U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 06433275

Date: APR. 6, 2020

Motion on Administrative Appeals 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). 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 (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 the record did not establish, as required, that [redacted] the NCE, would create the requisite number of jobs.[1] We summarily dismissed the subsequent appeal because it did not identify specifically any erroneous conclusion of law or statement of fact in the unfavorable decision. The Petitioner now files a combined motion to reconsider and reopen the matter. On motion, he submits evidence previously submitted in response to the Chief's notice of intent to deny (NOID) and maintains that he has established eligibility for the classification.

Upon review, we will deny the motions.

I. LAW

A motion to reconsider is based on an incorrect application of law or policy, and a motion to reopen is based on documentary evidence of new facts. The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3), and the requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

In addition, the regulation specifies motion filing requirements, providing that a petitioner must submit "a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed."

[1] See 8 C.F.R. § 204.6(j)(4)(i)(B).

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. 8 C.F.R. § 103.3(a)(1)(v).

II. ANALYSIS

The Petitioner maintains that she qualifies for the EB-5 classification based on a $500,000[2] investment in the NCE, a business that is associated with a United States Citizenship and Immigration Services (USCIS)-designated regional center,[3] [redacted] *See* 8 C.F.R. § 204.6(j)(4)(iii). According to the initial business plan, the NCE seeks to raise up to $98,000,000 EB-5 funds from 196 foreign national investors to invest in an equity interest in [redacted] and [redacted] the JCEs. The JCEs plan to create approximately 7,492 EB-5 qualifying jobs from a project that will cover the following three categories:

1. [redacted] transportation and Cool Containers [redacted]
2. [redacted] transportation; and
3. Agricultural harvest [redacted]

The Chief issued a notice of intent to deny (NOID) the petition, notifying the Petitioner that the evidence relating to the NCE's projected employment creation did not establish that the NCE would likely create the requisite number of jobs for qualifying employees within two years. *See* 8 C.F.R. § 204.6(j)(4)(i)(B). Among other things, the Chief raised concerns regarding a judgment[4] entered against the NCE on [redacted] 2016, finding that the NCE made materially false and misleading statements in the PPM issued to the EB-5 investors. Specifically, the NCE stated that an 80-year lease had been secured with the [redacted] when, in fact, it had not. In the NOID response, the Petitioner argued USCIS was relying on "a number of documents and pleadings that are either unreliable, untruthful or not complete" and presented additional evidence including the NCE's briefs and motion filed in the above lawsuit as well as, among other things, a copy of an agreement between the NCE and [redacted] and a photograph of the [redacted]

After reviewing the record, the Chief denied the petition, finding that the Petitioner did not sufficiently demonstrate that the NCE would likely create the requisite number of jobs within two years as the Petitioner did not submit a credible business plan or rely on reasonable economic methodologies. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998) and 8 C.F.R. § 204.6(j)(4)(iii), (m)(3)(v). The Petitioner's subsequent appeal did not specify any reasons for challenging the denial issued by the Chief but indicated he would submit a brief and/or additional evidence within 30 calendar days of filing the appeal. We summarily dismissed the appeal four months later having not received a brief or additional evidence.

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[2] The Petitioner indicates that she has made an investment in a targeted employment area, and that the requisite amount of qualifying capital is therefore downwardly adjusted from $1,000,000 to $500,000. *See* 8 C.F.R. § 204.6(f)(2).

[3] A regional center is an economic unit involved with the promotion of economic growth, "including . . . improved regional productivity, job creation, and increased domestic capital investment." *See* 8 C.F.R. § 204.6(e).

[4] [redacted]

We will deny the Petitioner's combined motions because they do not include "a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." *See* 8 C.F.R. § 103.5(a)(1)(iii)(C), (a)(4). In the alternative, we will deny the motions for the reasons set forth below.

A. Motion to Reconsider

On motion, the Petitioner requests we reconsider our summary dismissal because he already submitted legal arguments and evidence to the Chief in response to her NOID. Our summary dismissal, the decision at issue, stated "[w]e are summarily dismissing your appeal because it did not identify specifically any erroneous conclusion of law or statement of fact in the unfavorable decision" citing to 8 C.F.R. § 103.3(a)(1)(v). A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3).

Here, the Petitioner has not argued our summary dismissal was incorrect based on an incorrect application of law or policy. The Petitioner's argument that he identified erroneous conclusions of law or statements of facts in the NOID response is not persuasive as the summary dismissal required the Petitioner submit arguments regarding erroneous conclusions in the Chief's denial rather than the NOID. We will therefore dismiss his motion to reconsider the matter.

B. Motion to Reopen

In support of her motion, the Petitioner submits documents previously submitted in his response to the Chief's NOID. A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). The regulation at 8 C.F.R. § 103.5(a)(2) does not define what constitutes a "new" fact, nor does it mirror the Board of Immigration Appeals' (the Board) definition of "new" at 8 C.F.R. § 1003.2(c)(1) (stating that a motion to reopen will not be granted unless the evidence "was not available and could not have been discovered or presented at the former hearing"). Unlike the Board regulation, we do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, we interpret "new facts" to mean facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original petition.

On motion, the Petitioner resubmits evidence from his response to the Chief's NOID. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts." For this reason, we find that the Petitioner has not stated new facts demonstrating his eligibility for the classification or supported the new facts with documentary evidence. We will therefore deny his motion to reopen the matter. *See* 8 C.F.R. § 103.5(a)(2).

III. CONCLUSION

We will deny the Petitioner's combined motions under 8 C.F.R. § 103.5(a)(1)(iii)(C), (a)(4). In the alternative, we will deny his motion to reconsider the matter because he has not established that we

based our previous decision on an incorrect application of law or policy, or that the decision was incorrect based on the evidence in the record at the time of the decision. In addition, we will deny his motion to reopen the proceeding because the documentation he presents on motion does not demonstrate his eligibility for the classification.

ORDER: The motion to reconsider is denied.

FURTHER ORDER: The motion to reopen is denied.