U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 05846825

DATE: OCT. 2, 2020

Appeal of Immigrant Investor Program Office Decision

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 the lawful source of the funds he remitted to [redacted], the NCE, whose general partner is [redacted] Regional Center (the Regional Center), a United States Citizenship and Immigration Services (USCIS) designated regional center.[1] In addition, the Chief determined that the Petitioner made impermissible material changes to his petition. On appeal, the Petitioner submits additional evidence and maintains that he has shown eligibility for the EB-5 classification.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). 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 directly by the NCE, or by one or more separate entities known as the "job creating entity" (JCE).

[1] 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).

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 July 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] will be a [redacted]

The record includes a copy of a wire transfer form, dated April 13, 2017, indicating that [redacted] whom the Petitioner has referred to as "an agent," "an exchanger," and "a friend," remitted $500,000 to the Regional Center. [redacted] wrote in the comment section of the form "EB5 Investment Fund for [the Petitioner]." In an April 2017 letter, the Regional Center acknowledged the receipt of the funds as the Petitioner's EB-5 investment in the [redacted] The Petitioner has submitted a copy of another check, dated April 13, 2017, showing that the Regional Center issued a check to the NCE, noting "Capital Contribution to LP – [the Petitioner]" on the memo line. As we will explain below, we find that the Petitioner has not established, by a preponderance of the evidence,[2] his eligibility for the classification. Specifically, he has not documented the lawful source of his funds.

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").

[2] 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 T&N Dec. 369, 376 (AAO 2010); *see also 6 USCIS Policy Manual* G.2(E), https://www.uscis.gov/policymanual/HTML/PolicyManual.html.

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 . . . .
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> . . .
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> *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).

The record shows that on March 15, 2017, the Petitioner remitted 3,500,000 Renminbi (RMB) to [redacted]'s [redacted] account ending in 8424, and that on April 13, 2017, [redacted] remitted $500,000 from his [redacted] account ending in 8938 to the Regional Center. [redacted] noted in the comment section of the wire transfer form that the funds were for the Petitioner's EB-5 investment. Upon reviewing the evidence, the Chief issued a request for evidence (RFE) 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 RFE response, the Petitioner revealed additional information about the investment of his funds that purportedly involved three additional transactions and two companies which had not been disclosed in the initial filing. Specifically, the Petitioner claimed that after he sent 3,500,000 RMB to [redacted]'s [redacted] account, [redacted] remitted the sum to a business in China, [redacted].,[3] on March 16, 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. The Petitioner offered bank statements indicating that [redacted] wired $1,000,000 to [redacted]'s [redacted] account ending in 8938 on April 12, 2017. The Chief then, after reviewing the record in its entirety, denied the petition after concluding the Petitioner had "not demonstrated by a preponderance of the evidence that [the] Petitioner's own funds were invested in the NCE as he has… not sufficiently documented that funds he legally owns were transferred to the United States. More specifically, the Chief found that the Petitioner had not provided enough documentation to show the $4,850,000 transferred from [redacted]. to [redacted] included the Petitioner's funds.

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 "[the] Petitioner's own funds of

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

[3,500,000 RMB] had been de facto exchanged and moved all the way from [redacted] to [redacted] then to [redacted] US account then to [the] Regional Center's account and eventually to the NCE's account." We disagree. Rather, based on the documentation in the record, we find that the Petitioner has not demonstrated that he 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.

In this case, 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. On appeal, he presents several screenshots of a bank's website, purportedly showing [redacted]'s banking activities between November 2016 and June 2017. However, the screenshots indicate that the funds from the Petitioner, through [redacted] had been commingled with sums from many other sources. This evidence 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 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 and the record does not contain sufficient documentation of any arrangement between the two companies to exchange and transfer the Petitioner's funds.

Based on the reasons we have discussed above, the Petitioner has not established, by a preponderance of the evidence, he 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.

B. Lawful Source of Funds

In addition, the Petitioner has not sufficiently documented the lawful source of the $4,850,000 [redacted], remitted to [redacted] which he claims financed his 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.[4] *Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195.

The record before us does not confirm that [redacted], was authorized to act as a currency exchanger for multiple EB-5 investors. The Petitioner alleges that [redacted] was lawfully permitted to exchange and transfer $4,850,000 to [redacted] because it was licensed to conduct such an exchange. On appeal, the Petitioner submits a legal opinion letter from an attorney licensed to practice law in China which states that after reviewing the

[4] 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).

Certificate of Overseas Investment of Enterprise[5] and the financial transaction records, it is the attorney's opinion that [redacted]'s exchange and transfer of $4,850,000 into [redacted] in order to assist EB-5 investors was lawful.

The submitted Certificate of Overseas Investment of Enterprise does not substantiate the claims made in the foreign legal opinion letter. The certificate indicates [redacted] was permitted to make a single foreign investment of $4,850,000 into [redacted] The certificate also indicates that [redacted] would be the final destination for the invested funds. These provisions do not support the Petitioner's assertions that [redacted], was permitted to exchange funds on behalf of multiple EB-5 investors and transmit the $4,850,000 through [redacted]s bank accounts on into the NCE. Here, the record indicates the $4,850,000 was not actually an investment in [redacted] but rather an informal currency exchange for a pool of individuals seeking to invest in the NCE. When relying on foreign law to establish eligibility, the application of foreign law is a question of fact which must be proved by the petitioner. *Matter of Kodwo*, 24 I&N Dec. 479, 482 (BIA 2008) (citing *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). Here, the assertions made in the legal opinion letter is not sufficient to overcome the conflicting documentation in the record and establish, by a preponderance of the evidence, that the Certificate of Overseas Investment of Enterprise permitted [redacted], to exchange and transmit the Petitioner's funds through [redacted]

Based on the reasons we have discussed above, the Petitioner has not documented the lawful source of the $500,000 [redacted] remitted to the NCE in April 2017, which he alleges financed his 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.

C. 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 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, hhe has not documented the lawful source of the funds [redacted] remitted to the NCE on behalf of the Petitioner.

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.

[5] Found at RFE Exhibit B3.

ORDER: The appeal is dismissed.