U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 05531880

Date: JAN. 22, 2021

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

Form I-924, Application for Regional Center Designation Under the Immigrant Investor Program

In 1990, Congress established the EB-5 program[1] to promote economic growth in the United States through foreign investment. *See* Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5). Foreign national investors who comply with the program's requirements first receive conditional status, followed by the opportunity for the removal of conditions and permanent resident status.[2] Investors may fund their own projects, or invest through a United States Citizenship and Immigration Services (USCIS) designated regional center. *See* Section 610(a) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act (the "Appropriations Act"), 1993, Pub. L. No. 102-395, 106 Stat. 1828, 1874 (Oct. 6, 1992), as amended.

USCIS designated the Appellant as a regional center to participate in the program in March 2014. The Chief of the Immigrant Investor Program Office issued a notice of intent to terminate (NOIT) the Appellant's designation as a regional center in May 2017, and then, after the Appellant failed to respond to the NOIT, terminated the Appellant's designation in September 2017, finding it no longer served the purpose of promoting economic growth. *See* 8 C.F.R. § 204.6(m)(6). In December 2017, the Appellant filed a motion to reopen the termination proceedings, which the Chief dismissed.

On appeal, the Appellant provides additional evidence and requests reinstatement of the regional center designation. It asserts that its managers and principals never received the NOIT and the 30 day time period for responding[3] should have been subject to equitable tolling.

Upon *de novo* review, we will dismiss the appeal.

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[1] The EB-5 program, as it is commonly called, issues employment-based fifth preference visas to qualified foreign national investors.

[2] A foreign national investor files a Form I-526, Immigrant Petition by Alien Entrepreneur, attesting that he or she meets the criteria for conditional resident status, which includes showing that his or her investment (at least $500,000 or $1,000,000, depending on the geographic area) creates at least 10 jobs for qualified United States workers. After two years, the investor may file a Form I-829, Petition by Entrepreneur to Remove Conditions on Permanent Resident Status, which, if granted, affords the investor full lawful permanent resident status in the United States. As part of the petition, the investor must show that his or her initial investment is still creating the requisite number of qualifying jobs.

[3] The regional center will be provided 30 days from receipt of the notice of intent to terminate to rebut the ground or grounds stated in the notice of intent to terminate. 8 C.F.R. § 204.6(m)(6)(iv).

I. LAW

Any motion to reopen a proceeding before the Service filed by an Appellant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the Appellant or petitioner. 8 C.F.R. § 103.5(a)(1)(i).

II. ANALYSIS

USCIS granted the Appellant regional center designation based upon an actual project with a Form I-526 exemplar.[4] The Appellant filed three Forms I-924A, Annual Certification of Regional Center, from 2014 to 2016 indicating the Appellant did not have any EB-5 capital investment or job creation to report. In March 2017, the Chief issued a NOIT, finding that the Appellant did not appear to continue to serve the purpose of promoting economic growth. The Chief terminated the regional center designation in September 2017, after the Appellant failed to respond to the NOIT but provided the Appellant with 33 days to file a motion or appeal on the decision.

The Appellant filed an untimely motion to reopen the decision in December 2017. It contended that the managers and principals of the regional center never received the NOIT and therefore the 33 day deadline should have been tolled. In support, the Appellant provided affidavits from [redacted] and [redacted] co-managers of the regional center. The affidavits identified the Appellant's mailing address, which was also [redacted]'s residential address. Both managers indicated they never received the NOIT and only learned of the Appellant's termination when informed by a third party on November 30, 2017.

The Chief dismissed the motion to reopen stating that "USCIS records show that both the NOIT and the notice of termination (NOT) were sent to the Appellant's address of record and there is no evidence in the record showing that either of those notices was returned as undeliverable" and noted that the Appellant did not provide any evidence of error on the part of USCIS and therefore did not establish that the delay in filing the motion to reopen was reasonable or beyond the control of the Appellant. Additionally, the Chief dismissed the motion to reopen for failure to state new facts.[5]

The sole issue before us is whether the Appellant's untimely motion to reopen the termination of its regional center designation was properly dismissed. We find that it was.

