U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-Y-A-

DATE: JUNE 13, 2017

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

PETITION: FORM I-526, IMMIGRANT PETITION BY ALIEN ENTREPRENEUR

The Petitioner, an individual, seeks classification as an immigrant investor under the EB-5 program. *See* Immigration and Nationality Act section 203(b)(5), 8 U.S.C. § 1153(b)(5). The fifth preference or EB-5 classification makes immigrant visas available to foreign nationals who invest the requisite amount of qualifying capital in a new commercial enterprise that will create at least 10 full-time positions for qualifying employees. Foreign nationals may invest in a project associated with a United States Citizenship and Immigration Services (USCIS) designated regional center. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (Appropriations Act) section 610, as amended.

In this case, the Petitioner is one of multiple immigrant investors who have filed a Form I-526, Immigrant Petition by Alien Entrepreneur, based on investment in , the new commercial enterprise (NCE).[1] The NCE plans to loan up to $43.5 million[2] of EB-5 funds to the job creating entity (JCE), to develop and operate the (the project), a 79-unit condominium hotel located in Florida. The Petitioner indicates that the JCE's wholly owned subsidiary,[3] owns the project.

The Chief of the Immigrant Investor Program Office (Chief) denied the petition, concluding that the record did not establish, as required, that the Petitioner's $500,000[4] investment would, more likely than not, result in the necessary job creation. The Chief denied subsequent motions to reopen and reconsider the matter, finding that the Petitioner did not adequately address overarching credibility concerns about the project or its job creation estimates.

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[1] a USCIS designated regional center, is the NCE's general partner.

[2] The Project Confidential Business Review indicates that the funds will come from 87 EB-5 investors. The record, however, also includes a 2013 Confidential Business Review, which provides that the NCE will pool $39.5 million from 79 EB-5 investors.

[3] To minimize confusion, we will refer to both the JCE and its wholly owned subsidiary, as "the JCE."

[4] 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).

The Petitioner appealed the matter to us. Based in part on publicly reported project stoppages, we issued a combined notice of intent to dismiss and request for evidence (NOID/RFE), seeking clarification regarding project developments.[5] The Petitioner responded and provided project updates, including a new economic impact report and job creation projection.

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

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. 8 C.F.R. § 204.6. As it is the case here, the investor can invest in a NCE that is associated with a USCIS designated regional center. 8 C.F.R. § 204.6(j)(4)(iii). A regional center, which is an "economic unit . . . involved with the promotion of economic growth," can pool immigrant (and other) investor funds for qualifying projects that create jobs directly or indirectly. 8 C.F.R. § 204.6(e), (j).

To qualify for the EB-5 classification, an immigrant investor must demonstrate that his or her investment will create at least 10 qualifying jobs by submitting either documentation confirming the creation of jobs or a comprehensive business plan showing that the jobs will be created within two years.[6] 8 C.F.R. § 204.6(j)(4)(i). A comprehensive business plan is one that establishes that a project will create at least ten jobs per immigrant investor. 8 C.F.R. § 204.6(j)(4)(i)(B); 8 C.F.R. § 204.6(g). Moreover, to be "comprehensive," the business plan must be sufficiently detailed to permit USCIS to draw reasonable inferences about the project's job-creation potential. *Matter of Ho*, 22 I&N Dec. 206, 213-14 (Assoc. Comm'r 1998). Most importantly, the comprehensive business plan must be credible. *Id.* at 213.

Becoming a lawful permanent resident in the U.S. through an EB-5 investment is a multiple-step process. First, the foreign national, as the Petitioner has done in this case, files a Form I-526 petition, seeking EB-5 classification. 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 requests the removal of the conditions by filing a Form I-829, Petition by Entrepreneur to Remove Conditions on Permanent Resident Status. If USCIS determines that the investor has met all EB-5 program requirements, it will remove the conditions and grant (unconditional) lawful permanent resident status.

II. BACKGROUND

In this case, the project is located at [redacted] in [redacted] Florida. In 2009,[7] the JCE purchased a vacant hotel on the property with the intention of reopening it as a 79-unit condominium

[5] In our NOID/RFE, we also requested documentation verifying the lawful source of the Petitioner's investment capital.
[6] *See also* 6 USCIS Policy Manual G.2(D)(5), https://www.uscis.gov/policymanual.
[7] As the Chief noted in his November 2015 decision, an entity associated with the JCE owned the property before 2009.

hotel after reconstruction and redevelopment. As we noted in our NOID/RFE, an August 2015 news article in the record, as well as other publicly available documents, indicate that ownership disputes over the property resulted in the stoppage of construction in 2014. In addition, the NCE has accused individuals involved in the project of misappropriating EB-5 funds to pay personal expenses and to purchase a 151-foot yacht.[8]

