U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22316627

Date: NOV.7, 2022

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) (2017).[1] 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 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 Petitioner's Immigrant Petition by Alien Entrepreneur (Form I-526) on the ground that the Petitioner did not show she invested or was in the process of investing at least $1,000,000 in [redacted] (NCE), a dental practice in the State of Washington. *See* 8 C.F.R. § 204.6(e) (defining "capital" and "invest"), (j)(2), (3) (2017). The matter is now on appeal. On appeal, the Petitioner maintains that she has established eligibility for the EB-5 classification.

In these proceedings, it is the Petitioner's burden to establish, by a preponderance of the evidence, her eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012); *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).[2] 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 at least $1,000,000 of qualifying capital in a new commercial enterprise. 8 C.F.R. § 204.6(f)(1). The investor must show that his or her investment will benefit the United States economy and create at least 10 full-time jobs for qualifying employees. 8 C.F.R. § 204.6(j)(4). Under 8 C.F.R. § 204.6(j)(2), to be eligible for the EB-5 immigrant investor classification, an investor must establish that he or she "has invested or is

[1] On March 15, 2022, President Joseph Biden signed the EB-5 Reform and Integrity Act, which made significant amendments to the EB-5 program, including the designation of targeted employment areas and the minimum investment amounts. *See* Section 203(b)(5) of the Act, 8 U.S.C. § 1153(b)(5) (2022). As the Petitioner had filed her petition in April 2017, the relevant law then in existence governs this appellate adjudication.

[2] If a petitioner submits relevant, probative, and credible evidence that leads us to believe that the claim is "more likely than not" or "probably" true, then he or she has satisfied the preponderance of the evidence standard. *Chawathe*, 25 I&N Dec. at 375-76.

actively in the process of investing the required amount of capital" and must submit "evidence that [he or she] has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk." The regulation explains: "[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" and that the petitioner "must show actual commitment of the required amount of capital." *Id.*

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. All capital shall be valued at fair market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act.
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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). A petitioner must also demonstrate that he or she has placed his or her own capital at risk, i.e., that he or she was the legal owner of the invested capital. *Matter of Soffici*, 22 I&N Dec. 158, 165 n.3 (Comm'r 1998) (noting that "[a] petitioner must also establish, pursuant to 8 C.F.R. § 204.6(e), that funds invested are his [or her] own"). As specified in the regulatory definition of "invest," the petitioner must establish that his or her invested capital did not derive, directly or indirectly, from unlawful means. *See id.* Bank letters or statements corroborating the deposit of funds by themselves are insufficient to demonstrate their lawful source. *Matter of Ho*, 22 I&N Dec. 206, 210-11 (Assoc. Comm'r 1998); *Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998). The record must trace the complete path of the funds back to a lawful source.[3] *Matter of Ho*, 22 I&N Dec. at 210-11; *Matter of Izummi*, 22 I&N Dec. at 195.

II. ANALYSIS

On appeal, the Petitioner explains that in August 2016, she "purchased and acquired an existing dental practice from [redacted]." She had worked as an orthodontist at the practice before the purchase. According to pages 5 and 6 of the petition, the Petitioner invested $1,425,000 in the NCE. She explained in the petition that her investment included

[3] 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).

$825,000 in "Total of All Debt Financing" and $600,000 in "Other Capital." Page 8 of the petition indicates that the NCE had 2 full-time employees at the time of the Petitioner's investment and that she intended to create 10 additional full-time positions.

As noted, the Petitioner claims to have invested at least $1,000,000 in the NCE, which included $825,000 in "Total of All Debt Financing." The Petitioner has not sufficiently shown that the $825,000 constitutes her investment of qualifying capital in the NCE. Specifically, she has not demonstrated that the $825,000 meets the regulatory definition for "capital." *See* 8 C.F.R. § 204.6(e).

