U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24919338

Date: MAY 15, 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). 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 that will benefit the U.S. economy and create at least 10 full-time positions for qualifying employees.

The Chief of the Immigrant Investor Program Office denied the petition on four grounds. The Chief concluded that the record did not establish that the Petitioner has invested or is actively in the process of investing the required amount of capital in the NCE; that the Petitioner has placed her own capital at risk, i.e., that she was the legal owner of the invested capital; and that all invested capital has been derived by lawful means pursuant to 8 C.F.R. § 204.6(g)(1). The Chief also denied the petition for a material change. The matter is now before us on appeal. 8 C.F.R. § 103.3. On appeal, the Petitioner contends that the Chief erroneously concluded that she has not invested cash that was hers to invest and constituted the proceeds of a debt arrangement that were validly granted to her.

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

Applicable statutory and regulatory provisions provide that the immigrant investor must generally invest or be actively in the process of investing at least $1,000,000 of capital in a new commercial enterprise. 8 U.S.C. §§ 1153(b)(5)(A)(i), (C)(i); 8 C.F.R. §§ 204.6(f)(1), (j)(2). Alternatively, an immigrant investor can invest or be actively in the process of investing a reduced amount ($500,000) of capital if the new commercial enterprise into which the immigrant investor is investing is principally doing business and creates jobs in a targeted employment area (TEA). 8 U.S.C. §§ 1153(b)(5)(A)(i), (B)(i), (C)(ii); 8 C.F.R. §§ 204.6(f)(2), (j)(2), (j)(6).

"Capital" means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the immigrant investor, provided that the immigrant investor 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). Further, a petitioner must show 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 Ho*, 22 I&N Dec. 206 (Assoc. Comm'r 1998); *see also Matter of Soffici*, 22 I&N Dec. 158, 165 n.3 (Assoc. Comm'r 1998) (interpreting 8 C.F.R. § 204.6(e) as requiring that a petitioner establish the funds invested are his or her own).

Applicable regulations provide that, in order "[t]o 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). For the capital to be "at risk" there must be a risk of loss and a chance for gain.

To demonstrate that a petitioner has placed such capital at risk for the purpose of generating a return, the petitioner must first present evidence that he or she has made a qualifying investment of the minimum required amount of capital. The regulations define "invest" to mean a contribution of capital. However, the regulations state that 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 and, thus, does not constitute a qualifying investment. 8 C.F.R. § 204.6(e).

The regulation at 8 C.F.R. § 204.6(g) provides that a new commercial enterprise may be used as the basis for a Form I -526 even though there are several owners of the enterprise as long as the source(s) of all capital investment is identified, and all invested capital has been derived by lawful means.

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Therefore, 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 USCIS requirements. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998); *see also* 8 C.F.R. § 103.2(b)(1).

II. ANALYSIS

The Petitioner indicated on page 6 of her petition that she invested $315,000[1] in [redacted] the new commercial enterprise (NCE), from June 20, 2019 to August 22, 2019. The Petitioner also indicated on pages 6 and 7 of her petition that the NCE is owned by the Petitioner (90%) and [redacted]

[1] On March 15, 2022, President Joe Biden signed the EB-5 Reform and Integrity Act of 2022, which made significant amendments to the EB-5 program, including the designation of a targeted employment area (TEA) and the minimum investment amounts. *See* section 203(b)(5) of the Act, 8 U.S.C. § 1153(b)(5) (2022). In this case, the Petitioner filed her petition in 2019 and indicated that the NCE is located within a TEA. Therefore, the requisite amount of qualifying capital was downwardly adjusted from $1,000,000 to $500,000. *See* 8 C.F.R. § 204.6(f)(2) (2015).

(10%). According to the business plan of the NCE, the NCE intends to operate a retail pharmacy in New York.

