U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33968871

Date: MAR. 26, 2025

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) (2016).[1] This fifth preference (EB-5) classification makes immigrant visas available to aliens who invest the requisite amount of qualifying capital in a new commercial enterprise (NCE) that will benefit the U.S. economy and create at least 10 full-time positions for qualifying employees. Aliens 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), 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 Petitioner's investment in the NCE will result in the creation of at least 10 full-time positions for qualifying employees. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

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 withdraw the Chief's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

An alien may be classified as an immigrant investor if they invest the requisite amount of qualifying capital in an NCE. A petitioner may invest the required funds directly in an NCE or through a regional center. 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).

[1] On March 15, 2022, the EB-5 Reform and Integrity Act of 2022 was signed into law, revising general eligibility requirements, substantially reforming and codifying the Regional Center Program in section 203(b)(5) of the Act, and adding significant new integrity provisions. As the Petitioner filed his petition in December 2016, the relevant law then in existence governs this appellate adjudication.

An alien investor seeking EB-5 classification must demonstrate that their investment will benefit the U.S. economy and create at least 10 full-time jobs for qualifying employees. 8 C.F.R. § 204.5(j)(4). To establish prospective job creation, the petitioner must submit a copy of a comprehensive business plan to demonstrate the need for not fewer than 10 qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.[2] *See* 8 C.F.R. § 204.5(j)(4)(i)(B); *see also Matter of Ho*, 22 I&N Dec. at 2013. (specifying that a comprehensive business plan must be sufficiently detailed to permit USCIS to draw reasonable inferences about the job-creation potential" and "must be credible").

Volume 6, Part G, Chapter 3 of the *USCIS Policy Manual* articulates USCIS' policy regarding deference to previous agency determinations in the EB-5 context. *See generally* 6 *USCIS Policy Manual* G.3(A)(2), https://www.uscis.gov/policy-manual. 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. *Id.* However, 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 fraud or misrepresentation in the record of proceeding, or the previously favorable decision is legal deficient. 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. *Id.*[3]

II. ANALYSIS

The record indicates that in December 2016, the Petitioner invested $500,000[4] in [redacted] LLC (the NCE), which is associated with the [redacted] LLC, pursuant to the Immigrant Investor Program. The record indicates that the NCE proposed to pool up to $8 million from up to 16 immigrant investors with the intent to contribute those funds to [redacted], LLC (the job-creating entity) for the construction and management of a mixed-use residential and [redacted] in [redacted] California.

The Chief issued a notice of intent to deny (NOID) in January 2024. In the NOID, the Chief advised that USCIS conducted an "open-source search" and found the EB-5 project had not moved forward and was nearly five years behind schedule compared to the development timeline provided in its December 2015 business plan. The Chief therefore advised that "the project plans appear to have materially changed" and USCIS would not give deference to the prior favorable determination. The Petitioner's response to the NOID included a brief addressing the alleged material changes to the project and eight supplemental evidentiary exhibits, including a statement from the manager of the job-creating entity, addressing the status of the project.

The Chief denied the petition for the reasons outlined in the NOID, concluding the record (including "open source" information consisting of two newspaper articles and "street view and satellite images

[2] 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. *See generally* 6 *USCIS Policy Manual* G.2(D)(5), https://www.uscis.gov/policy-manual.

[3] A change is material if it would have a natural tendency to influence or is predictably capable of affecting the decision. *See Kungys v. United States*, 485 U.S. 759, 770-72 (1988).

[4] The Petitioner indicated the NCE is located in a targeted employment area, and that the required amount of qualifying capital is downwardly adjusted from $1,000,000 to $500,000. *See* 8 C.F.R. § 204.6(f)(2) (2016).

of the Project property," did not establish that the Petitioner's investment in the NCE will result in the creation of at least 10 full-time positions for qualifying employees. The Chief's decision also includes a statement that "the evidence in the record fails to establish that the NCE is principally doing business and creates jobs, in a TEA," an issue that was not addressed in the NOID.

On appeal, the Petitioner contends that the Chief violated USCIS policy by not giving deference to prior agency determinations and maintains there has been no material change to the project's plans despite some changes to the construction timeline since the initial business plan dated December 2015 was submitted to USCIS. The Petitioner further asserts that the Chief's unfavorable determination is contrary to evidence in the record showing that part of the project (an [redacted] is already completed and operational and that the project has created over 40 jobs to date.

Upon review, we will withdraw the Chief's decision and remand the matter for further review and entry of a new decision.

An officer's written decision must explain the specific reasons for denial. *See* 8 C.F.R. § 103.2(a)(1)(1). This explanation should be sufficient to allow a petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See, e.g. Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal).

Here, despite stating that the decision was based on "the evidence in the record," the Chief's decision lacked a substantive analysis of that evidence and a specific explanation of why it was determined to be insufficient to show, by a preponderance of the evidence, that the Petitioner's investment in the NCE would result in the creation of the requisite number of jobs. The Chief acknowledged only a fraction of the evidence, and none of the legal arguments, the Petitioner provided in response to the NOID. Further, as noted, the Chief's decision also includes a statement that "the evidence in the record fails to establish that the NCE is principally doing business and creates jobs, in a TEA," an issue that was not addressed in the NOID. This portion of the decision appears to be incomplete and does not offer sufficient explanation for the Chief's conclusion.

In addition, if a decision will be unfavorable to the petitioner and is based on derogatory information considered by USCIS and of which the petitioner is unaware, the petitioner must be advised of this fact and offered an opportunity to rebut the information before a decision is rendered. 8 C.F.R. § 103.2(b)(16)(i). A determination of statutory eligibility shall be based only on information contained in the record of proceeding which is disclosed to the petitioner. 8 C.F.R. § 103.2(b)(16)(ii).

The Chief's decision reflects that it was based, in substantial part, on potentially derogatory information obtained from open-source searches. However, the Chief identified only some of those sources in the NOID, and the record lacks copies of any open-source materials she may have reviewed. Thus, we cannot determine whether the Chief properly considered all the relevant evidence in the record. As noted, while the Petitioner endeavored to address the potentially derogatory information the Chief obtained from open sources in his NOID response, the decision does not acknowledge the Petitioner's explanations. In fact, much of the final decision merely repeats the initial findings made in the NOID.

To ensure fair and complete consideration of the proceedings before us, it is necessary that the record of proceedings contains copies of all evidence considered. The Chief bears the responsibility of ensuring that the record is complete and contains all evidence submitted by the Petitioner and any other evidence considered by the Chief in reaching her decision. *See* 8 C.F.R. § 103.2(b)(1); *cf. Matter of Gibson*, 16 I&N Dec. 58, 59 (BIA 1976).

Therefore, on remand, the Chief should identify and incorporate any documents, which may have been inadvertently omitted from the record of proceeding, before reviewing the entire record, including the Petitioner's appeal. If the Chief cannot supplement the record with the missing materials, and if the new decision will be based in part, on materials not submitted by the Petitioner, she should issue a new RFE or NOID, granting the Petitioner a reasonable opportunity to respond, before issuing the new decision, in compliance with 8 C.F.R. § 103.2(b)(16)(i) and (ii). That new decision, if unfavorable, shall include a sufficiently detailed and substantive analysis of the evidence to explain the specific reasons for denial, as required by 8 C.F.R. § 103.3(a)(1)(1).

ORDER: The Chief's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.