U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12754376

Date: JUN. 16, 2021

Motion on Administrative Appeals 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 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 the record did not establish, as required, that [redacted][1] the NCE, would create the necessary number of jobs.[2] We dismissed the subsequent appeal and combined motions to reconsider and reopen the matter.

The Petitioner now files his second combined motions to reconsider and reopen the matter. On motion, he submits additional evidence and maintains that he has established eligibility for the classification.

Upon review, we will dismiss the motions.

I. LAW

A motion to reconsider is based on an incorrect application of law or policy, and a motion to reopen is based on documentary evidence of new facts. The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3), and the requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

[1] Some documents in the record refer to the NCE as [redacted]

[2] The Petitioner does not allege, and the record does not demonstrate, that the NCE has already created the requisite number of jobs. *See* 8 C.F.R. § 204.6(j)(4)(i)(A).

II. ANALYSIS

The Petitioner maintains that she qualifies for the EB-5 classification based on a $500,000[3] investment in the NCE, a business that is associated with a United States Citizenship and Immigration Services (USCIS)-designated regional center,[4] [redacted] *See* 8 C.F.R. § 204.6(j)(4)(iii). She indicates that the NCE intended to pool up to $67,500,000 EB-5 capital, from 135 foreign national investors, and additional non-EB-5 funds to build a complex with approximately 460,000 square feet of leasable commercial space in [redacted] California, near the United States-Mexico border. Evidence shows that the NCE has attracted 121, not 135, foreign national investors.

We will dismiss the motions for the reasons set forth below.

A. Motion to Reconsider

1. Deference

On motion, the Petitioner maintains that we erred in our decision on the issue of deference. We concluded that while the Chief had approved the petitions of some individuals who had invested in the NCE, he properly declined to defer to those favorable determinations in this adjudication. As discussed, under *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016), we exercise *de novo* review on appeal of all issues of fact, law, policy, and discretion. Moreover, USCIS' deference policy specifies that a previously favorable decision may not be relied on where facts have materially changed, when evidence of fraud or misrepresentation is discovered, or if the prior decision is determined to have been legally deficient. USCIS Policy Memorandum PM-602-0083, *EB-5 Adjudications Policy* 23 (May 30, 2013), https://www.uscis.gov/legal-resources/policy-memoranda; *see also* 6 *USCIS Policy Manual* G.6, https://www.uscis.gov/policymanual/HTML/PolicyManual.html.

We explained in our prior decision that the previous approvals of the petitions of other investors in the NCE were based on a different set of facts, specifically, earlier versions of the project timeline that the Petitioner has, in the past, acknowledged no longer reflect the status of the project and the Petitioner did not challenge our determination that the facts in this case are materially different than those prior adjudications. On motion, the Petitioner claims our previous decision relied on an October 18, 2017, administrative site visit upon which USCIS officers found a single trailer and an empty field leading to the conclusion that "the project was not operational and therefore jobs from occupancy could not be relied on." The Petitioner claims we erred because "there was construction activity during 2012 to 2016" and points to the attachments included in the December 2017 economic analysis.

We disagree. Our previous decision referenced the USCIS deference policy and specified that the previous approvals of the petitions relied on earlier versions of the project timeline that are materially different from the Petitioner's submitted project timeline. Additionally, our previous decision did not mention the administrative site visit conducted in 2017. On motion, the Petitioner cites to *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) and *Path America Kingco v. U.S. Dept. of Homeland Security*,

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

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

426 F.Supp.3d 770 (D.D.C. 2019) to contend that we erred in our prior decision by not properly issuing notice with "good and sufficient cause" and improperly relying on mismanagement of investor funds to determine the Petitioner did not meet visa requirements. However, these cases are not relevant to our previous decision as *Matter of Estime* sets forth the requirements for issuing a notice of intent to terminate which is inapplicable to this case and *Path America Kingco* relates to considering the mismanagement of investor funds in the termination of a regional center which, also, has not been alleged in this case.