Although the NCE was organized in New York on 2019,[2] the NCE purchased an existing retail pharmacy business and inventory of located in New York, from [3] for $230,000 on June 20, 2019.[4] On June 20, 2019, (10% owner of the NCE) continued the operation of the pharmacy business as at the same location.[5] On June 20, 2019, the NCE executed in favor of (the seller of the business and inventory) a promissory note in the amount of $95,000, and and the Petitioner (the owners of the NCE) personally guaranteed payment of the note.[6] On June 20, 2019, to secure the full and prompt payment of all obligations of the NCE, the NCE agreed to grant to a security interest in all of the property, goods, chattels, and proceeds of the NCE.[7]

The Petitioner asserted that she derived her investment funds of $500,000 through four sources: (1) a loan of $175,000 from a family friend, (2) a loan of $220,000 from (3) a loan of $95,000 from[8]; and (4) savings of $30,000 from her and her spouse's employment income. The issues of this case arise out of the claimed loan proceeds of $220,000 from

On June 5, 2019, (Purchaser) and three entities,[9] , and the NCE, (Merchants) entered into a Future Receivables Sale Agreement in which agreed to purchase from the three entities 3.52% of the three entities' future receivables for $265,100 and fund $220,000 to the three entities.[10] In exchange, the three entities agreed to pay $5,522.92 bi-weekly and fees of $4,900 to until the three entities delivered a total of $265,000 to [11] and the Petitioner guaranteed the

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[2] *See* Articles of Organization of the NCE, which was filed with the New York Department of State on April 1, 2019.

[3] According to the New York Department of State database, which is available at https://apps.dos.ny.gov/publicInquiry/EntityDisplay (last visited May 14, 2023), was incorporated in New York on , 2011 and dissolved on 2021.

[4] *See* Asset Purchase Agreement by (Seller), (Seller's Shareholder), the NCE (Purchaser), and and the Petitioner (Guarantors), dated June 20, 2019.

[5] *See* Change of Ownership Certificate by , President of , dated June 20, 2019.

[6] *See* Personal Guaranty by and the Petitioner (Guarantors) in favor of (Payee), dated June 20, 2019.

[7] *See* Security Agreement) by the NCE (Debtor) and (Secured Party), dated June 20, 2019.

[8] According to the Certificate of Amendment to the Certificate of Incorporation, which was filed with the New Jersey Department of Treasury on December 22, 2016, is a New Jersey corporation. A promissory note from the Petitioner (Borrower) in favor of (Lender) in the amount of $95,000 was signed by as the president of and the Petitioner on July 29, 2019.

[9] According to the Certificate of Formation of which was filed with the New Jersey Department of the Treasury on 2017, was formed in New Jersey on 2017 to conduct its business as a retail pharmacy, and is listed as the member and manager of the company.

[10] *See* Future Receivables Sale Agreement by (Purchaser) and , and the NCE (Merchants), dated June 5, 2019.

[11] *See id.*

three entities' full and timely performance of their obligations under the agreement.[12] The sale agreement repeatedly states throughout the document that the agreement is a contract for the purchase and sale of future receivables and does not constitute a loan transaction.[13] The sale agreement also states that [redacted] assumed the risk that future receivables may not be available for remittance to [redacted].[14] The three entities agreed to use all amounts funded under the sale agreement solely for general working capital purposes in their businesses and for no other purpose.[15] The three entities also agreed not to sell or pledge the future receivables to another party, other than in connection with a financing approved by [redacted] in writing beforehand.[16] The three entities and two guarantors granted to [redacted] a first priority and continuing security interest in the amount sold ($265,000) of future receivables of the three entities, all property used in the three entities' businesses, all proceeds of such property, and any additional collateral as may be agreed by the parties.[17] The sale agreement states that it constitutes the entire agreement between the parties with respect to the subject matter and supersedes all previous agreements and understandings, whether written or oral.[18] The sale agreement also states that it may only be modified by a written amendment signed by the parties [redacted] and the NCE).[19]

A. Required Amount of Capital Investment

The Chief determined that the record did not establish that the Petitioner has invested or is actively in process of investing the required amount of capital in the NCE because she has not shown that the [redacted] funding of $215,100 ($220,000 minus fees of $4,900 paid to [redacted]) belongs to the Petitioner or that she was the legal owner of the funds.

