U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32851060

Date: JAN. 21, 2025

Motion on Administrative Appeals 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 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 U.S. economy and create at least 10 full-time positions for qualifying employees. Foreign nationals may invest in a project associated with a U.S. Citizenship and Immigration Services (USCIS) designated regional center. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, 106 Stat. 1828 (1992), section 610, as amended by section 575 of Pub. L. No. 114-113 (2015).

The Chief of the Immigrant Investor Program Office denied the petition, concluding that the record did not establish that [redacted] (NCE) will create at least 10 full-time positions for qualifying employees. We dismissed a subsequent appeal and two subsequent motions to reopen and reconsider. The matter is now before us again on the third motions to reopen and reconsider.

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). Upon review, we will dismiss the motions.

I. LAW

A motion to reopen must state new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome).

A motion to reconsider must establish that our prior 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). Our review on motion is limited to reviewing our

latest decision. 8 C.F.R. § 103.5(a)(1)(ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit.

II. ANALYSIS

A review of any motion is narrowed to the basis for the prior adverse decision. We will examine any new facts and arguments to the extent that they pertain to our most recent decision – the dismissal of motions to reopen and reconsider. As such, our analysis for these motions is limited to the following: (1) whether we erred in dismissing the Petitioner's prior motion to reopen, concluding that she has not stated new facts demonstrating her eligibility for the visa classification or supported the new facts with documentary evidence and (2) whether we erred in dismissing the Petitioner's prior motion to reconsider, concluding that she has not shown that our prior decision was based on an incorrect application of law or policy and that it was incorrect based on the evidence in the record at the time of the decision.

We incorporate our prior decision by reference and will repeat only certain facts and evidence as necessary to address the Petitioner's claims on motion. While we may not address each piece of evidence individually, we have reviewed and considered each one.

A. Motion to Reopen

Initially, we note that motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial based on newly discovered evidence. *INS v. Doherty,* 502 U.S. 314, 323, (1992) (citing *INS v. Abudu,* 485 U.S. 94, 108 (1988)); *see also Selimi v. Ashcroft,* 360 F.3d 736, 739 (7th Cir. 2004). There is a strong public interest in bringing proceedings to a close as promptly as is consistent with giving both parties a fair opportunity to develop and present their respective cases. *INS v. Abudu,* 485 U.S. at 107.

Based on its discretion, USCIS "has some latitude in deciding when to reopen a case" and "should have the right to be restrictive." *Id.* at 108. Granting motions too freely could permit endless delay when noncitizens continuously produce new facts to establish eligibility, which could result in needlessly wasting time attending to filing requests. *See generally id.* The new facts must possess such significance that, "if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *Matter of Coelho,* 20 I&N Dec. at 473; *see also Maatougui v. Holder,* 738 F.3d 1230, 1239-40 (10th Cir. 2013). Therefore, a party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu,* 485 U.S. at 110. With the current motion, the Petitioner has not met this burden.

In our prior motion decision, we stated that the Petitioner submitted as new evidence an EB-5 Supporting Letter Business Analysis, which provides the same project costs and funding figures as those provided in the updated November 2017 business plan submitted on appeal and reiterates the unforeseen delays involving the project and measures taken to address those issues. The Petitioner also indicated that the [redacted] has filed a lawsuit against [redacted][1] demanding the payment of a $16,000,000 debt and placed [redacted] assets in

[1] Limited Partnership Agreement of [redacted] (NCE), dated November 2014, identifies [redacted] as the general partner of the NCE.

receivership, but that [redacted] planned to sell part of its assets to resolve the lawsuit and would then carry out the project construction without delay. We concluded that in light of the major delays associated with this project and the lack of documentary evidence indicating that the lawsuit filed by the [redacted] is likely to be resolved, the record was insufficient to establish that the NCE will likely create the necessary number of jobs within the two-year period. *See* 8 C.F.R. § 204.6(j)(4)(i)(B); *see also* 8 C.F.R. § 204.6(g) (providing that each individual investor's investment must result in the creation of full-time positions for at least 10 qualifying employees).

The Petitioner now offer as new evidence a Job Creation Memo of the [redacted] prepared by [redacted] dated May 2019 (2019 Job Creation Memo), which updates the Job Creation Memo of the [redacted] prepared by [redacted] in December 2017 (2017 Job Creation Memo). She claims that additional job creating expenditures were not included in the 2017 Job Creation Memo and that if such additional expenditures have been made, additional jobs would have been created. The 2017 Job Creation Memo asserts that from January 2012 to January 2017, $15,668,190 were spent on construction, and based on the construction expenditures, the [redacted] created 105.6 new jobs. The 2019 Job Creation Memo claims that from January 2012 to January 2017, $17,251,095 were spent on construction, and based on the construction expenditures, the project created 115.9 new jobs. The Petitioner contends that there was construction activity during 2012 to 2016 and that because 115.9 jobs were created between January 2012 to January 2017, deference should be accorded to the Petitioner. She further argues that the 2019 Job Creation Memo demonstrates that the project is viable and will create hundreds of new jobs.

