U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 05235652

Date: MAR. 31, 2020

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 petition, concluding that the Petitioner did not establish eligibility for the EB-5 classification. On appeal, the Petitioner submits additional evidence and maintains that she has shown eligibility for the EB-5 classification.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). 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. 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. An immigrant investor may invest the required funds directly in an NCE or through a regional center. Regional centers apply for designation as such with USCIS. Designated 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 entity" (JCE). 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).

II. ANALYSIS

The Petitioner indicates she invested $500,000[1] in [redacted] the NCE, which is associated with a USCIS-designated regional center, [redacted] According to the initial business plan, the NCE seeks to raise up to $98,000,000 EB-5 funds from 196 foreign national investors to invest in an equity interest in [redacted], [redacted], and [redacted], the JCEs. The JCEs plan to create approximately 7,492 EB-5 qualifying jobs from a project that will cover the following three categories:

1. [redacted] transportation and [redacted] port terminal;
2. [redacted] transportation; and
3. Agricultural harvest [redacted]

The Chief issued a notice of intent to deny (NOID) the petition, notifying the Petitioner that the evidence relating to the NCE's projected employment creation did not establish that the NCE would likely create the requisite number of jobs for qualifying employees within two years. *See* 8 C.F.R. § 204.6(j)(4)(i)(B). Among other things, the Chief raised concerns regarding a judgment[2] entered against the NCE on [redacted] 2016, finding that the NCE made materially false and misleading statements in the PPM issued to the EB-5 investors. Specifically, the NCE stated that an 80-year lease had been secured with the Port of [redacted] when, in fact, it had not. In the NOID response, the Petitioner argued USCIS was relying on "a number of documents and pleadings that are either unreliable, untruthful or not complete" and presented additional evidence including the NCE's briefs and motion filed in the above lawsuit as well as, among other things, a copy of an agreement between the NCE and Port of [redacted] and a photograph of the Port of [redacted]

After reviewing the record, the Chief denied the petition, finding that the Petitioner did not sufficiently demonstrate that the NCE would likely create the requisite number of jobs within two years as the Petitioner did not submit a credible business plan or rely on reasonable economic methodologies. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998) and 8 C.F.R. § 204.6(j)(4)(iii), (m)(3)(v). On appeal, the Petitioner contends that she has shown her eligibility for the classification and argues USCIS violated its deference policy in revisiting the economic methodology and is barred from considering state court proceedings under the doctrine of collateral estoppel.

As explained below, we find that the Petitioner has not established, by a preponderance of the evidence, her eligibility for the classification.

A. Deference Policy

On appeal, citing the deference policy, the Petitioner maintains that the Chief erred in denying the instant petition because USCIS should defer to the favorable determination of the regional center or the approved petitions of the NCE's other EB-5 investors. As an initial matter, we note that, on appeal,

[1] The Petitioner indicates that 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(t)(2).

[redacted]

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).

In support of her contention that the Chief failed to defer to the favorable determination of the regional center, the Petitioner offers the Initial Regional Center Designation letter, dated December 19, 2013. However, the letter indicates the regional center designation was approved based on a hypothetical job creation estimate and "is not accorded deference and may not be relied upon by an individual investor when filing the Form I-526." In this case, the approved regional center designation filings do not warrant deference.

Moreover, a previously favorable decision may not be relied on where the underlying facts, upon which a favorable decision was made, 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* G.6, https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-6. In this case, evidence of misrepresentation was discovered in the form of a judgment entered against the NCE on [redacted] 2016. According to the court documents, [redacted] and other non-EB-5 investors filed a lawsuit in a [redacted] Court against the NCE and its two majority owners – [redacted] and [redacted] – alleging, among other claims, fraudulent misrepresentation and violation of [redacted] Securities Act.[3] Specifically, [redacted] alleged that the NCE falsely represented to her and other investors that it had secured an 80-year lease with the Port of [redacted] and that she relied on the misrepresentation when she invested in the project. The [redacted] Superior Court found in [redacted]'s favor. The Court of Appeals of [redacted] affirmed the decision, and the Supreme Court of [redacted] denied review on the matter.

Here, the NCE initially submitted a business plan which, on page 19, claimed that the project would be able to complete construction ahead of time "since this project's construction site have been [sic] existed and [the NCE] have [sic] been pre-contracted with Port of [redacted] authority with eighty years lease term of premise." The Chief relied on this claim when determining whether the submitted business plan was credible and the economic methodologies were reasonable. Since the NCE's claim of the existence of an 80-year lease was found to be a misrepresentation in a final judgment by a state court, sufficient evidence of exists to justify not granting deference to any previous approvals.

