U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-S-

DATE: JAN. 26, 2018

APPEAL OF IMMIGRANT INVESTOR PROGRAM 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 (EB-5) classification makes immigrant visas available to foreign nationals who make a qualifying equity investment of the requisite amount 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] Regional centers apply for designation as such with U.S. Citizenship and Immigration Services (USCIS). Designated regional centers identify and work with NCEs, which in turn are associated with a specific project, either taken on directly by the NCE or by one or more separate entities known as the "job creating entity" (JCE). Regional centers can pool immigrant (and other) investor funds for qualifying projects that create jobs directly or indirectly. 8 C.F.R. § 204.6(j)(4)(iii).

The Chief of the Immigrant Investor Program Office denied the petition and reaffirmed that decision on motion, concluding that the record did not contain, as required, a comprehensive and credible business plan demonstrating (NCE) will create at least 10 full-time jobs for each foreign national seeking EB-5 classification.

On appeal, the Petitioner provides a brief as well as additional exhibits, and asserts that the NCE is creating jobs while the most recent business plan is credible. In addition, he submits documents in response to our request for evidence (RFE).

Upon *de novo* review, we will withdraw the Chief's decision and remand the petition for further action and consideration.

[1] A regional center is an economic unit involved with the promotion of economic growth through "improved regional productivity, job creation, and increased domestic capital investment." *See* 8 C.F.R. § 204.6(e) (defining "regional center").

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. To invest means to place capital at risk for the purpose of generating a return on the capital. 8 C.F.R. § 204.6(j)(2). A petition based on an investment through a regional center must be accompanied by evidence that the investment will create at least 10 full-time positions for qualifying employees either directly or indirectly. 8 C.F.R. § 204.6(j)(4)(iii). The investor may satisfy the job creation requirements by presenting reasonable methodologies, supported by a comprehensive business plan. 8 C.F.R. § 204.6(j)(4)(i)(B), (iii).

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.*

An individual seeking classification as an immigrant investor files a Form I-526 petition. If USCIS grants the petition and an application to adjust status, the investor receives conditional permanent resident status. Approaching the end of a two-year period of conditional status, the investor must request that the conditions be removed by filing a Form I-829, Petition by Entrepreneur to Remove Conditions. If USCIS determines that the investor has met all program requirements, it will remove the conditions and grant (unconditional) lawful permanent resident status.

II. ANALYSIS

The issue raised on appeal is whether the Petitioner has demonstrated that his investment in the NCE will create at least 10 full-time jobs. The NCE proposes to finance the development, construction, and operation of [redacted] wholesale and retail sourcing center, in collaboration with the Central Arizona Regional Center. According to the original filing, the construction of the facility would occur between January 2012 and January 2013. A subsequent timeline projected that construction would commence in 2014, with completion anticipated in November 2015. The Chief found that the business plan was not credible because construction did not substantively commence until years after the initially forecasted completion date. *See Ho*, 22 I&N Dec. at 213 (holding that a business plan must be credible).

The Petitioner maintains that the requisite jobs will be created within the next two years.[2] He indicates that construction is now on schedule and outlines the major construction milestones that have been

[2] 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. 6 USCIS Policy Manual G.2(D)(5), https://www.uscis.gov/policymanual. The business plan filed with

achieved to date, which include the completion of underground utilities, the pouring of slab concrete, and the installation of the tilt wall panels, decking, and steel vertical assemblies for the building. Recent updates posted on the website,[3] confirm that there is significant construction occurring at this time. The construction budget, submitted in response to our RFE, anticipates that the majority of the remaining construction expenditures will happen by August 2018. The photographs in the record corroborate that the construction of the facility's outer structure is near completion. In addition, the construction contracts between the NCE and various firms verify the construction progress.

In light of the above, we conclude that the timeline for the construction of comports with the NCE's updated business plan and amended expenditure budgets. Therefore, we withdraw the Chief's finding that the business plan was not credible with regard to the construction portion of the plan. However, for the reasons discussed below, we find that the Petitioner still has not demonstrated that his investment will create full-time positions for not fewer than 10 persons either directly or indirectly. *See* 8 C.F.R. § 204.6(j)(4)(i)(B), (iii). We will also address whether the Petitioner has established that he has made a qualifying investment in the NCE.

