U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 5779772

Date: NOV. 27, 2020

Motion on Administrative Appeals 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, finding that the Petitioner did not show that [redacted] the NCE, would likely create the requisite number of jobs.[1] *See* 8 C.F.R. § 204.6(j)(4)(i)(B) (2014). Subsequently, we dismissed the appeal on the same ground. In addition, we found that the Petitioner had made an impermissible material change to his petition in an effort to make a deficient petition conform to eligibility requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175-76 (Assoc. Comm'r 1998).

The Petitioner now files a motion to reconsider our previous decision. He also submits a document from the State of Florida, indicating that [redacted] one of the NCE's subsidiaries, was a registered company as of [redacted] 2019. Upon review, we will dismiss the motion.

I. LAW

The regulation specifies motion filing requirements, providing that a petitioner must submit "a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed." In addition, a petitioner who files a motion to reconsider must establish that our previous 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).

[1] The Petitioner has not alleged, and the record does not show, that his investment has already created the requisite number of jobs. *See* 8 C.F.R. § 204.6(j)(4)(i)(A).

Moreover, as explained in our previous decision, to show eligibility for the EB-5 classification, a petitioner must establish, by a preponderance of the evidence,[2] among other requirements, that the NCE will meet the job creation requirements. Specifically, the regulation at 8 C.F.R. § 204.6(j)(4)(i) provides that 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
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> (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.[3]

If an NCE is "used as the basis of a petition for [EB-5] classification . . . by more than one investor," as it is the case here, then "each petitioning investor . . . [must show that his or her] investment results in the creation of at least ten full-time positions for qualifying employees." 8 C.F.R. § 204.6(g)(1). Additionally, as relating to a business plan, a comprehensive one 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.*

Furthermore, as discussed in our previous decision, a petitioner may not make an impermissible material change to the petition after its filing to make a deficient petition conform to eligibility requirements. *See Izummi*, 22 I&N Dec. at 175-76. *Izummi* specifies that "a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts" and that U.S. Citizenship and Immigration Services (USCIS) "cannot consider facts that come into being only subsequent to the filing of a petition." *Id.*; *see also Kungys v. United States*, 485 U.S. 759, 770-72 (1988) (explaining that 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).

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[2] If a petitioner submits relevant, probative, and credible evidence that leads U.S. Citizenship and Immigration Services to believe that the claim is "more likely than not" or "probably true," the petitioner has satisfied the "preponderance of the evidence" standard of proof. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010); *see also* 6 *USCIS Policy Manual* G.2(E), https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-2.

[3] 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/policy-manual/volume-6-part-g-chapter-2.

II. ANALYSIS

We will dismiss the Petitioner's motion to reconsider the matter because the filing does not include "a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." *See* 8 C.F.R. § 103.5(a)(1)(iii)(C), (a)(4). In the alternative, we will dismiss the motion for the reasons set forth below.

A. Job Creation

The Petitioner has not shown on motion that we erred in our previous finding that he did not demonstrate that the NCE would likely create at least 10 full-time jobs for each investor seeking EB-5 classification. *See* 8 C.F.R. § 204.6(g)(1), (j)(4)(i)(B); *Ho*, 22 I&N Dec. at 213. The Petitioner claimed on pages 1 and 2 of the petition that he invested $1,000,000 in the NCE.[4] According to a 2014 business plan that he submitted along with his petition, the NCE was "the parent of several project management companies": (1) [redacted] that supervised a real estate development project; (2) [redacted], that managed a commercial bakery; and (3) [redacted] that leased equipment to [redacted] Page 2 of the 2014 business plan stated that the NCE's "current focus of the business projects are the real estate development and commercial bakery." As noted in our previous decision, page 2 of the NCE's 2013 Private Placement Memorandum (PPM) similarly stated that the NCE "currently has two projects under its control and management," a real estate development in West Virginia and a commercial bakery in Florida. The PPM specified that "the two projects . . . will be able to create minimum 170 full time jobs" and "[t]hus, it is [*sic*] suitable for EB-5 investment."

