U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-W-

DATE: MAR. 16, 2018

APPEAL OF IMMIGRANT INVESTOR PROGRAM 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 record did not establish, as required, that the Petitioner had placed his investment at risk or that the NCE had created or would create the necessary number of jobs.

On appeal, the Petitioner submits additional evidence and asserts that the Chief misapplied the statute and regulations, contending that U.S. Citizenship and Immigration Services (USCIS) has approved hundreds of petitions involving similar facts.

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. To invest means to place capital at risk for the purpose of generating a return on the capital. 8 C.F.R. § 204.6(j)(2). The definition of "invest" excludes debt arrangements between the investor and the NCE. 8 C.F.R. § 204.6(e) (defining "invest"). In addition, the foreign national must show that his or her investment will benefit the United States economy and create at least 10 full-time jobs for qualifying employees. Prospective job creation must be demonstrated through submission of a comprehensive business plan.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products or services, and its objectives. *Matter of Ho*, 22 I&N Dec. 206, 213(Assoc. Comm'r 1998). Elaborating on the contents of an acceptable business plan, *Ho*, 22 I&N Dec. at 213, states that the plan should contain a market analysis, the pertinent processes and suppliers, marketing strategy, organizational structure, personnel's experience, staffing requirements, timetable for hiring, job descriptions, and projections

of sales, costs, and income. The decision concludes: "Most importantly, the business plan must be credible." *Id.*

An individual seeking classification as an immigrant investor files a Form I-526, Immigrant Petition by Alien Entrepreneur. 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 must request that the conditions be removed by filing a Form I-829, Petition by Entrepreneur to Remove Conditions. If USCIS determines that the investor has met all program requirements, it will remove the conditions and grant (unconditional) lawful permanent resident status.

II. ANALYSIS

The Petitioner invested $500,000[1] as the sole shareholder in the NCE, which is associated with a regional center, (the Regional Center). The NCE proposes to enter into a tenancy in common agreement with other single-investor owned limited liability companies working with the Regional Center to purchase property on which it will develop and manage a coffee farm. While the Petitioner has shown that suitable property is available in the neither the NCE nor the Regional Center has entered into negotiations for any of these properties. The record contains two business plans, two economic impact reports, and supporting documents. The Chief concluded that without a specific property, the Petitioner could not demonstrate that his funds were at risk, that the business plan was comprehensive rather than hypothetical, or that certain inputs to the economic model were valid. The Chief also found that the economic analysis did not project sufficient jobs within an acceptable timeline.

On appeal, the Petitioner offers a letter and exhibits addressing each concern raised by the Chief. The Petitioner supplies publications and private placement memoranda (PPMs) from unrelated regional centers, asserting that these items demonstrate similar proposals that USCIS has approved. At the outset, USCIS does not approve actual projects,[2] exemplar proposals,[3] or Form I-526 petitions based on the PPM alone. Moreover, USCIS may approve a regional center application based on a general proposal supported by hypothetical projects[4] and some applicants include hypothetical PPMs in support of their applications, providing more detailed versions later in support of an exemplar or

[1] 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). While the Petitioner has not yet secured property to develop into a coffee farm, it will limit its search to the which is rural.

[2] Actual projects are those proposed at the time of a regional center application and are supported by a compliant business plan. Organizational and transactional documents are not required. 6 *USCIS Policy Manual* G.3(B)(2), https://www.uscis.gov/policymanual.

[3] Exemplar projects are those accompanying an exemplar I-526 filing as a regional center amendment and are also supported by a compliant business plan. Transactional and organizational documents are required for an exemplar. 6 *USCIS Policy Manual*, *supra*, at G.3(B)(3).

[4] 6 *USCIS Policy Manual*, *supra*, at G.3(B)(1).

Form I-526 petition.[5] Accordingly, reviewing PPMs out of context presents an incomplete picture of a project and its status at the time USCIS approved associated petitions and is not relevant to establishing the Petitioner's eligibility for the benefit sought.

We will consider the Petitioner's remaining contentions below. As will be discussed, the Petitioner has not demonstrated an at-risk investment or that the NCE will create the necessary jobs during the requisite period.

