U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF V-D-

DATE: MAR. 22, 2016

APPEAL OF IMMIGRANT INVESTOR PROGRAM DECISION

PETITION: FORM I-526, IMMIGRANT PETITION BY ALIEN ENTREPRENEUR

The Petitioner, an individual, seeks classification as an immigrant investor. *See* Immigration and Nationality Act (the Act) § 203(b)(5), 8 U.S.C. § 1153(b)(5). This 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, Immigrant Investor Program, denied the petition, finding that the Petitioner had not: (1) established that his investment had created or would create the requisite 10 jobs; (2) placed his funds at risk; and (3) made a qualifying investment of lawfully obtained funds.

The matter is now before us on appeal. In his appeal, the Petitioner submits a brief, along with additional documentation, and states that (1) his investment created 10 full-time positions; and (2) he documented the lawful sources of his funds.

Upon *de novo review*, we will dismiss the appeal.

I. THE LAW

Section 203(b)(5)(A) of the Act, as amended, provides that a foreign national may seek to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (ii) which will benefit the United States economy and create full time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

II. ANALYSIS

A. Factual and Procedural Background

The petition is based on an investment in a business, , an NCE that is not affiliated with a regional center. is located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required minimum capital contribution in this case is $500,000. The Petitioner's investment of $505,000 in intends to fund and operate a

The record indicates that established in 2009, is owned by On 2012, executed an "Asset Purchase Agreement" with in which paid $505,000 to lease, manage, and operate for 16 years.

On February 27, 2013, the Petitioner filed Form I-526, Immigrant Petition by Alien Entrepreneur, along with supporting documentation. On January 15, 2014, the Director, California Service Center, issued a request for evidence (RFE). On April 9, 2014, the Petitioner responded and submitted additional documentation. On July 8, 2014, the Chief denied the petition determining that the Petitioner did not: (1) demonstrate his investment has created or would create at least 10 jobs; (2) establish that his investment had been placed at risk in the commercial enterprise; and (3) document the lawful source of his invested funds. On August 7, 2014, the Petitioner filed an appeal and subsequently submitted a brief with additional documentation. On May 22, 2015, we issued a Notice of Intent to Dismiss (NID) the appeal regarding the issue of employment creation. In response, the Petitioner submits additional documentation.

B. Employment Creation

The regulation at 8 C.F.R. § 204.6(j)(4)(i)(A) lists the evidence that a petitioner must submit to document employment creation, including photocopies of relevant tax records, Form I-9, Employment Eligibility Verification, or other similar documents for 10 qualifying employees. Alternatively, if the NCE has not yet created the requisite 10 jobs, the petitioner must submit a copy of a comprehensive business plan showing the need for not fewer than 10 qualifying employees. *See* 8 C.F.R. § 204.6(j)(4)(i)(B).

A comprehensive business plan, as contemplated by the regulations, should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). Elaborating on the contents of an acceptable business plan, *Matter of Ho* states that the plan should contain a market analysis, the pertinent processes and suppliers, marketing strategy, organizational structure, personnel's experience, staffing requirements, timetable for hiring, job descriptions, and projections of sales, costs, and income. The decision concludes: "Most importantly, the business plan must be credible." *Id.*

The regulation at 8 C.F.R. § 204.6(e) defines employee as an individual who provides services or labor for the NCE and receives wages or other remuneration directly from the NCE. In addition, the definition of "employee" in 8 C.F.R. § 204.6(e) excludes independent contractors. The same regulation defines "qualifying employee" as a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States. The definition excludes the petitioner, the petitioner's spouse, sons, or daughters, or any nonimmigrant.

