U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF Y-Y-

DATE: JAN. 31, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: 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 United States economy and create at least 10 full-time positions for qualifying employees.

The Chief of the Immigrant Investor Program Office denied the petition, concluding that the Petitioner had made an impermissible material change to her petition. We dismissed the appeal, affirming the Chief's finding. Specifically, we determined that the Petitioner submitted business plans that constituted a material change to the petition, and that she had not satisfied the job creation requirements.

The Petitioner now files combined motions to reconsider and reopen the matter. On motion, she submits additional evidence, maintaining that she has not made a material change to her petition and that she has satisfied the employment creation requirements.

Upon review, we will deny the motions.[1]

## I. LAW

A motion to reconsider must establish that our 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). In addition, a motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy.

[1] The Petitioner has not provided a statement regarding whether our prior decision has been or is the subject of any judicial proceedings. *See* 8 C.F.R. § 103.5(a)(1)(iii)(C) (requiring that a motion must be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding").

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We interpret "new facts" to mean facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts." We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

## II. ANALYSIS

The Petitioner maintains that she qualifies for the immigrant investor classification because she has invested $500,000 in the NCE.[2] The record contains three business plans that discuss different operations. The first one states that the NCE would operate a fast food restaurant franchise, serving Korean cuisine in California. The second one indicates that the NCE would be "engaged in [a Chinese food] catering and delivery services of and brands operated under ." The third business plan provides that the NCE would be doing business as and operate "[a] Chinese seafood cuisine restaurant, delivery and catering business."

In our previous decision, we concluded that when the Petitioner initially filed her petition, supported by the NCE's first business plan, she did not demonstrate her eligibility for the classification. *See Matter of Ho*, 22 I&N Dec. 206, 210 (Assoc. Comm'r 1998); 8 C.F.R. § 103.2(b)(1). In addition, we determined that her submission of the NCE's second and third business plans constituted an impermissible material change that she made to cure an apparently deficient petition. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998). Finally, we found that assuming *arguendo* that the NCE's second and third business plans did not materially change the petition, the Petitioner would nonetheless not qualify for the classification because the record did not confirm that the NCE would create at least 10 full-time positions. *See* 8 C.F.R. § 204.6(j)(4)(i)(B).

### A. Motion to Reconsider

While she maintains on motion that her initial filing establishes her eligibility at the time she submitted the petition, she has not cited to any relevant authorities showing that our decision was based on an incorrect application of law or policy, or that it was incorrect based on the evidence in the record of proceedings at the time. Specifically, she does not discuss our determination that at the time she filed the petition, the NCE had undertaken, at best, *de minimis* business activities, which is insufficient to demonstrate her eligibility for the classification.[3]

---

[2] The Petitioner indicates that the NCE is located in a targeted employment area, and that the requisite amount of qualifying capital is downwardly adjusted from $1,000,000 to $500,000. *See* 8 C.F.R. § 204.6(f).

[3] We noted in our decision that the Petitioner's "initial submission was supported by a lease proposal, draft lease, seller's permit, and a franchise agreement." *See Ho*, 22 I&N Dec. at 210 (finding that a "petitioner's *de minimis* action of signing a lease agreement, without more, is not enough" to demonstrate he or she has placed the required amount of capital at risk in a NCE).

In addition, the Petitioner has not shown that our finding that the NCE's second and third business plans constituted an impermissible change to her petition was erroneous. Citing USCIS policy manual and training materials concerning material changes to petitions, the Petitioner argues that the NCE's second and third business plans show "merely a change in food style." She also asserts that the first business plan indicates that the NCE would offer "a limited catering service" and that the subsequent business plans illustrate "the [NCE's] more dedicated effort invested in the catering service for the new style of cuisine."

While page 11 of the first business plan references the NCE's catering service, neither its projected staffing need nor proposed expenses illustrate that it would be a catering business. Rather, the business plan repeatedly provides that the NCE would focus on being a fast food restaurant and operate from a "1,800 sf. [square foot commercial space], with drive-through facility." In addition, page 23 of the first business plan states that the NCE would spend $25,000 on the initial franchise fee, $15,000 on architect fee, and $175,000 - $200,000 on leasehold improvement. The second business plan does not include a franchise fee, and the third business plan does not list a franchise or architect fee. Both of the subsequent plans also substantially decrease the projected leasehold improvement costs to $45,000 in the second business plan and to $87,000 in the third business plan. Moreover, the third business plan notes that the NCE would hire a "church and event catering manager," two "representative[s]/assistant[s]," a "delivery manager," and two "delivery driver[s]." These, however, are positions not specified in the first business plan.

