U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23335842

Date: FEB. 7, 2023

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) (2019).[1] This fifth preference (EB-5) classification makes immigrant visas available to noncitizens 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 that he owned [redacted] the entity listed on the petition as the NCE, and did not document the lawful source of at least $1,000,000 he claimed to have invested in the NCE.[2] On appeal, the Petitioner submits a brief as well as additional evidence, including a June 2022 statement and a June 2022 letter from an attorney who represents him and his businesses. The Petitioner maintains that he has demonstrated his eligibility for the EB-5 classification.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

A noncitizen may be classified as an immigrant investor if he or she invests the requisite amount of qualifying capital in an NCE. The regulation specifies that an EB-5 petition "must be accompanied by evidence that the [noncitizen] has invested or is actively in the process of investing lawfully

[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 his petition in November 2019, the relevant law then in existence governs this appellate adjudication.

[2] The Petitioner indicated on page 5 of the petition that the "petition is based on an investment in an area that is neither a targeted employment area nor upward adjustment area. *See* 8 C.F.R. § 204.6(f)(1) (2019).

obtained capital in a new commercial enterprise in the United States which will create full-time positions for not fewer than 10 qualifying employees." 8 C.F.R. § 204.6(j) (2019).

In addition, a noncitizen must demonstrate that he or she has placed his or her own capital at risk in the NCE. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998); *Matter of Soffici*, 22 I&N Dec. 158, 165 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 noncitizen must show that his or her invested capital did not derive, directly or indirectly, from unlawful means. 8 C.F.R. § 204.6(e). To show the lawful source of the funds, an investor must submit evidence such as foreign business and tax records or documentation identifying sources of the capital. *See* 8 C.F.R. § 204.6(j)(3). 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. 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.[3] *Matter of Ho*, 22 I&N Dec. at 210-11; *Matter of Izummi*, 22 I&N Dec. at 195.

II. ANALYSIS

According to page 6 of the petition, at the time he filed the petition, the Petitioner had invested approximately $1,255,994 in the NCE. A November 2019 letter that accompanied the petition filing indicates that the NCE is "a wholly-owned subsidiary of [redacted]." In another document, entitled "Table of Contents," the Petitioner specified that [redacted] is a holding and management company that owns the EB-5 new commercial enterprise." Page 7 of a November 2019 business plan similarly explains in an organizational chart, entitled "Ownership and Company Structure," that the Petitioner owns 100% of [redacted] which owns 100% of the NCE. The NCE's 2014 Limited Liability Company Operating Agreement also states that the [redacted] owns 100% of the NCE, and that [redacted] initial capital investment in the NCE was $50. These materials show that the Petitioner owns the NCE's parent company, which owns the NCE, and that the Petitioner does not directly own the NCE.

Although he does not own the NCE, the Petitioner claims to have invested approximately $1,255,994 in the NCE. In a document entitled "Source of Funds Overview," the Petitioner claims that he invested approximately $63,834 in the NCE using "retained earnings of two of [his] companies – [redacted] (the parent company of [the NCE]) and [redacted] (affiliate of [the NCE], as both companies are owned by the same parent [company])." The record, including processed checks, does not support this contention. Specifically, copies of processed checks indicate that in October 2014, [redacted] issued a $20,000 check to the NCE, with a "Startup Funds" notation, and [redacted] issued a $43,833.76 check to the NCE. Neither the checks nor other evidence in the record show that these funds were dividends that the companies issued to the Petitioner or that they belonged to the Petitioner. Instead, the evidence shows that the funds, which the Petitioner refers to as his initial investment in the NCE, belonged to the two companies, and thus the funds did not qualify as his EB-5 investment. A corporation and an individual

[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).

are two separate legal entities. *See Matter of Soffici*, 22 I&N Dec. 158, 162 (Comm'r 1998). This is true even if the individual is the sole shareholder of the business.[4] *See id.* at 161-63. As such, a contribution of capital, even if it comes from a business owned by the Petitioner, cannot be considered an investment by the Petitioner.

