



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF D-M-

DATE: JULY 31, 2019

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

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

The Petitioner seeks classification as an immigrant investor. *See* 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. 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 (Appropriations Act) section 610, as amended.

The Acting Chief of the Immigrant Investor Program denied the petition, concluding that the record did not establish, as required, that the Petitioner had invested the requisite amount of funds, that his claimed investment derived from a lawful source, and that he was actively involved in the management of the NCE.

On appeal the Petitioner submits a brief and additional evidence and asserts that he has established eligibility for the benefit sought.

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, which can be any lawful business that engages in for-profit activities. An immigrant investor may invest the required funds directly in an NCE, or invest through a regional center.<sup>1</sup> Regional centers apply for designation as such with USCIS. Designated regional centers identify and work with new commercial enterprises, which in turn are associated with a specific

---

<sup>1</sup> A regional center is an “economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.” 8 C.F.R. § 204.6(e).

project, known as the job creating entity (JCE). Regional centers can pool immigrant (and other) investor funds for qualifying projects that create jobs directly or indirectly. 8 C.F.R. § 204.6(j)(4)(iii).

The petitioner's invested capital must not derive, directly or indirectly, from unlawful means. 8 C.F.R. § 204.6(e), (j). The record must trace the path of the funds back to a lawful source.<sup>2</sup> *Matter of Ho*, 22 I&N Dec. 210-11 (Assoc. Comm'r 1998); *Matter of Izummi*, 22 I&N Dec. 195 (Assoc. Comm'r 1998). To show the lawful source of the funds, an investor must submit, as applicable, 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; *Izummi*, 22 I&N Dec. at 169, 195.

## II. ANALYSIS

In December 2016 the Petitioner filed the instant petition, basing his eligibility on an asserted November 2016 investment into EB5 [REDACTED], the NCE, which is affiliated with EB5 [REDACTED] Regional Center (the Regional Center). He indicated that the funds for his investment derived from a mortgage loan taken out on a house that he owned jointly with his father. In June 2018, the Chief issued a request for evidence (RFE) asking the Petitioner to submit documentation establishing that his investment was lawfully sourced as required at 8 C.F.R. § 204.6(e), (j). She notified him that the submitted documentation in the record pertained to a different person, [REDACTED], and that person's investment into [REDACTED] rather than to the Petitioner's investment into the instant NCE. The RFE further advised that:

To determine the lawful source of [his] investment funds, additional evidence is required. Petitioner must submit, as applicable, the following evidence in order to comply with 8 C.F.R. § 204.6(j)(3):

- Foreign business registration records;
- Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in the subpart described in 8 C.F.R. § 204.6(j)(3)(ii)), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of Father;
- Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against Father from any court in or outside the United States within the past fifteen years; or
- Evidence identifying any other source(s) of capital, such as

---

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

- Corporate, partnership, or other business entity annual reports and/or audited financial statements/records;
- Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by Petitioner's or Father's own assets, other than those of the NCE, and for which Petitioner or Father is personally and primarily liable;
- Evidence of income such as earnings statements or official correspondence from current or prior employer(s) stating when Father worked for the company and how much income Father received during employment;
- Please submit any and all social insurance payments in name of Father;
- Personal tax returns issued in name of Father (e.g. Individual Income Tax Payment Certificates from the local tax bureau for 1991 through 2009) to corroborate Father's claimed employment and income history. To clarify, USCIS is requesting personal tax returns (e.g. Individual Income Tax Payment Certificates from the local tax bureaus) from the tax bureau and not from a company or self-declarations. If such certificate is not available for any time period, please provide documentary evidence from the taxation authority for unavailability.
- Evidence of property ownership, including property purchase and/or sale documentation
- Please provide household consumption report for living expenses from Statistics Bureau for Father's resident area for the years from 1991 to 2009;
- If Father or other family member has or had any shareholder ownership interest in any other companies, please submit evidence to demonstrate the lawful source of the ownership interest. The evidence includes:
  - Evidence identifying any source(s) of income for the ownership interest, such as payroll records, individual income tax withheld statements from all companies and/or bank statements for his/her income deposit accounts for the ownership interest;
  - Individual income tax payment certificates/vouchers issued by Chinese local taxation bureau for Father or any other family member who has or had any shareholder ownership interest for all years his/her ownership interest income was earned. If such certificate is not available for any time period, please provide documentary evidence from the taxation authority for unavailability.
- Gift instrument(s) documenting gifts to Petitioner;
- Evidence, other than tax returns required under 8 C.F.R. § 204.6(j)(3)(ii), of payment of individual income tax, such as an individual income tax report or payment certificate, on the following:
  - Wages and salaries;
  - Any income from labor and service or business activities;
  - Any income/royalties from published books, articles, photographs, etc.;
  - Any royalties/income from patents or special rights;
  - Interest, dividends and bonuses;
  - Any rental income;

- Any proceeds from property transfers;
- Any incidental income; and/or;
- Other taxable income determined by the relevant financial department.
- Evidence demonstrating all Petitioner's investment funds were converted into USD funds and transferred to Petitioner's foreign currency bank accounts by legal means;
- Evidence demonstrating the required amount of capital has been invested into the NCE escrow account by legal means and made available to the business(es) most closely responsible for job creation;
- Any other evidence that overcomes the deficiencies noted above.

In his July 2018 response to the Chief's RFE, the Petitioner, through counsel, provided a document titled "Source of Funds Table of Contents: [Petitioner]" identifying 11 exhibits and indicated that these exhibits were attached therewith. Upon review of this response, the Chief determined that it did not address the concerns stated in her RFE and identified additional grounds for denial.

