U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-O-C-

DATE: MAY 11, 2017

MOTION ON ADMINISTRATIVE APPEALS 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 that will benefit the United States economy and create at least 10 full-time positions for qualifying employees. Foreign nationals may invest in a project associated with a United States Citizenship and Immigration Services (USCIS) designated regional center.[1] *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, section 610, as amended.

The Chief of the Immigrant Investor Program Office initially approved the petition, but subsequently revoked the approval, concluding that the record did not establish, as required, that the Petitioner's investment remained affiliated with a regional center. We dismissed the appeal.

The Petitioner now files combined motions to reopen and to reconsider. On motion, she submits additional evidence and asserts that she did not receive effective assistance from the regional center attorneys, that her investment satisfied all legal requirements when she filed the petition, and that we should take into account her severe hardship.

Upon review, we will deny the motions.

I. LAW

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. § 1003.23(b)(3) (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

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

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."

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of USCIS or Department of Homeland Security policy.

A foreign national may be classified as an immigrant investor if he or she invests the requisite amount of qualifying capital in a new commercial enterprise (NCE). The commercial enterprise can be any lawful business that engages in for-profit activities. An immigrant investor may invest the required funds directly in a new commercial enterprise, or invest through a regional center. Regional centers apply for designation as such with USCIS. Designated regional centers identify and work with new commercial enterprises, which in turn are associated with a specific project, known as the job creating entity. 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).

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.

Under certain circumstances, the Chief may revoke an approved petition after first issuing a notice of intent to revoke the approval. These types of revocations must be justified by "good and sufficient cause." *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)). The approval of a petition vests no rights in the beneficiary of the petition, as approval of a petition is but a preliminary step in obtaining an immigrant visa. *Id.* at 589.

II. ANALYSIS

At the time she filed the petition, the Petitioner was actively in the process of investing $500,000[2] in [redacted] (the NCE), which was affiliated with the [redacted] (the regional center). The Chief initially approved the petition. When USCIS terminated the

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

regional center's designation, however, the Chief revoked that approval. On appeal, the Petitioner attested that [redacted] the acting president and managing partner of the regional center and the Petitioner's former attorney for a separate application, "took approximately $47 million from 94 foreign investors," including the Petitioner. She explained that [redacted] has been detained in South Korea and has faced disciplinary action by the State Bar of California. She noted that the notice of intent to terminate the regional center's designation (NOIT) was sent to [redacted] office, which had closed, and was never served on her. Based on the above, she argued for relief, asserting ineffective assistance by [redacted] and a violation of due process rights that imposed a severe hardship on her for actions beyond her control. Finally, she affirmed that her investment was qualifying at the time she filed the petition and that she would seek "to satisfy the job creation requirements outlined under Form I-829 through raising additional funds for additional investments, if necessary and if required, by USCIS."

In our appellate decision, we found that the Chief was not required to serve the NOIT on the Petitioner or her counsel and that she had offered no legal authority holding otherwise. We next concluded that she must not only establish eligibility at the time of filing, but also remain eligible through becoming a conditional permanent resident; thus, any intervening malfeasance by the regional center is not a basis to overturn the Chief's revocation of the approved petition. With respect to effective representation, we considered only the attorneys the Petitioner retained for this petition, and not the regional center's attorney, observing that there was no evidence that the Petitioner's attorneys could have affected the outcome of the petition. Finally, with respect to job creation, we determined that an additional investment would constitute an impermissible material change and that Form I-829 filings are only permitted by those who have already become conditional permanent residents, which the Petitioner had not.

On motion, the Petitioner reiterates all of her previous arguments. Specifically, she continues to maintain that her due process rights were violated because the Chief did not serve the NOIT on her or her counsel. She further attests that she had a contractual agreement with [redacted] such that she can rely on his ineffective assistance to gain relief. She again contends that her investment was proper at the time of filing and that we should take into account her severe hardships. She advances one new position, namely, that a delay in the processing of her Form I-485, Application to Register Permanent Residence or Adjust Status, resulted in the revocation because the termination of the regional center occurred after the normal processing time for adjustment applications.

The Petitioner offers the following documents on motion: (1) her recent affidavit; (2) the cover letter for the petition from [redacted] partner, [redacted] (3) information about investigations of Mr. Lee by the Federal Bureau of Investigation (FBI) and the U.S. Securities and Exchange Commission (SEC), as well as his State Bar of California status; (4) a new SEC litigation release relating to a final judgment against [redacted] (5) documentation of [redacted] disbarred status; and (6) the Petitioner's complaint against [redacted] filed with the bar association. The petition cover letter is already part of the record and items three and six accompanied the appeal.