The document entitled "Source of Funds Overview" also claims that in 2015, the Petitioner invested $100,000 into the NCE. The record does not support this contention. The Petitioner offers a 2015 loan agreement, noting that he borrowed $500,000 from an individual. The Petitioner's bank statement shows that a few days after the execution of the loan agreement, the lender remitted $499,960[5] to the Petitioner's personal account. On the same day, the Petitioner transferred $500,000 to [redacted] A processed check indicates that [redacted] issued a $100,000 check to the NCE, with a "Capital Contribution" notation. Neither the processed check nor other documentation confirms that the $100,000 constituted the Petitioner's investment in the NCE. Rather, the record reveals that the Petitioner invested the loan proceeds in [redacted] and then [redacted], not the Petitioner, invested $100,000 in the NCE. As noted, a corporation and an individual are separate legal entities; as such, capital contribution from a corporation does not qualify as capital contribution from an individual, even if the individual is the corporation's sole shareholder. *See Matter of Soffici*, 22 I&N Dec. at 162.

Finally, the Petitioner states in the document entitled "Source of Funds Overview" that "[t]o secure additional capital for his EB-5 project, [he] obtained a mortgage loan on 13 properties held by his company [redacted] The record includes a loan agreement, noting that in November 2019, [redacted] borrowed $1,170,400 from [redacted] The documents "Table of Contents" and "Source of Funds Overview," which the Petitioner offered in his initial filing of the petition, discuss the loan that [redacted] obtained, noting that the loan proceeds went directly from an escrow account to [redacted] and from [redacted] account to the NCE's accounts, and then from NCE's accounts to [redacted] the NCE's wholly owned subsidiary.

On page 5 of the request for evidence (RFE), the Chief explained that "[t]he Petitioner must be the legal owner of funds transferred to the NCE in order [for the funds] to qualify as capital" and that the "records show the loan proceeds from [redacted] were issued to [redacted] and did not belong to the Petitioner." The Chief then concluded that the evidence did not support the Petitioner's contention that he had invested the loan proceeds. Upon being advised of the deficiency in the record concerning his claimed EB-5 capital, the Petitioner alleged for the first time in his RFE response that he had "executed the [redacted] and that under the [redacted] "the proceeds of the [redacted] loan were to be transferred directly from [redacted] to the [NCE's] accounts . . . ." He also presented a loan agreement between him and [redacted] noting that he borrowed $1,092,159.91 from [redacted] "to finance his new fix and flip venture in [redacted]" Florida. The agreement states that

[4] The Petitioner claims in a document, entitled "Table of Contents," that he holds 50% of the shares of [redacted] The document entitled "Source of Funds Overview," however, indicates in an organizational chart that [redacted] not the Petitioner, owns 50% of [redacted] While the organizational chart claims that the Petitioner owns [redacted] it does not indicate that he also owns [redacted]

[5] The bank statement indicates that the bank deducted $40 in fees.

the Petitioner "instructs Lender [redacted] to remit the Loan Proceeds directly into the [NCE's] account."

The Chief explained on page 8 of the denial of the petition that prior to the issuance of the RFE, the Petitioner submitted multiple documents concerning the loan between [redacted] and relied on these documents to show that he had invested funds in the NCE. The Petitioner did not make any reference to the purported loan agreement between [redacted] and him, a document he mentioned and submitted for the first time in his RFE response. The Chief also observed that the loan documents, including the loan agreement and the accompanying "Membership Interest Pledge Agreement," were executed solely by the Petitioner, as the borrower, as well as the manager of the lender, [redacted] The documents concerning a purported loan between the Petitioner and [redacted] are inconsistent with his initially submitted documentation, which does not reference such an agreement. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (stating that "[i]t is incumbent upon [the petitioner] 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 also Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998) (stating that "a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to [U.S. Citizenship and Immigration Services] requirements").

