U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 35206803

Date: MAY 30, 2025

Appeal of Field Operations Directorate (FOD) 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).[1] This employment-based fifth preference (EB-5) classification makes immigrant visas available to individuals 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. Petitioners 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, section 610, as amended by section 575 of Pub. L. No. 114-113 (2015).

FOD denied the petition, concluding that the record did not establish the requisite job creation requirements. In the denial, FOD declined to defer to a prior favorable determination in another petition associated with this NCE, based upon discrepancies and inconsistencies in the record. 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 decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

To be eligible for the EB-5 classification, a petitioner must show that he or she "has invested or is actively in the process of investing the required amount of capital" and "the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk." 8 C.F.R. § 204.6(j)(2). The regulation

[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 Immigration and Nationality Act, and adding significant new integrity provisions. *See* Section 203(b)(5) of the Act, 8 U.S.C. § 1153(b)(5) (2022). As the Petitioner filed his petition in September 2019, the relevant law then in existence governs this appellate adjudication.

further specifies "[e]vidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing" and "[t]he alien must show actual commitment of the required amount of capital." *Id.* Additionally, a petitioner must provide evidence of the actual undertaking of business activity because merely establishing and capitalizing an NCE and signing a commercial lease, for example, are not sufficient to show that an immigrant investor has placed his or her capital at risk. *See Matter of Ho*, 22 I&N Dec. 206, 209-210 (Assoc. Comm. 1998).

A petitioner may invest the qualifying capital in a "standalone" entity or in one associated with a regional center, as the Petitioner has done in this case. 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). An investor seeking EB-5 classification must show that their investment will benefit the U.S. economy and create at least 10 full-time jobs for qualifying employees. 8 C.F.R. § 204.6(j)(4). An NCE may be relied upon by multiple investors seeking EB-5 classification, provided that each investor has invested or is actively in the process of investing the required amount, and that each individual investment results in the creation of at least 10 full-time positions for qualifying employees. 8 C.F.R. § 204.6(g)(1).

A petitioner is not required to demonstrate that 10 full-time positions for qualifying employees have already been created by the NCE. However, where the jobs have not already been created, the petition must include a comprehensive business plan demonstrating the need for at least 10 qualifying employees within the next two years. *Matter of Ho* explained that a comprehensive business plan must be sufficiently detailed to permit USCIS to draw reasonable inferences about job-creation potential. *Matter of Ho*, 22 I&N Dec. at 213. Mere conclusionary assertions, however, do not enable USCIS to determine whether the job-creation projections are any more reliable than hopeful speculation. *Id.* Most importantly, the business plan must be credible. *Id.*

II. ANALYSIS

The Petitioner asserts eligibility based on an investment of $500,000 in [redacted] the NCE. The Petitioner claims that the NCE will provide funding to [redacted] LP, the JCE. The JCE, in turn, intends to build and operate a 175-room [redacted] hotel in [redacted] Florida.

FOD denied the petition, concluding that the Petitioner did not establish the job creation requirements. Specifically, FOD found that the evidence did not sufficiently establish how the investor funds from the NCE, or additional loan and equity funds, were used by the project, and that the record therefore did not establish that the EB-5 funds went towards business activity that would satisfy the job creation requirements of 8 C.F.R § 204.6(j)(2). FOD also found that different versions of the business plan reflected rising project costs without sufficient justification, and that the record therefore did not contain a credible and comprehensive business plan. Finally, FOD concluded that the economic methodologies used to establish the job creation requirements, which relied upon information from these business plans, were not reasonable.

On appeal the Petitioner acknowledges the delays and rising costs of the project, but asserts that construction is now nearly complete, the hotel is scheduled to open, and that the requisite job creation has been established. The Petitioner also submits additional evidence including a new business plan and new economic impact analysis. Additionally, during the pendency of this appeal, the Petitioner submitted supplemental evidence asserting that the hotel is now open and operating and that these changed circumstances establish eligibility.

Upon review, we conclude that we must withdraw FOD's decision and remand the matter for entry of a new decision because FOD, in reaching its findings, relied upon evidence that is not in the record. For example, the decision discusses various inconsistencies and discrepancies between the business plans dated February 2015, April 2019, and April 2022. The record, however, contains only the business plans dated 2015 and 2019. The decision also discusses an "unaccounted $22 [million]" that the Petitioner has not sufficiently explained and unidentified "contracted work" that should have been known to the NCE but was not incorporated into an April 2022 business plan. But it is not clear from the decision where this $22 million figure is from or what the contracted work is. FOD also asserts in the decision that the evidence in the record is inconsistent with claims that were made in "[t]he last filing by an investor in [the NCE]" and with [redacted] official website. While this may be true, the referenced information from [redacted] website and from the other investor's filing is not in the record before us.

