U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17853498

Date: JULY 1, 2024

Appeal of Immigrant Investor Program 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 (EB-5) classification makes immigrant visas available to noncitizens who invest the requisite amount of qualifying capital in a new commercial enterprise that will benefit the U.S. economy and create at least 10 full-time positions for qualifying employees. Noncitizens 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 the new commercial enterprise will create at least 10 full-time positions for qualifying employees and that the requisite number of jobs will be created using reasonable methodologies. The Chief did not defer to the job creation determination in USCIS' previous approvals of the Form I-526 exemplar project and previously filed Forms I-526 associated with the new commercial enterprise because the Chief found that the underlying facts upon which a favorable decision was made have materially changed. The matter is now before us on appeal. 8 C.F.R. § 103.3. On appeal, the Petitioner contends that he has met the project-related eligibility requirements by the preponderance of the evidence standard.

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). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

Volume 6, Part G, Chapter 3 of the USCIS Policy Manual articulates USCIS' policy regarding deference to previous agency determinations. As a general matter, USCIS does not reexamine determinations made earlier in the EB-5 process, and such earlier determinations will be presumed to

have been properly decided.[1] When USCIS previously concluded that an economic methodology is reasonable to project future job creation as applied to the facts of a particular project, USCIS defers to this determination for all related adjudications directly linked to the specific project for which the economic methodology was previously approved.[2]

Conversely, USCIS does not defer to a previously favorable decision in later proceedings when, for example, 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.[3] A change is material if it would have a natural tendency to influence or is predictably capable of affecting the decision.[4] When a new filing involves a different project from a previous approval or the same previously approved project with material changes to the project plan, USCIS does not defer to the previous adjudication.[5]

As required by 8 C.F.R. § 204.6(j)(4)(i), the petition must establish that the investment of the required amount of capital in a new commercial enterprise (NCE) will create full-time positions for at least 10 qualifying employees within two years. *See also* 8 U.S.C. § 1153(b)(5)(A)(ii). For purposes of the Form I-526 adjudication and the job creation requirements, the two-year period described in 8 C.F.R. § 204.6(j)(4)(i)(B) is deemed to commence six months after the adjudication of the Form I-526.

According to 8 C.F.R. § 204.6(j)(4)(i), to show that a NCE will create full-time positions for at least 10 qualifying employees within two years, the petition must be accompanied by:

> (A) Documentation consisting of photocopies of relevant tax records, Forms I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
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> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

A petition is not required to demonstrate that 10 full-time positions for qualifying employees have already been created by the NCE. However, where the jobs have not already been created, the petition must include a comprehensive business plan demonstrating the need for at least 10 employees within the next two years. *Matter of Ho* explained that a comprehensive business plan must be sufficiently detailed to permit USCIS to draw reasonable inferences about job-creation potential. *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998).

Petitioners investing in a NCE within a regional center may rely on economic methodologies to demonstrate that the investment will create indirect jobs as a result of the investment in the NCE, but such methodologies must be reasonable. *See* Pub. L. No. 102-395; 8 C.F.R. §§ 204.6(e), (j)(4)(iii),

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[1] *See generally 6 USCIS Policy Manual* G.3(A)(2), https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-3.
[2] *See generally 6 USCIS Policy Manual*, *supra*, at G.3(A)(2).
[3] *Id*.
[4] *See Kungys v. United States*, 485 U.S. 759, 770-72 (1988).
[5] *See generally 6 USCIS Policy Manual*, *supra*, at G.3(A)(2).

(m)(7)(ii). The petitioners must provide sufficient evidence for USCIS to determine whether methodologies used are reasonable.