On appeal, the Petitioner offers a statement stating that he "decided to wire the [redacted] funds straight from [redacted] to [the NCE] and to finalize the loan documents later on." He acknowledged that he had backdated the loan documents concerning the purported loan he obtained from [redacted] to November 4, 2019, the date of the [redacted] loan agreement and the date [redacted] remitted the loan proceeds to [redacted] He insisted that he had "intended to finalize and execute the loan and pledge documents [between [redacted] and him] prior to the transfer of funds [from [redacted]" but because his son was ill at the time, "traveling to sign paperwork and move funds . . . [was] an unaffordable luxury." This statement, as well as the Petitioner's revelation in his RFE response of a purported loan he had obtained from [redacted] do not support a finding that when [redacted] remitted $1,092,159.91 to NCE, those funds belonged to the Petitioner. The Petitioner has not demonstrated that his unsubstantiated intent to borrow funds from [redacted] without execution of any documents at the time of the remittance, sufficiently confirms that he owned the loan proceeds, or that the proceeds qualified as his EB-5 investment in the NCE. *See* 8 C.F.R. § 103.2(b)(1) (specifying that a "petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication").

Additionally, the loan documents between [redacted] do not support a finding that [redacted] could lawfully loan the proceeds to the Petitioner to make an EB-5 investment. Section 4.3 of the loan's terms and conditions specifies that "[t]he Loan is solely for the business purpose of Borrower or for distribution to Borrower's equity holders" and that "no portion thereof shall be used for personal, consumer, household purposes or to purchase any 'margin stock' . . . ." Section 4.6 states that "Borrower shall not engage in any business activity other than the ownership, leasing, maintenance, management, operation and permitted sale of the Properties [that secure the loan], . . . performance of its obligations under the Loan Documents . . . and the conduct of lawful business that is incidental, necessary and appropriate to accomplish the foregoing." Section 4.6

reiterates that the "Borrower agrees that (i) the purpose of the Loan is for business and/or commercial purposes only, (ii) the Loan is not for personal, family or household use . . . ." Loaning funds to the Petitioner to finance his personal investment in the NCE does not fall under the permissible uses of the [redacted] loan proceeds.

On appeal, the Petitioner points out that Section 4.3 of the terms and conditions permits [redacted] to use the proceeds "for such lawful purpose as Borrower [redacted] shall determine." He also offers a June 2022 letter from an attorney who represents his and his businesses' interests, stating that the purported loan the Petitioner obtained from [redacted] was permissible under the terms of the [redacted] loan. The Petitioner, however, has omitted portions of Section 4.3. Specifically, the relevant portion of Section 4.3 is:

> Borrower shall use proceeds of the Loan (a) to make initial deposits of the Reserve Funds, (b) to pay costs and expenses related to the closing of the Loan, including fees payable to Lender, (c) to release any Lien encumbering the Collateral, (d) to pay any delinquent Property Taxes and Other Charges, and (e) if any proceeds remain thereafter, for such lawful purpose as Borrower shall determine.

The Petitioner has not submitted sufficient evidence confirming that the loan proceeds have been used for the items specified under subsections (a) through (d). As such, he has not shown that [redacted] could lawfully loan him $1,092,159.91, the entire amount [redacted] received from the escrow account after the closing of the loan.

For the reasons we have discussed above, we conclude that the Petitioner has not established, by a preponderance of the evidence, his eligibility for the classification. It is his burden to demonstrate his eligibility for the EB-5 classification, which includes establishing the funds [redacted] remitted to the NCE qualified as the Petitioner's personal assets, such that he could lawfully invest the funds in the NCE as EB-5 capital. *See Matter of Soffici*, 22 I&N Dec. at 162; *Matter of Ho*, 22 I&N Dec. at 210-11; *Matter of Izummi*, 22 I&N Dec. at 195. Here, the Petitioner has not made such a showing.[6]

III. CONCLUSION

Based on the reasons stated above, we conclude that the Petitioner has not established, by a preponderance of the evidence, his eligibility for the EB-5 classification.

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. *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.

[6] In light of this finding, we need not address the Chief's alternative ground of denial as relating to the Petitioner's direct ownership of the NCE. We will reserve this issue for future consideration should the need arise.