U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26091037

Date: AUG. 26, 2024

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) (2018).[1] 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 that will benefit the U.S. economy and create at least 10 full-time positions for qualifying employees.

The Chief of the Immigrant Investor Program Office denied the petition on multiple grounds.[2] The Chief concluded that the record did not establish (1) that the required minimum amount of capital has been made available to the business most closely responsible for job creation, (2) that the Petitioner has complied with 8 C.F.R. § 204.6(g)(1) (multiple investors) by a preponderance of evidence, (3) that the funds invested by the Petitioner has been obtained through lawful means,[3] and (4) that [redacted] the new commercial enterprise (NCE), will create at least 10 full-time positions for qualifying employees.[4] The matter is now before us on appeal. 8 C.F.R. § 103.3.

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,

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[1] On March 15, 2022, President Joseph Biden signed the EB-5 Reform and Integrity Act of 2022, which made significant amendments to the EB-5 program. *See* Section 203(b)(5) of the Act, 8 U.S.C. § 1153(b)(5) (2022). As the Petitioner had filed his petition in 2018, the relevant law then in existence governs this appellate adjudication.

[2] The Chief had issued a notice of intent to deny the petition (NOID) and a denial decision in a case associated with another foreign national investor of the NCE. That investor responded to the NOID and subsequently filed a motion to reconsider and reopen the matter (MTR), and that investor presented additional evidence in support of the filings. The Chief incorporated the additional evidence into the record for the Petitioner's case, referring to the additional evidence as "interfiled" evidence. The Petitioner does not object to the inclusion of the interfiled materials.

[3] The Petitioner claims to have invested $500,000 in the NCE and alleges that at the time of filing his petition, the NCE was in a targeted employment area and, 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) (2018).

[4] The Chief's decision discusses evidence and filings separately, i.e., for each independent ground of denial, the decision first discusses evidence that the Petitioner had filed and then discusses "interfiled" evidence. The Chief should have considered the evidence in the record in its entirety when deciding whether the Petitioner has met each EB-5 eligibility requirement.

we will withdraw the Chief's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

A foreign national may be classified as an EB-5 immigrant investor if they invest the requisite amount of qualifying capital in an NCE. The regulation at 8 C.F.R. § 204.6(j)(2) (2018) provides that the foreign national investor must establish that they have invested or are actively in the process of investing the required amount of capital and must submit evidence verifying that they have placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. The precedent decision, *Matter of Izummi*, 22 I&N Dec. 169, 179 (Assoc. Comm'r 1998), explains that for an investor to establish that they have placed their investment funds at risk for the purpose of generating a return, the full amount of EB-5 money must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based.

The relevant regulation permits an NCE to have multiple investors, including those seeking and those not seeking EB-5 classification. In such cases, the regulation requires that the source(s) of all capital invested in the NCE is identified and all invested capital has been derived by lawful means. 8 C.F.R. § 204.6(g)(1) (2018).

Furthermore, an investor seeking EB-5 classification must demonstrate that their investment will benefit the U.S. economy and create at least 10 full-time jobs for qualifying employees. 8 C.F.R. § 204.6(j)(4). An NCE may have multiple investors each seeking EB-5 classification, provided that each investor has invested or is actively in the process of investing the required amount and that each individual investment results in the creation of at least 10 full-time positions for qualifying employees. 8 C.F.R. § 204.6(g)(1).

The regulation at 8 C.F.R. § 204.6(j)(4)(i) provides that to establish job creation, a petitioner must submit:

> (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
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> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.[5]

Prospective job creation must be demonstrated through submission of a comprehensive business plan. The precedent decision, *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998), specifies that to be comprehensive, a business plan must be sufficiently detailed to permit U.S. Citizenship and Immigration Services (USCIS) to draw reasonable inferences about the job-creation potential. Mere

[5] The two-year job creation period described in 8 C.F.R. § 204.6(j)(4)(i)(B) commences six months after the adjudication of the petition. 6 *USCIS Policy Manual* G.2(D)(5), https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-2.

conclusory assertions, however, do not enable USCIS to determine whether the job-creation projections are any more reliable than hopeful speculation. *Id.* Most importantly, the business plan must be credible. *Id.*

II. ANALYSIS

The Petitioner claims to be one of 99 investors who pooled their funds together to invest in the NCE, a business that offers for-hire vehicle services in [redacted] New York. On appeal, the Petitioner states that the NCE is managed by [redacted][6] and that the NCE continues to be "operational and ongoing."

