U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15760454

Date: JUNE 2, 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) (2017). 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. Noncitizens may invest in a project associated with a U.S. 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, concluding that the record did not establish that the capital, which has been invested by the Petitioner or which the Petitioner is actively in the process of investing, is capital obtained through lawful means. The Petitioner subsequently filed combined motions to reopen and reconsider. The Chief dismissed the motions. The matter is now before us on appeal. 8 C.F.R. § 103.3. On appeal, the Petitioner contends that the Chief misinterpreted the applicable law as requiring that a third-party exchanger's funds must be proven to be lawfully derived. The Petitioner further contends that this new requirement imposed by the Chief is not legally correct, drastically departed from the established USCIS policy, and was made without a prior notice to stakeholders in violation of the Administrative Procedure Act (APA).

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

Any assets acquired directly or indirectly by unlawful means, such as criminal activity, will not be considered capital. 8 C.F.R. § 204.6(e). A petitioner must demonstrate by a preponderance of the evidence that the capital was his or her own and was obtained through lawful means. 8 C.F.R. § 204.6(j)(3); *see also Matter of Ho*, 22 I&N Dec. 206, 210 (Assoc. Comm'r 1998). To show that the capital was his or her own, a petitioner must document the path of the funds. *Matter of Izummi*, 22

I&N Dec. 169, 195 (Assoc. Comm'r 1998). A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds in the new commercial enterprise. *Matter of Ho*, 22 I&N Dec. at 210-11; *Matter of Izummi*, 22 I&N Dec. at 195. The record must trace the path of the funds back to a lawful source. *Matter of Ho*, 22 I&N Dec. at 210-11; *Matter of Izummi*, 22 I&N Dec. at 195.

II. ANALYSIS

The Petitioner indicated on page 2 of his petition that on September 12, 2016, he invested $500,000[1] in [redacted] the new commercial enterprise (NCE), which is associated with [redacted] pursuant to the Immigrant Investor Pilot Program. According to the Confidential Private Placement Memorandum (PPM) of the NCE, the NCE proposed to pool $50,000,000 from 100 immigrant investors and lend the entire amount to [redacted] the job-creating entity (JCE), to finance the JCE's development of Phase I-A of a project known as [redacted] located in [redacted] New York. The PPM also states that the JCE will build [redacted] in two phases and that the project will be a 1.25 million gross square foot, mixed-use development. The PPM further states that Phase I will be the construction of two high-end residential towers, community facility space, an office tower, a retail complex, and an underground parking garage and that Phase II will be the construction of a 180-room boutique hotel.

A. Sources of the Petitioner's Investment Funds

The Petitioner asserted that he derived his investment funds through the sale of a real property owned by his spouse, [redacted] and brother-in-law, [redacted] in China for 5,300,000 Chinese renminbi (RMB) in March 2016.[2]

In October 2001, the Petitioner, his spouse, and his brother-in-law purchased the property for RMB 403,274. The Petitioner asserted that he made a down payment of RMB 203,274 using his accumulated employment income from [redacted] and they obtained a loan of RMB 200,000 from Bank of [redacted] secured by the property to purchase the property.[3] The Petitioner also asserted that his spouse repaid the loan in May 2002 using her accumulated employment income from [redacted].[4]

In June 2015, the Petitioner transferred his interest in the property to his spouse. On March 8, 2016, the Petitioner's spouse and brother-in-law sold the property for RMB 5,300,000. On March 30, 2016, the Petitioner's brother-in-law gifted his share of the sale proceeds in the amount of RMB 1,766,000 to the Petitioner's spouse.[5]

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[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 s*ection 203(b)(5) of the Act, 8 U.S.C. § 1153(b)(5) (2022). In this case, the Petitioner filed his petition in 2016 and indicated that the project is located in 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).

[2] *See* Explanation on the source of funds from the Petitioner, dated September 2016.

[3] *See id.*

[4] *See id.*

[5] *See* Declaration of the Petitioner, his spouse, and his brother-law, dated March 30, 2016.