The Petitioner also alleges that our previous decisions should have accorded deference to the previous favorable adjudications because the project has had approximately seventy-eight approved petitions. On motion, the Petitioner cites to *Doe v. U.S. Citizenship and Immigration Services*, 239 F.Supp.3d 297 (D.D.C. 2017) for the contention that we are acting arbitrarily and capriciously by treating effectively equivalent petitions differently. However, as indicated in *Doe*, USCIS must provide an explanation for treating the petitions differently. As discussed above, the Chief properly declined to defer to those favorable determinations in this adjudication in accordance with the USCIS deference policy and our previous decisions provided an explanation for why we are treating these petitions differently. The Petitioner therefore has not established that we erred in declining to defer to USCIS's previous adjudications related to the NCE.

2. Job Creation

Next, the Petitioner alleges that we erred in concluding that the Petitioner had not submitted a credible and comprehensive business plan. Our prior decision explained:

> Prospective job creation must be demonstrated through submission of a comprehensive business plan. 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. 206, 213 (Assoc. Comm'r 1998). "Mere conclusory assertions [, however,] do not enable [USCIS] to determine whether the job-creation projections are any more reliable than hopeful speculation." *Id.* The decision concludes: "Most importantly, the business plan must be credible." *Id.*

On motion, the Petitioner reiterates her argument that we erred in our prior decision because we "failed to take into account the fact that both foreign investment and domestic investment" will finance the project and that we "ignored the RIMS II model" in assessing whether the business plan was comprehensive or credible. As we stated in our previous decision:

> We did not question the December 2017 economic report's reliance on this modeling tool. Rather, we raised concerns over the data used as inputs into the model, such as construction costs and occupancy rates, to calculate job creation from the project. Furthermore, with the history of delays and lack of evidence of significant progress in

> the record, we also questioned the economic report's assumption that the NCE would likely complete the project and create the needed jobs within two years.[5]

Moreover, as noted in our previous decision, we observed that the NCE intended to finance the project with both EB-5 and non-EB-5 capital, however the record included inconsistent evidence regarding the costs, funding sources, and construction timeline of the project. Finally, we also questioned the economic report's assumption that the NCE would likely complete the project and create the needed jobs within two years due to the history of delays and lack of evidence of significant progress in the record. The record does not support the Petitioner's contention that we disregarded economic models in our previous decision.

Furthermore, the Petitioner has not overcome, on motion, the reasons we concluded that she had not submitted a credible and comprehensive business plan. Our prior decision found the Petitioner had not adequately resolved the inconsistent information contained in the multiple business plans submitted with this petition. We noted that the January 2011 (Revised), March 2017, and November 2017 business plans provided inconsistent information regarding how much the NCE would need to complete the project and from whom it would acquire the funds. On motion, the Petitioner reiterates her argument that "if [the NCE] has determined that the project will cost a total of $60,557,524.89, [we] must accept [the NCE]'s budget." However, as noted in our previous decision, the Petitioner has not pointed to any legal authority indicating that we must accept a petitioner's unsupported statement as fact when the record includes inconsistent evidence concerning the same issue. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (noting that "it is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence" and that "[a]ttempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice"). Instead, under both the relevant regulation and case law, we must determine if a business plan, considered in light of the evidence in the record, is credible and comprehensive in establishing that the NCE will likely create the necessary number of jobs within two years. *See* 8 C.F.R. § 204.6(j)(4)(i)(B); *Ho*, 22 I&N Dec. at 213. We therefore did not err in discussing the inconsistencies in the record as relating to the project, and concluding that they undermined the credibility of the November 2017 business plan.

The Petitioner's claim that the new 2019 economic analysis, submitted on motion, indicates we erred in our determination that the business plan was not credible is not relevant as a motion to reconsider must show the prior decision was incorrect based on the evidence in the record at the time of the decision. 8 C.F.R. § 103.5(a)(3).

