U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20791673

Date: JAN. 20, 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) (2018).[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 she placed at least $500,000[2] of her own capital at risk, and that she did not document the lawful source of the funds she claimed to have invested in [redacted] LLC, the NCE, which is associated with [redacted][3] On appeal, the Petitioner submits a brief as well as additional evidence, and maintains that she has shown her 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. A noncitizen may invest the required funds directly in an NCE or

[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 September 2018, the relevant law then in existence governs this appellate adjudication.

[2] The Petitioner indicated 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) (2018).

[3] [redacted] is an entity that U.S. Citizenship and Immigration Services (USCIS) has designated to participate in the EB-5 program. 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) (2018).

through a regional center, as the Petitioner has done in this case. 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) (2018).

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.[4] *Matter of Ho*, 22 I&N Dec. at 210-11; *Matter of Izummi*, 22 I&N Dec. at 195.

II. ANALYSIS

In this case, the Petitioner claims to have invested at least $500,000 in the NCE. According to page 2 of an [redacted] 2016 business plan, the NCE seeks to solicit funds from noncitizen investors to lend to [redacted] LLC to facilitate the development of a Four Seasons Hotel and residential property in [redacted] Massachusetts.

The Petitioner explained in an August 2018 letter she initially submitted in support of the petition that her EB-5 capital derived from two sources: (1) proceeds from a property sale, and (2) " lease deposit . . . from her another [sic] property." She submitted documents, including bank records, showing that she sold a property in [redacted] Hawaii, and received approximately $428,000 in [redacted] 2018. She also presented documents showing that she leased two properties[5] in [redacted] South Korea, to two lessees and received "security deposit[s]" in 2018.

The Petitioner has not demonstrated that the security deposits, which she claimed to have invested in the NCE, qualify as EB-5 capital because she has not shown that she owned the deposits. *See Matter of Ho*, 22 I&N Dec. at 213; *Matter of Soffici*, 22 I&N Dec. at 165 n.3; *see also* 8 C.F.R. § 204.6(e) (defining "capital"). Both of the "Real Estate One-Room Lease Contract[s]" executed by the Petitioner and the two lessees specify that the lease term was two years, between 2018 and 2020, and that "[u]pon the termination of the lease, the tenant will return the apartment . . . to the landlord" and

[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).

[5] These two properties are rooms in a multiplex building called "[redacted]"

"the landlord will return the deposit to the tenant . . . ." One contract lists 135,000,000 South Korean Won (KRW) as security deposit, while the other lists KRW 120,000,000.[6]

On appeal, the Petitioner offers a June 2021 letter from a law firm in [redacted] South Korea, stating that the security deposits, known as "Jeonsegeum," "is owned by the lessor [the Petitioner] and the lessor is able to make a profit from his/her own use, so it can be considered his/her equity capital."[7] The letter, however, also explains that "the lessor is obligated to pay the same amount of debt, that is, to return the money to the lessee at the end of the contract." The letter, citing South Korean law, reiterates that "'Jeonsegeum' is returned to the lessee in full when the contract ends." The letter further states that "if the lessor does not return 'Jeonsegeum' even after the end of the contract period, the lessee . . . has the right to file an application for auction of the leased house to recover 'Jeonsegeum'" under South Korean law. The record also includes articles about "Jeonsegeum," including a 2019 article posted on airshare.air-inc.com. The 2019 article provides that a lessor usually "takes the large deposit ["Jeonsegeum"], invests it, and keeps all the interest earned on the sum" and that the lessee's deposit is "protected by having a lien issued against the property for the amount given." However, the article states that in some cases, the lessee might "lose some or all of [his/her] deposit," if the lessor "owe[s] the government" in overdue taxes and the government "put[s] the [property] up for auction to collect overdue taxes."

