U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 38458360

Date: AUG. 11, 2025

Motions on Administrative Appeals Office Decision

Form I-526, Immigrant Petition by Alien Investor

The Petitioner seeks classification under the employment-based, fifth-preference (EB-5) immigrant visa category as an immigrant investor. *See* Immigration and Nationality Act (the Act) section 203(b)(5), 8 U.S.C. § 1153(b)(5). Aliens may qualify for U.S. permanent residence in this category if they invest requisite amounts of capital in new commercial enterprises that would boost the U.S. economy by creating at least 10 full-time jobs per alien investor. *Id.* The Petitioner invested in a project associated with a U.S. Citizenship and Immigration Services (USCIS)-designated regional center, which pools investor funds for qualifying projects to promote economic growth. *See* Depts of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, § 610, 106 Stat. 1828 (1992), as amended.

Field Operations Directorate (FOD) denied the petition, and we dismissed the Petitioner's following appeal. *See In Re: 30130390* (AAO Dec. 9, 2024). Most recently, we dismissed his motion to reopen as untimely.[1]

The matter returns to us on the Petitioner's combined motions to reopen and reconsider. He asks us to excuse the delayed submission of his prior motion to reopen, stating that a snow and ice storm prevented its timely filing.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Upon review, we will excuse the delayed filing of his prior motion to reopen. But, because that motion does not establish his eligibility as an immigrant investor, we will dismiss his current motions.

I. LAW

A motion to reopen must state new facts, supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). In contrast, a motion to reconsider must demonstrate that our prior decision misapplied law or policy based on the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). On motion, our scope of

[1] We rejected the untimely motion. *See* 8 C.F.R. § 103.5(a)(4) (requiring us to "*dismiss*" a motion that does not meet applicable requirements) (emphasis added). We will treat this motion as if we had properly dismissed the prior motion.

review is limited to our prior decision. *See* 8 C.F.R. § 103.5(a)(1)(i), (ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit.

II. ANALYSIS

A. The Petitioner's Prior Untimely Motion

A petitioner must file a motion to reopen or reconsider within 33 days of the date of an unfavorable mailed decision. *See* 8 C.F.R. §§ 103.5(a)(1)(i), 103.8(b). We have discretion, however, to excuse an untimely motion to reopen "where it is demonstrated that the delay was reasonable and was beyond the control of the . . . petitioner." 8 C.F.R. § 103.5(a)(1)(i).

The record shows that the Petitioner filed his prior motion to reopen on January 14, 2025. The filing occurred 36 days after we mailed our December 9, 2024 appellate decision to him. As USCIS did not receive the motion within the requisite 33 days, we dismissed the filing as untimely. *See* 8 C.F.R. § 103.5(a)(4).

Consistent with 8 C.F.R. § 103.5(a)(1)(i), the Petitioner asks us to excuse the delay in filing his prior motion to reopen. *Id.* He submits evidence that - on Friday, January 10, 2025, 32 days after we mailed the appellate decision - his counsel intended to send his prior motion to USCIS via an overnight commercial courier service. A snow and ice storm, however, struck that day, and counsel states that the storm forced cancellation of commercial courier services around his office in Georgia. Counsel was able to deliver the motions to a commercial courier the following morning, the last day of the 33-day filing period. Because that day fell on a Saturday, the filing period extended until the end of Monday, January 13, 2025, the next day that was not a Saturday, Sunday, or legal holiday. *See* 8 C.F.R. § 1.2 (defining the term "day"). But courier records show that we did not receive the Petitioner's filings until Tuesday, January 14, 2025. Numerous reports confirm the storm and resulting commercial courier delays.

Under these specific circumstances, we will excuse the untimely filing of the Petitioner's prior motion to reopen. He has sufficiently shown that the delay was reasonable and beyond his control. *See* 8 C.F.R. § 103.5(a)(1)(i).

We will therefore consider the Petitioner's prior motion to reopen.

B. The Lawfulness of the Petitioner's Funds

Affirming FOD's conclusion, our appellate decision found insufficient evidence that the Petitioner's investment funds derived from lawful sources. For EB-5 purposes, "[a]ssets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital." 8 C.F.R. § 204.6(e). Petitioners must demonstrate that they obtained their investment funds through lawful means, submitting documentary evidence, such as: foreign business registration records; corporate, partnership and personal tax returns; and evidence identifying other source(s) of capital. 8 C.F.R. § 204.6(j)(3).

The Petitioner claims that he and up to nine other alien investors each contributed $500,000 to establish a U.S. hotel. A regional center pooled their investments, providing the funds to a new commercial enterprise (NCE) that lent the money to a job creating entity (JCE) that would build and operate the hotel.

The Petitioner filed his immigrant investor petition in March 2018. Asked on the Form I-526, Immigrant Petition for Alien Entrepreneur, for "Your Sources of Investment Capital," the Petitioner indicated that his funds derived from "Income," "Gift," and "Tangible Assets." He submitted evidence that the $100,000 in cash that he invested in the NCE in December 2017 was a gift from his uncle. The Petitioner, however, did not show that he provided his remaining $400,000 investment to the NCE. He also did not establish the source or path of the remaining funds. *See Matter of Soffici*, 22 I&N Dec. 158, 164–65 (Assoc. Comm'r 1998) (stating that when "[t]he source of funds ... has ... not been adequately documented," it cannot be determined "whether the funds have lawfully been obtained").

