U.S. Citizenship and Immigration Services

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

MATTER OF Y-Z-

DATE: AUG. 27, 2019

MOTION ON ADMINISTRATIVE APPEALS 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 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 and Immigration Services (USCIS) designated regional center. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, section 610, as amended.

The Chief of the Immigrant Investor Program Office denied the Form I-526, Immigrant Petition by Alien Entrepreneur, concluding that the record did not establish, as required, that [redacted], met the regulatory requirements of a new commercial enterprise (NCE), and that it would create the number of required jobs. He also found that the Petitioner had not invested the required minimum amount of capital, or was not actively in the process of doing so. We dismissed the Petitioner's appeal, finding that he had not established his eligibility for the benefit sought.

The Petitioner now files combined motions to reconsider and reopen the matter. On motion, he submits additional evidence and maintains that he has established eligibility for the classification.

Upon review, we will deny the motions.

## I. LAW

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). We do not consider new facts or evidence in a motion to reconsider.

A motion to reopen must state new facts and be supported by documentary evidence. 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.

## II. ANALYSIS

The Petitioner seeks to establish eligibility based upon his January 2015 investment into [redacted], the NCE. As noted above, in November 2017, the Chief denied the petition. In our decision dismissing the Petitioner's appeal, we found that the record did not support the Chief's determination that the Petitioner had not invested into a new commercial enterprise. We determined that the Petitioner had acquired a pre-existing business, [redacted], that satisfied the definition of new at 8 C.F.R. § 204.6(e). However, because he had purchased a business that already existed, he was consequently required to show that his investment had created, or was likely to create 10 qualifying jobs, in addition to those existing before acquisition. *See* 8 C.F.R. § 204.6(j)(4); *see also Matter of Soffici*, 22 I&N Dec. 158, 167-168. We found that the Petitioner failed to do so. Further, we concluded that he had materially misrepresented[1] the relationship between the NCE and the pre-existing business, and had not established the lawful source of funds used for his investment.

On motion, the Petitioner contends that the NCE employs a minimum of ten (10) qualifying employees and that he did not intentionally materially misrepresent the relationship between the NCE and the pre-existing business.[2] He also argues that his investment was derived from lawful sources.

### A. Motion to Reconsider

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 makes no argument that our decision was incorrect based on the evidence in the record or that it was based on an incorrect application of law and policy. Accordingly, Petitioner has failed to meet the applicable requirements for a motion to reconsider.

### B. Motion to Reopen

In support of his motion to reopen, the Petitioner provides new evidence related to job creation and the source of his investment.

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[1] The terms "fraud" and "misrepresentation" are not interchangeable. Unlike a finding of fraud, a finding of material misrepresentation does not require an intent to deceive or that the officer believes and acts upon the false representation. See Matter of Kai Hing Hui, 15 I&N Dec. 288 (BIA 1975). A finding of fraud requires a determination that the alien made a false representation of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the false representation must have been believed and acted upon by the officer. See Matter of G-G-, 7 I&N Dec. 161 (BIA 1956).

[2] On motion, the Petitioner does not contest our finding that he misrepresented this relationship. Rather, in an accompanying declaration, he states "[i]t was never [his] intention to misrepresent any material fact about [his] investment in [the NCE]." The Petitioner further declares that "[t]he initial plan to of [sic] acquisition of [redacted] was later withdrawn and my omission of this detail was an inadvertent mistake and not an intentional misrepresentation." The Petitioner submits no other new evidence. As this declaration does not contest our finding, and in fact affirms that the initial plan was to acquire an existing business, the Petitioner has not overcome the grounds for dismissal.

1. Job Creation

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, Forms 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.[3]

In our dismissal, we determined the Petitioner had not established, as required, that the NCE employed a minimum of ten (10) qualifying full-time employees,[4] noting both that we were unable to determine the number of individuals employed when the Petitioner acquired the entity, and that the record contained incomplete Forms I-9, Employment Eligibility Verification. *See* 8 C.F.R. § 204.6(j). On motion the Petitioner again asserts that the NCE employs a minimum of ten (10) qualifying employees and provides the missing portions of the forms, plus supporting documentation. The Petitioner also submits uncertified Forms I-941, Employer's Quarterly Federal Tax, and Forms DE-9, State of California Quarterly Contribution Return and Report of Wages, for the first and second quarters of 2018.