In Part 5 of Form I-526, the Petitioner initially indicated that there were six employees at under management at the time he made his investment into that four jobs were created, and that there are now a total of 10 jobs. Further, the Petitioner's accompanying cover letter stated that , under management, "employed Six (6) workers" and "has increased the number of workers by at least Forty Percent (40%) to Ten (10) full time US workers now." To establish the number of jobs that were created by the Petitioner's investment, the Director issued an RFE, in part, requesting additional documentation to establish the number of full-time jobs that existed at under management at the time of the Petitioner's investment. The response to the RFE, however, did not include evidence to establish the number of jobs in existence under at the time of investment. In his denial, the Chief found the record only reflected that at the time of the Petitioner's investment, the manages that remains the business being managed by the and that the currently had 10 employees. Therefore, since the Petitioner indicated there were already six positions at the time of his investment and only four positions were created after his investment, the Chief concluded the Petitioner did not establish that his investment created 10 full-time positions.

On appeal, the Petitioner states that the six employees filling the positions at were leased by . Further, the Petitioner states that for tax purposes, expensed the expenditure as employee leasing. According to the Petitioner, issued paychecks to the employees that were leased to The Petitioner also submitted copies of IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2011 and 2012 reflecting no salaries and wages, copies of IRS Form 941, Employer's Quarterly Federal Tax Return, for 2011 and 2012 listing employees and wages, copies of profit and loss statements for 2011 and 2012, and copies of checks written by to from 2011 to 2012.

The Petitioner, however, has not met his burden by a preponderance of the evidence that his investment has created 10 full-time positions. Specifically, although currently employs 10 full-time workers, six of the positions were previously filled by leased employees of In addition, those six workers are occupying the same positions as when they were contracted to from Therefore, the Petitioner's investment has only created four full-time positions, and he has not shown that any more positions will be created.

Accordingly, the Petitioner has not established that his investment has created or will create the requisite 10 jobs under the regulation at 8 C.F.R. § 204.6(j)(4).

C. Investment of Capital

The regulation at 8 C.F.R. § 204.6(e) defines capital as cash, equipment, inventory, other tangible property, cash equivalents, and "indebtedness secured by assets owned by the alien entrepreneur..." The regulation at 8 C.F.R. § 204.6(j)(2) explains that a petitioner must document 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 petitioner must show actual commitment of the required amount of capital. The regulation then lists the types of evidence the petitioner may submit to meet this requirement.

The full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi*, 22 I&N Dec. 169, 179 (Assoc. Comm'r 1998).

At the initial filing of the petition, the Petitioner submitted seven promissory notes reflecting that $425,000 of his investment was derived from loans from seven individuals. The Chief issued an RFE explaining that "[t]he petitioner did not establish that the capital obtained from others is secured by his own assets." In response to the RFE, the Petitioner stated that he "obtained $425,000 via personal loans that are not secured by any assets." In addition, the Petitioner submitted seven letters from the holders of the promissory notes who confirmed that the Petitioner's loans were "unsecured." As $425,000 of his investment was derived from indebtedness that was not secured by assets owned by the Petitioner, the Chief determined that the Petitioner did not establish that he invested the requisite qualifying capital into [redacted] On appeal, the Petitioner briefly states that "$425,000 was obtained by [him] through personal loans" without addressing the issue of unsecured loans. The Petitioner does not contest the Chief's findings on this issue or offer additional arguments. Therefore, the Petitioner has abandoned this issue. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885, at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he did not raise them on appeal).

For the reasons discussed above, the Petitioner has not established that he has placed the required amount of $500,000 of qualifying capital at risk in [redacted] under the regulation at 8 C.F.R. § 204.6(j)(2).

D. Source of Funds

The regulation at 8 C.F.R. § 204.6(j)(3) lists the type of evidence a petitioner must submit, as applicable, to show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means. The list includes, among other things, foreign business registration records, business or personal tax returns, or evidence of other sources of capital.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. 206, 210-211 (Assoc. Comm'r 1998). Without documentation of the path of the funds, the petitioner cannot establish the

requirement that the capital be obtained through lawful means under 8 C.F.R. § 204.6(j)(3).. *Matter of Izummi*, 22 I&N Dec. at 195.

