U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-Y-

DATE: JAN. 31, 2019

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 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 record did not establish the Petitioner's eligibility for the classification. We dismissed the appeal, affirming the Chief's finding.[1] Specifically, we determined that the record had not established the Petitioner's actual commitment of capital in the NCE; that he contributed $1,000,000 to the NCE or owns 12.125% of the company, as claimed in the petition; that he placed his own funds at risk; and that he satisfied the employment creation requirements.

The Petitioner now files a motion to reconsider and maintains that he is eligible for the benefit sought. Upon review, we will deny the motion.

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] *See Matter of D-Y-*, ID# 1060192 (AAO June 15, 2018).

II. ANALYSIS

We will deny the Petitioner's motion because it does not satisfy the filing requirements. Specifically, it lacks "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." 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed." Regardless, for the reasons we discuss below, the Petitioner has not shown his eligibility.

The Petitioner maintains that he qualifies for the immigrant investor classification because he invested $1,000,000 in the NCE, which plans to build and operate a 400-student school and dormitory in Nevada. The appellate brief states the NCE has three members: the Petitioner; and

In our previous decision, we concluded that at the time of the petition's filing, the NCE had taken *de minimis* business action that is insufficient to establish a petitioner's actual commitment of capital in the NCE. We also found that due to insufficient evidence confirming the Petitioner placed $1,000,000 at risk in the NCE, that the entire amount of his purported investment was available to the NCE for job creation purposes, and inconsistencies relating to his ownership interest, the Petitioner had not demonstrated that he contributed $1,000,000 to the NCE or owns 12.125% of the company, as claimed in the petition. *See* 8 C.F.R. § 204.6(j)(2); *Matter of Ho*, 22 I&N Dec. 206, 210 (Assoc. Comm'r 1998). Further, we determined the Petitioner had not demonstrated he placed his own funds at risk in the NCE because he had not established his ownership of the $1,000,000 his spouse remitted to [redacted][2] and he did not sufficiently document the complete path of the funds. Finally, we found the Petitioner had not satisfied the employment creation requirements. The NCE had not created the requisite jobs and the record did not contain a comprehensive and credible business plan confirming that it will create the required jobs within two years. *See* 8 C.F.R. § 204.6(j)(4)(i); *Ho*, 22 I&N Dec. at 213. The Petitioner offered inconsistent evidence relating to the capital the NCE needs, and the updated business plan contained deficiencies related to its funding sources, project costs, competitors, and anticipated jobs.

Citing no precedent decisions to support his arguments, the Petitioner claims we erred in our determination that the NCE had taken only *de minimis* business activity. Rather, he contends that we "were incorrect and ran head on collision with 8 C.F.R. § 204.6(j)(2)" because the record "proved that [the Petitioner] ha[d] invested the required capital in the NCE" and "the capital contribution of $1,000,000 was released to the NCE for deployment in accordance with the Business Plan." The Petitioner maintains that he invested $1,000,000 of his own funds in the NCE by remitting the funds to [redacted], which then deposited his funds into two accounts that are "EB5 Escrow Accounts opened for the purpose and use of the NCE." He contends that "even though both

[2] We noted in our previous decision that although this entity is not the NCE, the Petitioner claimed this transfer represents his investment of EB-5 capital.

accounts belong to [redacted] not the NCE" he has "showed he had been actively in the process [of] investing" and the total amount that [redacted] "spent to purchase land and remitted to the NCE was $894,032.66." The Petitioner asks the AAO "to reconsider its requirement of capital investment at $1,000,000 because "it neglected the active process of investing specified in 8 C.F.R. § 203(b)(5)(A)(i)."

The Petitioner has not shown that our findings, specifically that the record did not establish that he placed $1,000,000 at risk in the NCE, were based on an incorrect application of the law, regulation, or USCIS policy, and he has not resolved the deficiencies noted in our previous decision. For example, while the Petitioner asserts that $894,032.66 of his investment funds were either used by [redacted] to purchase land or were remitted to the NCE, the record does not contain corroborating documentation that demonstrates the full amount of his investment funds were available to the NCE for job creation purposes. The Petitioner also does not address our concerns, as noted in our previous decision, that he submitted conflicting information regarding his ownership interest in the NCE.

In addition, the Petitioner maintains the record demonstrates his ownership of the funds his spouse remitted to [redacted] and that those funds lawfully derived from compensation to relocate a factory in China. The Petitioner references the "Notarized Consultation Opinion" issued by the [redacted] that was previously provided, and states "it is unacceptable that the AAO has failed to acknowledge an official and professional opinion from a Chinese governmental entity regarding land condemnation proceeding because this is a second-guessing of a different country's laws and regulations." When relying on foreign law to establish eligibility, the application of foreign law is a question of fact which must be proved by the petitioner. *Matter of Kodwo*, 24 I&N Dec. 479, 482 (BIA 2008) (citing *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973)). The opinion submitted by the accounting firm does not establish the Petitioner's interest in the company or his entitlement to the relocation compensation, and it does not resolve concerns noted in our previous decision that submitted documentation indicated a separate entity, [redacted] not the Petitioner, had the right to use the land to build an automobile factory.

Further, the Petitioner does not offer any explanation concerning the lack of evidence to establish the complete path of funds, specifically documents reflecting he or his spouse retained at least $1,000,000 of the 2010 relocation compensation before remitting it to [redacted] in 2014. Without documentation of the path of funds, an investor cannot show that the funds are his or her own. *See Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998).

In regard to our determination that the Petitioner had not satisfied the employment creation requirements, he asserts the NCE has created two jobs and the business plan meets "the requirement of *Matter of Ho*."[3] The Petitioner offers the NCE's private placement memorandum and refers to a

[3] The precedent decision *Matter of Ho* held that, to be "comprehensive," a business plan "must be sufficiently detailed to permit [USCIS] to draw reasonable inferences about the job-creation potential." 22 I&N Dec. at 213. "Mere conclusory

section regarding the NCE's competitors. However, he does not address the inconsistencies regarding the capital the NCE needs, or the updated business plan's deficiencies related to its funding sources, project costs, and anticipated jobs. The Petitioner has not shown that he satisfied the employment creation requirements, either by creating the requisite jobs or submitting a comprehensive and credible business plan confirming that the NCE will create the required jobs within two years.

The Petitioner has not established that our previous decision's findings were based on an incorrect application of the law, regulation, or USCIS policy. Further, he has not resolved the inconsistencies noted above. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, he has not done so. We do not consider new facts or evidence in a motion to reconsider. In the instant motion, the Petitioner disagrees with our conclusions, but cites no precedent decisions to demonstrate an incorrect application of law or policy. As he has not established that the decision was incorrect based on evidence in the record at the time of the initial decision, the Petitioner has not met the requirements of a motion to reconsider. 8 C.F.R. § 103.5(a)(3)

Though we do not consider new facts or evidence in a motion to reconsider, we note the new evidence submitted on motion, the NCE's private placement memorandum and one employee's July 2018 payroll data and earnings statement, does not overcome the petition's deficiencies.

III. CONCLUSION

The Petitioner has not demonstrated that we based our previous decision on an incorrect application of law or USCIS policy. *See* 8 C.F.R. § 103.5(a)(3).

ORDER: The motion to reconsider is denied.

Cite as *Matter of D-Y-*, ID# 1948154 (AAO Jan. 31, 2019)

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assertions[, however,] do not enable [USCIS] to determine whether the job-creation projections are any more reliable than hopeful speculation." The decision concludes: "Most importantly, the business plan must be credible." *Id.*