Both the 2019 Job Creation Memo and the 2017 Job Creation Memo contain the same ledger of expenses and copies of the same cancelled checks. The Petitioner does not clearly identify which expenditures were not included in the 2017 Job Creation Memo to substantiate the new construction expenditures of $17,251,095. Moreover, in our prior appellate decision, we discussed the reasons for our determination that the Petitioner has not presented a comprehensive or credible business plan showing that the NCE will create full-time positions for at least 10 qualifying employees. *See* 8 C.F.R. § 204.6(j)(4)(i)(B); *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). Because the business plan was found not comprehensive and credible, we now determine that the economic inputs used from the business plan are not reliable for demonstrating that the requisite number of jobs will be created. *See* 8 C.F.R. §§ 204.6(j)(4)(iii), (m)(7)(ii). Although the Petitioner offers additional evidence in support of the motion to reopen, the Petitioner has not established eligibility for the immigrant investor visa classification because the 2019 Job Creation Memo does not support that the Petitioner meets the job creation requirements. *See Matter of Coelho*, 20 I&N Dec. at 473 (requiring that new evidence have the potential to change the outcome).

The scope of a motion is limited to "the prior decision" and "the latest decision in the proceeding." 8 C.F.R. § 103.5(a)(1)(i), (ii). Therefore, we will only consider new evidence to the extent that it pertains to our latest decision dismissing the motion to reopen. Here, the Petitioner has not provided new facts to establish that we erred in dismissing the prior motion. *See* 8 C.F.R. § 103.5(a)(2). Accordingly, we conclude that the Petitioner has not shown proper cause for reopening the proceeding.

B. Motion to Reconsider

As indicated above, to have established merit for reconsideration of our latest decision, a petitioner must both state the reasons why they believe the most recent decision was based on an incorrect application of law or policy and specifically cite laws, regulations, precedent decisions, or binding policies that they believe we misapplied in that prior decision. Thus, to prevail in her motion to reconsider, the Petitioner cannot merely disagree with our conclusions but rather must demonstrate how we erred as a matter of law or policy in that immediate prior decision. *See Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006) (stating that a motion to reconsider is not a process by which the party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision).

In our prior motion decision, we stated that the Petitioner has not established that we erred in declining to defer to USCIS' previous favorable adjudications related to the NCE because the previous approvals of the petitions relied on earlier versions of the project timeline that are materially different from the Petitioner's submitted project timeline. We also determined the Petitioner's claim that the project costs have now been reconciled was not relevant to our decision because a motion to reconsider must show that the prior decision was incorrect based on the evidence in the record at the time of the decision. *See* 8 C.F.R. § 103.5(a)(3).

The Petitioner now contends that the denial of her petition was based upon errors of both fact and law, that USCIS has ignored the RIMS II model in assessing whether the business plans are comprehensive or credible, and that we erred or abused our discretion by deciding the issue of the credibility and comprehensiveness of the business plan without considering the methodology applicable to this matter. She also claims that the denial decision was in error regarding deference because deference should be accorded given the fact that approximately 78 investors who invested in the NCE have had their petitions approved.

First, we are not required to approve petitions where eligibility has not been demonstrated merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988). Furthermore, USCIS does not defer to a previously favorable decision in later proceedings when the underlying facts upon which a favorable decision was made have materially changed, there is evidence of fraud or misrepresentation in the record of proceeding, or the previously favorable decision is determined to be legally deficient. *See generally 6 USCIS Policy Manual* G.3(A)(2), https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-3.

In our prior appellate decision, we determined that facts relevant to the adjudication materially changed between the approvals of the earlier petitions and the instant adjudication such that affording deference was not warranted.[2] We explained that a business plan must show that job creation will occur within two years, making the timeline material to determining deference. *See* 8 C.F.R. § 204.6(j)(4)(i)(B). We found that the NCE has modified its project timeline, including completion date, multiple times. We noted that the previous approvals were based on a different set of facts – including the earlier versions of the project timeline – than those before us and, therefore, determined this case did not warrant deference.

[2] A change in fact is material if the changed circumstances would have a natural tendency to influence or are predictably capable of affecting the decision. *See Kungys v. United States*, 485 U.S. 759, 770-72 (1988).

The Petitioner does not provide the reasons why she believes our prior motion decision dismissing her prior motion to reopen was based on an incorrect application of law or policy. Nor does she cite laws, regulations, precedent decisions, or binding policies to support that we erred in dismissing the prior motion. Likewise, the Petitioner's brief in support of the current motion lacks any cogent argument as to how we misapplied the law or policy in dismissing her prior motion to reopen.

The scope of a motion is limited to "the prior decision" and "the latest decision in the proceeding." 8 C.F.R. § 103.5(a)(1)(i), (ii). The Petitioner's contentions in her current motion merely reargue facts and issues we have already considered in our previous decisions. *See Matter of O-S-G-*, 24 I&N Dec. at 58 (stating that a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision). The Petitioner has not shown that our prior decision contains errors of law or policy or that the decision was incorrect based on the record at the time of that decision. *See* 8 C.F.R. § 103.5(a)(3). Therefore, we determine that the instant motion does not meet the requirements of a motion to reconsider.

III. CONCLUSION

On motion to reopen, the Petitioner has not provided new facts supported by affidavits or other documentary evidence to establish that we erred in dismissing her prior motion to reopen. Because the Petitioner has not established new facts that would warrant reopening of the proceeding, we have no basis to reopen our prior decision. On motion to reconsider, the Petitioner has not established that our previous decision was based on an incorrect application of law or policy at the time we issued our prior decision. Accordingly, the motions will be dismissed. *See* 8 C.F.R. § 103.5(a)(4). We will not re-adjudicate the petition anew, and the underlying petition remains denied.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.