U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13460929

Date: MAR. 24, 2021

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 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 Petitioner's Immigrant Petition by Alien Investor (Form I-526 petition), finding that the record was insufficient to establish the Petitioner's purported investment in [redacted] the NCE, would create the requisite number of jobs. *See* 8 C.F.R. § 204.6(e) (defining "capital"), (g), (j) (2016). The matter is now on appeal. On appeal, the Petitioner submits a brief and additional evidence, asserting that she has established eligibility for the EB-5 classification.

In these proceedings, it is the Petitioner's burden to establish, by a preponderance of the evidence, her eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012); *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).[1] 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 an NCE. The investor must show that his or her investment will benefit the United States economy and create at least 10 full-time jobs for qualifying employees. 8 C.F.R. § 204.6(j)(4). An immigrant investor may invest the required funds directly in an NCE or through a regional center,[2] as the Petitioner has done in this case. Regional centers apply for designation to participate in the EB-5 program with U.S. Citizenship and Immigration Services (USCIS). Designated

[1] If a petitioner submits relevant, probative, and credible evidence that leads us to believe that the claim is "more likely than not" or "probably" true, it has satisfied the preponderance of the evidence standard. *Chawathe*, 25 I&N Dec. at 375-76.

[2] 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).

regional centers identify and work with NCEs, which in turn are associated with a specific investment project, taken on either directly by the NCE or by one or more separate entities known as the "job creating entities" (JCEs). Regional centers can pool immigrant (and other) investor funds for qualifying projects that create jobs directly or indirectly. 8 C.F.R. § 204.6(j)(4)(iii).

The regulation at 8 C.F.R. § 204.6(j)(4)(i) provides that to establish job creation, a petitioner must submit:

> (A) Documentation consisting of photocopies of relevant tax records, Form 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
>
> (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 not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.[3]

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.*

II. ANALYSIS

According to pages 1 and 2 of the petition, the Petitioner invested $500,000[4] in the NCE, which is associated with a USCIS-designated regional center, [redacted] (the Regional Center). The record includes four business plans, dated October 2015, October 2017, February 2020, and June 2020, respectively, and multiple economic impact reports. Pages 1, 5 and 6 of the 2015 business plan indicates that the NCE seeks to raise up to $35,000,000 from 70 foreign national investors to loan to [redacted][5] which in turn, plans to loan funds to [redacted] and [redacted] (the developers), to construct "a mixed use development of [redacted] components" located at [redacted] New York. Page 2 of the 2015 busines plan further explains that capital the NCE receives from investors will be used for "the development and operation of Phase I" of the project, which is "the [redacted] structure . . . consist[ing] of 2 levels

[3] The two-year job creation period described in 8 C.F.R. § 204.6(j)(4)(i)(B) commences six months after the adjudication of the petition. 6 *USCIS Policy Manual* G.2(D)(5), https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-2; *see also* USCIS Policy Memorandum PM-602-0083, *EB-5 Adjudications Policy* 19 (May 30, 2013), https://www.uscis.gov/legal-resources/policy-memoranda.

[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)(2).

[5] On appeal, the Petitioner submits a June 2020 letter from her attorney, who also represents the Regional Center, stating that [redacted] will also borrow funds from another NCE, [redacted], to facilitate the project.

of below-ground parking and two above-ground stories plus mezzanine level of [redacted] establishments]."

The 2015 business plan identifies [redacted], as the JCE. On appeal, the Petitioner submits a June 2020 letter from her attorney, stating that the developers are the entities that own the land for the project. Page 13 of the 2015 busines plan claims that exterior construction of the project will complete in the third quarter in 2017, the interior construction will complete in the first quarter of 2018, and the project will be in operation by the third quarter of 2018. Page 4 of the December 2014 economic impact report states that "a total of 2,035 new jobs would be created from the construction of this building, rental income from the [redacted] and parking revenue."[6]

After reviewing the record before the Chief, the Chief denied the petition, finding that the business plans and economic impact reports failed to demonstrate that the NCE, the JCE, or the developers would likely create the requisite number of jobs within two years.[7] *See* 8 C.F.R. § 204.6(j)(4)(i)(B). On appeal, the Petitioner maintains that she has shown her eligibility for the EB-5 classification and offers additional evidence, including the NCE's June 2020 business plan, and a June 2020 economic impact report, which claims on page 2 that "[b]y the time the construction is completed in February 2024, the hard construction expenditures will have created 1,932.1 new jobs" and that "based on the expenditure and revenue projections, the project will create a total of 2,253.0 new jobs."

