U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-H-

DATE: MAY 18, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-526, IMMIGRANT PETITION BY ALIEN ENTREPRENEUR

The Petitioner, an individual, seeks classification as an immigrant investor. *See* Immigration and Nationality 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. If foreign nationals invest in a troubled business, then they can also satisfy the employment creation requirement by demonstrating job preservation. In addition, foreign nationals may invest in a project associated with a United States Citizenship and Immigration Services (USCIS) designated regional center. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (Appropriations Act) section 610, as amended.

The petition is based on the Petitioner's $500,000[1] investment in a new commercial enterprise (NCE) associated with the a USCIS designated regional center. The NCE plans to raise $6 million from 12 investors to purchase an interest in a job creating entity (JCE) that operates a hospital. The investment funds will be used to repay the hospital's outstanding loans, expand its psychiatric unit, and fund other priorities.

The Chief of the Immigrant Investor Program Office denied the petition, concluding that the record did not establish, as required, that the JCE was a troubled business and that it would preserve or create a sufficient number of jobs. The Chief denied a subsequent motion to reopen, determining that the NCE did not meet the regulatory definition for a "new" commercial enterprise,[3] and that the Petitioner had not documented he could receive a return on his investment in the NCE.

On appeal, we found that the NCE meets the definition of a "new" commercial enterprise, but raised concerns relating to the Petitioner's investment in the NCE, the JCE's status as a troubled business, and the predicted job preservation and creation. We subsequently reopened the matter on our own

[1] 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).
[2] This regional center was formerly known as the
[3] The regulation at 8 C.F.R. § 204.6(e) defines "new" to mean "established after November 29, 1990."

motion for purposes of entering a new decision and afforded the Petitioner 60 days to supplement the record. We have now received a response.

Upon *de novo* review, and in light of the new evidence the Petitioner has now submitted, we will sustain 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 new commercial enterprise. 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). 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. If the investment is made in a troubled business, the foreign national can also meet the job creation requirement by documenting that the number of existing employees is being or will be maintained at no less than the pre-investment level for at least two years. 8 C.F.R. § 204.6(j)(4)(ii).

Finally, the regulation at 8 C.F.R. § 204.6(e) offers the following definition of a troubled business:

> *Troubled business* means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve- or twenty-four month period prior to the priority date on the alien entrepreneur's [petition], and the loss for such period is at least equal to twenty percent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

II. ANALYSIS

In response to our motion, the Petitioner provides an expert opinion from [redacted] senior managing director at the [redacted] He sufficiently resolves the concerns we expressed in prior decisions and we now conclude that the Petitioner qualifies for the immigrant investor classification. Specifically, he has demonstrated that he invested the requisite amount in the NCE, which qualifies as a new commercial enterprise under the regulation. In addition, he has established that the JCE is a troubled business that will meet the job creation requirements through job preservation.

A. New Commercial Enterprise

Under the regulation, a new commercial enterprise is one established after November 29, 1990. 8 C.F.R. § 204.6(e) (definition of new). The Chief did not review the correct entity when evaluating this issue. Specifically, he considered the JCE's founding date, not the NCE's, which in regional

center cases such as this one is the relevant entity. *Matter of Izummi*, 22 I&N Dec. 169, 198-200 (Assoc. Comm'r 1998). Here, the NCE was formed well after the relevant date and, thus, it meets the definition of "new."

B. Ability to Receive a Return on the Investment

In the Chief's final decision, he determined that the terms of the investment precluded any chance for the Petitioner to break even on his investment in the foreseeable future. In response to our motion, notes that is obligated to pay a preferred six percent rate of return on the NCE's ownership interest and that the financial projections reflect the hospital will enjoy profitability beginning in 2015. He further expands on the option for the NCE to sell its interest in the JCE to generate a return.

At issue is whether the Petitioner has placed his invested funds at risk for purposes of generating a return. 8 C.F.R. § 204.6(j)(2). For his capital to be considered "at risk," the Petitioner must have made his investment not knowing if he will be able to sell his interest or receive a guaranteed price at a later date. *Izummi*, 22 I&N Dec. at 187. As notes on motion, the regulation does not specify a time period in which there must be potential for gain. In addition, the confidential offering memorandum advises that the Petitioner and the other investors may "force a sale of the project." explains that a sale could generate either a loss or a return. Neither the statute nor the regulation suggests that we should evaluate whether a particular investment is a good one for the investor, only that it constitutes an at-risk equity investment in the NCE. As the Petitioner is not guaranteed a return and the various agreements obligate the JCE to distribute profits, the record establishes a risk for both loss and gain.

C. Troubled Business and Job Preservation

A troubled business is one that, in the previous 12 or 24 months, has suffered a net loss equal to or greater than 20 percent of the company's net worth prior to the loss. 8 C.F.R. § 204.6(e) (definition of troubled business). Thus, the relevant metrics are the entity's net loss and net worth prior to that loss. The record contains two sets of income statements, tax returns, compiled financial statements, and audited reports, submitted in that order throughout this proceeding.

The audited reports confirm that the JCE is a troubled business. Specifically, 20 percent of $411,521 (the JCE's net worth in 2010) is $82,304. The JCE lost far more than that amount in both 2011 and 2012. While these numbers are significantly different from the ones on prior documents in the record, all of the financial materials reflect values consistent with a troubled business. On motion, explains how a comparison of cash and accrual accounting methods resolves the inconsistencies and he confirms the reliability of the audited statements. Accordingly, we conclude that the Petitioner has demonstrated that the JCE is a troubled business.

In order to rely on job preservation in a troubled business to meet the regulatory job creation requirement, the Petitioner must provide a comprehensive business plan. 8 C.F.R. § 204.6(j)(4)(ii).

The record contains three business plans. The second business plan includes pro forma statements and a breakdown of how the JCE would use the NCE's invested funds. The third one updates the pro forma statements in light of the audited financial reports. Despite some changes in these numbers the most recent economic analysis projects both the preservation of over 100 jobs and the creation of 61 new ones. Considering all of the submissions in the aggregate with the new evidence the Petitioner has proffered on motion, the Petitioner has demonstrated by a preponderance of the evidence that his investment will preserve and create the necessary jobs at the JCE.

III. CONCLUSION

The Petitioner has demonstrated that he placed his investment at risk in the NCE for both loss and gain, that the JCE is a troubled business, and that the invested funds will preserve and create the required number of jobs at the JCE.

ORDER: The appeal is sustained.

Cite as *Matter of W-H-*, ID# 381184 (AAO May 18, 2017)