Indirect jobs are those that are held outside of the NCE but are created as a result of the NCE.[6] For example, indirect jobs include, but are not limited to, those held by employees of the job-creating entity (JCE) (when the JCE is not the NCE) as well as employees of producers of materials, equipment, or services used by the NCE or the JCE.[7]

II. ANALYSIS

The Petitioner asserted that on August 17, 2017, he invested $500,000[8] into [redacted] the new commercial enterprise (NCE), which is sponsored by [redacted] pursuant to the Immigrant Investor Program. According to the Private Placement Memorandum, dated September 2015, the NCE proposes to raise $35,000,000 from 70 immigrant investors and lend the entire amount to [redacted] (the Borrower). The Borrower in turn will lend the entire amount to [redacted] and [redacted], the job-creating entities (JCEs). The JCEs plan to develop, construct, equip, and operate a shopping center consisting of two levels of below-ground parking and three stories of retail, restaurants, clubs, bars, and a grocery store located in [redacted] New York.

A. Deference

The Chief determined that deference to the prior determination is not appropriate due to material changes. Specifically, the Chief found that the listing of the NCE's real estate for sale in 2019, the multiple material delays in the permitting timeline and commencement of construction, and changes to the capital stack and financing constitute impermissible material changes. On appeal, the Petitioner contends the listing of the real estate for sale, delays in the permitting timeline and commencement of construction, and changes to the capital stack do not constitute material changes.

As an initial matter, we note that we on appeal exercise de novo review of all issues of fact, law, policy, and discretion. *See Matter of Christo's, Inc.*, 26 I&N Dec. at 537. Upon de novo review, we determine that facts relevant to the adjudication materially changed between the approval of the Form I-526 exemplar in December 2017 and the adjudication of this petition such that affording deference is not warranted.

The regulation requires the Petitioner to submit a credible and comprehensive business plan showing that job creation will occur within two years, making the project timeline material to determining E-5 eligibility and deference.[9] *See* 8 C.F.R. § 204.6(j)(4)(i)(B). Here, the NCE has modified its project

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[6] *See generally* 6 *USCIS Policy Manual* G.2(D)(4), https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-2.
[7] *Id.*
[8] On March 15, 2022, President Joe Biden signed the EB-5 Reform and Integrity Act of 2022, which made significant amendments to the EB-5 program, including the designation of a targeted employment area (TEA) and the minimum investment amounts. *See s*ection 203(b)(5) of the Act, 8 U.S.C. § 1153(b)(5) (2022). In this case, the Petitioner filed his petition in 2017 and asserted that the project is located in a TEA. Therefore, the requisite amount of capital investment was downwardly adjusted from $1,000,000 to $500,000. *See* 8 C.F.R. § 204.6(f)(2) (2015).
[9] 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. at 770-72.

timeline, including completion date, multiple times. Page 13 of the 2015 business plan alleges that exterior construction will finish in the third quarter of 2017, and interior construction will finish in the first quarter of 2018. Page 9 of the 2017 business plan claims that exterior construction will finish in the fourth quarter of 2020, and interior construction will finish in the first quarter of 2022. The February 2020 business plan indicates that exterior construction will finish in the second quarter of 2022, and interior construction will finish in the second quarter of 2023. The June 2020 business plan and its accompanying June 2020 economic impact report further push back the construction completion date to 2024. The previous approval was based on a different set of facts – including the earlier version of the project timeline – than those currently before us, and thus, the Chief correctly concluded that deference to the prior determination is not appropriate due to material changes. *See 6 USCIS Policy Manual* G.3(A)(2), https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-3.

B. Job Creation

The Chief determined the record did not establish that the NCE will create at least 10 full-time positions for qualifying employees and that the requisite number of jobs will be created using reasonable methodologies. Specifically, the Chief found the Petitioner has not established that the business plan is both comprehensive and credible because business plan milestones have not been met since 2015 and because the record lacks sufficient evidence to demonstrate the financing necessary for the project has been obtained or is likely to be obtained by the JCEs. On appeal, the Petitioner contends that the business plan is credible because it is more likely than not that the project will proceed and create the necessary jobs and because the financing necessary for the project is more likely than not to be obtained.

Upon de novo review, we find the Petitioner has not provided a business plan that is both comprehensive and credible. *See* 8 C.F.R. § 204.6(j)(4)(i)(B); *Matter of Ho*, 22 I&N Dec. at 213. Therefore, he has not demonstrated that the JCEs will likely create at least 10 full-time positions for qualifying employees within two years as projected in the business plans and economic impact reports.