A. Capital at Risk

The Chief concluded that the Petitioner failed to establish that he had placed at least $500,000 at risk for the purpose of generating a return on the capital, as required under 8 C.F.R. § 204.6(j)(2). The Chief based this finding, in part, on the low number of vehicles that the NCE purchased with EB-5 funds, stating that between January 2017 and May 2018, the NCE's total vehicle ownership increased from 410 to 447 while government records indicate that a total of approximately 36 EB-5 petitioners, including the Petitioner, had invested in the NCE for a total contribution of $18,000,000 in EB-5 investor funds. The Chief also discussed inconsistencies in the record concerning the NCE's use of EB-5 funds. Based on these reasons, a low number of vehicle acquisition and inconsistencies concerning the NCE's expenditures, the Chief concluded that the full amount of the Petitioner's as well as other foreign national investors' EB-5 funds had not been made available to the NCE, the business most closely responsible for job creation upon which the petition is based. *See Matter of Izummi*, 22 I&N Dec. at 179.

The Chief, however, has not adequately explained how *Matter of Izummi* supports the conclusion that the full amount of EB-5 funds had not been made available to the NCE. The case, *Matter of Izummi*, 22 I&N Dec. at 172-73, 177-79, involved a regional center[7] sponsored project where the NCE was funding a lending company that would in turn make micro-loans to small businesses and that lending company was the job creating entity. The NCE in *Matter of Izummi* took $30,000 from each EB-5 investment before remitting the funds to the lending company, which would deduct its expenses before putting the funds into the lending pool. *Matter of Izummi* held that USCIS "does not wish to encourage the creation of layer upon layer of 'holding companies' or 'parent companies,' with each business taking its cut and the ultimate employer seeing very little of the [investors'] money" for job creating purposes. *Id.* at 179.

The instant case does not involve a regional center sponsored project. Rather, it involves a project that relies on pooled investment from multiple foreign national investors. Significantly, the Petitioner asserts that bank documents in the record confirm the path of funds from his personal bank account to

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[6] The Petitioner states in his brief that [redacted] negotiated contracts for the NCE and that the owners of [redacted] were able to make personal guarantees, which the NCE could not. He further explains in his brief that the NCE is an operational project that operates on the supply side, supplying job creating assets, while [redacted] the manager, has the authority to manage the demand side.

[7] 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) (2018).

the project's escrow account. The Petitioner states that from the escrow account, 90% of the investors' funds flow into the NCE's operating account, with the remaining 10% scheduled to be released to the NCE upon the investor's Form I-526 approval. The Petitioner further argues that his and other foreign national investors' EB-5 funds were then disbursed for capital expenditures and operating expenses of the project, such as the NCE's operating, payroll, and vehicle expenses. As supporting evidence, the Petitioner points to bank records to substantiate his claim that he remitted his EB-5 investment to the escrow account, and the escrow account then remitted the funds, partially, to the NCE's operating account.

It appears that the Petitioner has satisfied concerns discussed in *Matter of Izummi* because he had made his funds available to the NCE, the business most closely responsible for job creation in this pooled investment case. *See id.*, 22 I&N Dec. at 179. The Chief has not sufficiently explained how *Matter of Izummi* supports the conclusion that the Petitioner failed to demonstrate that he had placed at least $500,000 at risk for the purpose of generating a return on the capital. *See* 8 C.F.R. § 204.6(j)(2).[8] *See* 8 C.F.R. § 103.3(a)(1)(i) (providing that when the Chief denies a petition, the Chief shall explain in writing the specific reasons for denial).

B. 8 C.F.R. § 204.6(g)(1) (Multiple Investors)

As an alternative ground for denial, the Chief concluded that the Petitioner had failed to establish the lawful source of all the funds invested in the NCE. *See* 8 C.F.R. § 204.6(g)(1). Specifically, the Chief discussed that the non-EB-5 funding for the NCE, including cash, assets, technology, and intellectual property, derives from an equity investment of $11 million. The Chief then determined that the Petitioner had not documented the lawful source of the $11 million in non-EB-5 investment.[9] The Chief's discussion of the non-EB-5 investment lacks specificities as required under 8 C.F.R. § 103.3(a)(1)(i).

The Chief also noted that the record included inconsistencies concerning whether the $11 million were invested in the NCE or in [redacted] The Chief then determined that the Petitioner did not resolve the inconsistencies with sufficient evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (stating that it is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence and that attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth in fact lies, will not suffice). The Chief, however, did not explain what evidence was reviewed and how the reviewed evidence supported the determination that the Petitioner had not resolved the inconsistencies. We note that the Petitioner points to the NCE's financial statements and bank statements to support his position that the $11 million were not credited to the NCE.

C. Job Creation

[8] The Chief raised valid concerns over the NCE's use of EB-5 funds. However, these concerns as relating to whether the NCE had used the funds in accordance with its business plans and other business documents are relevant in determining whether the business plans, including their job creation projections, are credible. *See Matter of Ho*, 22 I&N Dec. at 213.

[9] The Chief then repeated the same discussion, essentially verbatim, before concluding that the Petitioner had similarly not established the lawful source of his own EB-5 funds. The Chief has not sufficiently explained how concerns raised over non-EB-5 funds, referenced under 8 C.F.R. § 204.6(g)(1), could be imputed into concerns over the Petitioner's own EB-5 funds, referenced under 8 C.F.R. § 204.6(j).

