U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-G-

DATE: NOV. 28, 2017

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

PETITION: 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 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 of the Immigrant Investor Program Office denied the petition, concluding that the record did not establish, as required, that the Petitioner had placed at least $1,000,000[1] at risk in the NCE, or shown that the NCE would create sufficient number of jobs. The Chief subsequently denied the Petitioner's motion to reopen the matter, concluding that she did not demonstrate her eligibility. In addition, the Chief determined that the Petitioner had made an impermissible material change to the petition because the NCE closed its Italian restaurant and reopened it to serve American causal cuisine instead.[2]

On appeal, the Petitioner submits additional evidence, asserting that she has established her eligibility for the classification, and that a change in the type of food the NCE serves does not constitute a material change to her petition.

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 an NCE. 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.

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[1] The minimum required amount of capital in this case is $1,000,000. *See* 8 C.F.R. § 204.6(f)(1).

[2] The Petitioner states on appeal that the NCE purchased and operated an Italian restaurant, which it later closed and reopened as serving American causal cuisine. The NCE subsequently changed the restaurant's name to

To demonstrate eligibility for the classification, a petitioner must place the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. 8 C.F.R. § 204.6(j)(2). Funds that are invested in a significantly overcapitalized company with no expenditures forecasted, however, do not constitute capital placed at risk. *See Matter of Ho*, 22 I&N Dec. 206, 209 (Assoc. Comm'r 1998) (holding that "the petitioner cannot meet his [or her] at-risk requirement by merely depositing funds into a corporate account"); *see also Al Humaid v. Roark*, No. 3:09-CV-982-L, 2010 WL 308750, *3-4 (N. D. Tex. Jan. 26, 2010) (finding that capital contribution that "is sitting idle, kept in a passive reserve account" is not at risk).

To establish employment creation, a petitioner must submit evidence showing that he or she has already created the requisite number of jobs or provide a "comprehensive business plan" demonstrating that due to the nature and projected size of the NCE, the need for not fewer than 10 full-time qualifying employees will result within the next two years. 8 C.F.R. § 204.6(j)(4)(i). 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. *Ho* concludes, "[m]ost importantly, the business plan must be credible." *Id.* If a petitioner invests in a troubled business, as defined under 8 C.F.R. § 204.6(e), he or she may satisfy the job creation requirement through job creation as well as preservation. 8 C.F.R. § 204.6(j)(4)(ii); 6 USCIS Policy Manual G.2(D)(4), https://www.uscis.gov/policymanual.

Finally, a petitioner's invested capital must not derive, directly or indirectly, from unlawful means. 8 C.F.R. § 204.6(e). To show the lawful source of the funds, a petitioner must submit, for example, foreign business and tax records or documentation identifying any other sources of funds. 8 C.F.R. § 204.6(j)(3). Bank letters or statements corroborating the deposit of funds by themselves are insufficient. *Ho*, 22 I&N Dec. at 210-11; *Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998). The record must trace the path of the funds back to a lawful source.[3] *Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195.

II. ANALYSIS

The Petitioner and her father Q-G- became the NCE's directors in August 2012. They each invested $1,000,000 in July 2013, seeking classification as an immigrant investor. In August 2013, the NCE purchased an Italian restaurant [redacted] and operated it for about two years. It then renovated the restaurant, and renamed it [redacted] serving American causal cuisine. On appeal, the Petitioner reveals that in September 2016, the NCE changed the restaurant's name to [redacted]

[3] These requirements confirm that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003) (holding 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).

A. Capital Investment

The Petitioner has not established that she has placed the minimum required amount of capital at risk, because she has invested in a significantly overcapitalized company. The NCE received $2,000,000 from two investors, the Petitioner and her father. The record, however, does not confirm that the NCE will need this contribution.

According to page 3 of the business plan, the NCE plans to use $400,000 to purchase a restaurant[4] and about $100,000 to renovate it.[5] The business plan does not sufficiently explain how the company will use the remaining investment contribution. The pro forma profit and loss statement, which includes information on expected sales revenue and operating expenses, provides that the NCE will have a net loss of $13,920 in its first year of operation, but will make a profit in subsequent years. In addition, the pro forma cash flow anticipates that the NCE will continue to have a cash balance of over $1,500,000 during its years of operation.[6] These projected figures illustrate that although the NCE will have certain startup costs, its revenue will exceed its expenditure after the first year, and that it will not use a significant portion of the investors' monies. In light of these numbers, the Petitioner has invested in a significantly overcapitalized business, because she has not shown that the NCE will need $2,000,000 from her and her father.