While the Petitioner claims that she derived part of her investment funds in the amount of $220,000 from [redacted] the Future Receivables Sale Agreement by [redacted] (Purchaser) and [redacted] and the NCE (Merchants), dated June 5, 2019, indicates that [redacted] purchased from the three entities ([redacted], and the NCE) 3.52% of the three entities' future receivables for $265,100 and funded $220,000 to the three entities, not to the Petitioner. In exchange, the three entities, not the Petitioner, agreed to pay $265,000 to [redacted] Although the Petitioner and another individual, [redacted] guaranteed the three entities' performance of their obligations under the sale agreement, the purchase of the future receivables of the three entities by [redacted] was secured by a first priority and continuing security interest in the future receivables of the three entities, all property used in the three entities' businesses, and all proceeds of such property. The primary and ultimate responsibility to fulfill the obligations under the terms of the sale agreement lie with both [redacted] as the purchaser of the future receivables of the three entities and the three entities as the seller

[12] *See* Guaranty of Performance by [redacted] and the NCE (Merchants) and [redacted] and the Petitioner (Guarantors), dated June 5, 2019.
[13] *See* Future Receivables Sale Agreement, *supra* at 2 and 9.
[14] *See id.* at 2.
[15] *See id.* at 6.
[16] *See id.* at 7.
[17] *See id.* at 9.
[18] *See id.* at 13.
[19] *See id.*

of their future receivables, not with the Petitioner who is not a party to the agreement. Under the terms of the sale agreement, [redacted] has the obligation to fund $215,100 ($220,000 minus fees of $4,900) to the three entities, and the three entities have the obligation to pay $265,000 to [redacted] according to the payment schedule agreed by the parties.

The Petitioner submitted bank statements of the NCE from TD Bank for its account ending in 1915, which show that on June 17, 2019, [redacted] deposited $215,100 into the NCE's account. However, this does not automatically establish that the deposited funds belong to the Petitioner or that the Petitioner was the legal owner of the funds because the funds were obtained by the three entities from [redacted] for general working capital purposes in their businesses and for no other purpose, according to the sale agreement signed by the parties on June 5, 2019. In the absence of evidence demonstrating changes to the terms of the sale agreement, we are bound by the terms of the sale agreement, which was duly executed by the parties involved.

In response to a request for evidence (RFE), the Petitioner submitted an email message from [redacted] a funding support specialist at [redacted], dated November 8, 2021 - more than one year after the execution of the sale agreement. [redacted] states that [redacted] is a revenue-based funding company, that [redacted] is a subsidiary company of [redacted], and that they conduct business as [redacted] but funding is provided by [redacted] also states that they put [redacted] on the contract because this business was a guarantor and it was for collateral purpose. In addition, [redacted] states that [redacted] are the same business, but the name mismatches on few documents so they put both businesses on the contract to be on safer side. [redacted] further states that the loan was issued to the Petitioner and the Petitioner then assigned the funds to "the business account" as her equity. Mr. [redacted] does not identify the owner of the claimed business account, but it appears that he was referring to the NCE's business account because the bank statements of the NCE show a deposit of $215,100 from [redacted]

[redacted] email message contains several inaccurate statements. [redacted] is not a guarantor but one of the three entities that obtained the funds from [redacted] (the NCE) are not the same entity, but two different entities. [redacted] is the seller of the [redacted] business and inventory, and [redacted] (the NCE) is the purchaser of the [redacted] business and inventory. While Mr. [redacted] claims that the loan was issued to the Petitioner and the Petitioner then assigned the loan proceeds to "the business account," the purchase price of the future receivables of the three entities were funded to the three entities, not to the Petitioner, according to the terms of the sale agreement. Furthermore, section 16 of the sale agreement, on page 13, clearly states that it constitutes the entire agreement between the parties and supersedes all previous agreements and understandings, whether written or oral. Section 16 of the sale agreement also explicitly states that it may only be modified by a written amendment signed by the parties [redacted] and the NCE). The record lacks a written amendment signed by the parties. Accordingly, we find that [redacted] claim that the loan was issued to the Petitioner is neither credible nor valid. The record supports the Chief's finding that the sale agreement is given more probative value as to the terms of the agreement and as to the entities that were funded under such agreement.