The Appellant argues they did not receive either the NOIT or NOT because they were marketing the regional center to potential foreign investors, and that therefore they should be given the opportunity to provide sufficient evidence to overcome the NOIT under the doctrine of equitable tolling. It cites

[4] To demonstrate that the regional center will promote economic growth, an Appellant may submit a proposal for a hypothetical or actual project. An "actual project" including a Form I-526 immigrant investor exemplar petition require more details than a hypothetical or actual project submitted without exemplar. 6 *USCIS Policy Manual* G.6, https://www.uscis.gov/policymanual/HTML/PolicyManual.html; *see also* USCIS Policy Memorandum PM-602-0083, *EB-5 Adjudications Policy* 14 n.2 (May 30, 2013), https://www.uscis.gov/laws/policy-memoranda.

[5] A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2).

to *Socop–Gonzalez v. INS*, 272 F.3d 1176, 1193 (9th Cir.2001) for the proposition that equitable tolling should apply since it was ignorant of the filing deadline due to circumstances beyond its control.

However, the record does not support the Appellant's contention. USCIS records demonstrate that the notice was mailed to the Appellant's address of record on September 25, 2017. While both [redacted] and [redacted] state they did not receive either notice because they were out of the country for an extended period of time, they do not provide any information on what procedures they had established to ensure they timely received correspondence while they were abroad. As such, the Appellant has not established that the circumstances that led to their ignorance of the filing deadline were beyond its control. Therefore, it has not shown that equitable tolling applies, based on the cases it relies on, nor that the late filing should have been excused, per 8 C.F.R. § 103.5(a)(1)(i).

The Appellant argues that the Constitution's Due Process Clause required USCIS to afford the regional center notice of the intention to terminate the regional center as well as an opportunity to respond to the NOIT. Specifically, the Appellant states that "as notice was never received, for whatever reason, there was nothing to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections." USCIS administers the EB-5 program pursuant to statutory and regulatory authorities, and the Appellant does not argue that a specific provision of the EB-5 statute or regulations is unconstitutional. To the extent that the Appellant's due process argument had been grounded in the constitutionality of the EB-5 statute and regulations, we lack jurisdiction to rule on the constitutionality of laws enacted by Congress or of regulations promulgated by DHS. *See, e.g.*, *Matter of Fuentes-Campos*, 21 I&N Dec. 905, 912 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992). Therefore, we will consider the Appellants's process concerns as they relate to whether USCIS complied with the applicable statute and regulations.

We find that USCIS complied with the relevant regulations and did not violate the Appellant's procedural due process requirements.[6] In this case, USCIS was required to issue a NOIT to the Appellant specifying that USCIS determined the regional center no longer served the purpose of promoting economic growth and allow the Appellant thirty days to rebut the grounds stated in the NOIT. *See* 8 C.F.R. § 204.6(m)(6)(ii)-(iii). USCIS was also required to notify the Appellant of the final decision and state the reasons for termination. *See* 8 C.F.R. § 204.6(m)(6)(v). The Appellant argues they were never given notice because they never received the NOIT or NOT while they were marketing the regional center project to investors in India and "spent considerable time and money marketing the project to that nationality." The affidavits submitted by the Appellant indicate it did not receive the notices but do not allege any error or wrongdoing on the part of USCIS. However, the Appellant's failure to receive the notices while marketing the project to other investors does not indicate that USCIS failed to comply with the applicable statue and regulations. The record shows USCIS issued the NOIT and NOT to the Appellant's address of record and the NOT was sent to the Appellant over 120 days after the NOIT. In this case, the Appellant was given sufficient notice of the grounds for termination to satisfy the agency's procedural due process requirements.

[6] While the Appellant argues its due process rights were violated under the 14th Amendment to the U.S. Constitution, we will analyze its concerns under the procedural due process requirements as provided under the 5th Amendment.

III. CONCLUSION

We find the Chief did not err in dismissing the Appellant's motion to reopen as untimely.

ORDER: The appeal is dismissed.