A. Employment Creation

Though multiple EB-5 investors may be credited with jobs created by the NCE, each investor must demonstrate the creation of at least 10 full-time positions through his or her capital investment in the NCE. *See* 8 C.F.R. § 204.6(g)(1). The Petitioner states in his RFE response that the NCE has received EB-5 capital from 84 investors,[4] and will obtain the remaining funds from non-EB-5 sources, including a $50 million loan from members of its management company, Therefore, the Petitioner must show that the NCE will create at least 840 full-time jobs. According to the 2014 economic analysis in the record, most of the job creation will come from the operation of the facility, and the NCE will achieve the requisite jobs once the facility becomes fully operational.[5]

The Petitioner, however, has not shown that job creation through the operation of the facility will be realized within two and a half years of the adjudication of the petition, as required.[6] Despite the numerous delays in construction, the record lacks an updated timeline for the commencement of operations at the facility in the manner required to create the operational jobs described in the business plan. The Chief should address whether the evidence is sufficient to show that the operational jobs estimated in the updated business plan and economic analysis will be created within two and a half years of the adjudication of the petition so that all of the NCE's EB-5 investors will meet the job creation requirements. *See* 8 C.F.R. § 204.6(g)(1).

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the petition should reasonably demonstrate that the requisite number of jobs will be created by the end of this two-year period. *Id.*

[3] http:/

[4] Some of the EB-5 capital is held in the NCE's escrow account, pending the adjudication of the investors' petitions.

[5] The 2013 Confidential Private Offering Memorandum indicates on page 9 that the NCE anticipates that 80% of the Phase 1 leasing space will be leased upon opening. Phase 1 is described on page 14 as "580,000 square feet of small vendor retail space", which is to be completed ten months after the construction start date.

[6] *See* 8 C.F.R. § 204.6(j)(4)(i)(B). *See* also 6 USCIS Policy Manual G.2(D)(5), https://www.uscis.gov/policymanual.

B. Qualifying Investment in the NCE

Though not raised in his denial, the Chief should also address whether the granting of first right of refusal to EB-5 investors for the purchase of up to 1,500 shops in [redacted] constitutes an impermissible redemption agreement. The regulation at 8 C.F.R. § 204.6(e) defines "invest" to mean "to contribute capital." Moreover, for the capital to be "at risk" there must be a risk of loss and a chance for gain. If an investor is guaranteed a return or a rate of return on all or a portion of his or her investment, then the amount of any guaranteed return is not at risk. Additionally, a petitioner may not enter into a redemption agreement at any time prior to the end of his or her two year period of conditional permanent residence. *See Matter of Izummi*, 22 I&N Dec. 169, 183-88 (Assoc. Comm'r 1998); *see also* 6 USCIS Policy Manual G.2(A)(2), https://www.uscis.gov/policymanual.

The Petitioner provided a February 2012 signed agreement between [redacted] the NCE's management company, and [redacted] a real estate company, for [redacted] exclusive right to represent the NCE in the sale or leasing of [redacted] condominiums, mall shopping, and anchor store spaces. The agreement provides in section 1.2., that of the 1740 shops included in [redacted] commercial building space "1,500 [of the shops] are reserved for EB-5 investors right of first refusal." The agreement appears to give investors in the NCE a right to purchase or lease space in the building before others in the market, a legal right with an unknown economic value. The material in the record does not describe the terms of the investor's purchase or lease option, such as the option costs, or the source of funds to be used if an investor exercises this option. As the right appears to guarantee some return to the Petitioner, it suggests that not all of the Petitioner's capital has been placed at risk. *See* 22 I&N Dec. at 180-184. Therefore, the Chief should consider whether the first right of refusal for EB-5 investors of commercial space in [redacted] reflected in this document constitutes an impermissible guaranteed return.

III. CONCLUSION

For the reasons discussed above, we withdraw the Chief's decision and remand the matter for consideration of whether the Petitioner has shown that the NCE is likely to create the necessary jobs in the relevant timeframe, and if the full amount of the Petitioner's capital has been placed at risk. If the Chief determines it appropriate, he may issue a request for evidence or notice of intent to deny containing specific findings that will afford the Petitioner the opportunity to present a meaningful response in order to establish eligibility for the immigration benefit sought.

ORDER: The decision of the Chief, Immigrant Investor Program Office, is withdrawn. The matter is remanded to the Chief, Immigrant Investor Program Office, for further proceedings consistent with the foregoing opinion and for the entry of a new decision, which, if adverse, shall be certified to us for review.

Cite as *Matter of M-S-*, ID# 358526 (AAO Jan. 26, 2018)