In denying the petition, the Chief found specifically that, in the RFE response, "[a]gain counsel submitted a source of fund packager [*sic*] for [redacted] instead [of] for Petitioner" despite USCIS' specific request for "the source of fund package for Petitioner in the RFE." She also determined that the Petitioner had not demonstrated his investment of the requisite funds into the NCE as the documentation in the record shows that "the funds invested were [redacted]'s funds and not Petitioner's funds" and does not show that he invested in the instant NCE. Further, the Chief found that the Petitioner had not demonstrated that he "is, or will be engaged in management of the NCE"<sup>3</sup> as "all the source of funds supporting documents in this Form I-526 [relate] to an individual (i.e. [redacted] other than Petitioner." The Chief then denied the petition on the grounds that the Petitioner had not established the lawful source of funds used in his investment or his involvement in the management of the NCE.

On appeal, the Petitioner, through counsel, submits a brief, a document titled "Source of Funds Table of Contents: [Petitioner]," and documents relating to the source and path of funds used in the Petitioner's investment into the NCE. In this brief counsel argues that the Petitioner's supporting documents "were mistakenly confused" with another Petitioner's documents, and "were inaccurately examined and adjudicated." Counsel claims that "[a]t the time of filing the Petition, [redacted]'s documents were mistakenly also included in [the Petitioner's] petition" and that the Petitioner's "source of funds documents were previously provided to USCIS and reflect that the funds invested belonged to him."

With respect to counsel's contentions that the record before the Chief included the Petitioner's source of funds documentation and that such evidence was overlooked in error, the record does not support these assertions. Instead, it supports the findings discussed above that at the time of filing the Petitioner provided documents related only to [redacted]'s source of funds, and his RFE response similarly included source of funds documents solely pertaining to [redacted]. We note that the record

---

<sup>3</sup>See 8 C.F.R. § 204.6(j)(5) (providing that a petition submitted under the Immigrant Investor Pilot Program must be accompanied by evidence showing that the petitioner is or will be engaged in the management of the NCE as opposed to maintaining a purely passive role in regard to investment.).

includes a copy of an August 2018 letter to the Chief in which the Petitioner's counsel acknowledges this, stating: "We ask the [Chief] to understand that our office made an internal office error by inadvertently including the incorrect source of funds documents with the Petitioner's I-526 Petition....The misfiling of the documents is not at the fault of the Petitioner nor the Project. We sincerely apologize for these errors and kindly ask the [Chief] to reconsider [her] decision."

Notwithstanding these statements, we note that the Petitioner's appeal does not include a specific claim of ineffective assistance of counsel for our review. If a petitioner wishes to make a claim of ineffective assistance of counsel, we will review it following the framework established by the Board of Immigration Appeals for asserting and assessing such claims. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). *Lozada* sets forth the following threshold documentary requirements for asserting such a claim:

- A written affidavit of the Petitioner attesting to the relevant facts. The affidavit should provide a detailed description of the agreement with former counsel (i.e., the specific actions that counsel agreed to take), the specific actions actually taken by former counsel, and any representations that former counsel made about his or her actions.
- Evidence that the petitioner informed former counsel of the allegation of ineffective assistance and was given an opportunity to respond. Any response by prior counsel (or report of former counsel's failure or refusal to respond) should be submitted with the claim.
- If the Petitioner asserts that the handling of the case violated former counsel's ethical or legal responsibilities, evidence that the Petitioner filed a complaint with the appropriate disciplinary authorities (e.g., with a state bar association) or an explanation why the Petitioner did not file a complaint. *Id.* at 639.

A petitioner must also demonstrate that he was prejudiced by former counsel's deficient performance. *Id.* at 632. If the Petitioner would like for us to consider ineffective assistance of counsel as the reason why the wrong evidence was submitted in support of his petition and to establish eligibility for the petition, he would have to submit documentation meeting these requirements.

Regarding the new evidence submitted on appeal, the Petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The Petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). Accordingly, the appeal will be adjudicated based on the record of proceeding before the Chief.

Upon of a review of this record, we conclude that the Petitioner did not establish that he invested or was in the process of actively investing the requisite amount into the NCE, or that the funds used for his claimed investment derived from lawfully sourced funds as required pursuant to 8 C.F.R. § 204.6(e),(j). As discussed above, and acknowledged by counsel, the record contained documentation relating to the source of [redacted]'s investment into [redacted]. It

lacked evidence of the Petitioner's claimed investment into the instant NCE and documentation showing lawful source of funds from this investment, as required.

Regarding the Chief's determination that the Petitioner had not established his active involvement in the management of the NCE, we also agree with this finding. A petition submitted under the Immigrant Investor Pilot Program must be accompanied by evidence showing that the petitioner is or will be engaged in the management of the NCE, as opposed to maintaining a purely passive role in regard to investment. *See* 8 C.F.R. § 204.6(j)(5). As evidence of his active involvement in the NCE's management, the petition was accompanied by the NCE's private placement memorandum establishing that in his role as a limited partner, the Petitioner would "have the rights provided to limited partners under non-waivable provisions of the District of Columbia Uniform Limited Partnership Act," and a limited partnership agreement between the NCE and the Petitioner executed in November 2016. While the language of these documents is consistent with the requirements of 8 C.F.R. § 204.6(j)(5), it is premised on his status as an investor. As discussed above, the record lacked evidence of his investment in the NCE such that he would qualify to act in this role. We therefore uphold the Chief's conclusion on this issue.

### III. CONCLUSION

The Petitioner did not establish a qualifying investment into the NCE, document the lawful source of such investment, or demonstrate that he is or will be involved its management. Accordingly he has not demonstrated eligibility for the immigrant investor classification. In visa petition proceedings, the petitioner bears the burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of D-M-*, ID# 2919388 (AAO July 31, 2019)