U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-T-

DATE: NOV. 29, 2016

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

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

The Petitioner seeks classification as an immigrant investor under 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 that will benefit the United States economy and create at least 10 full-time positions for qualifying employees. Foreign nationals may invest in a project associated with a United States Citizenship and Immigration Services (USCIS) designated regional center. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, section 610, as amended.

The Chief of the Immigrant Investor Program Office denied the petition. The Chief concluded that the Petitioner had not established that the new commercial enterprise (NCE) was doing business in a targeted employment area (TEA). The Chief further determined that the Petitioner had not established that she invested or was in the process of actively investing in the NCE, that her invested funds were at risk, or that she obtained the invested funds through lawful means.

The matter is now before us on appeal. In support of her appeal, the Petitioner submits a brief and additional documentation. She maintains that she has provided sufficient evidence that her investment funds originated lawfully through loans secured by her husband's investments and that she has placed her funds at risk.

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

I. THE LAW

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking 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

The Petitioner maintains that she invested in the NCE, and that it is within a TEA. Therefore, the required amount of capital investment is $500,000. We find that the Petitioner has not shown that the NCE is located within a TEA. Therefore, the minimum investment amount in this case is $1,000,000. The Petitioner has also not shown that she has invested or is actively in the process of investing that amount. Furthermore, even if we were to agree that she invested in a TEA, the Petitioner invested indebtedness, and did not establish by a preponderance of the evidence that her personal assets adequately secured the indebtedness at the time the loan originated. She also did not establish how she or her husband acquired an ownership interest in the company providing the loan collateral, evidencing a lawful source of funds. We will address each issue below.

A. Targeted Employment Area

The regulation at 8 C.F.R. § 204.6(f) explains that the minimum investment amount is generally $1,000,000, but may be adjusted down to $500,000 if the investment is in a targeted investment area. The regulation further provides that "[t]he amount of capital necessary to make a qualifying investment in a targeted employment area within the United States is five hundred thousand United States dollars ($500,000)." A TEA is one which, "at the time of investment" is an area that has experienced unemployment of at least 150 percent of the national average rate. 8 C.F.R. § 204.6(e) A petitioner must document a TEA through the submission of data regarding the county or a letter from an authorized body of the government of the relevant state. 8 C.F.R. § 204.6(j)(6)(ii) *See also* 8 C.F.R. § 204.6(i).

In a supporting statement, the Petitioner described her investment as follows:

> [The Petitioner] is investing in (hereinafter, " "), incorporated on June 14, 1994, in Delaware. The principal place of business of the company is in Maryland. The company has or is beginning operations in VA, North Carolina and other cities and states, directly and through subsidiaries.

The Petitioner also stated that she will be "directly in charge of a call center which the Company is establishing in the area . . . the precise location of the call center in has not been decided yet; however, it will be in a high-unemployment area of the city . . . ."

In a notice of intent to deny (NOID) the petition, the Chief requested additional evidence documenting the location of where the NCE regularly provided goods and services that support job creation, along with a letter from an authorized body of the government of the state or district in which the NCE is located, and valid at the time of the Petitioner's filing or at the time of the investment, confirming the location as a TEA. In response, the Petitioner stated that "the establishment of a call center with Investor's funds is a major commitment. Until the Investor has been issued a [*sic*] immigration visa, it would be imprudent to invest in a premises for the NCE." The Petitioner explained that the NCE identified two potential locations: MD and MD both of which are within a TEA as determined by the Maryland Department of Commerce. The Petitioner submitted two letters from the Maryland Department of Commerce, dated February 26, 2016, stating that "Census tract 2001" is within a TEA. The Chief denied the petition, in part, finding that the Petitioner had not decided where the NCE would be doing business or whether it would be located within a TEA.