B. Job Creation

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, Forms 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

[3] [redacted]

(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.[4]

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, 210 (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.*

Moreover, the regulation explains that the job creation projection should be demonstrated by reasonable methodologies, including economically or statistically valid forecasting tools, such as feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and/or multiplier tables. 8 C.F.R. § 204.6(j)(4)(iii), (m)(3)(v).

Considering the record in its totality, we find that the Petitioner has not provided a business plan that is credible. Specifically, the business plan, considered together with other documents, is not credible. *See* 8 C.F.R. § 204.6(j)(4)(i)(B); *Ho*, 22 I&N Dec. at 213. Therefore, the Petitioner has not demonstrated that the NCE will likely create at least 10 jobs for each of the 196 investors, or 1,960 jobs, within two years, as projected in the most recent business plan or economic report. The submitted business plan indicates the existence of the lease between the NCE and the Port of [redacted] would allow for the quick remodel of a cold storage [redacted] and warehouse. Exhibit E-2 of the business plan indicates the transportation and post-harvest [redacted] operations would create a total 7,722 EB-5 qualifying jobs within 2.5 years of I-526 approvals.

First, the record contains inconsistent evidence relating to the existence of the 80-year lease between the NCE and the Port of [redacted] as a state court judgment against the NCE determined the NCE's statements that a lease was secured were misrepresentations. "It is incumbent upon the [P]etitioner 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." *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In light of these discrepancies, the Petitioner has not established that the employment creation projections, predicated on the completion of the project, are credible.

On appeal, the Petitioner attempts to reconcile the inconsistent evidence by alleging that the state court judgment against the NCE was obtained through fraud and the alleged misrepresentations lack credibility. The Petitioner alleges [redacted]'s lawsuit was part of a family dispute where she brought the lawsuit because the NCE refused to give [redacted] or her father, [redacted] who is a founding member of the NCE, money belonging to other investors. The Petitioner further alleges that [redacted]

[4] 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. USCIS Policy Memorandum PM-602-0083, *EB-5 Adjudications Policy* 19 (May 30, 2013), https://www.uscis.gov/legal-resources/policy-memoranda; *see also* 6 *USCIS Policy Manual* G.2(D)(5), https://www.uscis.gov/policymanual/HTML/PolicyManual.html.

provided translation services for [redacted] both parties were present at the Port of [redacted] and therefore knew that a lease with the Port of [redacted] had been secured. In support of the Petitioner's claims, she points to photographs submitted in response to the NOID that purport to show [redacted] and her father at various meetings and locations with members of the NCE. The Petitioner's allegations are speculative and not competent objective evidence as, for example, the photographs submitted as evidence of [redacted]'s knowledge of the lease simply show [redacted] and [redacted] in various locations or meetings. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Even if we were to accept the Petitioner's statements, the Petitioner has not submitted sufficient documentation to demonstrate an actual 80-year lease was signed, as alleged. The Petitioner provided, as Exhibit 3 of her NOID response, the minutes of a meeting dated February 26, 2013, between the NCE and members of the Port of [redacted] The exhibit cover sheet indicates paragraph 2 evidences the Port of [redacted] agrees to 80 year lease. Paragraph 2 states: "[b]oth parties name this project as [redacted] – Port of [redacted]" The rest of the meeting minutes indicate the terms of the lease were still under negotiation as, for example, paragraph 13 states the Port of [redacted] will provide a fair lease price and other paragraphs mention details will be finalized at the next meeting. This information does not support the Petitioner's assertions that a lease with the Port of [redacted] exists. Further, the Petitioner makes no mention of whether or not a copy of a lease is available or why the Petitioner has not submitted a copy for the record. We have reviewed all the documents in the record, including those the Petitioner presents on appeal, and conclude that they do not reconcile the inconsistencies in the record concerning the existence of an 80-year lease between the NCE and the Port of [redacted]

On appeal, the Petitioner argues USCIS is precluded from revisiting the claims of misrepresentation in the NCE's state court case under the doctrine of collateral estoppel. However, USCIS was not a party to the state court proceeding and therefore not subject to collateral estoppel. Collateral estoppel applies only where it is established that… "the party against whom the collateral estoppel is asserted was a party or in privity with a party at the first proceeding." *See Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000).

Based on these deficiencies and upon considering the record as a whole, we conclude that the Petitioner has not presented a credible business plan showing that, due to the signing of an 80-year lease, the NCE will hire not fewer than 10 qualifying employees for each of the 196 EB-5 investors within the next two years. *See* 8 C.F.R. § 204.6(j)(4)(i)(B).

III. CONCLUSION

Based on the reasons stated above, we conclude that the Petitioner has not presented a credible business plan showing that the NCE will need at least 10 qualifying employees for each of the 196 EB-5 investors within the next two years. She has therefore not established by a preponderance of the evidence the lawful source of the funds she claims to have invested in the NCE.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish

eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has not been met.

ORDER: The appeal is dismissed.