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U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-L-

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 based on an investment in a new commercial enterprise, [redacted] (the NCE). *See* 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.

The Chief of the Immigrant Investor Program Office denied the petition. He concluded that the Petitioner did not demonstrate that [redacted] qualified as a new commercial enterprise; he placed at least $500,000[1] at risk in the NCE; or he met or would meet the employment creation requirements. *See* 8 C.F.R. § 204.6(j).

The matter is now before us on appeal. The Petitioner submits additional evidence and maintains that he has shown his eligibility for the immigrant investor classification. Specifically, he states that the NCE meets the regulatory definition for a new commercial enterprise; he placed his capital at risk because the NCE had already used his funds; and he will meet the job creation requirements.

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 new commercial enterprise. The commercial enterprise can be any lawful business that engages in for-profit activities. 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.

[1] In this case, the required amount of capital is $500,000 because the investment is in a targeted employment area. *See* 8 C.F.R. § 204.6(f).

Specifically, section 203(b)(5)(A) of the Act 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 . . . 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).

A petitioner must also show that he has placed the required amount of capital at risk for the purpose of generating a return. Evidence of 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 requisite amount of capital. Moreover, the full amount of the investment funds must be made available to the business most closely responsible for employment creation upon which the petition is based. *Matter of Izummi*, 22 I&N Dec. 169, 179 (Assoc. Comm'r 1998).

Finally, the regulation at 8 C.F.R. § 204.6(j)(4)(i)(B) requires a petitioner to show the requisite job creation through documentation confirming such employees have been hired. In the alternative, the petitioner must present "a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired."

II. ANALYSIS

The Petitioner is one of two individuals who have invested in the NCE, and who seek the immigrant investor classification. The NCE owns [redacted] a waste tire processing plant in Louisiana, and plans to build and operate a new crumb rubber plant. The Petitioner has not shown that he placed at least $500,000 at risk in the NCE, made at least $500,000 available for job creation, or illustrated that the NCE has created or will create at least 20 full-time positions, 10 for each of the two foreign national investors. We will therefore dismiss the appeal.

A. New Commercial Enterprise

The Petitioner has submitted sufficient evidence showing that the NCE meets the regulatory definition of a new commercial enterprise. Under 8 C.F.R. § 204.6(e) and (h), a new commercial enterprise can be an original business created after November 29, 1990, or an existing business that is restructured and reorganized such that a new commercial enterprise results. The NCE, created in 2005, became the sole owner of [redacted] in 2007. Tax records showed that as of 2014, the NCE and [redacted] jointly owned [redacted] previous owner built the

waste tire processing plant and began to use the trade name in 1994. In light of these facts, the Petitioner has demonstrated that the NCE qualifies as a new commercial enterprise under the regulation.

B. Capital Placed at Risk

The record does not establish that the Petitioner has invested or is in the process of investing at least $500,000 in the NCE. The bank statements showed that he remitted $499,985 to the NCE: (1) $49,985 on October 28, 2013; (2) $99,946.57 on November 22, 2013; and (3) $350,053.43 on December 4, 2013. He explains that the bank charged him $15 for the three transactions; as a result, $499,985, not $500,000, reached the NCE's account. The Petitioner has not demonstrated that funds that never reached an entity, such as bank charges, qualify as a capital investment. He also has not illustrated that he is in the process of investing the bank charges in the NCE. *See* 8 C.F.R. § 204.5(e) (defining "invest" to mean "to contribute capital"). The Petitioner has not offered any legal authority to support his position that fees a bank charges to facilitate financial transactions between an individual and a business constitute that individual's capital contribution in the business.