To support claims regarding their accumulated employment income, the Petitioner submitted his income certificate from [redacted] Human Resources Department of [redacted] dated October 1999, which states that the Petitioner is the purchase and quality manager of [redacted] and that his average after-tax monthly income for the last three years was RMB 7,156. The Petitioner also submitted an income certificate of his spouse from [redacted] which states that the Petitioner's spouse has worked for [redacted] as the manager of marketing department since April 1996 and that she earned a total of RMB 491,000 from January 1997 to December 2001. The income certificate also states that the individual income tax was withheld and paid by [redacted] However, the record does not contain sufficient evidence to corroborate claims in the record.

The Chief determined that the Petitioner did not submit sufficient documentary evidence to support his claimed accumulated earnings. On appeal, the Petitioner does not submit new evidence to demonstrate the claimed accumulated employment income of the Petitioner and his spouse to purchase the property nor does he provide an explanation regarding this determination.

The Petitioner asserted that on March 11, 2016, his spouse loaned RMB 1,000,000 from the sale proceeds to her friend, [redacted] and that on August 5, 2016, [redacted] repaid the loan of RMB 1,000,000 to his spouse.[6] The Petitioner also asserted that on March 11, 2016, his spouse loaned RMB 530,000 from the sale proceeds to her fiend [redacted] and that on August 10, 2016, [redacted] repaid the loan of RMB 530,000 to his spouse.[7]

The Chief determined that the Petitioner has not demonstrated by a preponderance of the evidence that the loan repayments from [redacted] derived from lawful means. On appeal, the Petitioner does not submit new evidence to demonstrate the claimed lawful sources of funds used by [redacted] to transfer RMB 1,000,000 and RMB 530,000 to the Petitioner's spouse's account on August 5, 2016 and on August 10, 2016.

The Petitioner contends that there is no legal basis for the Chief to require that the loan repayments made by third parties be proven to have been derived from lawful means and that the law only requires the Petitioner to prove the loan he made to the third parties was derived from lawful means. The Petitioner further contends that by instituting a new requirement that a third party's loan repayment must be shown to have derived from lawful means, but not requiring the same proof concerning funds used by a third-party purchaser of the property, the Chief acted arbitrarily, capriciously, and unfairly in violation of the Constitution and violated the APA.

First, USCIS administers the EB-5 program pursuant to statutory and regulatory authorities, and the Petitioner does not argue that a specific provision of the EB-5 statute or regulations is unconstitutional. To the extent that the Petitioner's due process argument had been grounded in the constitutionality of the EB-5 statute and regulations, we lack jurisdiction to rule on the constitutionality of laws enacted by Congress or of regulations promulgated by the Department of Homeland Security. *See, e.g., Matter of Fuentes-Campos*, 21 I&N Dec. 905, 912 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529, 532 (BIA

[6] *See* Explanation from the Petitioner's spouse, dated September 1, 2016.
[7] *See* Explanation from the Petitioner's spouse, dated September 1, 2016.

1992). Therefore, we will consider the Petitioner's process concerns as they relate to whether the Chief complied with the applicable statute and regulations.

Second, a petitioner must demonstrate by a preponderance of the evidence that the capital invested or actively in the process of being invested in the new commercial enterprise was obtained through lawful means. 8 C.F.R. § 204.6(j)(3); *see also Matter of Ho*, 22 I&N Dec. at 210-11. 8 C.F.R. § 204.6(j)(3) sets forth types of documentation that a petitioner must provide with the petition to demonstrate that the capital was obtained through lawful means. Through this documentation, the petitioner provides evidence of the source of the capital. Here, since the Petitioner claimed that the loan repayments from [redacted] were used by the Petitioner to invest in the NCE,[8] the Petitioner is required to demonstrate that the funds were obtained through lawful means. The Petitioner has not submitted sufficient evidence of the claimed lawful sources of funds used by [redacted] to repay the loans to his spouse. Accordingly, the record lacks sufficient evidence to show that the Petitioner's investment funds were lawfully sourced.