A. Deference Policy

On appeal, citing USCIS's deference policy, the Petitioner maintains that the Chief erred in denying the petition, because in December 2017, USCIS approved a sample Form I-526 petition, known as a Form I-526 exemplar, that the Regional Center filed for the project. *See* 6 *USCIS Policy Manual*, *supra*, at G.3(B)(3). As an initial matter, we note that, on appeal, we exercise *de novo* review of all issues of fact, law, policy, and discretion. *See Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

Moreover, 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. 6 *USCIS Policy Manual*, *supra*, at G.6. In this case, as discussed in the Chief's decision, 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.

As discussed, 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.[8] *See* 8 C.F.R. § 204.6(j)(4)(i)(B). Here, the NCE has modified its project timeline, including completion date, multiple times. As noted, page 13 of the

[6] Page 4 of the December 2014 economic impact report states: "Since the construction will take more than two years, the economic impact figures for the hard construction costs and appropriate soft costs include direct as well as indirect and induced jobs." *See* 6 *USCIS Policy Manual*, *supra*, at G.2(D)(3) (noting that qualifying jobs are those lasting at least two years); *see also* USCIS Policy Memorandum PM-602-0083, *supra*, at 17.

[7] *See supra* footnote 3.

[8] 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. 759, 770-72 (1988).

2015 busines 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, which the Petitioner offers on appeal, 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 on page 6 of the decision that "deference to the prior determination is not appropriate due to material change." *See* 6 *USCIS Policy Manual*, *supra*, at G.6.

B. Business Plans

Considering the record in its totality, we find that the Petitioner has not provided a business plan that is comprehensive and credible. *See* 8 C.F.R. § 204.6(j)(4)(i)(B); *Ho*, 22 I&N Dec. at 213. Therefore, she has not demonstrated that the NCE, the JCE, or the developers will likely create at least 10 jobs for each investor seeking EB-5 classification, within two years, as projected in the business plans or economic impact reports.

First, the record contains insufficient evidence that the developers 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 developers 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 developers had initially projected.

The record does not demonstrate, by a preponderance of the evidence, that the developers have obtained or will likely obtain the capital required to complete the project. On appeal, the Petitioner submits a June 2020 term sheet, indicating that Commercial Mortgage Strategies "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 her latest filing, which is dated December 2020. Additionally, the Chief pointed out on page 14 of the decision, that the developers 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 developers will likely obtain the needed loan. Although the record includes other evidence showing the developers' attempt to obtain the necessarily 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 she labels 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 developers 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 developers 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 developers will complete the project, are credible. *See Ho*, 22 I&N Dec. at 213 (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.[9] *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 ten full-time positions for qualifying employees").

As noted, the project timeline has changed multiple times. The 2015 business plan indicates that the "administrative phase" 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 on page 11 of the Chief's decision, "[g]iven that the project has already been frozen in administrative phase for approximately five years, is significantly behind on 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); *Ho*, 22 I&N Dec. at 213.

Page 9 of the 2017 business plan explains that "[a]s of October 2017, the [project] timeline has been pushed back further due to an Environmental Impact Statement ("EIS") study which is currently 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 developers 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]s June 2020 letter, which the Petitioner presents on appeal, claims

[9] *See supra* footnote 3.

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." On appeal, the Petitioner offers a letter from her counsel, in which he repeatedly claims that "final EIS approval is expected in September/October 2020." Neither these letters nor other 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 developers 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, in her latest filing, which is dated December 2020, 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, she has submitted documents showing that the project site is no longer for sale, and that the developers 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 developers 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 developers "expect[] 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 the insufficient documentation confirming that the developers 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 her 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); *Ho*, 22 I&N Dec. at 213.

III. CONCLUSION

Upon considering the record as a whole, we conclude that the Petitioner has not presented a comprehensive or credible business plan showing that, due to the nature and projected size of the NCE, the JCE, or the project, it will hire no fewer than 10 qualifying employee for each investor seeking EB-5 classification within the next two years. *See* 8 C.F.R. § 204.6(g), (j)(4)(i)(B); *Ho*, 22 I&N Dec. at 213. Accordingly, she has not demonstrated eligibility for the immigrant investor classification.

ORDER: The appeal is dismissed.