A. Capital at Risk

On appeal, the Petitioner contends that he has established his investment is at risk because his money is in escrow and he is obligated to fulfill the business plan. He provides a legal opinion from a corporate law expert in who affirms that the NCE's manager will have control over the Petitioner's funds once released from escrow and is required to use them in accordance with the business plan. While we do not question assessment, at issue is whether the Petitioner has placed his capital at risk as contemplated in the EB-5 regulations and precedent decisions. In order to demonstrate that risk, a petitioner must present some evidence of the actual undertaking of business activity. *Ho*, 22 I&N Dec. at 210. Moreover, simply formulating an idea for future business activity, without taking meaningful concrete action, is insufficient to meet the at-risk requirement. *Id.*

The Petitioner has documented several plots of land available for purchase, but the NCE has not taken any concrete action to secure one of them. Here, the Petitioner has only executed agreements from which he can easily withdraw. For instance, the operating agreement gives the Petitioner, as the sole member, the authority to dissolve the NCE at any time. Similarly, the tenancy in common agreement allows any tenant to transfer his or her interest upon notice, without requiring consent of the others. Additionally, while the management agreement prohibits early termination, the Petitioner still retains the ability to exit the agreement at will by dissolution of the NCE.[6] Accordingly, the Petitioner's execution of these agreements appears to be preparation for future business activity, rather than meaningful and concrete action indicating that the capital has been placed at risk. We previously determined in *Ho* that this type of *de minimus* activity, such as a lease, is insufficient business activity to demonstrate risk.

B. Job Creation

Because the Petitioner has not established that he has placed his capital at risk, he has not demonstrated eligibility for the benefit sought and we need not consider additional grounds for dismissal. However, we briefly note that a review of the record supports the Chief's conclusions that

[5] Organizational and transactional documents are not required to support a hypothetical project and USCIS does not analyze their sufficiency if submitted. 6 *USCIS Policy Manual*, *supra*, at G.3(B)(1).

[6] Additionally, we note that the record does not contain a properly executed management agreement, only one signed solely by the Petitioner.

the Petitioner has not demonstrated the credibility of the business plan. Furthermore, the Petitioner does not adequately support his interpretation of relevant statutes and regulations regarding the time period in which a regional center project must establish job creation.

Upon review, the most recent business plan does not comply with *Matter of Ho* because it contains a number of deficiencies that affect its credibility. For example, the market analysis does not list competing businesses, their relative strengths and weaknesses, or a comparison of the competition's products and pricing structures. The production plan contains "industry best practices" for coffee farms without providing sufficiently detailed information about required permits, licenses the NCE obtained, or contracts it executed for the supply of materials or product distribution. Further, while page 8 states that the coffee farms will be located on "prime coffee lands in the record lacks sufficiently detailed or consistent information about the location of the intended farm property. Similarly, pages 32 to 36 describe the farming risks related to coffee production, to include weather, pests, water, and the probability of lava flows, without adequate supporting evidence demonstrating how those risks are specifically applicable to the intended farm property. Moreover, the business plan is deficient concerning the NCE's financial projections. As stated on page 37, "This section provides financial estimates for a model coffee farm. Revenues and expenses will vary according to the purchase price and acreage of the specific parcel of land." The record does not include details regarding the sources and /or derivation of the input data being used and the methodological steps taken to show that they are derived from reliable sources using reasonable assumptions.[7] Based on the above, the Petitioner has not provided a comprehensive, credible business plan. *Matter of Ho*, 22 I&N Dec. at 213.

Additionally, the Petitioner seeks to satisfy the job creation requirement over an impermissible time period of 48 months. A Form I-526 must be accompanied by evidence of how a petitioner intends to satisfy the job creation requirement, either through evidence demonstrating the required number of qualifying employees have been hired or prospectively through the submission of a comprehensive business plan demonstrating the need for the requisite number of jobs within the next two years. *See* 8 C.F.R. § 204.6(j)(4). *See also* 6 *USCIS Policy Manual* G.5(B)(2) (indicating that the business plan submitted with the Form I-526 immigrant petition must establish a likelihood of job creation within the next two years, demonstrating an expectation that EB-5 projects will generally create jobs within such a timeframe).[8] Although the Petitioner contends otherwise, he improperly relies on regulations and policy guidance related to the adjudication of a Form I-829, Petition by Entrepreneur to Remove Conditions on Permanent Resident Status, rather than the instant petition.

III. CONCLUSION

The Petitioner has not demonstrated an at-risk investment or that the NCE will create the necessary jobs during the requisite period.

[7] Additionally, we note that the NCE intends to plant four times as many trees as a "traditional" coffee farm, but the record does not address impact of the higher density planting on crop yield.

[8] https://www.uscis.gov/policymanual

ORDER: The appeal is dismissed.

Cite as *Matter of P-W-*, ID# 813465 (AAO Mar. 16, 2018)