B. Informal Value Transfer

The Petitioner asserted that due to China's restrictions on currency exchange and international transfer, he asked his friend, [redacted] to help him exchange his investment funds into U.S. dollars.[9]

On August 20, 2016, the Petitioner transferred RMB 3,628,245 from his China Merchants Bank (CMB) account ending in [redacted] China Construction Bank account ending in [redacted] In exchange, on August 29, 2016, [redacted] transferred $559,000 from his [redacted] Bank (HSB) [redacted] Branch account ending in [redacted] to the Petitioner's CMB [redacted] Branch account ending in [redacted]

In response to a request for evidence (RFE), the Petitioner asserted that the U.S. dollars [redacted] used in the currency exchange were derived from [redacted] employment income and that from January 2006 to August 2016, [redacted] worked as the chairman of the board of directors at [redacted] earning average after-tax annual income of HKD 10,000,000. To support this claim, the Petitioner submitted an income certificate of [redacted] from [redacted] the general manager of [redacted] and business registration documentation of [redacted] However, the record does not contain sufficient evidence of the claimed accumulation and maintenance of these funds in [redacted] HSB [redacted] account ending in [redacted] until transfer to the Petitioner's account on August 29, 2016.

In response to a notice of intent to deny (NOID), the Petitioner submitted pages 1 and 2 of a bank statement of [redacted] for his HSB [redacted] account ending in [redacted] for the period covering from August 3, 2016 to September 3, 2016.[10] This bank statement shows that on August 12, 2016, $1,080,000 was deposited into [redacted] HSB [redacted] account ending in [redacted] – immediately

[8] *See* Explanation on the source of funds from the Petitioner, dated September 2016.

[9] *See* Explanation on the source of funds from the Petitioner, dated September 2016; *see also* Declaration of the Petitioner and [redacted] on the currency exchange, dated August 29, 2016.

[10] The Petitioner did not provide a complete bank statement; the record does not contain pages 3 and 4 of this bank statement.

prior to the transfer of $559,000 from this account to the Petitioner's account on August 29, 2016. However, the bank statement does not indicate the source of deposit.

On motion, the Petitioner claimed that [redacted] income is demonstrated by his share ownership in [redacted] and that [redacted] 32.77% shares in [redacted] was worth RMB 344,388,071 in 2012 based on the shareholders equity. To support this claim, the Petitioner submitted minutes of extraordinary general meeting of [redacted] dated December 31, 2009, which indicates that as of December 31, 2009, [redacted] owned 592,128,289 shares of [redacted] The Petitioner also submitted 2012 annual report of [redacted] which includes a five-year financial summary of [redacted] from 2008 to 2012. The 2012 annual report indicates that as of December 31, 2012, [redacted] his spouse, and companies owned by [redacted] owned 129,056,933 ordinary shares of [redacted] While the meeting minutes and 2012 annual report of [redacted] show [redacted] ownership interest in [redacted] in 2009 and 2012, these documents do not support claims of the lawful source and claims of the path of how funds arrived in [redacted] HSB [redacted] account ending in [redacted] prior to the transfer of $559,000 to the Petitioner's account in 2016.

The Chief determined that the Petitioner has not provided sufficient documentary evidence to corroborate [redacted] claim that he derived the U.S. dollars in his HSB [redacted] account from his accumulated income from [redacted] On appeal, the Petitioner does not submit new evidence to support this claim.

The Petitioner contends that the Chief's unreasonably broad and intrusive request into a third-party exchanger's source of funds is unauthorized by the law, violates privacy rights, and is irrelevant. The Petitioner further contends that such documents are not in his possession and that to comply with the Chief's request, he has to beg the exchanger to cooperate and disclose his sensitive personal financial information, and he is left to the mercy of the exchanger.