In response to the RFE, the Petitioner also submitted a Transfer Agreement by [redacted] and the NCE (Transferors) and the Petitioner (Transferee), dated June 10, 2019 – five days after the execution of the sale agreement. The transfer agreement states that [redacted] is no longer in operation and defunct and refers to the previously filed closing documents. The transfer agreement also states that [redacted] is the old entity, and the NCE is the new surviving entity. The transfer agreement further states that the [redacted] loan of $215,000 shall unconditionally be assigned and transferred to the Petitioner and that all parties to the [redacted] transaction agreed to this transfer of funds in favor of the Petitioner.

The transfer agreement contains several inaccurate statements. As pointed out by the Chief, the purchase of the [redacted] business and inventory by the NCE from [redacted] did not take place until June 20, 2019[20] – 10 days after the execution of the transfer agreement. Therefore, the referenced closing documents did not exist, and [redacted] was not the old entity and the NCE was not the new surviving entity at the time of the transfer agreement. [redacted] was still in operation at the time of the transfer agreement and until June 20, 2019. In addition, according to the New York Department of State database, which is available at https://apps.dos.ny.gov/publicInquiry/EntityDisplay (last visited May 14, 2023), [redacted] was incorporated in New York on [redacted] 2011 and dissolved on [redacted] 2021. Therefore, [redacted] was not defunct at the time of the transfer agreement on June 10, 2019.

On appeal, the Petitioner acknowledges the statement in the transfer agreement that [redacted] was defunct as of June 10, 2019 was a mistake. The Petitioner contends that although the purchase of assets did not close until June 20, 2019, the Petitioner and the seller had agreed in principle to the sale as early as February 2019 and that they were simply waiting for closing. To support this claim, the Petitioner submits a Business Purchase Letter of Intent by [redacted] and the Petitioner (Buyers) and [redacted] (Seller), dated February 20, 2019, which states that [redacted] and the Petitioner will enter into an agreement with [redacted] for the purchase of the business of [redacted] for $190,000 plus the price of inventory. This letter of intent indicates that on February 20, 2019, [redacted] and the Petitioner expressed their desire to purchase the business and inventory of [redacted] and that the parties will further negotiate the terms of the sale and purchase. The sale was not agreed upon and finalized until June 20, 2019 – four months after the execution of the letter of intent. While we acknowledge the Petitioner's claims on appeal, the fact that this transfer agreement contains several inaccurate statements calls into question the claimed credibility and the claimed validity of the transfer agreement.

Most importantly, the transfer agreement was signed only by (1) [redacted] on behalf of [redacted] as a transferor, (2) [redacted] and the Petitioner on behalf of the NCE as a transferor, and (3) the Petitioner as the transferee. The transfer agreement was not signed by [redacted] and [redacted], which are also parties to the sale agreement. As stated above, section 16 of the sale agreement explicitly states that it may only be modified by a written amendment signed by the parties [redacted], and the NCE). The record lacks a written amendment signed by the parties. The three entities [redacted] and the NCE) agreed to use all amounts funded under the sale agreement solely

[20] *See* Asset Purchase Agreement, *supra*.

for general working capital purposes in their businesses and for no other purpose.[21] As noted by the Chief, the transfer agreement's attempt to transfer the funds to the Petitioner for her personal use as her EB-5 investment in the NCE, instead of using the funds for general working capital purposes in the three entities' businesses, constitutes other purpose.