On appeal, the Petitioner states that he and his co-investor "provided some travel expenses for the [NCE] delegation while they were in China." Specifically, he made an additional "contribution of roughly $250.00 for [the NCE] management travel expenses in China in October 2013." In explaining this amount, the NCE and managing partner, provides that the Petitioner and his co-investor "contributed cash to support their EB5 investment" and "in support of the delegation [the NCE] sent to China in October 2013 . . . ." The record lacks business documentation, such as tax documents or meeting minutes, indicating that the $250 was the Petitioner's capital investment in the NCE, a gratuitous payment to facilitate a trip, or a contribution for some other reasons. Significantly, the Petitioner references the October 2013 cash contribution for the first time on appeal, after the Chief found insufficient investment funds in his denial. Without additional corroboration, the Petitioner has not established that he invested an additional $250 or at least $500,000 in the NCE.

In addition, the bank statements showed that a large sum of the Petitioner's capital left the NCE's account for unspecified reasons within days of the remittance. The Petitioner sent a total of $499,985 to the NCE's account, which had a balance of $250 prior to the transfer. The bank record listed these subsequent withdrawals: (1) a $25,000 check to an unidentified payee on November 5, 2013; (2) a $50,000 "miscellaneous debit" on November 8, 2013; (3) an $85,000 check on November 27, 2013; and (4) a $300,000 check to an unnamed payee on December 6, 2013. The Petitioner has not demonstrated that these withdrawals, totaling $460,000, were for the NCE or business operation. Specifically, he has not presented additional information on the $50,000 "miscellaneous debit," or copies of the three processed checks, which might illustrate the purposes of the withdrawals.

The Petitioner maintains that he meets the at-risk requirement because his funds "have all been exhausted." He states that to support operation, the NCE had to deposit $120,000 in an

escrow account held by the made a $150,001 deposit in an unsuccessful attempt to purchase "Crumb Rubber Equipment"; and spent an unspecified amount "to maintain the operation and to build the inventory." The record, however, does not establish if the NCE used the Petitioner's capital, or funds from other sources, for these expenditures. Moreover, the NCE incurred these expenses in 2014 and 2015. The bank statements, however, illustrated that as of December 2013, $460,000 of the Petitioner's investment had left the NCE's account for undetermined reasons. Without corroborating evidence, the Petitioner has not established that he has placed at least $500,000 at risk in the NCE. *See* 8 C.F.R. § 204.6(j)(2).

C. Funds for Employment Creation

The Petitioner has not established that he has made at least $500,000 available to the NCE to create jobs. *See Izummi*, 22 I&N Dec. at 179. The NCE used a portion of the Petitioner's investment to fund a trip to China, "to meet investors and to visit several Chinese manufacturers of crumb rubber equipment for the operation." At the time of the trip, the Petitioner had remitted $49,985 to the NCE. A handwritten note on the bank statement indicated that the NCE spent at least $10,000 of the remittance on the trip. While the NCE may choose to meet foreign investors to encourage their investment, money spent on such trips, however, does not constitute qualifying investment in the NCE or funds for employment creation. *See id.* at 178 (if a parent company wishes to have a foreign national investor pay administrative expenses, "these expenses must be paid in addition to the $500,000").

On appeal, the Petitioner states that "[b]usiness activities such as business development, paying the company bills" are legitimate expenses for job creation. In this case, none of the submitted business plans specified that the NCE had any business dealings with Chinese companies, or explained how the visit related to its job creation efforts. As the Petitioner has not documented the connection between the China trip and job creation, the Petitioner has not illustrated that the travel expenses qualify as funds used to create jobs.

Similarly, investment capital that the NCE retains to cover its administrative expenses does not generally qualify as funds made available for employment creation. On appeal, the Petitioner states that the NCE "kept $25,000 of [his] investment on its account to cover its expenses as the parent company of In *Izummi*, we noted that if a parent company wishes to have a foreign national investor pay administrative expenses, "these expenses must be paid in addition to the $500,000." *Izummi*, 22 I&N Dec. at 178. As such, *Izummi* requires the Petitioner to show that he has made the full amount of his investment available to the businesses most closely responsible for creating jobs. *Id.* Because the NCE has retained $25,000 for expenses that are not shown to be job creation related, the Petitioner has not demonstrated that he has made at least $500,000 available to the NCE to create jobs. *See id.* at 179.