First, the record contains insufficient evidence that the JCEs will likely have sufficient capital for the project. The 2015 business plan indicates that the project would have cost approximately $228,000,000. Subsequent business plans, including those dated 2017 and February 2020, provide that the cost will be approximately $320,000,000. The 2017 business plan claims that the JCEs will seek a $60,000,000 construction loan to finance the project. The February 2020 and June 2020 business plans, however, state that the project will need a $115,000,000 construction loan because, in part, the NCE did not attract as many investors as the JCEs had initially projected.

The record does not demonstrate by a preponderance of the evidence that the JCEs have obtained or will likely obtain the capital required to complete the project. The record includes a June 2020 term sheet, indicating that [redacted] will initiate due diligence for a loan. This document specifies that "This Term Sheet shall be non-binding" and that "This Term Sheet is not a loan commitment." Moreover, while the document lists August 12, 2020 as the projected loan closing date, the Petitioner has not presented evidence confirming the closing of this loan in his filing. Additionally, the Chief pointed out that the JCEs had previously obtained a term sheet for a $60,000,000 loan from another financial entity in 2017, but the record similarly does not confirm that they actually closed on the loan or received the loan proceeds. Thus, neither term sheet demonstrates

that the JCEs will likely obtain the needed loan. Although the record includes other evidence showing the JCEs' attempt to obtain the necessary construction loan, none is sufficient to confirm the likelihood of them acquire such financing.

Similarly, the record is insufficient to confirm that the project will likely receive the necessary "Developer Subordinated Investment." According to the February 2020 business plan, the project will need "Developer Subordinated Investment" in the amount of $180,031,136. An asterisk next to the amount explains that the amount "[i]ncludes purchase price of the land (removing land cost equals $70,031,136)." (Parentheses in original). The Petitioner presents documents labeled as "Checks, wire receipts, and deposit slips showing equity injections." The figures listed in these documents, however, total much less than the needed amount. Additionally, the Petitioner has not offered sufficient evidence demonstrating that the JCEs will likely have access to the funds that the February 2020 business plan categorizes as "Developer Subordinated Investment" to invest into the project.

In short, the record before us does not establish by a preponderance of the evidence that the JCEs will likely have sufficient funds for the project. As such, the Petitioner has not established that the employment creation projections, which rely on the assumption that the JCEs will complete the project, are credible. *See Matter of Ho*, 22 I&N Dec. at 213 (stating that a business plan must be sufficiently detailed to permit USCIS to draw reasonable inferences about the job-creation potential).

Second, the evidence in the record does not substantiate the construction timeline, which in turn, does not demonstrate that the project will likely create sufficient number of jobs for the Petitioner and other investors seeking EB-5 classification, within the required two-year time frame. *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 at least 10 full-time positions for qualifying employees).

As noted, the project timeline has changed multiple times. The 2015 business plan indicates that the administrative phase[10] will take 9 to 12 months and that exterior and interior construction will each take 12 to 15 months, with interior construction ending in the first quarter of 2018. The 2017 business plan claims that the administrative phase will take 3 years and 9 months and that exterior and interior construction will each take 18 months, with interior construction ending in the first quarter of 2022. The February 2020 business plan provides that the administrative phase will last 5 years and 9 months and that interior construction will end in the second quarter of 2023. The June 2020 business plan further pushes back the project milestones, stating that the administrative phase will last 6 years and that interior construction will end in the fourth quarter of 2023. The June 2020 business plan thus anticipates a delay of over five years as the completion date for interior construction specified in the 2015 business plan. As noted in the Chief's decision, given that the project has already been frozen in administrative phase for many years since 2015, is significantly behind on the construction, and has had several business plan modifications due to timeline pushbacks, the Petitioner has not offered a business plan that is credible and comprehensive. *See* 8 C.F.R. § 204.6(j)(4)(i)(B); *Matter of Ho*, 22 I&N Dec. at 213.

[10] Section 2.6 of the February 2020 business plan explains that the administration phase covers design, civil engineering, permit acquisition, fee payments, and the supervision of the entire construction process, and the marketing for the EB-5 investor program.