Although, the USCIS policy manual and training materials that the Petitioner references provide that a change in the cuisine does not constitute a material change to a petition, the NCE's second and third business plans represent far more than a change in food styles. Specifically, as we concluded in our decision that in addition to changing the type of food, the subsequent business plans also change "the NCE's nature of business, services offered, location, start-up costs, and staffing needs." As such, the USCIS materials that the Petitioner cites do not illustrate that we erred.

On motion, the Petitioner also references *Kungys v. United States*, 485 U.S. 759 (1988). This case similarly does not illustrate that we erred. *Kungys* discusses materiality in the context of misrepresentation as a basis for revocation of naturalization under 8 U.S.C. § 1451(a). The decision provides that the test for materiality of the concealments or misrepresentations in that case was "whether they had a natural tendency to influence the decisions of the [former] Immigration and Naturalization Service [now USCIS]." *Kungys*, 485 U.S. at 772. Here, the NCE's second and third business plans, along with additional corroboration that the Petitioner has submitted, appear to better support her claim of eligibility than the first one. For example, they appear to address our concern regarding the NCE's *de minimis* business activities. These subsequent business plans therefore do have a natural tendency to influence USCIS's adjudication of her petition. As such, *Kungys* supports our finding that the later business plans contained impermissible material changes.

Finally, the Petitioner has not demonstrated that we erred in finding that, assuming *arguendo* that the NCE's second and third business plans did not materially change her petition, she would nonetheless

not qualify for the classification. She maintains that she has satisfied the job creation requirements because her "financial investment in this type and grade of food service business is consistent with that of an establishment capable of supporting ten qualifying full-time employees." However, she has not addressed our determination that the NCE's second and third business plans are not comprehensive, and do not credibly illustrate the company's need for at least 10 full-time employees. We pointed to a number of deficiencies that undermined the credibility of the business plans' projected job creation data, including the lack of corroboration that [redacted] lease permits subletting space to the NCE or that the kitchen can support both a restaurant and a full-time catering and delivery operation.[4] The Petitioner has not discussed or provided an explanation for these issues on motion.

Furthermore, on motion, the Petitioner has not specifically challenged our finding that a portion of her investment is not available to the NCE for job creation purposes. A mid-2016 balance sheet shows that the NCE has made a $226,672.74 investment in '[redacted]" representing [redacted] The Petitioner has not explained how an investment in another restaurant is making that money available to the NCE for job creation purposes. *See Izummi*, 22 I&N Dec. at 179. Based on these reasons, the Petitioner has not demonstrated that our previous decision was based on an incorrect application of law or policy, or that it was incorrect based on the evidence in the record of proceedings at the time of the decision. *See* 8 C.F.R. § 103.5(a)(3).

B. Motion to Reopen

In her motion to reopen the matter, the Petitioner has not stated new facts supported by documentary evidence. *See* 8 C.F.R. § 103.5(a)(2). On motion, she resubmits some of her evidence, including the NCE's a mid-2016 balance sheet. We considered these documents previously and found them insufficient to establish her eligibility.

The Petitioner also offers additional documents – including but not limited to the NCE's filings with the California State Board of Equalization, its Employer's Quarterly Federal Tax Returns (Internal Revenue Service Forms 941),[5] as well as its purchase and sales invoices – all of which postdate the filing of her petition in November 2014. She has not explained how this evidence, which relates to the NCE's operation after she filed the petition, illustrates that the NCE had undertaken actual business activity that was not *de minimis* in nature at the time she filed the petition.[6] Furthermore, these documents do not address our other findings: the NCE's second and third business plans materially changed the petition, and that neither of these business plans demonstrates that the

[4] According to the second and third business plans, the NCE and [redacted] which operates [redacted] have entered into a joint venture that allows the NCE to use [redacted] equipment and space for a catering and delivery service.

[5] These federal tax filings list the Petitioner's counsel's business address as the NCE's address.

[6] In addition, some of the NCE's purported purchases and expenses – including two "cashier counter[s]," a "custom wok range," and "installation for gas connection" – specified in the invoices appear to contradict the NCE's third business plan, which states that it would "rent and share the use of equipment from its neighbor restaurant [redacted]"

Petitioner has satisfied the employment creation requirements. Based on these reasons, the Petitioner has not stated new facts that are supported by documentary evidence, or established her eligibility for the classification on motion. *See* 8 C.F.R. § 103.5(a)(2).

## III. CONCLUSION

The Petitioner has not established that we based our previous decision on an incorrect application of law or policy, or that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. Her motion to reconsider the matter will therefore be denied. In addition, the documentation she presents on motion does not demonstrate her eligibility for the classification. Her motion to reopen the proceeding will therefore be denied.

**ORDER:** The motion to reconsider is denied.

**FURTHER ORDER:** The motion to open is denied.

Cite as *Matter of Y-Y-*, ID# 853850 (AAO Jan. 31, 2018)