A. Due Process

USCIS is only required to send the NOIT to the regional center. 8 C.F.R. § 204.6(m)(6); *see also* 8 C.F.R. § 103.2(b)(19). The Petitioner offers no legal authority or new facts suggesting that the Chief was obligated to provide the NOIT to the regional center's investors. She has also not explained how she was a party to the regional center designation application and subsequent termination, or that she otherwise has sufficient knowledge about the regional center (with which she has no position) such that she could have responded to the NOIT with corroboration that it continued to promote economic growth.[3]

B. Ineffective Assistance of Counsel

The Petitioner has filed a complaint with the State Bar of California against and seeks relief based on his ineffective assistance to the regional center. As noted in our previous decision, was not the Petitioner's counsel for the filing and adjudication of the petition. Rather, he was the contact person for immigration-related matters, not the attorney, for the regional center. In June 2013, did represent her for her adjustment application, which is a separate form and process from the instant petition. The ineffective assistance the Petitioner discusses in her affidavit, however, relates to failure to file the Form I-924A, Annual Certification of Regional Center, on behalf of the regional center and committing "massive fraud" by using invested funds for his personal use.

The standard for reviewing ineffective assistance of counsel arguments is found in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). At issue in that case was whether an individual's attorney had provided ineffective assistance during a proceeding to warrant a new hearing. In this matter, we considered all new evidence on appeal and are doing so again on motion. The Petitioner has offered no legal authority suggesting that we must consider in her case the ineffective assistance of an attorney in a regional center designation matter or that the relief for poor representation in a separate proceeding is approval for a benefit for which she is no longer eligible. Accordingly, we will not reinstate approval of the petition based on malfeasance in managing the regional center.[4]

C. Eligible at Time of Filing

A petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). Moreover, post-approval changes are a valid basis for revocation. For example, in employment-based petitions, the termination of the employer's business is a ground for automatic revocation.

[3] A regional center applies for designation on Form I-924, which is signed by the principal of that regional center. The individual investors' names do not appear on that form, nor do the investors sign the application. Rather, the individual investor files and signs Form I-526, which is adjudicated separately from the Form I-924.

[4] According to materials the Petitioner files on motion, the United States District Court for the of California entered a final judgment against for misappropriating investor funds.

8 C.F.R. § 205.1(a)(3)(iii)(D). In addition, any "good and sufficient cause" may serve as a basis for revocation upon notice to a petitioner. 8 C.F.R. § 205.2(a); *Ho*, 19 I&N Dec. at 590. The Petitioner has not offered any legal authority supporting her position that her prior compliance with the initial evidence requirements precludes a revocation of the petition.

D. Hardship

While we are cognizant of the harm caused by regional center managers who misuse investment funds, the conditional permanent resident status requires an investor to implement the approved business plan and create jobs before USCIS will remove those conditions. The Petitioner does not point to a legal authority that allows us to reinstate the approval of the petition based on hardship considerations and speculation that she might be able to locate another investment during the conditional period that could create the necessary jobs.

E. Delay in Adjustment Processing

On motion, the Petitioner notes that she filed her adjustment application in October 2010 and affirms that USCIS should have adjudicated it within one year. Yet, the application remained pending in September 2014, when the Chief terminated the regional center designation. Had USCIS approved the application timely, argues the Petitioner, the underlying petition would not have been subject to revocation. It remains, however, that during the pendency of her application it came to the attention of USCIS that the regional center was no longer promoting economic growth. The September 2014 termination was the culmination of a lengthy review of that entity in preparation for the June 2014 NOIT. While the Petitioner's concern regarding how long her application remained pending is understandable, we cannot reinstate the approval of the petition where the designation of the affiliated regional center is terminated and the Petitioner has not demonstrated how she could eventually qualify to remove conditions without a material change to the business plan.

III. CONCLUSION

The Petitioner has not cited any legal authority to support her assertion that our prior decision was incorrect, as required for a motion to reconsider. In addition, the new evidence she presents on motion does not demonstrate that she remained eligible for the classification at the time the Chief revoked the approved petition, as required for a motion to reopen.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of C-O-C-*, ID# 306773 (AAO May 11, 2017)