On appeal, the Petitioner submits an agreement between the NCE and dated June 1, 2015, indicating that the NCE would conduct prescription drug benefits operations out of the facility located at Maryland The Petitioner asserts that this agreement is evidence that the NCE will be doing business in a TEA. This agreement was signed on June 1, 2015, after the filing of the petition and the Petitioner's investment in the NCE. Furthermore, the Petitioner has not submitted evidence that the address Maryland, falls within US census tract 2001, or was designated as a TEA by the Maryland Department of Commerce in November 2014, the time of filing the petition.[1]

In light of the above, the petitioner has not shown that the NCE is located within a TEA, and therefore the minimum investment must remain at $1,000,000.

B. Investment of Capital

Assuming, *arguendo,* that the Petitioner established that the NCE is doing business in a TEA, the Petitioner has not established that she made the requisite investment of her own capital. The regulation at 8 C.F.R. § 204.6(j)(2) explains that a petitioner must have placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk.

The implementing regulation at 8 C.F.R. § 204.6(e) defines "capital" and "invest" and states, in pertinent part:

[1] The record contains a letter from the Maryland Insurance Administration, dated September 9, 2013, indicating that is licensed to conduct business as a pharmacy benefits manager. However, the license expired on September 8, 2015, and the Petitioner has not submitted evidence that it has been renewed.

> Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur 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. All capital shall be valued at fair market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act.
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> Invest means to contribute capital. 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 for the purposes of this part.

Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that a petitioner is actively in the process of investing. A petitioner must actually commit the required amount of capital. The regulation then lists the types of documents a 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).

The regulatory definition of "capital" includes indebtedness as well as cash. If the Petitioner invests indebtedness, then she must show that she has adequately secured the indebtedness with her own personal assets. When a petitioner's capital is derived from proceeds of a third-party loan, such is the case here, she has invested, not cash, but indebtedness. Consequently, she must demonstrate that her personal assets sufficiently secure the third-party loan to meet the regulatory definition of "capital." *See* 8 C.F.R. § 204.6(e).

In a supporting statement, the Petitioner explained that the funds used for the investment in the NCE derived from her husband, ownership interest in two distinct companies: and Thus, we must evaluate not only the value of ownership interest in both companies, but also whether the loan from to adequately secured the loan.

Regarding ownership interest in the Petitioner provided a document entitled, Sales Agreement." This agreement discusses purchase of the operation from the Chinese government for RMB 1,500,000 on July 29, 1999. later purchased 60% ownership interest in in exchange for RMB 4,700,000 as evidenced by the "Articles of Incorporation and Registered Capital" of dated December 8, 2010. Also at that time, purchased the assets of

mine out of bankruptcy in exchange for RMB 14,200,000. This transaction is documented in the " dated November 24, 2010. Thus, in November 2010, the evidence indicates that held a 60% ownership interest in which also included the assets of the operation.

Regarding ownership interest in the Petitioner submitted an undated copy of "Revenue and Taxes of This document lists the "taxable amount/sales" for the company but does not include any dates or evidence of ownership. However, the record also contains a copy of the "Articles of Incorporation" for dated June 29, 2005 along with annual registered capital attachments which evidence 70% ownership in on July 3, 2010, the date of the last registered capital increase.

The Petitioner also submitted a document entitled, "Declaration of Pledge on Stock Right," dated February 24, 2016,[2] in which irrevocably pledges 15% of his shares in to secure the loan from the proceeds of which were then used as the source of the Petitioner's investment funds. The Petitioner stated that "the funds for the investment in were obtained through borrowing RMB 4,000,000 from the equity of [the Petitioner's] husband from of which he is Legal Representative (e.g. Chief Executive Officer) and owns RMB 8,400,000 in shareholder equity." The Petitioner submitted a copy of a promissory note, dated August 10, 2013, stating that borrowed RMB 4,000,000 from The note states that the loan is for "a three-year period;" however, it does not indicate if the loan was secured, nor does it provide information about the interest rate other than to state that it is "based on the daily prime interest rate published by the "

The Chief denied the petition finding that the Petitioner did not provide sufficient evidence of the source of funds her husband used to invest in He also noted that the evidence does not demonstrate how lawfully obtained his ownership interest in each company.