The Chief determined that the Petitioner did not establish the transfer of funds from Specifically, at the initial filing of the petition, the Petitioner submitted a promissory note for $100,000 executed by the Petitioner in favor of however the Petitioner submitted copies of two checks in the amount of $25,000 each from account written to the Petitioner, and a wire transfer in the amount of $50,000 from account to the Petitioner's account. The documentary evidence reflected that the transfer of funds between and the Petitioner rather than the transfer of funds between and the Petitioner as indicated in the promissory note. Although the Petitioner indicated that is an officer and shareholder of the Petitioner did not submit any documentary evidence showing that the funds were authorized to be loaned or distributed by to or 2012 tax returns reflecting any loans or disbursements to shareholders.

On appeal, the Petitioner submits a letter from who explained the accounting and reporting of withdrawals from shareholder loans on 2012 taxes, and submitted general ledger and additional tax returns confirming the loan disbursement. Specifically, stated that "to avoid any future tax consequences the [payments to the petitioner] totaling $100,000 were reported as withdrawals from shareholder loans." Based on the submitted documentation, the Petitioner has sufficiently documented the path of funds from to the Petitioner through withdrawals from shareholder loans from

The Chief also determined that the Petitioner did not demonstrate that the remaining $75,000 investment that was not obtained through promissory notes was lawfully derived. Specifically, the Chief indicated that the Petitioner did not provide evidence clarifying where he obtained the funds that were deposited into his account, so as to establish that those funds were obtained through lawful means. On appeal, the Petitioner submits a spreadsheet with supporting documentation explaining the sources of his $75,000 investment. The spreadsheet, however, only accounts for $74,299 - $701 short of the $75,000 investment. Although the Petitioner claims to have a total investment in of $505,000, the Petitioner's spreadsheet, even when considering the $425,000 of unsecured loans, only accounts for $499,299. Accordingly, the Petitioner did not establish that the entire $75,000 investment was derived through lawful means.

Moreover, the Petitioner's spreadsheet indicates that $43,000 was derived from loan repayments to the Petitioner. Specifically, $33,000 was from loan repayments from and $10,000 was from loan repayments from The Petitioner submitted a copy of a check, dated May 6, 2011, from the Petitioner to for $2,000 with "Loan" written in the comment section. In addition, the Petitioner submitted copies of checks written to the Petitioner from and for $39,000. According to the spreadsheet, the remaining $4,000 was from a cash transaction from on October 12, 2012. Although three of the checks have "Loan Back" and "Borrow Back" written in the memo sections, three of the

checks do not indicate any purpose. Additionally, the Petitioner did not submit any loan agreements or any other documentary evidence supporting his assertions that the funds were from loans he made that were repaid by the borrowers. Further, although the Petitioner's bank statement reflects a $4,000 "Counter Credit" on October 12, 2012, the Petitioner did not submit any documentary evidence establishing that this credit was based upon loan repayment. Statements made without supporting documentation are of limited probative value and are not sufficient to meet the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Assoc. Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

In addition, the Petitioner's spreadsheet indicates that $8,300 was based on three deposits from "Payroll" on September 17, 2012, October 19, 2012, and November 27, 2012. According to the Petitioner's bank statements for those periods, those transactions are reflected as general deposits. The Petitioner did not submit any documentation supporting his assertion that the $8,300 was, in fact, derived from his "Payroll," so as to reflect that these funds were lawfully obtained.

Finally, regarding the remaining $22,999, the Petitioner submitted another spreadsheet for his spouse's bank account reflecting transactions from January 2011 to November 2012 along with her bank statements. The Petitioner's spouse transferred $999 on September 4, 2012, from her account to the Petitioner's account, and the Petitioner deposited a check issued by his spouse in the amount of $22,000 into his bank account on November 4, 2012. Although the Petitioner did not document all of the transactions listed on the spreadsheet, his spouse's salary at , which is confirmed by the direct deposit transactions on her bank statements, establishes that the invested $22,999 was lawfully derived from the Petitioner's personal assets.

For the reasons discussed above, the Petitioner did not establish that his capital was obtained through lawful means under the regulation at 8 C.F.R. § 204.6(j)(3).

III. SUMMARY

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 Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of V-D-*, ID# 11172 (AAO Mar. 22, 2016)