U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29712807

Date: DEC. 18, 2024

Appeal of 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) (2019).[1] This fifth preference (EB-5) classification makes immigrant visas available to noncitizens 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 Investor Program Office denied the petition, concluding that the record did not establish that the required amount of capital has been made available to the business most closely responsible for job creation, that the new commercial enterprise will create at least 10 full-time positions for qualifying employees, or that the Petitioner has demonstrated indirect job creation through reasonable methodologies. 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

A noncitizen may be classified as an immigrant investor if they invest the requisite amount of qualifying capital in an NCE. A noncitizen may invest the required funds directly in an NCE or through a regional center, as the Petitioner has done in this case. Regional centers can pool immigrant

[1] On March 15, 2022, President Joseph Biden signed the EB-5 Reform and Integrity Act, which made significant amendments to the EB-5 program, including the designation of targeted employment areas (TEA) and the minimum investment amounts. *See* Section 203(b)(5) of the Act, 8 U.S.C. § 1153(b)(5) (2022). As the Petitioner had filed his petition in November 2017, the relevant law then in existence governs this appellate adjudication.

(and other) investor funds for qualifying projects that create jobs directly or indirectly. 8 C.F.R. § 204.6(j)(4)(iii) (2019).

A noncitizen must demonstrate that they have placed their own capital at risk in the NCE. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998); *Matter of Soffici*, 22 I&N Dec. 158, 165 n.3 (Assoc. Comm'r 1998) (stating that "[a] petitioner must . . . establish, pursuant to 8 C.F.R. § 204.6(e), that funds invested are [their] own"). In addition, the noncitizen must show that their invested capital did not derive, directly or indirectly, from unlawful means. 8 C.F.R. § 204.6(e). To show the lawful source of the funds, an investor must submit evidence such as foreign business and tax records or documentation identifying sources of the capital. *See* 8 C.F.R. § 204.6(j)(3). Bank letters or statements corroborating the deposit of funds by themselves are insufficient to demonstrate their lawful source. *Matter of Ho*, 22 I&N Dec. at 210-11; *Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998). The record must trace the path of the funds back to a lawful source.[2] *Matter of Ho*, 22 I&N Dec. at 210-11; *Matter of Izummi*, 22 I&N Dec. at 195.

As required by 8 C.F.R. § 204.6(j)(4)(i), the petition must establish that the investment of the required amount of capital in a new commercial enterprise will create full-time positions for at least 10 qualifying employees within two years. *See also* 8 U.S.C. § 1153(b)(5)(A)(ii). For purposes of the Form I-526 adjudication and the job creation requirements, the two-year period described in 8 C.F.R. § 204.6(j)(4)(i)(B) is deemed to commence six months after the adjudication of the Form I-526.

According to 8 C.F.R. § 204.6(j)(4)(i), to show that a new commercial enterprise will create full-time positions for at least 10 qualifying employees within two years, the petition must be accompanied by:

> (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 fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

A petition is not required to demonstrate that 10 full-time positions for qualifying employees have already been created by the commercial enterprise. However, where the jobs have not already been created, the petition must include a comprehensive business plan demonstrating the need for at least 10 employees within the next two years. *Matter of Ho* explained that a comprehensive business plan must be sufficiently detailed to permit USCIS to draw reasonable inferences about job-creation potential. *Matter of Ho*, 22 I&N Dec. 206, at 213. Additionally, *Matter of Ho* held that a "comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives." *Id.*

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[2] These requirements "serve a valid government interest; i.e., to confirm that the funds utilized in the [EB-5] program are not of suspect origin." *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Cal. 2001) (holding that a petitioner had not established the lawful source of her funds because, in part, she did not designate the nature of all of her employment or submit five years of tax returns), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

Under the statute and regulations, petitioners investing in a new commercial enterprise within a regional center may rely on economic methodologies to demonstrate that the investment will create indirect jobs as a result of the investment in the NCE, but such methodologies must be reasonable. *See* Appropriations Act at § 610; 8 C.F.R. §§ 204.6(e), (j)(4)(iii), (m)(7)(ii). The Petitioner must provide sufficient evidence for USCIS to determine whether methodologies used are reasonable.

Indirect jobs are those that are held outside of the new commercial enterprise but are created as a result of the new commercial enterprise. They include jobs that may be considered "economically direct," such as jobs created directly by a job-creating entity that is not also the new commercial enterprise. They also include economically indirect jobs, such as those further down the supply chain, or induced jobs created through increased spending.

II. ANALYSIS

The Petitioner asserts eligibility based on an investment in [redacted] pursuant to the Immigrant Investor Program.[3] On pages 5 and 6 of his petition the Petitioner indicated that he has invested $500,000[4] into [redacted] the new commercial enterprise (NCE). According to the Confidential Private Placement Memorandum (PPM), the NCE proposed to pool up to $23,000,000 from up to 46 immigrant investors to finance construction of a 300-room hotel with a casino and an amusement park in [redacted] Mississippi.

The Chief issued a request for evidence (RFE), identifying multiple eligibility requirements that were not sufficiently established. Specifically, the Chief requested evidence that the Petitioner made a qualifying investment and that the NCE was operating in a TEA.

Following the Petitioner's response, the Chief concluded that the Petitioner did not establish that the EB-5 capital is being made available to the business(es) most closely responsible for job creation. Upon reviewing the business plans in the record, the Chief also determined that the business plans were not *Matter of Ho* compliant because the record lacked evidence that the construction of the hotel/casino had started and that the projected jobs would be created. The Chief further determined that the Petitioner did not establish that economic methodologies used to demonstrate the creation of indirect jobs were reasonable. In making these determinations, the Chief relied on "publicly available sources" that construction progress on the project was only partially complete, with no progress on construction of the hotel/casino. However, the Chief did not identify these sources or meaningfully discuss the derogatory information they revealed. Further, the Chief did not address the insufficiency of the evidence supporting these eligibility requirements in the RFE, but rather raised these concerns for the first time in the denial.

If a decision will be adverse to a petitioner and is based on derogatory information considered by U.S. Citizenship and Immigration Services (USCIS) and of which the petitioner is unaware, the petitioner must be advised of this fact and offered an opportunity to rebut the information and present information on its behalf before a decision is rendered. 8 C.F.R. § 103.2(b)(16)(i). Here, the RFE did not request

[3] *See* Appropriations Act at § 610.

[4] The Petitioner filed his petition in 2017 and asserted that the NCE would be principally doing business within a TEA. Therefore, the requisite amount of capital investment was downwardly adjusted from $1,000,000 to $500,000. *See* 8 C.F.R. § 204.6(f)(2) (2015).

additional evidence regarding job creation. Nor did the RFE mention the "publicly available sources" relied on in the decision, or any derogatory information regarding the progress of the construction project. As a result, the RFE did not provide adequate notice of the derogatory information that formed the basis of the Chief's decision and did not provide a meaningful opportunity for the Petitioner to address it.

Accordingly, we will withdraw the Chief's decision and remand the matter for further review, issuance of a new RFE, and entry of a new decision. We are remanding this matter to ensure that the Petitioner has an opportunity to rebut the derogatory information that resulted in the Chief's denial.

III. CONCLUSION

The Chief's decision is withdrawn as she did not provide the Petitioner with adequate opportunity to rebut derogatory information from outside the record of proceeding prior to making a decision, as required by 8 C.F.R. § 103.2(b)(16)(i). On remand, the Chief should consider all evidence already submitted, including the evidence and claims submitted on appeal, issue a new RFE providing adequate notice of any derogatory information considered, and enter 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.