On appeal, the Petitioner contends that the loan from to is secured by the "Declaration of Pledge on Stock Right" in which pledged to a portion of his shares of The Petitioner states that this amount is valued at RMB 7,056,000, however, she does not provide evidence of this value. She also does not provide evidence of the value of 60% ownership interest in Furthermore, the Petitioner's Declaration of Pledge is dated February 24, 2016. Without a new contract, a loan cannot be secured by a pledge of collateral made several years after the loan originated. Thus, while the Petitioner asserts that the loan from to was secured by his pledge of a 15% interest in this pledge was not made until after the loan was executed, and is therefore not evidence that the loan was secured at the time it was made or at the time of the Petitioner's investment in the NCE.

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[2] The Chief notes that the date the Petitioner referenced in the NOID response was February 24, 2014, and the actual document is dated February 24, 2016. On appeal, the Petitioner states that this was a typographical error and that the document is correctly dated February 24, 2016. In either case, the promissory note was executed after the loan originated on August 10, 2013.

Additionally, the record lacks documentation showing the value of the alleged collateral in August 2013, when executed the promissory note and the Petitioner transmitted the funds to the NCE. Without evidence of the value of his ownership interest in even if we were persuaded the loan was secured, we cannot determine if the loan proceeds were sufficient to account for the funds necessary to invest in the NCE. Therefore, the Petitioner has not demonstrated that she has invested or is in the process of actively investing her own capital in the NCE pursuant to the regulation at 8 C.F.R. § 204.6(e). As the Petitioner transferred proceeds of a third-party loan to the NCE, she invested indebtedness, not cash. To show that the loan proceeds constitute capital under 8 C.F.R. § 204.6(e), she must establish that her personal assets adequately secured the indebtedness. The Petitioner has not made this showing.

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). Here, the Petitioner has not met her burden and the petition will be dismissed for this additional reason.

C. Lawful Source of Funds

Even if the Petitioner had shown the $500,000 loan was adequately secured by her husband's ownership of equity in she has not provided information regarding where the assets that were used to purchase that ownership interest originated.

On appeal, the Petitioner states that,

> [T]he funds her husband invested in originated from working for many years and only buying the company after China privatized industries. Beyond the evidence showing that the government sold the company to him, due to the nature of Chinese government practices prior to this, there is no way to show any more than has been demonstrated where the funds came from him.

As stated above, going on record without supporting documentation is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Soffici*, 22 I&N Dec. at 165. These requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 1025, 1040 (E.D. Calif. 2001), *aff'd*, 345 F.3d 583 (9th Cir. 2003) (affirming a finding that a petitioner had not established the lawful source of her funds because she did not designate the nature of all of her employment or submit five years of tax returns).

The record includes no other evidence demonstrating how the Petitioner's husband obtained the capital used to purchase either his ownership interest in or in The Petitioner has not established the lawful source of the collateral or the value of ownership interest which she claimed was used to secure the $500,000 loan. *See Izummi*, 22 I&N Dec. at 195 (finding that without documentation of the complete path of the funds, a petitioner cannot meet his or her burden of demonstrating the funds are his or her own funds). As the Petitioner has not sufficiently shown the

source of her funds with probative evidence, she did not establish that she invested capital obtained through lawful means pursuant to the regulation at 8 C.F.R. § 204.6(j)(3).

D. Capital at Risk

Furthermore, the Petitioner has not shown that she has placed at risk the $500,000 she sent to the NCE's account in August 2013. As discussed in *Ho*, to demonstrate that her capital is at risk, the Petitioner "must present some evidence of the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise." 22 I&N Dec. at 210. In addition, "*de minimis* action of signing a lease agreement, without more, is not enough" to show that the funds are at risk. *Id.*

Here, the Petitioner submitted a June 2015 agreement indicating that the NCE entered into a contract to provide pharmacy benefits management to [redacted] but there is no evidence in the record that this agreement has resulted in actual business activity. Furthermore, this contract was not in place at either the time of filing (November 2014) or at the time the Petitioner made the investment (August 2013). Prospective investment arrangements entailing no present commitment will not suffice to show that a petitioner is actively in the process of investing. *Izummi*, 22 I&N Dec. at 179.