While we acknowledge the Petitioner's claims and potential difficulty in obtaining financial or other personal information from a third-party exchanger, in visa petition proceedings, the petitioner bears the burden of establishing eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966). As the Chief stated in the RFE, because the Petitioner's funds were routed through a third-party exchanger [redacted] and there is insufficient documentation to demonstrate the legitimacy of the exchanger and the funds in the exchanger's HSB [redacted] account ending in [redacted], the Petitioner bears the burden of demonstrating that the funds transferred to the Petitioner's CMB [redacted] account ending in [redacted] were obtained through lawful means. Here, the Petitioner has failed to meet this burden. Based on the evidence in the record, it appears that Petitioner's funds sent to [redacted] China Construction Bank account ending in [redacted] have never left mainland China. While the Petitioner claims that [redacted] obtained the exchange funds through his accumulated employment income from [redacted], the record does not contain sufficient evidence to support this claim. The sources of funds in [redacted] HSB [redacted] account ending in [redacted] have not been sufficiently demonstrated.

The Petitioner also contends that in section 203(b)(5) of the Act, which provides the EB-5 program, and in 8 C.F.R. § 204.6(e), which provides definition of "capital," not a single word is mentioned about "lawful means," "a third party," "an intermediary," or "an exchanger" and that the lawful means inquiry would only apply to the alien entrepreneur, not to a third-party exchanger. The Petitioner

further contends that the four precedent decisions, *Matter of Ho*, *Matter of Izummi*, *Matter of Soffici*, and *Matter of Hsiung*, only require the petitioner to document his or her source of funds and make no reference to an intermediary or an exchanger. To support this claim, the Petitioner submits section 203(b)(5) of the Act, 8 C.F.R. § 204.6, and Volume 6, Part G, Chapter 2 of USCIS Policy Manual.

A petitioner must demonstrate by a preponderance of the evidence that the capital was his or her own and was obtained through lawful means. 8 C.F.R. § 204.6(j)(3); *see also Matter of Ho*, 22 I&N Dec. at 210. To show that the capital was his or her own, a petitioner must document the path of the funds. *Matter of Izummi*, 22 I&N Dec. at 195. The record must trace the path of the funds back to a lawful source. *Matter of Ho*, 22 I&N Dec. at 210-11; *Matter of Izummi*, 22 I&N Dec. at 195. USCIS' complete path interpretation of the regulations is its authoritative position as explained in the 1998 precedential decisions. *See Borushevskyi v. USCIS,* No. 19-3034, 2023 WL 2663006, at 19-20 (D.D.C. Mar. 27, 2023). These decisions require the petitioner to establish the complete path of funds to demonstrate that the funds were obtained through lawful means. *See id.* at 20.

In this case, the record reflects that the Petitioner's funds sent to [redacted] China Construction Bank account ending in [redacted] have never left mainland China. On August 20, 2016, the Petitioner transferred RMB 3,628,245 from his CMB account ending in [redacted] China Construction Bank account ending in [redacted] On August 29, 2016, [redacted] transferred $559,000 from his HSB [redacted] Branch account ending in [redacted] to the Petitioner's CMB [redacted] Branch account ending in [redacted] There is a break in the path of the Petitioner's funds. Since the Petitioner is unable to establish the complete path of the Petitioner's funds from mainland China to [redacted] the Petitioner must demonstrate by a preponderance of the evidence that the funds occurring after the break in the path derived from lawful means. While the Petitioner claims that [redacted] obtained the exchange funds through his accumulated employment income from [redacted] the record does not contain sufficient evidence to support this claim. The sources of funds in [redacted] HSB [redacted] account ending in [redacted] have not been sufficiently demonstrated.

The Petitioner further contends that he has already demonstrated the exchanger's income level (his 32.77% equity holding in [redacted] was worth RMB 344,488,071, approximately $48.7 million, in 2012), which greatly exceeds the $559,000 needed to perform the currency exchange under the preponderance of the evidence standard.