Other documents in the record support the finding that the Petitioner has not placed the minimum required amount of capital at risk. For example, Schedule L of the NCE's 2013 U.S. Corporation Income Tax Return, Internal Revenue Service (IRS) Form 1120,[7] indicates that the company's assets included $805,796 cash and $700,000 "other investments." Likewise, its 2014 IRS Form 1120[8] shows that the NCE had $696,118 in cash and $700,000 in "other investments." The Petitioner has not offered information on the NCE's $700,000 "other investments." Regardless, these figures illustrate that a sizeable portion of the Petitioner and her father's $2,000,000 contribution had been sitting idle. *See Al Humaid*, 2010 WL 308750 at *3.

On appeal, the Petitioner submits the NCE's balance sheet as of the end of 2016, which indicates that the business has only $28,905.92 in bank accounts and petty cash. While this financial statement lists three bank accounts, it does not include information on the NCE's checking account ending in 2699, which is where the Petitioner and her father had deposited $2,000,000. In addition, this balance sheet does not reference the $700,000 "other investments" listed in the NCE's 2013 and 2014 tax returns.

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[4] The Petitioner submits a copy of a check indicating that in August 2013, the NCE paid $404,473 to purchase [redacted]

[5] The Petitioner offers documents indicating that in November 2015, the NCE spent approximately $85,000 to renovate the restaurant.

[6] The pro forma cash flow statement, included in the business plan, provides information on the NCE's first three years of operation.

[7] This tax return covers the tax year between June 2013 and May 2014.

[8] This tax return covers the tax year between June 2014 and May 2015.

Al Humaid explains that if a contribution remains in a NCE's bank account, then the petitioner "could abolish that account at any time and have those funds returned to him [or her] under his [or her] powers as sole director." *Id.*, 2010 WL 308750 at *4. As such, funds that sit idle are not capital that has been placed at risk. Here, the projected figures in the business plan and other documents on actual expenditure demonstrate that the NCE does not need the Petitioner and her father's $2,000,000, and that a good portion of the contribution has remained in the NCE's accounts or as "other investments." As the Petitioner and her father are the sole directors on the NCE's board of directors, they have the power to return the idle funds to themselves. In light of these reasons, the record does not establish that the Petitioner has placed at least $1,000,000 at risk in the NCE for the purpose of generating a return on the capital. *See* 8 C.F.R. § 204.6(j)(2).[9]

B. Job Creation

The Petitioner has not demonstrated that the NCE qualified as a troubled business because the record lacks sufficient financial documents covering the relevant periods. *See* 8 C.F.R. § 204.6(e). As such, she must rely on job creation, rather than job preservation, to meet the employment creation requirement. *See* 8 C.F.R. § 204.6(j)(4)(ii); *see also* 6 USCIS Policy Manual G.2(D)(4), https://www.uscis.gov/policymanual.

1. Troubled Business

The record is insufficient to establish that the NCE constituted a troubled business. The regulation defines a troubled business as:

> [A] business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve- or twenty-four month period prior to the priority date on the alien entrepreneur's Form I–526, and the loss for such period is at least equal to twenty percent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

8 C.F.R. § 204.6(e).

In this case, the NCE purchased a pre-existing, ongoing business, [redacted] from [redacted] also known as [redacted] in August 2013. The record shows that [redacted] was doing business as [redacted] before this purchase. We will therefore

[9] In his December 2015 denial of the petition, the Chief questioned the validity of the NCE's purchase of [redacted] The Petitioner has submitted sufficient documents, including ownership evidence before the purchase, to overcome the Chief's concerns.

consider [redacted] financial status to determine if it, and in turn the NCE, qualified as a troubled business.

The priority date in this case is September 27, 2013. The relevant 12- and 24-month periods prior to that date therefore begin in September 2012 and September 2011, respectively.[10] The record includes minimal information on [redacted] status during the relevant periods. In support of a motion to reopen the matter with the Chief, the Petitioner submitted [redacted] financial documents and IRS Forms 1120 that cover two tax years: April 2008 through March 2009, and April 2009 through March 2010. She also provided a tax return transcript for the tax year covering April 2010 through March 2011. The information in these documents, however, is outside of the 12- and 24-month periods relevant to the regulatory definition of a troubled business. *See* 8 C.F.R. § 204.6(e).