On appeal, the Petitioner points to the NCE's business plan that she contends "shows the plans for [redacted] to expand its business and hiring of employees to fulfill this goal." The Petitioner also maintains that the NCE's agreement with [redacted] 'was signed at the time and implementation began in January 2016 where the customer service and pharmacy operations were established. Since then the call center and pharmacy bilingual services have been started and work is in progress." The Petitioner has not provided any evidence of the actual undertaking of business activity. The Petitioner's statements that the call center and pharmacy bilingual services have "been started" and "work is in progress," are not supported by any documentation in the record.

The Petitioner has not adequately explained how the NCE will utilize the $500,000 that she placed into its account. As discussed in *Ho*, the regulations provide that a 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. Simply formulating an idea for future business activity, without taking meaningful concrete action, is similarly insufficient for a petitioner to meet the at-risk requirement. Before it can be said that capital made available to a commercial enterprise has been placed at risk, a petitioner must present some evidence of the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise. 22 I&N Dec. at 210. As such, the Petitioner has not demonstrated that the $500,000 she provided is sufficiently at risk for purposes of generating a return on the capital. *Izummi*, 22 I&N Dec. at 179; *see also Al Humaid v. Roark*, No. 3:09-CV-982-L, 2010 WL 308750 (N. D. Tex. Jan. 26, 2010).

E. Employment Creation

The Petitioner has not shown that the NCE has met the employment creation requirements. Specifically, as the NCE has not yet created at least 10 full-time positions for qualifying employees, the Petitioner must provide a comprehensive business plan demonstrating the NCE's need for not fewer than 10 qualifying full-time 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. *Ho*, 22 I&N Dec. at 213. Elaborating on the contents of an acceptable business plan, *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 business plan submitted by the Petitioner as part of her initial filing, does not constitute a comprehensive business plan, and does not credibly show the NCE's need for at least 10 full-time employees. It does not include an explanation of the amount of start-up costs, how the funds will be utilized, or provide a timeline to support its projection of 1,400,000 patients/customers and $592 million in revenue in 2016. Without evidence that the revenue projections are credible, the Petitioner has also not shown that the NCE's forecasted personnel needs are reliable or credible. The business plan also projected hiring 370 employees, although no timeframe for hiring was stated. The plan lacks a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. While the Petitioner claims that the "work is in progress," she has not provided any evidence to support her statements. The business plan indicates that goal is to capture 3% of the pharmacy benefit management market by the year 2020, including partnerships with companies including and The Petitioner has not submitted evidence that has entered into agreements with these prospective business partners.

Moreover, the business plan lacked detailed information on positions that the NCE aimed to create. Specifically, the business plan did not include "job descriptions for all positions" or "its personnel's experience." *See Ho*, 22 I&N Dec. at 213. It also did not explain the NCE's pricing structure or strategy. As discussed in *Ho*, to be "'comprehensive,' a business plan must be sufficiently detailed to permit [us] to draw reasonable inferences about the job-creation potential." *Id.* at 212-13. The statements from the Petitioner and the business plan that the NCE will need at least 10 full-time qualifying employees, without offering details on the bases of these conclusions, are not sufficient to demonstrate "the job-creation projections are any more reliable than hopeful speculation." *Id.* at 213. As such, the Petitioner has not established that the NCE has created, or will create, at least 10 full-time positions for qualifying employees.

III. CONCLUSION

The Petitioner has not demonstrated by a preponderance of the evidence that she is eligible for the immigrant investor classification. The burden is on the Petitioner to show 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). The Petitioner has not met this burden.

ORDER: The appeal is dismissed.

Cite as *Matter of S-T-*, ID# 37090 (AAO Nov. 29, 2016)