings history, "it is incumbent upon the [P]etitioner to resolve the inconsistencies by independent objective evidence" and that "[a]ttempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Claiming "inaccurate memories," without more, does not constitute "competent objective evidence" that resolves the inconsistencies. In addition, the Petitioner has not explained why [redacted] Construction Bureau would issue two income certificates that contain different information on when [redacted] had been employed by the entity. Upon a review of the record, we conclude that the Petitioner has not sufficiently explained or reconciled the inconsistent evidence relating to [redacted]'s employment and earnings, or demonstrated that the coupled purchased the [redacted] property – the sale of which purportedly financed her EB-5 investment – with lawfully acquired funds.

Based on the reasons we have discussed above, the Petitioner has not documented the lawful source of the 3,450,000 RMB she remitted to [redacted] in November 2016, 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 she or [redacted] retained a sufficient amount from their sale of the [redacted] property to send 3,450,000 RMB to [redacted] or that they had lawfully accumulated enough funds to purchase that property, the sale 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 H-Z-*, ID# 4194506 (AAO Sept. 19, 2019)