The transfer agreement, which attempts to transfer the funds (obtained by the three entities for the sale of their future receivables to [redacted] to the Petitioner, is materially inconsistent with other evidence in the record that has not been overcome with independent and objective evidence. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591. As such, the record fails to establish that the Petitioner legally owned the funds purportedly allocated by the transfer agreement.

The Chief noted that it is unclear and not shown by a preponderance of the evidence whether it is lawful to seek to recharacterize a "sale" as a "loan" and whether it is lawful to seek via the purported transfer agreement for the NCE and other pharmacy sellers in the sale agreement to transfer funds to the Petitioner's unconditional use.

On appeal, the Petitioner contends that the agreement itself says that that it is not a loan, but it has significant debt characteristics, including a first priority security interest in the receivables, a personal guaranty, UCC filing statements, and confession of judgment, and it was treated as a loan by the parties. To support this claim, the Petitioner cites case law, which indicates that a court should look to the substance of the transaction to determine whether the transaction is a true sale or secured loan. The Petitioner asserts that [redacted] provides this type of business funding styled as a sales agreement instead of a loan to avoid being regulated as loans or as a lender. The Petitioner also submits an email message from [redacted] corporate counsel of [redacted] which states that the structure of the agreement as a sale agreement rather than a loan provides a fast financing to business owners who need quick and easy funding.

Open sources search reveals that [redacted] doing business as [redacted] is a licensed finance lender and a non-depository credit intermediary, which provides working capital financing.[22] It appears that [redacted] provides to businesses funding that it advertises and market as "future receivables purchases" that a customer is responsible for paying back through some of its future revenue to avoid being regulated as loans, as stated by the Petitioner, in order to charge rates that may violate usuary laws on loans.[23] If the sale agreement were in fact a loan agreement, as claimed by the Petitioner, the loan proceeds, which were invested in the NCE, would violate the definition of "capital" set forth in 8 C.F.R. § 204.6(e) because the assets of the NCE were used to secure the indebtedness.

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[21] *See* Future Receivables Sale Agreement, *supra* at 6.

[22] *See* State of California, Department of Financial Protection and Innovation, https://dfpi.ca.gov/[redacted] (last visited May 14, 2023); Dun&Bradstreet Business Directory, https://www.dnb.com/business-directory/company-profiles[redacted]html. (last visited May 14, 2023).

[23] *See InveTel LLC v.* [redacted] Class Action Complaint, Case [redacted], https://www.classaction.org/media/inventel-tv-llc-et-al-v-[redacted]pdfs.

"Capital" means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the immigrant investor, provided that the immigrant investor 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).

As a separate and independent basis for denial, the Chief stated that the Petitioner has failed to demonstrate that a sale of future receivables of the NCE constitutes "capital" in the EB-5 context that she can use to invest in the NCE.

On appeal, the Petitioner contends that she has not invested the sale of future receivables of the NCE or indebtedness, but she has invested cash and cites the *Zhang* decision. In *Zhang* v. *USCIS*, the district court concluded that loan proceeds qualify as cash, not indebtedness, under the EB-5 visa program.[24] The circuit court held that the term "cash" as used in 8 C.F.R. § 204.6(e) includes the proceeds of third-party loans and affirmed the district court's decision affording relief to a class of immigrant investors denied visas under an interpretation adopted and announced by U.S. Citizenship and Immigration Services (USCIS) in 2015.[25] Based on the *Zhang* ruling, we agree with the Petitioner that she has invested cash, not the sale of future receivables of the NCE and two other entities. While the Petitioner has invested cash, the record supports the Chief's determination that the Petitioner has not demonstrated that the [redacted] funding of $215,000 belongs to the Petitioner or that she was the legal owner of the funds. Since the transfer agreement is materially inconsistent with other evidence in the record that has not been overcome with independent and objective evidence, we determine that the Petitioner has not demonstrated that the [redacted] funding belongs to the Petitioner or that she was the legal owner of the funds.