D. Actual and Planned Employment Creation

In this case, the NCE has not created the requisite number of jobs. As such, the regulation at 8 C.F.R. § 204.6(j) requires the Petitioner to present a comprehensive business plan showing that, due to the nature and projected size of the NCE, it will need no fewer than 20 full-time qualifying employees, 10 for each of the two individuals seeking the immigrant investor classification. *See* 8 C.F.R. § 204.6(j)(4)(i)(B); 8 C.F.R. § 204.6(g)(2); *Matter of Ho*, 22 I&N Dec. 206, 211-13 (Assoc. Comm'r 1998). A comprehensive business plan should include, at a minimum, a description of the business, its products or services, and its objectives. *Ho*, 22 I&N Dec. at 213. "Most importantly, the business plan must be credible." *Id.* The record lacks a comprehensive business plan verifying that the NCE will create at least 20 full-time positions.

1. Wholly Owned Subsidiary

The Petitioner cannot rely on jobs at [redacted] to meet the NCE's employment creation requirements unless [redacted] is the NCE's wholly owned subsidiary. *See* 8 C.F.R. § 204.6(e), (j)(4)(i) (a new commercial enterprise, which can be "a holding company and its wholly-owned subsidiaries," must create at least 10 full-time positions for each immigrant investor). The Petitioner has presented conflicting evidence on whether the NCE owns 100 percent of [redacted] On appeal, he maintains that [redacted] is the NCE's wholly owned subsidiary. The NCE's 2014 Internal Revenue Service (IRS) Form 1065, Schedule K, Partner's Share of Income, Deductions, Credits, Etc., however, showed that the NCE owned a 99 percent share of [redacted] while [redacted] owned the remaining 1 percent. In an October 2015 letter, the Petitioner admitted, "[redacted] owns 1% of [redacted] as a token of company business relationship." On appeal, the Petitioner offers a letter from [redacted] stating that although [redacted] was listed as NCE's "1% partner on the 2014 tax return," [redacted] was classified as a "'disregarded entity' for IRS purposes." The letter then says that [redacted] is the NCE's wholly owned subsidiary. Neither the letter nor other documentation explains how a "disregarded entity" classification for tax filing purposes affects [redacted] ownership, or how the NCE can own 100 percent of [redacted] while another entity – [redacted] – simultaneously owns 1 percent.

On appeal, the Petitioner provides a February 2016 filing with the State of Delaware, amending the NCE's certification of formation to state that [redacted] is a wholly owned subsidiary of the NCE. This document postdates the Petitioner's filing of the petition in April 2014. *See* 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971); *Izummi*, 22 I&N Dec. at 175-76 (*adopting Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981) for the proposition that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition.") Moreover, the corporate filing came after the Chief's denial of the petition in January 2016, in which he found that [redacted] was not the NCE's wholly owned subsidiary. The Petitioner cannot make material changes to a submitted petition to make an apparent deficiency conform to USCIS requirements. *Izummi*, 22 I&N Dec. at 175.

Pointing to January 2016 Modified Plan of Reorganization, the Petitioner states that is "creditor or claimant," not a shareholder. The document, however, does not reference Moreover, the Petitioner has not presented evidence illustrating that an entity cannot be both a creditor and a shareholder of another business. A shareholder may extend a loan to an entity, and thus becomes its creditor. In short, the Petitioner has not demonstrated that the NCE owns 100 percent of or that he may rely on jobs creates or will create to meet his job creation requirements. *See* 8 C.F.R. § 204.6(e), (j)(4)(i).

In addition, as discussed further below, entered bankruptcy (reorganization) proceedings in 2015. The record contains a March 2016 commitment letter from confirming financing for the as part of the bankruptcy reorganization plan. The letter specified the purpose of the loan: "Equipment and DIP [debtor-in possession] financing for a waste processing facility in Louisiana and financing for the predevelopment and construction of a WTF [waste to fuel] facility to be constructed on land located in Louisiana."