The PPM provided additional information about the NCE. Page 3 of the PPM stated that the NCE "plans to accept up to 17 immigration investors," each contributing $1,000,000 to the NCE. The PPA explained how the NCE intended to use the anticipated $17 million EB-5 capital. It specified on page 3 that "[t]he bakery [in Florida] will need $5 million operational capital" and "[t]he capital investment needed for the [West Virginia real estate development] is estimated to [be] $10 million."

The record also included a second business plan, a 2016 '[redacted] Business Plan." Page 8 of the 2016 business plan stated that the "initial workforce [would be] approximately 75-80." According to page 2 of a 2016 "Amendments of Operating Agreement of [the NCE]," and other documents the Petitioner submitted to the Chief in his request for evidence (RFE) response, the NCE "decided not to pursue [the] West Virginia . . . development project as a part of EB-5 investment scheme."

As discussed on page 3 of our previous decision, the Petitioner claimed that the NCE would need an additional $2 million investment to satisfy its job creation requirements through the commercial bakery operation. He, however, did not present evidence of the availability of the funds required by the NCE. Indeed, in the brief he filed in support of the instant motion, the Petitioner does not confirm the availability of the needed investment. Rather, he alleges that the NCE's "management is

[4] The regulation specifies that "the amount of capital necessary to make a qualifying investment in the United States is one million United States dollars ($1,000,000)." 8 C.F.R. § 204.6(f)(1) (2014).

negotiating new investment to fund the production." The Petitioner's unsubstantiated statement is insufficient to establish that our finding was an error of law or policy.

In addition, as explained in our previous decision, the evidence then before us did not confirm that [redacted] was in operation. Specifically, at the time we issued our decision, the State of Florida listed [redacted] as inactive and thus ineligible to conduct business in the State.[5] Similarly, the Petitioner admitted on page 13 of his appellate brief that the business's "permits and certificates [needed] to [be] renew[ed]," because "some of them [had] expired." The record also included an August 2018 letter from a property manager, who referred to [redacted] as a "former tenant," stating that the location that housed the commercial bakery operation was "currently vacant" and that he was "actively looking for tenants for the property."

Moreover, we noted on page 3 of our decision that the Chief had pointed out inconsistencies in the record regarding the NCE's alleged job creation projections. The Petitioner submitted a number of documents, including two business plans, dated 2014 and 2016, respectively. These business plans and documentation contained discrepancies in the number of anticipated employees, hiring timelines, and projected revenues. The Petitioner did not resolve these inconsistencies, and thus did not establish the credibility of either business plan. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (stating: "the petitioner [must] 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"). Furthermore, we also pointed out in our previous decision that the Chief had noted that publicly available sources indicated that the NCE scheduled an auction of [redacted] equipment for June 2018. These documents did not support a finding that the NCE, through the commercial bakery operation, would likely create the requisite number of jobs.

On motion, the Petitioner asserts that the commercial bakery "is 95% percent finished," a claim he had also made on appeal. He claims that the NCE had created some jobs as well as spent money on equipment purchases. In addition, he argues that he need not show actual job creation until "about two or two and a half years" after the adjudication of the petition.[6]

As discussed in our previous decision, the Petitioner need not show actual job creation. Instead, he must submit a comprehensive and credible business plan showing that the NCE would likely create at least 10 full-time jobs for qualifying employees for each investor seeking EB-5 classification. *See* 8 C.F.R. § 204.6(g)(1), (j)(4)(i)(B); *Ho*, 22 I&N Dec. at 213. Although the record included some evidence of job creation and business operation, based on the reasons we had discussed in our previous decision and reiterated above – including the lack of needed capital, lack of or diminished business activities, as well as discrepancies in the number of anticipated employees, hiring timelines, and projected revenues – we find no error in our conclusion that the Petitioner had not demonstrated that

[5] On motion, the Petitioner submitted a certificate from Florida, noting that [redacted] paid fees and filed appropriate documents with the State, and that its status was active as of [redacted] 2019. A search of public records available from the Florida Division of Corporations on November 9, 2020, however, indicated that the business had again became inactive as of [redacted] 2020 due to "admin dissolution for annual report." State of Florida Division of Corporations, Detail by Entity Name, http://search.sunbiz.org/Inquiry/CorporationSearch/ByName, last visited on November 9, 2020.