[redacted] equity holding in [redacted] in 2012 does not support the claim that the U.S. dollars he used in the currency exchange in 2016 were derived from his accumulated employment income from a different company, [redacted] from 2006 to 2016. As noted above, on August 12, 2016, $1,080,000 was deposited into [redacted] HSB [redacted] account ending in [redacted] prior to the transfer of $559,000 from this account to the Petitioner's account on August 29, 2016. On appeal, the Petitioner does not submit new evidence to identify the source of this deposit. The Petitioner does not provide new evidence to support claims of the lawful source and claims of the path of how funds arrived in [redacted] HSB [redacted] account ending in [redacted]

The Petitioner contends that by selectively targeting only individual exchangers for examination, but not conducting the same rigorous inquiry on institutional exchangers, such as banks and financial institutions, the Chief has committed discrimination in violation of the equal protection clause and the due process clause of the U.S. Constitution. Additionally, the Petitioner asserts that in 2017, USCIS

started issuing requests for evidence to Chinese investors who used third-party money exchangers to transfer money to the United States and that by requiring an examination of a third-party exchanger's lawful source of funds after 2017, USCIS acted arbitrarily and capriciously and has in effect legislated a new law. The Petitioner also claims that the Chief has applied the new requirement seeking proof of a third-party exchanger's lawful source of funds retroactively to the Petitioner's case after he had already invested and filed his petition in 2016 and that the retroactive application of this new rule blindsided him who has relied on the plain language of the EB-5 regulations and USCIS' prior adjudicatory practices to his detriment.

The record reflects that [redacted] is not a licensed money service business but a friend of the Petitioner who helped the Petitioner exchange his funds into U.S. dollars for the Petitioner's EB-5 investment. As stated above, because the Petitioner's funds were routed through a third-party exchanger [redacted], and there is insufficient documentation to demonstrate the legitimacy of the exchanger and the funds in the exchanger's HSB [redacted] account ending in [redacted] the Petitioner bears the burden of demonstrating that the funds transferred to the Petitioner's CMB [redacted] account ending in [redacted] were obtained through lawful means. The Chief's request for evidence of the source of funds used by a third-party exchanger as part of her examination of the lawful source of funds of the Petitioner is supported by regulations and precent decisions.

In his brief, the Petitioner cites three court decisions to support his claims. The first case cited by the Petitioner, *ITServe Alliance, Inc. v. Cissna*, 443 F.Supp. 3d 14 (D.D.C. 2020), addresses USCIS' interpretation of the employer and employee relationship requirement as it related to non-immigrant H-1B visa petitions. The second case cited by the Petitioner, *Chang v. USCIS*, 289 F.Supp. 3d 177 (D.D.C. 2018), discusses a call option in the limited partnership agreement, which gave the new commercial enterprise in which the plaintiffs invested the choice to buy plaintiffs out, as it related to the capital at risk requirement. The third case cited by the Petitioner, *Zhang v. USCIS*, 344 F.Supp. 3d 32 (D.D.C. 2018), addresses USCIS' interpretation of the loan proceeds, which were invested by the plaintiffs in the new commercial enterprise, as indebtedness instead of cash as it related to the required amount of capital investment requirement. These cases do not address the issues raised in the present case.

Furthermore, the Petitioner does not present evidence that the Chief has not examined the source of funds used by third-party exchangers in the currency exchange prior to 2017 or has approved other petitions without making an inquiry into the claimed source of funds used by third-party exchangers. Moreover, petitions are not required to be approved where the petitioner has not demonstrated eligibility because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). USCIS or any agency need not treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

For the reasons we have discussed above, the record remains insufficient to establish by a preponderance of the evidence that the capital, which has been invested by the Petitioner or which the Petitioner is actively in the process of investing, is capital obtained through lawful means.

III. CONCLUSION

As the record does not sufficiently demonstrate that the capital, which has been invested by the Petitioner or which the Petitioner is actively in the process of investing, is capital obtained through lawful means, the Petitioner has not shown by a preponderance of the evidence that he is eligible 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.