U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Y-W-

DATE: NOV. 16, 2018

APPEAL OF IMMIGRANT INVESTOR PROGRAM 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 (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 the Petitioner did not establish that , the NCE, has created or will create the required number of jobs for each immigrant investor. The Chief further determined that the Petitioner had made impermissible material changes to the initial filing.

On appeal, the Petitioner submits additional evidence and asserts that the record establishes eligibility for the benefit sought.

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 through a regional center,[1] or directly in an NCE, as the Petitioner has done in this case.

The regulation at 8 C.F.R. § 204.6(j)(4)(i) provides that to establish job creation, a petitioner must submit:

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

(A) Documentation consisting of photocopies of relevant tax records, Form 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

(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.[2]

II. ANALYSIS

The Petitioner bases his eligibility on a $1,008,000 investment in the NCE, becoming the second EB-5 investor in this project according to USCIS records. The cover letter submitted with the petition stated that the NCE is a shipping and logistics business, its main office is located in New Jersey, and 44 employees work in its New Jersey, Texas, California, Florida, Illinois, and Maryland offices. The Petitioner indicated on his March 2016 petition that at the time of his April 2015 investment the NCE did not have any full-time employees. As of the filing date, the NCE purportedly created 43 full-time jobs, 14 of which were created by the Petitioner's investment. The record also contains an undated business plan for a different entity, [redacted] that describes a New Jersey-based "trucking and warehousing company[,]" initially focusing on the "international e-commerce industry," with planned hiring in its California, Texas, and New Jersey warehouses.[3]

The Chief issued two requests for evidence (RFE) and a notice of intent to deny (NOID) asking for, among other things, additional documentation to address apparent changes that had taken place with the NCE, and to demonstrate that the NCE would, more likely than not, create the requisite number of jobs for qualifying employees within two years. Specifically, the Chief noted that a review of the NCE's website, www[redacted] in October 2017 revealed that "due to the bad economic" the company "decided that it will not be possible to operate as is[,]" and planned to "provisionally operate it for several months to reorganize its headquarters and other branches." The Chief denied the petition, concluding that the record did not establish that the NCE created or would create the requisite jobs and the Petitioner made impermissible material changes to the initial filing.

On appeal, the Petitioner asserts that he satisfied the job creation requirement at the time of filing and the submitted business plan demonstrates that [redacted] as the NCE's successor, "will

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

[3] While page 2 of the business plan is titled "[redacted] Business Plan," the information contained in the plan pertains to [redacted] Page six states that the new company, [redacted] "is heritage from [redacted] a U.S. trucking company "that was established in March 2015."

create at least 40 full time jobs in the middle of 2019." As evidence, he submits the NCE's payroll records from the Petitioner's 2015 investment date to September 2017 and the October 2017 business transfer agreement between the NCE and [redacted] The Petitioner further asserts that the business and organizational changes noted by the Chief are not material.

A. Job Creation

Considering the record in its totality, the Petitioner has not demonstrated that the NCE has created, or more than likely will create, the requisite number of jobs for qualifying employees within two years. On appeal, the Petitioner asserts that the NCE had hired "29 full time employees" at the time he filed his petition, and therefore he already satisfied the job creation requirement. Though he acknowledges the NCE's subsequent loss of jobs[4], he contends that "there is no law or regulation that any loss of jobs by an [NCE] will form a basis to deny I-526 petition." The Petitioner further states that since the NCE "created almost 90 jobs within 2 years after its formation, it is more likely than not that [redacted] under the same management and shareholders' structure as [the NCE] will create no fewer than 10 jobs in the next two years."

To satisfy the job creation requirement, the Petitioner must show that the NCE will create not fewer than ten full-time positions for qualifying employees. 8 C.F.R. § 204.6(j)(4). Qualifying employees are defined in 8 C.F.R. § 204.6(e) as:

> [A] United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Here, the record does not support the Petitioner's claim that he had already satisfied the employment creation requirement. It contains 41 Forms I-9, Employment Eligibility Verification. 16 employees attest that they are citizens of the United States, but the record lacks corroborating evidence. 18 employees claim to be lawful permanent residents or other lawful authorization to work.[5] Seven forms are defective, as the employees either claimed no status authorizing them to work in the United States or failed to complete the form.