On appeal, the Petitioner claims that at the time the Itria agreement was signed, she as the manager of the NCE, [redacted] as the manager of [redacted] and she and [redacted] in their personal capacity had agreed that ownership in the proceeds would be transferred to and belong to the Petitioner who would invest in the NCE. To support this claim, the Petitioner submits a statement from [redacted], which states that he and the Petitioner agreed ahead of time that the funds would be hers to use for her investment and that he, [redacted], and the NCE would not be the owners of the funds. The Petitioner also submits an email message from [redacted], corporate counsel of [redacted] which states that they considered the sale agreement to be a form of debt financing to the Petitioner to be used to fund her business, the NCE, and that they understood at the time that ownership of the proceeds would be given to the Petitioner to be used as her capital contribution to the business. The Petitioner further claims that although there was a binding oral contract between the parties, it had not been reduced to writing at that time and that they later created the transfer agreement to memorialize their agreement and reduce it to writing. The Petitioner asserts that oral contracts are binding in the State of New York.

While oral contracts may be legally binding in New York, the sale agreement states that it constitutes the entire agreement between the parties and supersedes all previous agreements and understandings, whether written or oral.[26] The sale agreement also states that it may only be modified by a written

[24] *See Zhang* v. *USCIS*, 978 F.3d 1314, 13 (D.C. Cir. 2020).
[25] *See id.*
[26] *See* Future Receivables Sale Agreement, *supra* at 13.

amendment signed by the parties [redacted] and the NCE).[27] As stated above, the record lacks a written amendment signed by the parties. The transfer agreement was not signed by [redacted] The statement from [redacted] or email message from corporate counsel of [redacted] does not constitute a valid written amendment signed by the parties involved.

Lastly, the Petitioner claims that as a further indication that the loan from [redacted] was essentially a loan to her, the loan has been repaid from her personal account with income from her and her spouse.

However, the record does not contain complete bank statements or other sufficient evidence to support this claim. On the contrary to the Petitioner's claim, bank statements of the NCE from TD Bank for its account ending in [redacted] reflect that monthly payments of $5,522.92 to [redacted] were made from the NCE's business account, not from the Petitioner and her spouse's personal account.[28]

For the reasons we have discussed above, the record does not sufficiently demonstrate that the [redacted] funding of $215,100, which was deposited into the NCE's account on June 17, 2019, belongs to the Petitioner or that she was the legal owner of the funds. Accordingly, we conclude that the Petitioner has not established that she has invested or is actively in the process of investing the required amount of capital in the NCE.

B. Capital at Risk

The Chief determined that the record did not establish that the Petitioner has placed her own capital at risk, i.e., that she was the legal owner of the invested capital, because the [redacted] funding of $215,000 belongs to the three entities, [redacted] and the NCE), not to the Petitioner.

As the record does not sufficiently demonstrate that the Petitioner owned the [redacted] funding of $215,100, which was deposited into the NCE's account on June 17, 2019, or that she was the legal

[27] *See id.*

[28] *See, e.g.*, the bank statement of the NCE from TD Bank for its account ending in [redacted] for the period covering from July 1, 2019 to July 31, 2019, at pages 4 and 5; the bank statement of the NCE from TD Bank for its account ending in [redacted] for the period covering from August 1, 2019 to August 31, 2019, at page 4; the bank statement of the NCE from TD Bank for its account ending in [redacted] for the period covering from September 1, 2019 to September 30, 2019, at page 4; the bank statement of the NCE from TD Bank for its account ending in [redacted] for the period covering from October 1, 2019 to October 31, 2019, at page 4.

owner of the funds for the reasons stated above, we determine that the Petitioner has not established that she has placed her own capital at risk, i.e., that she was the legal owner of the invested capital.

C. Material Change

As a separate and independent basis for denial, the Chief denied the petition for a material change because the Petitioner sought to claim eligibility based on the material change of the content of the purported transfer agreement.

