U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20792326

Date: JUN. 16, 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). 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 establish she placed the required amount of capital at risk into [redacted] the NCE, as required by 8 C.F.R. § 204.6(j)(2) or show that the capital invested in the NCE derived from lawful sources as required by 8 C.F.R. § 204.6(g)(1). The Chief then affirmed her decision on a motion to reopen filed by the Petitioner. On appeal, the Petitioner maintains that she has shown eligibility for the EB-5 classification and submits new evidence.

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, as in this case, or through a regional center. To be eligible for the EB-5 classification, a petitioner must show that he or she "has invested or is actively in the process of investing the required amount of capital" and "placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk." 8 C.F.R. § 204.6(j)(2). The regulation defines "invest" to mean "to contribute capital," and specifies that capital includes "cash, equipment, inventory, other tangible property," and "cash equivalents" but states that a contribution of capital "in exchange for a note, bond, convertible debt, obligation, or any

other debt arrangement between the immigrant investor and the [NCE] does not constitute a contribution of capital for the purposes of this part." 8 C.F.R. § 204.6(e).

The USCIS Policy manual[1] provides additional guidance on debt arrangements involving "redemption language" stating:

> Any agreement between the immigrant investor and the new commercial enterprise that provides the investor with a contractual right to repayment is an impermissible debt arrangement. In such a case, the investment funds do not constitute a qualifying contribution of capital.
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> FN 20. *See Matter of Izummi*, 22 I&N Dec. 169, 188 (Assoc. Comm. 1998). *Matter of Izummi* addressed redemption agreements in general, and not only those where the investor holds the right to repayment. USCIS generally disfavors redemption provisions that indicate a preconceived intent to exit the investment as soon as possible, and notes that one district court has drawn the line at whether the investor holds the right to repayment. *See Chang v. USCIS*, 289 F.Supp.3d 177 (D.D.C. Feb. 7, 2018).

In addition, a petitioner must show that his or her invested capital did not derive, directly or indirectly, from unlawful means. 8 C.F.R. § 204.6(e). The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an immigrant investor even though there are several owners of the enterprise, including persons who are not seeking EB-5 classification provided that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means. 8 C.F.R. § 204.6(g)(1).

II. ANALYSIS

In this case, the Petitioner alleged that she invested $500,000 into the NCE on July 19, 2016.[2] According to the business plan, the NCE intends to develop and operate a [redacted] California. On appeal, we withdraw the Chief's determination finding the Petitioner did not place her capital at risk but agree with the Chief's determination that the Petitioner did not identify the sources of all capital invested in the NCE or show that all the capital invested derived by lawful means.

A. Capital at Risk

The Chief's decision questioned whether the Petitioner had entered into an impermissible debt arrangement by signing an operating agreement that included redemption provisions that indicated a preconceived intent to exit the investment as soon as possible and gave the Petitioner the right to repayment. In her decision to deny the petition, the Chief indicated the operating agreement made the Petitioner "legally able to (and possibly expect to) withdraw [her investment] at any time with the consent of the Manager." The Chief determined that the Petitioner had entered into an impermissible debt arrangement with the NCE and therefore had not placed her capital at risk as required under 8

[1] 6 *USCIS Policy Manual* G.2(A)(2), *available at*: https://www.uscis.gov/policy-manual.

[2] The Petitioner indicates that the NCE is located in a targeted employment area, and that the requisite amount of qualifying capital is downwardly adjusted from $1,000,000 to $500,000. See 8 C.F.R. § 204.6(f)(2).

C.F.R. § 204.6(j)(2). The Chief also determined that the Petitioner had not identified the sources of all capital invested in the NCE by other investors and had not shown the invested capital derived from lawful means as required by 8 C.F.R. § 204.6(g)(1).

On appeal, the Petitioner argues the provisions in Article 9 of the operating agreement do not contain the terms "redemption" or guarantee a buyer even if the NCE manager agrees to allow the sale. She also argues she had no intention to exercise any rights to transfer her shares in the NCE and did not attempt to sell her shares when the [redacted] appeared to be at risk of never being constructed.[3] The record includes an operating agreement that allows the Petitioner to sell her shares, with the consent of the NCE manager, to any third party after other members of the NCE have the right of first refusal. However, while the operating agreement allows the Petitioner to sell her shares at the price and terms she sets, there are no provisions in the operating agreement that indicate there is a guaranteed buyer. Here, since the record does not demonstrate the Petitioner had a preconceived intent to exit the investment as soon as possible with a right to repayment we will withdraw the Chief's determination that the Petitioner entered into an impermissible debt arrangement and therefore had not placed her capital at risk as required by 8 C.F.R. § 204.6(j)(2).