[6] *See supra* note 3.

the NCE would likely satisfy the job creation requirements. *See* 8 C.F.R. § 204.6(g)(1), (j)(4)(i)(B); *Ho*, 22 I&N Dec. at 213.

B. Material Change

In addition, we find no error in our conclusion that the Petitioner had made an impermissible material change to the petition in an attempt to cure its defects. As noted, according to the 2014 business plan, as well as the 2013 PPM, the NCE would create jobs through two projects, a West Virginia real estate development and a Florida commercial bakery. The Chief, on page 7 of the RFE, explained to the Petitioner that he must demonstrate that the qualifying jobs would be created by the NCE or its wholly-owned subsidiaries. *See* 8 C.F.R. § 204.6(e) (defining "commercial enterprise" to include a business that "consist[s] of a holding company and its wholly-owned subsidiaries"); 6 *USCIS Policy Manual* G.2(C), https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-2.

Pages 1 and 3 of the 2013 PPM revealed the ownership of the two projects, noting that the NCE owned 51% of the West Virginia real estate project and "100% of the bakery [in Florida] till the investment is recouped." Page 4 of the 2014 business plan similarly provided that the NCE owned "a majority" share of [redacted] As the evidence in the record did not show that [redacted] – the entity that would purportedly create jobs through the West Virginia real estate development – was the NCE's wholly-owned subsidiary, the Petitioner did not establish that he and other foreign national investors could rely on jobs from that project to meet the employment creation requirements. *See* 8 C.F.R. § 204.6(g)(1), (j)(4)(i).

In response to the deficiency noted in the Chief's RFE, the Petitioner submitted additional documents, including a 2016 '[redacted]Business Plan," 2016 "Amendments of Operating Agreement of [the NCE]," and 2016 market analysis for the West Virginia real estate project. Page 2 of the 2016 Amendments of Operating Agreement, along with other documents the Petitioner submitted in his RFE response, indicated that the NCE "decided not to pursue [the] West Virginia . . . development project as a part of EB-5 investment scheme." On pages 4-5 of his RFE response, the Petitioner claimed that the "West Virginia . . . development project was a scheme to diversify the EB-5 investment to reduce the risk" and "[i]t was never meant to be a [job creating entity] in the first place." He further alleged that the NCE "decided to delink the West Virginia project all together early this year [2016]."

On motion, the Petitioner contends that the elimination of the West Virginia real estate project was the result of the NCE "scal[ing] up and scal[ing] down based on the availability of the capital investment." He asserts that the NCE's "core business," which was "the commercial bakery business has never been changed," and argues that therefore there was "no 'material change' in the business." The record did not support his contention.

As discussed in our previous decision and reiterated above, the Petitioner initially indicated that the NCE would create at least 170 jobs through the West Virginia real estate development and the Florida commercial bakery. This level of job creation would satisfy the employment creation requirements for the 17 foreign national investors the NCE sought to attract. Upon learning from the Chief's RFE that the NCE could not rely on the West Virginia real estate project to satisfy job creation requirements, because [redacted] the job creating entity, was not the NCE's wholly-owned

subsidiary, the Petitioner presented documents stating that the NCE would no longer invest in that project.

As we stated on page 5 of our decision, the 2016 business plan and 2016 "Amendments of Operating Agreement of [the NCE]" "removed the business activities of the problematic subsidiary such that the NCE would create only eligible jobs." The changes in the NCE's business and investment activities constituted a new set of facts that had a natural tendency to influence or was predictably capable of affecting the outcome of our decision. *See Izummi*, 22 I&N Dec. at 175-76; *Kungys*, 485 U.S. at 770-72. We therefore find no error in our conclusion that "these changes were made to cure the deficiencies noted by the Chief in her RFE" and they "constitute[d] an impermissible material change to the petition."

III. CONCLUSION

We will dismiss the Petitioner's motion to reconsider the matter under 8 C.F.R. § 103.5(a)(1)(iii)(C), (a)(4). In the alternative, we will dismiss his motion because he has not established that we based our prior decision on an incorrect application of law or policy, or that the decision was incorrect based on the evidence in the record at the time of the decision.

ORDER: The motion to reconsider is dismissed.