The record shows that the JCE has secured a number of loans using the project property as collateral. Specifically, a article that the Chief referenced in his decision reported that in the JCE obtained a $27.5 million mortgage from [9] In 2014, it obtained a $39.5 million second mortgage from the NCE.[10] Moreover, there are a number of pending lawsuits against individuals and entities associated with the project. For example, as noted by the Chief , reported that in filed foreclosure proceedings against the JCE. In 2015, a circuit court judge in Florida, appointed a receiver, to assume control of the project property and its reconstruction. In addition, the Petitioner presents a 2017 article that states: "[m]ore than investors claim they were the victims of fraud, and are suing defendants," including the project's developer, his wife, his brother, and other individuals, alleging improper use of EB-5 funds.

III. ANALYSIS

The Chief denied the petition and subsequent motions to reopen and reconsider the matter, finding that the materials submitted did not demonstrate that the necessary job creation would more likely than not occur. He cited ongoing disputes over project ownership, pending lawsuits, as well as a dearth of funding, as grounds to support his conclusion that the Petitioner had not submitted a comprehensive, credible business plan. *See Ho*, 22 I&N Dec. at 213. Specifically, he determined that the Petitioner has not shown, "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees [per foreign national investor] will result . . . within the next two years." *See* 8 C.F.R. § 204.6(j)(4)(i); *see also* 8 C.F.R. § 204.6(g).

On appeal and in response to our NOID/RFE, the Petitioner alleges that the Chief erred in evaluating the project's prospective job creation estimates at the Form I-526 stage of adjudication, arguing such an analysis should instead take place only after an immigrant investor files the Form I-829. He states: "it is entirely improper and inappropriate for USCIS to speculate on the actual number of jobs that will be created with the Project until the completion of the project and the filing of the I-829 petition." We disagree.

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[8] available at , and incorporated into our NOID/RFE.

[9] *See also* (the Petitioner submitted this article in response to the Chief's notice of intent to deny the petition).

[10]

As noted above, the EB-5 classification provides conditional permanent resident status for a petitioner who can demonstrate that he or she will create at least 10 qualifying jobs. *See* section 203(b)(5) of the Act; *see also* 8 C.F.R. § 204.6(j)(4)(i). To qualify for the classification, a petitioner must establish his or her eligibility, by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). In other words, a petitioner must show that what he or she claims is "more likely than not" or "probably" true. As a result, the Petitioner in this case must establish that the claimed job creation will more likely than not occur. The Chief's consideration of job creation at the Form I-526 stage is therefore not only proper, but essential to his evaluation of the Petitioner's eligibility for the classification.

Next, the Petitioner states that "[he] should not be punished by [the denial of his] I-526 for reasons that are normal and customary to construction projects that are clearly beyond [his] control." We understand that the nature of construction requires some level of flexibility and adaptability. However, this argument mischaracterizes the Chief's reasoning. As detailed below, the project and business plan present several substantive issues that render the job creation estimates not credible. In addition, we do not consider a lawsuit in which the NCE alleges that the JCE and its managers improperly used EB-5 funds, as is the case here, to be "normal and customary to construction projects."[11] On the contrary, this and other issues regarding ownership of the underlying property are serious concerns that do not support a finding that the Petitioner and other foreign national investors will more likely than not create the necessary number of jobs in accordance with the EB-5 program. We therefore find that the Chief's denial was not a punishment, but rather the correct conclusion in light of the facts in this case.

The Chief cited numerous problems concerning the credibility of the job creation estimates, some of which the Petitioner addressed in his subsequent motions and appeal. Due to several outstanding issues regarding the ownership and financial status of the JCE, however, the Petitioner has not sufficiently demonstrated, by a preponderance of the evidence, that the project is viable or that the projected job creation is credible. We discuss these remaining concerns below.

A. Project Ownership

One of the key concerns is the contested ownership of the project property. As illustrated by [redacted] foreclosure action and the other lawsuits mentioned above, there are ongoing claims regarding ownership and control of the project. To address these issues, the Petitioner has provided a printout from the county tax assessor's office that lists the JCE as the property owner. Although this document shows that the JCE purchased the property, it does not establish that the legal disputes regarding ownership have been resolved. On the contrary, other material in the record, as noted above, shows that those disputes are ongoing.

[11] While factors such as weather conditions, availability of labor, supplies, or equipment may result in construction delay or stoppage, the Petitioner has not shown that allegations of misappropriation of investor funds are similarly "normal and customary to construction projects."