B. Lawful Source of Funds

The Petitioner's initial filing included records showing the NCE had a total of 12 other investors not seeking EB-5 classification. In response to the Chief's notice of intent to deny (NOID), the Petitioner provided an updated capital accounts and member registry showing the NCE had a total of 48 other investors including three investors seeking EB-5 classification with a total capital investment of $10,358,056. The Petitioner also provided a letter from the manager of the NCE stating all investors in the NCE had invested funds from lawful sources. In her motion to reopen filed with the Chief, the Petitioner provided another updated capital accounts and member registry document which indicated that as of January 2020, there were 50 other investors in the NCE including two seeking EB-5 classification. However, none of the documents in the record identify the sources of any of the funds invested in the NCE from other investors. Additionally, the letter from the manager of the NCE alleging all sources of funds invested in the NCE derived from lawful means is not sufficient to demonstrate, by a preponderance of the evidence, the lawful sources of the funds invested. The letter did not specifically identify the sources of the invested funds and is not supported by independent, objective evidence that would show the sources of invested funds derived from lawful sources. Here, we agree with the Chief's determination the Petitioner did not identify the sources of all capital invested in the NCE by other investors or show the invested capital derived from lawful means as required by 8 C.F.R. § 204.6(g)(1).

On appeal, the Petitioner argues a second EB-5 investor in the NCE received an approval and therefore her petition should be approved. However, we are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988); *see also Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987).

[3] The Petitioner also alleges in her appellate brief that her previous counsel did not notice the redemption provisions and mistakenly told the Petitioner all provisions complied with USCIS. However, to the extent the Petitioner alleges ineffective assistance of counsel she has not complied, either strictly or substantially, with the procedural requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

Additionally, the Petitioner argues the Chief improperly weighed the evidence using a heightened standard of proof and claims her list of the age and occupation of other investors shows "there is a greater than 50% change [sic] that their investment funds are from lawful means." 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 Otiende*, 26 I&N Dec. 127, 128 (BIA 2013); *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012); *Matter of Ho*, 19 I&N Dec. 582, 588-89 (BIA 1988); *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966); *Matter of D-Y-S-C-*, Adopted Decision 2019-02 (AAO Oct. 11, 2019). Except where a different standard is specified by law, a petitioner must prove eligibility for the requested immigration benefit by a preponderance of the evidence. *Chawathe*, 25 I&N at 375-76. Under the preponderance of the evidence standard, the evidence must demonstrate that the petitioner's claim is "probably true." *Id.* at 376. We will examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

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, she has satisfied the standard of proof. Stated another way, a petitioner must establish that there is greater than a fifty percent chance that a claim is true. We disagree with the Petitioner's contention that the Chief applied a heightened standard of proof. In this case, the Petitioner provided documents from the NCE listing the name of each investor as well as the amount of their capital contribution into the NCE. Later, the Petitioner provided the age and occupation of each investor. However, the Petitioner has not submitted evidence to establish that each investor's capital contribution derived from the income earned from their occupation. The Petitioner's unsupported conjecture regarding the source of the other investors' funds is not sufficient to establish the lawfulness of those funds under the preponderance of the evidence standard. . *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (simply going on the record without supporting documentation is not sufficient to meet the burden of proof in these proceedings).

Finally, the Petitioner argues she is unable to obtain evidence from other investors because she already invested her funds in the NCE and no longer had "bargain power to request for any financial files from other investors" and blames her former counsel for not informing her of this requirement.[4] The Petitioner's argument is not convincing, as at the time of filing her I-526, she was required to identify the sources of all capital invested in the NCE by other investors and show the invested capital derived from lawful means as required by 8 C.F.R. § 204.6(g)(1). As mentioned above, it is the Petitioner's burden to show, by a preponderance of the evidence, the lawful source of all funds invested in the NCE. Here, the Petitioner has failed to do so. As such, we find the Petitioner has not identified the sources of all capital invested in the NCE and has not shown the capital invested in the NCE derived from lawful sources. 8 C.F.R. § 204.6(g)(1).

III. CONCLUSION

We withdraw the Chief's finding that the Petitioner had not placed her capital at risk as required by 8 C.F.R. § 204.6(j)(2). Based on the reasons stated above, we conclude that the Petitioner has not

[4] As mentioned above, to the extent the Petitioner alleges ineffective assistance of counsel she has not complied, either strictly or substantially, with the procedural requirements of *Lozada*, 19 I&N at 637.

identified the sources of all capital invested in the NCE and has not shown the capital invested in the NCE derived from lawful sources. 8 C.F.R. § 204.6(g)(1).

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.