On appeal, the Petitioner contends that a material change is a change in the facts underlying the petition and that the transfer agreement is evidence supporting the facts that she is the recipient of the proceeds of the [redacted] agreement and that she used the funds to make a capital contribution in the NCE. The Petitioner further contends that she provided more detail of the mechanics of the transaction in the RFE response, but the underlying assertion has always been that she received money as a result of the [redacted] agreement and used it to invest in the NCE.

A change is material if it "has a natural tendency to influence, or was capable of influencing, the decision of" the decision-making body to which it was addressed. *Kungys v. United States*, 485 U.S. 759, 770, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988).

In this case, we determine that the Petitioner has made an impermissible material change to the petition because she attempted to become eligible under a new set of facts after filing her petition in an effort to make the apparently deficient petition conform to USCIS requirements. In response to the RFE, the Petitioner submitted a transfer agreement to establish that the [redacted] funding of $215,100 belongs to the Petitioner or that she was the legal owner of the funds. The transfer agreement attempted to transfer the [redacted] funding of $215,100 from the three entities to the Petitioner for her EB-5 investment in the NCE - after the funds were obtained by the three entities from [redacted] for general working capital purposes in their businesses and disbursed by [redacted] for those purposes. The Petitioner presented the transfer agreement in an effort to establish that the Petitioner was the legal owner of the [redacted] funding of $215,000 in order to demonstrate her eligibility for the immigrant investor visa classification. Although the transfer agreement is dated June 2019, the transfer agreement was not submitted to USCIS at the time of filing the petition in August 2019. The Chief issued a RFE in September 2021, and the Petitioner did not present the transfer agreement to USCIS until February 2022 in response to the RFE – three years after the date of the purported transfer agreement. The Petitioner also acknowledges that the transfer agreement was later created to memorialize their alleged oral agreement. The Petitioner attempted to become eligible under a new set of facts by presenting the transfer agreement in response to the RFE - after filing her petition and after she was notified of the deficiencies in the record in the RFE. Therefore, we conclude that the Petitioner has made an impermissible material change to the petition.

D. Failure to Demonstrate All Investment in the NCE Derived from Lawful Means Pursuant to C.F.R. § 204.6(g)(1)

As noted above, the NCE is owned by the Petitioner (90%) and [redacted] (10%). In the RFE, the Chief requested for evidence to identify the sources of all capital invested in the NCE and establish that all invested capital has been derived by lawful means. In response to the RFE, the Petitioner did

not provide the requested evidence or an explanation regarding this request. The Chief concluded that the Petitioner has failed to establish that all invested capital has been derived by lawful means pursuant to 8 C.F.R. § 204.6(g)(1).

On appeal, the Petitioner submits a statement from [redacted] which states that he has not invested any working capital in the NCE and owns sweat equity of 10%. The NCE's income tax returns support this assertion.[29] As such, we will withdraw the Chief's determination that the Petitioner has not established that all invested capital has been derived by lawful means pursuant to 8 C.F.R. § 204.6(g)(1).

III. CONCLUSION

We withdraw the Chief's determination that the Petitioner has not established that all invested capital has been derived by lawful means pursuant to 8 C.F.R. § 204.6(g)(1). However, the record remains insufficient to demonstrate that the Petitioner has invested or is actively in the process of investing the required amount of capital and that she has placed her own capital at risk, i.e., that she was the legal owner of the invested capital. Moreover, Petitioner has made an impermissible material change to the petition because she attempted to become eligible under a new set of facts after filing her petition in an effort to make the apparently deficient petition conform to USCIS requirements. Accordingly, the Petitioner has not established by a preponderance of the evidence her eligibility for the immigrant investor visa classification.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.

[29] Schedules K-1 (Form 1065, Partner's Share of Income, Deductions, Credit, etc.) issued by the NCE to [redacted] in 2019 and 2020 indicate that although [redacted] owned 10% of the NCE in 2019 and 2020, he did not make any capital contribution in the NCE in 2019 or 2020.