In response to FOD's request for additional evidence, the Petitioner stated - for the first time - that his uncle gave him the entire $500,000 investment amount. He submitted a December 2017 promissory note stating his uncle's promise to pay the NCE the remaining $400,000 within the following two years. The note states that the Petitioner's uncle secured his promise with land that he owns in the United States.

We agreed with FOD that, after the petition's filing, the Petitioner materially changed the source of his investment funds. *See* 8 C.F.R. § 103.2(b)(1) (requiring a petitioner to establish eligibility "at the time of filing the benefit request"); *see also Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998) ("[A] petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements.") We therefore disregarded his uncle's 2017 promissory note and found that the Petitioner had not demonstrated acquisition of the remainder of his originally indicated investment funds through lawful means.

On motion, the Petitioner denies that the source of his investment funds changed. Counsel states:

> The petitioner indicated the source of funds to be income, gift, and tangible assets. The entire Capital investment of $500,000 was a gift from his uncle. As the uncle used his income and assets to gift the petitioner, it was disclosed, as such by the petitioner at the time of the petition.

Counsel's unsubstantiated assertions about the Petitioner's purported intent at the time of the petition's filing, however, do not constitute evidence. *See, e.g., Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) ("[S]tatements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight").

The 2017 promissory note indicates that, before the petition's 2018 filing, the Petitioner's uncle promised to donate the entire $500,000 investment on the Petitioner's behalf. But we do not find the document persuasive. The Petitioner has not explained other evidence of record indicating that, after the petition's filing, he changed the source of his funds. His initial petition contained "Documents as evidence of Lawful Source of Funds," including a financial statement, income tax returns, and property

valuation documents regarding his own finances and assets. These materials indicated that the remaining $400,000 in investment funds would come from his own income and property, not from his uncle's assets. Also, although his uncle purportedly promised to donate the full investment amount on the Petitioner's behalf in December 2017, the initial filing in March 2018 omitted evidence of that promise. Rather, the Petitioner did not claim that his uncle was giving him the remaining investment funds until FOD notified him of evidentiary deficiencies in the source and path of the funds derived from his own income and property.

Our appellate decision detailed these inconsistencies. But the Petitioner's motion does not address them. These unexplained discrepancies cast doubt on his claim that, since before the petition's filing, he relied on his uncle to give him the entire $500,000 investment amount. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies).

The Petitioner further argues, that even if he intended to provide some of his own investment funds at the time of the petition's filing, he personally paid various immigration-related costs, including administrative fees to the regional center and filing and legal fees. Counsel states: "[T]he petitioner can still be right in stating that his source of funds are from his personal funds, as he used his personal funds to pay for these additional expenses in his EB-5 investment process."

The Form I-526, however, asked the Petitioner for "Your Sources of *Investment Capital*." (emphasis added). Also, regulations and case law require him to demonstrate the source and path of the required $500,000 amount invested in the hotel project. *See* 8 C.F.R. § 204.6(j); *Matter of Izummi*, 22 I&N Dec. at 194-95. Thus, the Petitioner's payment of other immigration-related expenses is irrelevant.

For the foregoing reasons, the Petitioner has not demonstrated that he lawfully obtained the investment funds he identified at the time of the petition's filing.

C. Investment of the Required Capital

Even if the Petitioner demonstrated his uncle's intent to give him the entire $500,000 investment amount at the time of the petition's filing, the Petitioner would not establish that he invested the necessary capital. An immigrant investor must show that they "ha[ve] invested or [are] actively in the process of investing the required amount of capital." 8 C.F.R. § 204.6(j)(2).

The promissory note from the Petitioner's uncle for the remaining $400,000 in investment funds does not meet the regulatory definition of "capital." Capital can include "indebtedness," like promissory notes. *See* 8 C.F.R. §§ 204.6(e), (j)(2)(v). But that indebtedness must be "secured by assets owned by the alien investor, provided that the alien investor is personally and primarily liable." 8 C.F.R. § 204.6(e); *see also Matter of Hsiung*, 22 I&N Dec. 201, 202 (BIA 1998) ("A promissory note can constitute 'capital' under 8 C.F.R. § 204.6(e) if the note is secured by assets owned by the petitioner.") The promissory note of the Petitioner's uncle does not meet the definition of capital because the Petitioner's assets do not secure the indebtedness, nor is the Petitioner personally and primarily liable. Thus, for EB-5 purposes, the note does not constitute capital.

For this additional reason, the Petitioner has not demonstrated investment of the minimum amount and the lawful source of funds.

D. Remaining Issues

Our decision regarding the lawfulness of the Petitioner's funds resolves these motions. We will therefore continue to reserve review of the petition's other denial grounds, including whether the Petitioner's investment would create the requisite number of jobs. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (per curiam) (holding that agencies need not make "purely advisory findings" on issues unnecessary to their ultimate decisions).

III. CONCLUSION

The Petitioner's motions do not establish his eligibility as an immigrant investor.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

NOTICE: Aliens who are not lawfully present, or who are otherwise inadmissible or deportable, may be subject to the commencement of removal proceedings under section 240 of the Act through the issuance of a Form I-862, Notice to Appear. Those proceedings may result in their removal from the United States and possible ineligibility for future visas or other immigration benefits.