Page 9 of the 2017 business plan explains that as of October 2017, the project timeline has been pushed back further due to an Environmental Impact Statement (EIS) study, which was under way. An exhibit to the 2017 business plan, entitled "EIS Timeline," provides that the study will result in the [redacted] Council approving special permit and rezoning applications in the fourth quarter of 2018. The record, however, shows that the project has not met this milestone. Specifically, attached to the February 2020 business plan is a February 2019 letter from the [redacted] an entity that the JCEs have retained for the EIS. The letter contradicts the 2017 business plan, stating that "we are expecting to have the final EIS approved by Q4, 2020." The [redacted] June 2020 letter claims that "we are aggressively targeting a September/October [2020] final sign-off" and that "[s]ubsequently, the application would be ready for Certification, which would initiate the 6-month ULURP [Universal Land Use Review Procedure] time clock to final approval of the application." The Petitioner claims that "final EIS approval is expected in September/October 2020." None of the documents in the record substantiate the claim that the [redacted] Council approved special permit and rezoning applications in 2018, that the EIS led to "a September/October [2020] final sign-off," or that the JCEs will likely receive the necessary approvals and permits allowing the project to create sufficient number of jobs for investors within the required two-year period. *See* 8 C.F.R. § 204.6(g), (j)(4)(i)(B). Significantly, the Petitioner has not presented evidence confirming "a September/October [2020] final sign-off" or "final EIS approval . . . in September/October 2020."

The Petitioner has presented some evidence showing that the project might be proceeding forward after years of delay. For example, he has submitted documents showing that the project site is no longer for sale and that the JCEs have obtained a demolition permit in December 2020. None of this documentation, however, sufficiently demonstrates that the project will likely be completed or that the necessary number of jobs will likely be created timely. *See* 8 C.F.R. § 204.6(j)(4)(i)(B); *see also* 8 C.F.R. § 204.6(g). Significantly, according to page 1 of the June 2020 business plan, the project still needs a number of permits, including a special permit, a construction permit, a sewer permit, and a sidewalk permit. The June 2020 business plan alleges that the JCEs will obtain the special permit in September 2020 and the construction permit in December 2020. Additionally, page 4 of the June 2020 business plan states that the JCEs expected construction to commence in January 2021 after permits are issued. The Petitioner, however, has not offered evidence verifying that any of these milestones – obtaining special and construction permits or commencing construction – has been met.

While some delays in project progress might not affect the credibility of a business plan, in this case, a delay of many years, the lack of evidence that construction originally slated to begin in 2016 has actually begun, and insufficient documentation confirming that the JCEs will likely have the needed funds for the project do not support a finding that the Petitioner has submitted a credible business plan that includes a credible projected completion date or job creation projections. While the Petitioner lists a number of circumstances surrounding the delays in his filing, none of them sufficiently explains the multiple and extensive postponements in the project reaching its milestones, including the commencement and conclusion of construction. In short, the Petitioner has not credibly demonstrated when the project will likely be completed or that it will likely create at least 10 jobs for investors within two years. *See* 8 C.F.R. § 204.6(g), (j)(4)(i)(B); *Matter of Ho*, 22 I&N Dec. at 213.

In light of our discussion on deference and job creation requirements, we need not consider other eligibility issues in this case. We will reserve other eligibility issues for future consideration should the need arise.[11]

III. CONCLUSION

Deference to the prior determination is not appropriate in this case because the underlying facts upon which a favorable decision was made have materially changed since the approval of the Form I-526 exemplar project due to the inability of the project to meet the development timeline outlined in the business plans and the JCEs' inability to obtain the necessary financing to fund the project. Moreover, the Petitioner has not presented a comprehensive and credible business plan showing that, due to the nature and projected size of the project, the JCEs will likely create at least 10 full-time positions for qualifying employees for each investor seeking EB-5 classification within the next two years. *See* 8 C.F.R. § 204.6(g), (j)(4)(i)(B); *Matter of Ho*, 22 I&N Dec. at 213. Accordingly, he has not demonstrated eligibility for the immigrant investor classification.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.

[11] *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternate issues on appeal where an applicant is otherwise ineligible).