To ensure fair and complete consideration of the proceedings before us, it is necessary that the record of proceedings contains copies of all evidence that has been submitted by a petitioner or considered by FOD in reaching its decision. 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). FOD bears the responsibility of ensuring that the record is complete and contains all evidence submitted by the Petitioner and any other evidence considered by FOD in reaching the decision. *See* 8 C.F.R. § 103.2(b)(1); *cf. Matter of Gibson*, 16 I&N Dec. 58, 59 (BIA 1976). We will, therefore, withdraw FOD's decision and remand this matter.

On remand, FOD should identify and incorporate any documents, which may have been inadvertently omitted from the record of proceedings before reviewing the entire record. If FOD cannot supplement the record with the missing materials, and if the decision will be based in part on materials not submitted by the Petitioner, FOD should issue a new notice of intent to deny (NOID), granting the Petitioner a reasonable opportunity to respond. Upon receipt of a timely response, FOD should review the entire record, including the Petitioner's brief and additional evidence submitted on appeal, and enter a new decision. 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)(i).

Additionally, we note that FOD's decision focused primarily on whether the business plan is credible and whether the JCE's hotel project would result in the requisite job creation. But more fundamentally, the record as it is currently constituted does not establish that the investor's funds have actually been made available to the JCE. Therefore, the record also does not establish that the capital has been placed at risk. *See* 8 C.F.R. § 204.6(j) (requiring that the alien has invested or is actively in the process of investing capital which will create the required employment); 8 C.F.R. § 204.6(j)(2) (requiring that

the required capital be placed at risk for the purpose of generating a return on the capital placed at risk); *see also Matter of Izummi*, 22 I&N Dec. at 179 (requiring that "[t]he full amount of money must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based").

According to both the Confidential Offering Memorandum, dated August 1, 2015, and the July 2015 business plan, the NCE proposes to pool $2 million from four EB-5 investors to fund a loan to the JCE. But the initial filing provided no additional evidence, such as a proposed loan agreement or promissory note, to support the claim that this had or would occur. Additionally, this claim is contradicted by the Petitioner's brief, which characterizes the NCE as providing "an up to $7 million mezzanine loan" to the JCE, pooled from up to 14 EB-5 investors.

In the NOID, FOD noted that the record did not establish that the Petitioner's investment funds were made available to the JCE for the purpose of job creation. In response to NOID, the Petitioner submitted additional evidence in an attempt to establish that the funds had been made available for job creation. However, rather than demonstrating that the NCE had either funded a loan to the JCE or was in the process of doing so, the Petitioner provided a copy of two bank statements, dated February, March and June 2020, for the NCE's escrow account. Most of the transactions on the bank statements are redacted, but the statements show three transactions in which funds are wired out of the escrow account, totaling $881,641.46. The Petitioner asserted in the NOID response that this is sufficient to establish that the capital was both placed at risk and made available for job creation because the NCE is permitted to "contribute directly to project costs." However, we note that the record does not include documentation supporting the Petitioner's assertion that the wired funds were directly contributed to the project to demonstrate that the funds were at risk.

Accordingly, FOD should consider on remand whether this evidence establishes that the investor's capital has been placed at risk for the purpose of generating a return on the capital placed at risk. Specifically, FOD should address whether the funds wired establishes the existence of the claimed "mezzanine loan" from the NCE to the JCE for the purpose of job-creating activities, the amount of this loan, and the number of investors seeking to establish the requisite job creation. Further, if the investor's capital will not be used to fund a loan and will instead "contribute directly to project costs," then FOD should address whether this is consistent with the business plan; whether these wire transactions, which are to unidentified entities for unidentified purposes, constitute placing capital at risk for the purpose of generating a return on the capital placed at risk; and whether they demonstrate that the investor has invested capital which will create the required employment upon which the petition is based.

III. CONCLUSION

Accordingly, the matter will be remanded to FOD to determine if the Petitioner has established eligibility based on the evidence in the record and to enter a new decision. FOD may request any additional evidence considered pertinent to the new determination. As such, we express no opinion regarding the ultimate resolution of this case on remand.

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