For the reasons we discussed above, we find the Petitioner has not demonstrated that we erred in our previous decision. He has not shown that our prior decision was based on an incorrect application of law or policy and that it was incorrect based on the evidence in the record at the time of the decision. *See* 8 C.F.R. § 103.5(a)(3). We will therefore dismiss his motion to reconsider the matter.

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[5] When investing in a project associated with a regional center, an immigrant investor may satisfy the employment creation requirement through direct or indirect jobs, as demonstrated by reasonable methodologies. *See* 8 C.F.R. § 204.6(j)(4)(iii). When using an economic input-output model to demonstrate job creation, USCIS requires that the immigrant investor demonstrate the inputs into the model, such as expenditures, revenues, or jobs, are reasonable. 6 *USCIS Policy Manual* G.6(D)(5)

B. Motion to Reopen

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). The regulation at 8 C.F.R. § 103.5(a)(2) does not define what constitutes a "new" fact, nor does it mirror the Board of Immigration Appeals' (the Board) definition of "new" at 8 C.F.R. § 1003.2(c)(1) (stating that a motion to reopen will not be granted unless the evidence "was not available and could not have been discovered or presented at the former hearing"). Unlike the Board regulation, we do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, 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."

On motion, the Petitioner submits documents, some of which had previously been presented on appeal and in her previous motion. The Petitioner now offers, as new evidence, an updated 2019 economic analysis that, the Petitioner argues, shows the project is viable and will create 364 new jobs. The updated economic analysis references the same attachments that were submitted with the 2017 economic analysis but states "[f]urther review of cleared checks found at Exhibit C shows additional job creating expenditures not included in the summary ledger that was used for the December 2017 job memo." The economic analysis claims to have found an additional $1,373,654 in additional construction expenses as well as $90,999 in additional architectural, engineering, and related services expenses which would add an additional 10.3 jobs created from January 2012 to January 2017.

While this new economic analysis corrects an apparent miscalculation of previous expenditures listed in the 2017 economic analysis, it does not overcome the concerns noted in our previous decisions. The 2019 economic analysis references the same attachments submitted with the 2017 economic analysis and does not address the construction delays or inconsistencies between the numerous business plans and prior economic analysis as noted in our previous decisions. The new economic analysis also does not add to the credibility of the business plan and does not appear to use proper inputs as the analysis does not specify, with detail, what expenditures were missed in the 2017 economic analysis and also further speculates that there are other costs that have not been considered that would add more job creation to the project. We conclude that the record, including documents filed on motion, is insufficient to establish that the NCE will likely create the necessary number of jobs within the two-year period, as required under 8 C.F.R. § 204.6(j)(4)(i)(B).

The 2019 economic analysis also does not address the inconsistencies regarding the contention in the business plans and the 2017 economic report that future tenants of the project would contribute over $19,000,000 to the project costs in the form of tenant improvements or lack of evidence that the project would have an occupancy rate of about 86% at thirty months. As noted in our previous decisions, the multiple business plans submitted with this project have been inconsistent regarding whether future tenants would contribute $19,000,000 in project costs and lacked documentary support for the contention that the project would have "an occupancy rate of about 86% at thirty months." We conclude that this new evidence does not resolve the previous inconsistencies regarding future tenant contributions and is insufficient to demonstrate the projected tenant occupancy rate referenced in the most recent business plan.

For the reasons we discussed above, we find that the Petitioner has not stated new facts demonstrating his eligibility for the classification or supported the new facts with documentary evidence. We will therefore dismiss his motion to reopen the matter. *See* 8 C.F.R. § 103.5(a)(2).

III. CONCLUSION

We will dismiss the Petitioner's motion to reconsider the matter because he 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 at the time of the decision. In addition, we will dismiss his motion to reopen the proceeding because the documentation he presents on motion does not demonstrate his eligibility for the classification.

ORDER: The motion to reconsider is dismissed.

FURTHER ORDER: The motion to reopen is dismissed.