B. Project Funding and Developments

In denying the Petitioner's motions to reopen and reconsider the matter, the Chief noted the receiver's February 2016 initial report, which indicates that the project would need an additional $100 million to complete. We raised this concern in our NOID/RFE. In response, the Petitioner provides a document dated May 4, 2017, purporting to show that , has agreed to loan the JCE $40 million. a member and manager of the JCE, signed the document on behalf of the JCE.

This document raises several concerns. Foremost is that it lists the project property as security for the loan. The record, however, does not demonstrate that Mr. had the authority to obtain such a mortgage on the project property. The circuit court judge's order appointing the receiver states: "The Parties have agreed to endeavor to obtain funds and financing to complete construction of the Project and shall present all financing offers to the Receiver. In all events, the Receiver shall accept a reasonable financing proposal that best ensures the completion of the Project in accordance with this Order." Similarly, in his August 2015 letter, the receiver notes that "current ownership has been removed from any operational control or decision-making processes regarding the Project." The Petitioner has not sufficiently shown that the receiver has either reviewed or agreed to this financial arrangement, which uses the receivership property as collateral.

The Petitioner submits an email from the developer of the project, indicating that the receiver knew about the document and would "write a letter of support" for it. To date, however, we have received no letter or other communication from the receiver confirming either his knowledge of or consent to this financing. Without additional corroboration, the document and Mr. email are insufficient to show that the JCE has secured the necessary funds to restart and complete the project.

Similarly, while the Petitioner has provided an April 2017 letter from a construction company indicating that construction on the project will resume in June 2017, this document, without additional corroboration, does not credibly demonstrate the viability of the project or credibility of its job creation estimates. As with the document, there is no indication that the receiver has approved or been apprised of such plans. Moreover, the Petitioner's claim that the JCE could restart construction in June 2017 appears to be inconsistent with other evidence in the record. Specifically, in response to our NOID/RFE, the Petitioner presents a 2017 article, entitled in which the receiver said that there is "significant buyer interest for the project," but did not reference the JCE's intention or ability to obtain financing to restart the project.

Regardless, even if the document were valid and construction would soon begin, we note that the proceeds of the loan would be much less than $100 million, the amount the receiver deemed necessary to complete the project. Regarding other financing, the Petitioner offers a 2017 news release from the NCE's general partner, stating that "were prepared to fund the completion of the project in a manner likely to preserve the immigration status of EB-5

investors." The record, however, lacks specific evidence substantiating this claim. In the absence of sufficient material verifying the availability of the needed funds, the Petitioner has not demonstrated that the JCE will, more likely than not, create the required number of jobs.

C. Job Creation

All economic analyses submitted, including the most recent one dated April 2017, include jobs that are calculated based on "hotel operations." In the case of a condominium hotel, operations would begin once units are available for purchase and then opened to guests. Operational capacity depends, however, on the completion of the project. In light of the JCE's financial circumstances and pending legal actions, the Petitioner has not shown that it is more likely than not that the project will proceed to this stage, i.e. operation of a condominium hotel.

Documents in the record note that [redacted] holds a $27.5 million first mortgage on the project property. The NCE appears to have a $39.5 million second mortgage on the property.[12] The terms of the court order appointing the receiver indicate that, once the first mortgage is paid, the condominium units will be released to the JCE for possible sale only if the JCE has repaid the proportional amount still owed to the NCE. Specifically, page 4 of the July 2015 order provides:

> [The NCE] has agreed to release its rights, title and interests in and to the Property, the Project or any condominium unit sold without payment or remuneration until all sums due to mortgagees ahead of it in priority are paid in full. Once all of said mortgagees are paid in full, the release price for each such unit shall be the sum which equates to the then current balance due to [the NCE] under its note and mortgage divided by the number of condominium units unsold.

As noted, the record lacks sufficient documentation verifying the availability of additional funds. As such, the Petitioner has not established that the JCE would acquire the financing needed to pay its debts to both [redacted] and the NCE such that it could sell any units and operate the property as a condominium hotel. As discussed, the Petitioner must demonstrate that it is more likely than not that the predicted job creation will occur. Based on the numerous outstanding legal and financial issues surrounding this project, we conclude that he has not met this burden.

IV. CONCLUSION

The Petitioner has not submitted a credible and comprehensive business plan showing that the necessary job creation will more likely than not occur. He therefore has not established eligibility for EB-5 classification.

12 [redacted]

ORDER: The appeal is dismissed.

Cite as *Matter of M-Y-A-*, ID# 118546 (AAO June 13, 2017)