Although the Petitioner also presented [redacted] IRS Form 1120 that covers the tax year from April 2011 through March 2012, this tax return includes only seven months of the 24-month period that began in September 2011. This document thus does not demonstrate that [redacted] incurred a net loss of at least 20% of its net worth during either the 12- or 24-month periods preceding the filing of the petition. Without additional corroborating evidence on [redacted] net loss and net worth during the relevant timeframes, the Petitioner has not shown that [redacted] and in turn the NCE, qualifies as a troubled business.

2. Business Plan

As the Petitioner has not shown that the NCE was a troubled business, to meet the job creation requirement, she must demonstrate that the contribution from her and her father, who is also seeking the immigrant investor classification, will create at least 20 new full-time jobs (10 for each investor). 8 C.F.R. § 204.6(g). Their investment must create the requisite number of jobs in addition to maintaining the positions that already existed at the time the NCE purchased Opera Café and Bistro. *Matter of Soffici*, 22 I&N Dec. 158, 167-68 (Assoc. Comm'r 1998); *Matter of Hsiung*, 22 I&N Dec. 201, 204-05 (Assoc. Comm'r 1998).

The Petitioner indicated in a motion to reopen the matter with the Chief that "there were althogether [*sic*] 16 to 17 employees, including a number of part-time employees, working for [redacted] when the NCE took over." As such, she must submit documents confirming that the NCE has created 20 additional full-time positions, or present a comprehensive business plan showing that it will. As the record does not illustrate the actual creation of these jobs, we will review the business plan to determine if the Petitioner has demonstrated that due to its nature and projected size, the NCE will create no fewer than 20 additional full-time positions within the next two years. *See* 8 C.F.R. § 204.6(j)(4)(i)(B).

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[10] On appeal, the petitioner references the NCE's recent financial data. This information, however, does not illustrate that the NCE was a troubled business as of the petition's priority date. *See* 8 C.F.R. § 204.6(e).

The sole business plan in the record does not demonstrate the NCE will satisfy the job creation requirements. The executive summary provides that the NCE "plans to have a total of 20 full-time positions in the next four years to expand [its] operations, provide better customer services and meet customer demands." The document reiterates this staffing goal on pages 8 and 10. However, as a pre-existing, ongoing business, the NCE must maintain its original staffing requirements, plus create 20 additional full-time positions. Based on this reason, the Petitioner has not satisfied her job creation requirement, because she has not presented a comprehensive business plan that demonstrates the NCE will add 20 full-time jobs within the next two years, while maintaining "16 to 17" existing positions. *See* 8 C.F.R. § 204.6(j)(4)(i)(B).

C. Lawful Source of Funds

Finally, the Petitioner has not sufficiently documented the lawful source of the $1,000,000 she invested in the NCE. She indicates that her funds derived from a 6,200,000 Renminbi (RMB) mortgage she obtained from in 2013. She used her apartment in China, as security for the loan. She, however, has not demonstrated the lawfulness of the funds she used to acquire the apartment. Specifically, she purchased the property for 1,630,938 RMB in 2004, and paid off her 20-year mortgage a year later. She claimed that her accumulated income from 1995 through 2005 financed the purchase. While a June 2013 "Work and Income Certificate" indicating that she earned 1,880,000 RMB during this period, she has not provided sufficient evidence, such as bank records, showing that she had saved over 85 percent of her income over this 10 year timeframe. Without additional corroboration, she has not documented the lawful source of the funds she used to purchase the property that serves as collateral for the 6,200,000 RMB mortgage, the proceeds of which she invested in the NCE.

III. CONCLUSION

The Petitioner has not established that she has placed at least $1,000,000 at risk in the NCE. She has also not satisfied the employment creation requirement. Finally, she has not sufficiently documented the lawful source of her capital. Based on these reasons, she has not shown her eligibility for the immigrant investor classification.[11]

ORDER: The appeal is dismissed.

Cite as *Matter of B-G-*, ID# 674712 (AAO Nov. 28, 2017)

[11] In light of the multiple bases under which we dismiss the appeal, we will not consider the Petitioner's assertion that a change in the type of food the NCE serves does not constitute a material change to her petition.