Further, the submitted evidence, such as the NCE's payroll and tax records, does not establish that the claimed jobs were full-time.[6] Of the 18 individuals claiming some authorization to work in the

[4] The Petitioner indicated in his response to the Chief's NOID that the NCE lost 40 jobs as of February 2018.

[5] We note that 10 individuals claiming to be lawful permanent residents or have another status permitting them to work in the United States provided information on their Form I-9 that conflicts with other USCIS records. The Petitioner must address this concern in any future filing.

[6] 8 C.F.R. § 204.6(e) defines full-time employment as "employment of a qualifying employee by the new commercial

United States, two are absent from the payroll records and do not appear to have ever been employed by the NCE, while six others do not appear to have been employed full-time. Four other individuals appear to have worked only briefly for the NCE, and therefore cannot be considered permanent, full-time jobs.[7] Thus, the Petitioner has not established that the NCE has created at least 10 full-time positions for qualifying employees, as required by 8 C.F.R. § 204.6(j)(4).

In addition, the Petitioner has not provided a business plan that demonstrates the NCE would, more likely than not, create the requisite number of jobs for qualifying employees within two years. Prospective job creation must be demonstrated through submission of a comprehensive business plan. The precedent decision *Matter of Ho* held that, to be "comprehensive," a business plan "must be sufficiently detailed to permit [USCIS] to draw reasonable inferences about the job-creation potential." 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). "Mere conclusory assertions [, however,] do not enable [USCIS] to determine whether the job-creation projections are any more reliable than hopeful speculation." *Id.* The decision concludes: "Most importantly, the business plan must be credible." *Id.*

Though the Petitioner submitted a business plan to address the Chief's concerns about the NCE's job creation deficiencies, the information contained in the plan, such as the company's market analysis, financial projections, and hiring timeline, pertains to the newly established company, [redacted] The Petitioner states on appeal that in 2017 the NCE's shareholders "decided to form a new company [redacted] to continue [the NCE's] business and at the same time, add new customer base[.]" As confirmed in the submitted business transfer agreement, [redacted] "assumed all assets, rights, interest and obligations from [the NCE]."

While the Petitioner asserts that [redacted] also assumed the NCE's "obligation to create no fewer than "10" full time jobs[,]" he has not established, as required, that the NCE itself has created or will create the required jobs. 8 C.F.R. § 204.6(e) defines commercial enterprise to include a holding company and its wholly-owned subsidiaries. The record contains an executed investment agreement indicating that after his investment, [redacted] would acquire a 5% ownership interest in [redacted] with the remaining shares owned by the NCE. As [redacted] is not wholly-owned by the NCE, the Petitioner could not use any employment creation stemming from its operations to satisfy the job creation requirements of 8 C.F.R. § 204.6(j)(4).

B. Material Change

The Chief found that the Petitioner's attempt to transfer all assets, rights, interests, and obligations from the NCE to [redacted] to represented an impermissible material change.[8] As the Petitioner

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enterprise in a position that requires a minimum of 35 working hours per week."

[7] Jobs that are intermittent, temporary, seasonal, or transient in nature do not qualify as permanent full-time jobs. *See* 6 *USCIS Policy Manual* G.2(D)(3), https://www.uscis.gov/policymanual.

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

has not established that he has satisfied the job creation requirement and demonstrated his eligibility for the classification, we need not consider additional grounds for dismissal. However, this additional issue must be resolved in any future proceeding.

III. CONCLUSION

The Petitioner has not demonstrated that the NCE has created the required number of jobs for each immigrant investor. In addition, he has not submitted a business plan for the NCE showing that, due to the nature and projected size of the NCE, it will need at least 10 qualifying employees for each EB-5 investor within the next two years.

ORDER: The appeal is dismissed.

Cite as *Matter of Y-W-*, ID# 1717213 (AAO Nov. 16, 2018)