The letter thus indicated that the financing was actually for two projects: a waste processing facility, owned by the NCE, and a waste to fuel facility that intends to build and operate. The NCE was to receive $3,000,000, with its ownership in be reduced to 50%, while would own the remaining 50% and become the chief financial officer. was described as "[a] newly formed, bankruptcy remote entity . . . affiliated with and/or its successors or assigns[,] AND and/or its successors and assigns." The letter provided that would own 40% of and serve as the chief operating officer, would own 40% and serve as the chief financial officer, and "exit investors" would own the remaining 20%.

According to the most recent business plan, all of the NCE's new jobs, 40 in total, will come from new waste to fuel facility (crumb rubber plant). Based on the documentation presented, the Petitioner has not shown that the NCE has any ownership equity in the crumb rubber plant that will be constructed. Additionally, the Petitioner has not shown that the entities that would own under the commitment letter – and "exit investors" – are wholly owned subsidiaries of the NCE. As such, the Petitioner has not illustrated that he may rely on jobs that the new plant intends to create to meet his job creation requirements. *See* 8 C.F.R. § 204.6(e), (j)(4)(i).

2. Business Plans

Even if we were to find that the Petitioner could rely on jobs from the new crumb rubber plant to meet his employment creation requirements, he has not shown that due to the nature and projected size of the NCE, it will need no fewer than 20 qualifying employees. *See* 8 C.F.R. § 204.6(j)(4)(i)(B); *see also Ho*, 22 I&N Dec. at 213. The Petitioner has submitted three business plans. The initial business plan indicated that the NCE would secure $1,000,000 from two foreign national investors and a $2,000,000 loan to expand operation "by building a steel removal and crumb rubber making plant." The NCE's second business plan indicated that the Petitioner's

investment added one employee to [redacted] which previously had seven employees. The business plan also revealed that in [redacted] 2015, [redacted] "filed for Chapter 11 Reorganization protection under the US Bankruptcy code." Subsequently, [redacted] suspended operation and terminated all of its employees.

The final business plan indicates that the NCE had "secured a term sheet from [redacted] a $3 million loan [sic] recapitalization loan to restart and stabilize operations at [redacted] and invest $35 million to build and operate a waste tire pyrolysis operation at the [redacted] site." The business plan noted that upon receiving [redacted] funds, [redacted] would restart operation and transition to producing "crumb rubber, rubber mulch and feedstock for thermal conversion plants." To date, the Petitioner has not submitted evidence that [redacted] has emerged from Chapter 11 bankruptcy protection, received funding from [redacted] or restarted operation. As such, he has not shown that his investment has created or will create at least 10 full-time positions. *See* 8 C.F.R. § 204.6(j)(4)(i)(B); *see also Ho*, 22 I&N Dec. at 213.

Moreover, according to the NCE's final business plan, all of the new jobs will be created in the new crumb rubber plant. The Petitioner, however, acknowledged that although the NCE at one time placed a down payment to purchase crumb rubber equipment, the sale did not materialize due to the lack of funds. Without documentation verifying that the NCE has acquired the necessary crumb rubber machines, the Petitioner has not demonstrated that the NCE will create at least 20 full-time positions (10 for each foreign national investor). Finally, the Petitioner revealed that the NCE has exhausted his entire investment contribution before entering into Chapter 11 bankruptcy protection and terminating all of the NCE and [redacted] employees. In light of this admission, the Petitioner has not established how the NCE will be able to use his capital to create any jobs. In short, the Petitioner has not shown that his investment has created at least 10 full-time employees, or presented a comprehensive and credible business plan confirming the NCE's need for no fewer than 20 full-time employees.

III. CONCLUSION

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). Here, the Petitioner has not established his eligibility for the immigrant investor classification. Accordingly, we will dismiss the appeal.

ORDER: The appeal is dismissed.

Cite as Matter of C-L-, ID# 12074 (AAO Nov. 29, 2019)