U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26329844

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, concluding that the record did not establish (1) that the Petitioner has complied with 8 C.F.R. § 204.6(g)(1) (multiple investors) by a preponderance of evidence, (2) that the funds invested by the Petitioner has been obtained through lawful means,[2] and (3) that [redacted] the new commercial enterprise (NCE), will create at least 10 full-time positions for qualifying employees. 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, we will withdraw the Chief's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

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

[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 her petition in 2018, the relevant law then in existence governs this appellate adjudication.

[2] The Petitioner claims to have invested $500,000 in the NCE and alleges that at the time of filing her 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).

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
>
> (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.[3]

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 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][4] and that the NCE continues to be "operational and ongoing."

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

[3] 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.

[4] The Petitioner states in her 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. She further explains in her 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.

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.[5] The Chief's discussion of the non-EB-5 investment lacks specificities as required under 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).

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 her position that the $11 million were not credited to the NCE.

B. Job Creation

As an 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 her 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 her position that she could rely on independent contractor positions to satisfy the EB-5 job creation requirements.

The legal authorities that she 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, specifically 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).[6] To support her proposition, she offers evidence

[5] The Chief then repeated the same discussion, essentially verbatim, before concluding that the Petitioner had similarly not established the lawful source of her 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).

[6] IRS explains that entities provide a Form 1099-Misc to independent contractors and Form W-2 to employees. *When*

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 she claims establishes her 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 years 2015 and 2016 and referencing the NCE's IRS Forms W-2, tax filings, payroll documents, and other employment records; and (5) vehicle acquisition records, such as vehicle titles, lease agreements, and copies of checks, to verify the NCE's ownership or financial obligation of vehicles.[7]

C. 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

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).

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

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.