The ownership of the Petitioner's purported EB-5 capital that derived from the security deposits is a matter of foreign law. 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). In this case, the record does not establish that the Petitioner owned the security deposits before remitting them to the NCE as her EB-5 capital. Rather, the documentation, including the "Real Estate One-Room Lease Contract[s]," specifies that she must return the security deposits to the lessees at the end of the two-year lease term. While the "Real Estate One-Room Lease Contract[s]" and the South Korean law do not specifically prohibit the Petitioner from using the deposits during the lease term, the evidence does not establish that she has ever owned the funds as she must return them when the lease term ends.[8] Additionally, although the Petitioner has submitted her certificates of income as well as certificates of tax payments for "Global Income Tax" and "Capital Gains Tax" for multiple years, she has not offered these certificates listing the security deposits as her income or showing that she has paid taxes on these funds. The lack of such evidence does not support her contention that she has ever owned the funds, or that her remittance of the funds to the NCE qualifies as her investment of her own capital. *See Matter of Ho*, 22 I&N Dec. at 213; *Matter of Soffici*, 22 I&N Dec. at 165 n.3.

On appeal, the Petitioner argues that "the security deposit[s] under the lease[s] [are] akin to secured indebtedness and the Petitioner is free to use the proceeds of funds . . . [to] mak[e] the EB-5

[6] The Petitioner indicated in an August 2018 letter from counsel that KRW 135,000,000 was approximately $120,000 and KRW 120,000,000 was approximately $106,000.

[7] The record includes another letter from the same law firm dated February 2021 that offers the same legal opinion as the June 2021 letter.

[8] Indeed, the Petitioner provided an August 2019 "Real Estate (One-Room) Lease Jeonse Contract," revealing that she has a new lessee for one of the two properties that she leased out in 2018. This appears to indicate that she returned to her former lessee KRW 135,000,000 in security deposit. This evidence does not support her contention that she has ever owned the security deposits that she remitted to the NCE in 2018.

investment." The record, however, lacks documents executed between the Petitioner and the lessees demonstrating that they were or are in a lender-borrower relationship. As such, the Petitioner has not established that her remittance of the security deposits to the NCE qualifies as her investment of loan proceeds or indebtedness as the term is referenced in 8 C.F.R. § 204.6(e) (defining "capital").

Moreover, even if the Petitioner had shown that she owned the security deposits before remitting them to the NCE in 2018, we would nonetheless conclude that she had not established the lawful source of her EB-5 investment. *See* 8 C.F.R. § 204.6(e), (j)(3). The Petitioner claimed that she purchased a property in [redacted] South Korea, in 1984; and then in 2011, she sold a piece of the property for KRW 1,017,750,000 and the remaining piece for KRW 4,000,000,000. She alleged that these amounts were approximately $905,000 and $3,558,000. In an August 2018 statement, the Petitioner indicated that she could not find the purchase agreement from 1984, that she "had worked as a Korea[n] traditional music performer, . . . [but] there is no official record about [her] income" during that time period, and that she "had enough income to purchase the land." In a February 2021 statement, the Petitioner claimed that she purchased the property in 1984 with the security deposit she received for leasing out another property that she bought with the KRW 70,000,000 that her mother gifted to her in 1980. She offered documents relating to the property she bought in 1980 allegedly with her mother's gifted funds.

The record, however, lacks documentation concerning the property that she purportedly purchased in 1984, which she then sold in 2011 to finance her purchase of the property in [redacted] Hawaii, and the two properties in [redacted] South Korea. As noted, she claimed that her EB-5 capital derived from the sale of her Hawaii property and the security deposits she received for leasing out the two [redacted] properties. The record lacks a copy of the contract for the 1984 purchase, evidence confirming she had sufficient income and savings to finance the 1984 purchase, evidence verifying the purported gift she received from her mother in 1980, or evidence that she received security deposit that was sufficient to finance the 1984 property purchase. While we acknowledge the passage of time since the possible creation of these documents, we find that her uncorroborated statements about the funds she used to make the 1984 purchase insufficient to demonstrate that she purchased the property with capital that did not derive, directly or indirectly, from unlawful means. *See* 8 C.F.R. § 204.6(e); *see also* 8 C.F.R. § 103.2(b)(2)(i) (noting that "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility").

For the reasons we have discussed above, we conclude that the Petitioner has not established, by a preponderance of the evidence, her eligibility for the classification. It is her burden to demonstrate her eligibility for the EB-5 classification, which includes establishing she owned the funds she remitted to the NCE and the lawful source of her purported EB-5 investment. *See 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.

III. CONCLUSION

Based on the reasons stated above, we conclude that the Petitioner has not established, by a preponderance of the evidence, her 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.