As discussed in our previous decision, we determined that at the time of filing the Petitioner owned DSI, a pre-existing business satisfying the definition of "new" at 8 C.F.R. § 204.6(e). Accordingly, we advised the Petitioner that he must demonstrate that the NCE would create ten qualifying positions, in addition to those existing at the time he took ownership of [5] Upon review of the record we determined that it lacked evidence demonstrating the number of persons employed when he acquired it and therefore found that that the Petitioner had not demonstrated the number of full-time positions he would need to maintain, in addition to the ten he must create. We advised the Petitioner that "[a]bsent this information we cannot determine that [the Petitioner] has met the requirements of 8 C.F.R. § 204.6(j)." On motion the Petitioner submits no new evidence demonstrating the number of individuals employed by at the time he acquired the business. Therefore, he has not established that he meets the requirements of 8 C.F.R. § 204.6(j)(4).

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[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. USCIS Policy Memorandum PM-602-0083, *EB-5 Adjudications Policy* 19 (May 30, 2013), https://www.uscis.gov/legal-resources/policy-memoranda; *see also* 6 *USCIS Policy Manual* G.2(D)(5), https://www.uscis.gov/policymanual/HTML/PolicyManual.html.

[4] *Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien. 8 C.F.R. § 204.6(e).

[5] *See Matter of Soffici*, 22 I&N Dec. 158, 167-168.

Additionally, in our prior decision we also found that the Petitioner did not establish that the NCE had created the requisite number of jobs beyond those which he was required to maintain, as the record contained incomplete Forms I-9, Employment Eligibility Verification. *See* 8 C.F.R. § 204.6(j). On motion the Petitioner asserts that [redacted] employs a minimum of ten (10) qualifying employees. As the Petitioner has not established his eligibility under 8 C.F.R. § 204.6(j)(4), we need not fully address this issue. However, we briefly note that the record does not support the Petitioner's assertion. Specifically, there are discrepancies between the information reported on the Forms I-9 and the supporting documentation provided on motion, as well as between the Forms I-9 and Forms DE-9. Because of these discrepancies, the record does not establish the number of full-time employees or establish that they satisfy the requirements of a "qualifying employee" set forth in 8 C.F.R. § 204.6(e). The Petitioner must resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). For these reasons, the evidence the Petitioner submits on motion does not demonstrate his eligibility for the benefit sought.

2. Source of Funds

In our previous decision, we found that the Petitioner had not established the lawful source of his invested funds. He indicated that he was gifted this investment by his parents and that it was derived from their accumulated earnings. While the record included income and employment verification for each of his parents, it did not include evidence demonstrating that the gifted funds came from their retained earnings.

On motion, the Petitioner submits a declaration from his mother stating that the series of wire transfer provided to him were a gift. While this document is translated, it is not accompanied by the translator's certification that the English language translation is complete and accurate, and that the translator is competent to translate from the foreign language into English, as required. 8 C.F.R. § 103.2(b)(3). Because the Petitioner did not submit a properly certified English language translation of the document, we cannot meaningfully determine whether the translated material is accurate and thus supports the Petitioner's claims. Beyond his mother's declaration, the Petitioner submits no other evidence to corroborate her claim that the gifted funds derived from his parents' retained earnings.

We also determined that the record lacked certified translations of the applications to transfer funds to the Petitioner. On motion, the Petitioner submits properly certified translations of these documents. However, for the reasons discussed above, he has not shown that these funds derived from lawful sources as required at 8 C.F.R. § 204.6(e). He therefore has not established his eligibility for the benefit sought.

## III. CONCLUSION

The Petitioner has not met the filing requirements for a motion. 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. His motion to reconsider the matter will therefore be denied. In addition, the documentation the Petitioner presents on motion does not demonstrate his eligibility for the classification. His motion to reopen the proceeding will therefore be denied.

**ORDER:** The motion to reconsider is denied.

**FURTHER ORDER:** The motion to reopen is denied.

Cite as *Matter of Y-Z-*, ID# 2837184 (AAO Aug. 27, 2019)