As another alternative ground for denial, the Chief concluded that the Petitioner had not satisfied the job creation requirements under 8 C.F.R. § 204.6(g)(1) and (j)(4). There appears to be evidence in support of the Chief's adverse finding. Specifically, the Petitioner acknowledges in his brief that many of the jobs, including jobs for drivers that the NCE has created or intends to create, are independent contractor positions. The Petitioner cites section 274A(a)(4) of the Act, 8 U.S.C. § 1324a(a)(4); and 8 C.F.R. § 274a.5 to support his position that he could rely on independent contractor positions to satisfy the EB-5 job creation requirements.

The legal authorities that he has references are not EB-5 authorities; instead, they are a statute concerning unlawful employment of individuals without work authorization and a regulation concerning use of labor of individuals without work authorization. Relevant EB-5 regulation – 8 C.F.R. § 204.6(e) (2018) – on the other hand, provides that the definition of an employee shall not include independent contractors. In other words, under the regulation, foreign national investors, like the Petitioner, cannot rely on the creation of independent contractor positions to meet the EB-5 job creation requirements.

The Petitioner claims on appeal that it is industry practice to hire drivers as independent contractors and to issue to them Internal Revenue Service (IRS) Forms 1099-Misc (Miscellaneous Information), rather than Forms W-2 (Wage and Tax Statement).[10] To support his proposition, he offers evidence including: (1) a January 2023 statement from the NCE's Director of Operational Excellence, discussing the NCE's oversight and control over the drivers; (2) business and employment records listing the NCE's administrative staff and drivers as well as their work schedule; (3) a March 2023 statement from [redacted] discussing the NCE's decision to issue IRS Forms 1099-Misc, rather than Forms W-2, to its drivers; and (4) a March 2023 statement from [redacted] a professor of finance and data analytics at the [redacted] discussing the credibility of the NCE's business plans as relating to job creation. These documents, however, do not support the Petitioner's assertion that independent contractor positions, such as those for drivers that the NCE has created or intends to create, qualify as employees under the relevant EB-5 regulation. *See* 8 C.F.R. § 204.6(e) (defining "employee"). However, the Petitioner has presented many of these documents for the first time on appeal; as such, the Chief has not had an opportunity to review them.

In addition to the evidence we have discussed above, the Petitioner has presented other materials on appeal that he claims establishes eligibility for EB-5 classification and that the Chief has not had an opportunity to review. These materials include: (1) a January 2023 statement from the NCE's chief technology officer, explaining the NCE's need for workers, including its need to have two drivers for each vehicle it owns or leases; (2) documents confirming that the NCE is in operation; (3) service contracts that the Petitioner claims were executed by entities associated with the NCE; (4) a March 2023 preliminary report, discussing the NCE's job creation for 2015 and 2016 and referencing the NCE's IRS Forms W-2, tax filings, payroll documents, and other employment records; and (5) vehicle

[10] IRS explains that entities provide a Form 1099-Misc to independent contractors and Form W-2 to employees. *When Would I Provide a Form W-2 and a Form 1099 to the Same Person?*, available at https://www.irs.gov/government-entities/federal-state-local-governments/when-would-i-provide-a-form-w-2-and-a-form-1099-to-the-same-person (last accessed on June 17, 2024).

acquisition records, such as vehicle titles, lease agreements, and copies of checks, to verify the NCE's ownership or financial obligation of vehicles.[11]

D. The Securities and Exchange Commission Complaint

Additionally, approximately a year after the Chief issued the decision denying the Petitioner's petition, in [redacted] 2023, the U.S. Securities and Exchange Commission (SEC) filed a lawsuit in the United States District Court for the [redacted] charging the NCE, [redacted] and an individual who manages both entities with making fraudulent misrepresentations in securities offerings to investors seeking EB-5 classification.

According to the SEC's complaint, from 2014 to 2018, the NCE, [redacted] and the individual falsely told the NCE's investors that the NCE would be operated in a manner consistent with the requirements of the EB-5 visa program but failed to do so. The lawsuit also alleges that the two entities and the individual put key revenue-generating contracts in [redacted] name despite telling investors that the NCE would be the operating transportation business. The SEC further alleges that the individual used one investor's funds to pay a portion of a prior settlement between another one of his companies and the SEC. [redacted] SEC Press Release, [redacted] 2023, available at https://www.sec.gov/news/press-release/2023[redacted] (last accessed on August 9, 2024). The Chief should consider if the issues raised in the SEC litigation materially impact the Petitioner's eligibility.

III. CONCLUSION

In light of the pending SEC litigation, alleging that the NCE and [redacted] had committed fraud against foreign national investors, the deficiencies we have identified in this decision, as well as the Petitioner's submission of additional evidence on appeal that the Chief has not had an opportunity to review, we are remanding the matter to allow the Chief to consider all materials in the record and for the entry of a new decision.

ORDER: The Chief's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

[11] We note that most of the vehicle title documents do not list the NCE as the owner of the vehicles.