The record shows that the $825,000 relates to a 2016 business loan that the NCE obtained. The loan document provides that the NCE borrowed $825,000 from [redacted] (the Lender), stating that the "Borrower [the NCE] will pay this loan in accordance with the . . . payment schedule, . . . 119 monthly consecutive principal and interest payments of $8,315.14 each, beginning December 15, 2016." The loan document further notes that the "Lender reserves a right to setoff in all Borrower's accounts with Lender (whether checking, savings, or some other account)." The record also includes a Business Loan Agreement that states the NCE had borrowed $825,000 from the Lender, and that the agreement "shall be . . . in full force and effect until such time as all of [the] Borrower's Loans in favor of [the] Lender have been paid in full." Page 3 of the Business Loan Agreement indicates that the Petitioner is the guarantor for the loan. The Commercial Guaranty similarly lists the Petitioner as the loan's guarantor, stating that she "absolutely and unconditionally guarantees full and punctual payment and satisfaction of the indebtedness of Borrower [the NCE] to the Lender, and the performance and discharge of all Borrower's obligations under the Note and the Related Documents." The Assignment of Life Insurance Policy as Collateral shows that the Petitioner used her life insurance policy – with a $1,000,000 face value – as collateral for the business loan. Other documents in the record reveal that the Lender remitted approximately $779,000 of the loan proceeds to [redacted] the dental practice that the NCE had purchased, and approximately $44,0000 of the loan proceeds to the NCE's checking account. The Lender did not remit any of the loan proceeds to the Petitioner.

On appeal, the Petitioner argues that the business loan proceeds qualify as capital she invested in the NCE under 8 C.F.R. § 204.6(e), because she was listed as a guarantor on the business loan and because the loan was secured with her life insurance policy. She states that "the business loan was secured by an asset owned by [her], not the assets of the NCE" and that "the NCE had no assets at the time of acquiring the loan." She further claims that "it is undisputed that the assets actually contributed to the [NCE] were cash loan proceeds in the amount of $825,000 [which] was used to purchase the dental practice business of the NCE . . . ."

The relevant law does not support the Petitioner's position. As noted, under the regulatory definition of "capital," capital can include "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." 8 C.F.R. § 204.6(e). In this case, the loan document specifies that the borrower of the $825,000 loan is the NCE, not the Petitioner. While the Petitioner is a guarantor on the loan – such that if the NCE fails to make its loan repayments, then the Lender can seek repayments from the Petitioner – the indebtedness, i.e., the business loan belongs to the NCE, not the Petitioner. Indeed, the loan document specifies for the "Borrower [the NCE, not the Petitioner,] to pay this loan in accordance with the . . .

payment schedule," and the Commercial Guaranty explains that the Petitioner "guarantees full and punctual payment and satisfaction of the indebtedness of Borrower [the NCE]." Additionally, the NCE's Balance Sheet, as of December 31, 2016, lists this business loan under its "Long Term Liabilities," noting that its "Notes Payable" included "N/P – Purchasing Practice Loan" in the amount of $800,076. Moreover, the Lender did not distribute the proceeds of the loan to the Petitioner. Instead, it remitted the proceeds to the NCE and [redacted] As such, the evidence does not support the Petitioner's contention that she was the owner of the loan proceeds or is "primarily liable" for the indebtedness.

The Petitioner cites a number of cases in her appellate brief. These cases include *Zhang v. USCIS*, 344 F. Supp. 3d 32 (D.D.C. 2018); *Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998); and *Matter of Hsiung*, 22 I&N Dec. 201, 203-04 (Assoc. Comm'r 1998). The facts of these cases, however, are distinguishable from the facts in this case. In *Zhang*, the named plaintiff investor obtained a loan from a company and then invested the loan proceeds in the new commercial enterprise. In both *Izummi* and *Hsiung*, the investor executed a promissory note in favor of the new commercial enterprise, claiming that the execution of the promissory note constituted his EB-5 investment in the enterprise. These cases, unlike the instant matter, do not involve the new commercial enterprise obtaining a loan and the investor using personal assets to collateralize the business loan. Instead, the cited cases all involve the investor's indebtedness, i.e., the investor's loan or promise to pay, not the enterprise's indebtedness. The cited cases, therefore, do not support the Petitioner's contention that the proceeds of the $825,000 business loan qualify as her EB-5 capital. As noted, "[a] petitioner must . . . establish . . . that funds invested are his [or her] own." *Matter of Soffici*, 22 I&N Dec. at 165 n.3. Here, the Petitioner has not established that the proceeds from the business loan that lists the NCE as the sole borrower qualify as her funds. As such, the Petitioner has not demonstrated that at the time she filed the petition in April 2017, she invested or was in the process of investing at least $1,000,000. *See* 8 C.F.R. § 204.6(e) (defining "capital" and "invest"), (j)(2), (3).

III. CONCLUSION

The Petitioner has not established that at the time she filed the petition in April 2017, she invested or was in the process of investing at least $1,000,000 of qualifying capital in the NCE. *See* 8 C.F.R. § 204.6(e) (defining "capital"); *see also Matter of Izummi*, 22 I&N Dec. at 195. Accordingly, the Petitioner has not established, by a preponderance of the evidence, her eligibility for the immigrant investor classification.

ORDER: The appeal is dismissed.