U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 05169419

Date: FEB. 25, 2020

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). 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 (NCE) that will benefit the United States economy and create at least 10 full-time positions for qualifying employees. An immigrant investor may invest the required funds directly in a NCE, or through a "regional center."[1]

The Chief of the Immigrant Investor Program Office denied the petition, concluding that the record did not establish, as required, that the Petitioner's investment into the NCE would create at least 10 full-time jobs. Additionally, the Chief determined that the NCE's agreement to undergo a reverse merger after the time of filing Form I-526 constituted an impermissible material change. On appeal, the Petitioner provides a brief as well as additional exhibits, and asserts that the Chief erred in reaching her decision and that the instant petition establishes her eligibility for the benefit sought.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Upon *de novo* review, we will dismiss the appeal.

I. LAW

A foreign national may be classified as an immigrant investor if he or she invests the requisite amount of qualifying capital in a NCE. The foreign national must show that his or her investment will benefit the United States economy and create at least 10 full-time jobs for qualifying employees. An immigrant investor may invest the required funds directly in the NCE, as the Petitioner has done in this case. 8 C.F.R. § 204.6(j)(4)(iii). For a new commercial enterprise not located within a regional center, the full-time positions must be created directly by the new commercial enterprise to be counted.

[1] 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).

This means that the new commercial enterprise (or its wholly owned subsidiaries) must itself be the employer of the qualifying employees.[2]

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
>
> (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]

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products or services, and its objectives. *Matter of Ho*, 22 I&N Dec. 206, 210 (Assoc. Comm'r 1998). Elaborating on the contents of an acceptable business plan, *Ho*, 22 I&N Dec. at 213, states that the plan should contain a market analysis, the pertinent processes and suppliers, marketing strategy, organizational structure, personnel's experience, staffing requirements, timetable for hiring, job descriptions, and projections of sales, costs, and income. The decision concludes: "Most importantly, the business plan must be credible." *Id.*

In addition, when the new commercial enterprise is owned by other persons not seeking classification as an immigrant investor, the petitioner must identify the source(s) of all capital invested and show all invested capital has been derived from lawful means. 8 C.F.R. § 204.6(g)(1). 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. 206, 210-11 (Assoc. Comm'r 1998); *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.[4] *Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195.

II. ANALYSIS

In this petition, filed on October 3, 2016, the Petitioner seeks classification as an immigrant investor based upon her $500,000 investment into [redacted] (the NCE) in March 2016. The

---

[2] 8 C.F.R. § 204.6(e). USCIS Policy Memorandum PM-602-0083, *supra*, at 18; *6 USCIS Policy Manual, supra,* at G.2(D)(4).

[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] 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).

NCE is not affiliated with a regional center, and intends to create direct jobs from the manufacturing and wholesale distribution of Chinese dim sum foods through [redacted] and other businesses.

The Chief issued a denial, finding that the Petitioner had not shown, as required, that the NCE will create the required number of jobs and that the reverse merger was an impermissible material change in the petition. On appeal, the Petitioner argues that the NCE is properly creating jobs and the reverse merger with [redacted] was simply an inexpensive method to increase shareholder stock value and to raise additional investment funds.

A. Job Creation

The Petitioner provided a 2016 business plan, an updated 2018 business plan, purchase orders and invoices, as well as tax records and Forms I-9, Employment Eligibility Verification. In determining that the Petitioner had not established that the NCE would create the required number of jobs, the Chief concluded that the updated business plan was not credible, and that the record did not establish that a sufficient number of jobs would be created. Regarding the credibility of the plan, she found that while the business plan indicated the NCE entered into an agreement with [redacted] to sell fresh Dim Sum samplers, the submitted purchase orders were not sufficient to establish an ongoing agreement with [redacted] or other businesses. The Chief further found that the Petitioner did not provide documentary evidence to support the assertions in the business plan that the NCE would use established distributors to sell and distribute its products and that the NCE entered into a marketing agreement with a professional baseball team.

On appeal, the Petitioner asserts, through a revised 2018 business plan, that the projected job creation will be realized. The Petitioner indicates in the appellate brief that the NCE has expanded and, while potential purchasers identified in the original business plan have not made purchases, others have since made purchases. The revised business plan states that "[t]he operation of the production facility is anticipated to grow to a $25 million per year enterprise that will create 125 new jobs within 5 years... and have a significant economic impact of the overall job market in the TEA." However, the record does not support the Petitioner's claims regarding either the NCE's financial growth or its concomitant need for project increases in employment. The revised 2018 business plan indicates that its financial projections are based on the assumption that [redacted] will "roll out our productions into all their stores in all three divisions and each store will sell a minimum of $1,000 per week of product." Furthermore, it assumes that 300 [redacted] stores will be retailing their products by the end of fiscal year 2017.

The Petitioner has not provided any new documentary evidence to support these assertions; rather she re-submitted the same purchase orders provided in the original RFE response. The purchase orders are sporadic, spread out over years, and are not indicative of ongoing purchases that support the financial projections set out in the revised 2018 business plan. Without support for the sales, cost, and income projections and the bases therefor, the business plan is neither comprehensive nor credible. *See Ho*, 22 I&N Dec. at 213.

In addition, we find that the Petitioner has not demonstrated the NCE already created ten full-time jobs[5] or hired qualified employees.[6] In order to establish the NCE has already hired ten qualifying employees, a petitioner must submit: "[d]ocumentation 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." 8 C.F.R. § 204.6(j)(4)(i)(A). On appeal, the Petitioner reasserts through the revised 2018 business plan that the NCE has already hired 156 employees, but offers no new documentary evidence to demonstrate the hires are qualifying employees. The Petitioner previously submitted tax records, fifteen Forms I-9, and the list of 156 employees. However, as the Chief noted in her denial, this evidence does not show when the employees were hired,[7] whether the employees are qualifying, and whether the jobs are full-time. For these reasons, the Petitioner has not demonstrated the operational job creation will result in a sufficient number of qualifying jobs, as required. *See* 8 C.F.R. § 204.6(j)(4)(i).

B. Other Issues

In the decision denying the petition, the Chief also concluded that the Petitioner had made impermissible material changes to her petition. In light of our discussion and reasons above in support of our dismissal of the Petitioner's appeal, we will not address this additional ground of denial.

III. CONCLUSION

Based on the reasons stated above, we conclude that the Petitioner has not established, as required, that the entity most closely responsible for job creation will create at least 10 qualifying positions. She therefore has not demonstrated eligibility for the benefit sought.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has not been met.

ORDER: The appeal is dismissed.

---

[5] Full-time employment means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week. 8 C.F.R. § 204.6(e).

[6] A qualified employee is defined as "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 investor, the alien investor's spouse, sons, or daughters, or any nonimmigrant alien." 8 C.F.R. § 204.6(e).

[7] While not addressed by the Chief in her decision, we also note that the Petitioner invested in a pre-existing company but did not demonstrate the base level of employment at the time of her investment. Specifically, the record lacks evidence demonstrating the pre-acquisition level of employment and that the Petitioner's investment either has created or will create ten full-time positions. *See Matter of Soffici*, 22 I&N Dec. 158, 167-68 (Assoc. Comm'r 1998).