U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF X-W-

DATE: NOV. 30, 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 record did not establish, as required, that the NCE, would create the necessary number of jobs.[1] On appeal, the Petitioner submits additional evidence and asserts that the record establishes his 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 directly in an NCE or through a regional center,[2] as the Petitioner has done in this case. Regional centers apply for designation as such with the United States Citizenship and Immigration Services (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, as it is the case here, or by one or more separate entities 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).

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

[2] 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).

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

> (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
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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]

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.*

II. ANALYSIS

The Petitioner invested $500,000[4] in the NCE, which is associated with a USCIS-designated regional center, [redacted] The record includes the initial business plan, dated 2013, and a 2017 addendum, which state that the NCE will pool up to $8,500,000 EB-5 capital from 17 foreign national investors to develop and operate 12 acres of greenhouses growing vegetables. The 2013 business plan, 2017 addendum, and economic impact analysis indicate that the NCE will grow bittermelon, sinqua, and amaranth for sale to distributors in California, and provide that the NCE will create jobs directly and indirectly through operation of the greenhouse business.

The Chief denied the petition, finding that the record did not demonstrate that the NCE would likely create the requisite number of jobs within two years. *See* 8 C.F.R. § 204.6(j)(4)(i)(B). Specifically, he found that the evidence submitted by the Petitioner did not support the need for the 70 full-time non-seasonal employees or the 10 administrative and office positions identified in the business plan.

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[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/policymanual/HTML/PolicyManual.html.

[4] The Petitioner indicates that the NCE is located in a targeted employment area, and that the requisite amount of qualifying capital is downwardly adjusted from $1,000,000 to $500,000. *See* 8 C.F.R. § 204.6(f)(2).

The Chief also noted the plan's income projections were unsupported. Additionally, he found that the economic methodology used to establish job creation was not reasonable, as it was based upon the 80 direct jobs that the record did not support.

On appeal, the Petitioner contends that he has shown his eligibility for the classification and offers additional documentation, including the 2017 business plan addendum, which contains the NCE's updated development schedule, production plan, financial projections, and hiring timeline. In addition, the Petitioner submits photographs depicting the project's development and statements regarding the operational delays. Considering the record in its totality, the Petitioner has not demonstrated that the NCE will create the requisite number of jobs for qualifying employees within two years, as projected in the business plan.

First, the Petitioner has not established that any job creation will occur within the mandated two year timeframe. As noted by the regional center principal, droughts in California have detrimentally delayed operations. The 2013 business plan states that "establishing the proposed greenhouse farm will require a development process of 12-13 months," and indicates "growing and harvesting" will commence in January 2016. Page seven of the 2017 addendum states however, that "due to unforeseen circumstances beyond its control" the NCE was unable to meet its development schedule. Severe drought conditions in 2015 and 2016 "significantly limited" the amount of water available from and in April 2015, the NCE decided to install a well to access groundwater for irrigation. The addendum further specifies that "in 2017, the well was completed" and "in November 2017, connection to the new electricity pole was completed and electricity to the well was established. It is anticipated that the groundwater from a fully operational well will alleviate the irrigation issues." Page 10 of the 2017 addendum states that "growing and harvesting" will now commence in January 2019, and the Petitioner additionally asserts that "now that the well is completed, the NCE is on track and expected to be completed and open in November 2018."

According to the addendum's timeline, in April 2016, the company notified the NCE and other property owners, about inspections to plan a transmission line, that "will be used for electricity to power the well's pump." Similarly, in her 2017 letter, explained that a new electricity pole "will be able to provide electricity to the well by the end of November 2017. At which time, the well will be able to provide groundwater to solve the water shortage problem." She further stated that "we have found a permanent solution to the water-shortage-induced job creation problem" and "the Regional Center will eventually be able to hire the planned 80 direct full-time jobs for each project," including this NCE.

Though the 2017 addendum includes photographs that are described as pictures of the well, irrigation pipes, and a canal, the record does not demonstrate the NCE has completed the well and established the electricity supply, and that the new irrigation system is operational. The submitted evidence, including the well construction pricing proposal and the April 2016 letter from detail prospective plans rather than verify that the well is operational. For example, the Petitioner has not provided corroborating documentation, such as electricity bills, bank statements showing

past payments, or updated letters from [redacted] to demonstrate the new electricity pole was installed and the new well is operating as claimed.[5]

As explained above, because the record does not demonstrate that the NCE has resolved the issues that resulted in extensive operational delays or that it has moved forward sufficiently with the development plans, the Petitioner has not established that the required job creation will occur within the mandated two year timeframe.

Second, the Petitioner has not provided a business plan that is comprehensive or credible, because the 2017 addendum still contains insufficient details and supporting documentation. *See Ho*, 22 I&N Dec. at 213. Therefore, the Petitioner has not demonstrated that the NCE will create the requisite number of jobs for qualifying employees within two years, as projected in the business plan.

The 2013 business plan's market analysis asserts that the "positive outlook" for the NCE is based on factors such as the strength of [redacted] agriculture and the "growing importance of greenhouse production." Though it states that the growth of the Asian population in California is likely to "drive growth in the Asian grocery stores and restaurants that purchase the NCE's products[,]" the record does not demonstrate that the market analysis assertions are based on verifiable data. In regard to the NCE's potential competitors, the business plan indicates it "obtain[ed] our information on relevant competitors" by interviewing "several major Asian vegetable wholesalers" in [redacted]

However, the Petitioner does not provide information about entities that are similar in size and scope to the NCE. For example, page 35 of the business plan references non-greenhouse vegetable farming operations in Mexico and California that range between 100 and 1,500 acres, in contrast to the NCE's proposed 12-acre [redacted] California greenhouse project. Further, the analysis describes these competitors' pricing structures as low, medium, or high, without explaining what those labels mean or identifying the actual prices.

Concerning the NCE's proposed distribution strategy, though page 34 of the 2013 business plan lists several companies that "will likely be among the initial distribut[o]rs of vegetables produced by the NCE," the Petitioner does not provide supporting documentation, such as contracts or sales agreements, between the NCE and any distributors. While the Petitioner provided a 2013 letter from the sales manager for an Asian vegetable wholesaler, [redacted] listing primary

[5] The addendum states that the new transmission line "will be used for electricity to power the well's pump." According to the submitted April 2016 letter, the new line appears to be contingent upon [redacted] proposed [redacted] project. However, the [redacted] website indicates that the "work on [redacted] has paused while [redacted] works with the [redacted], which is reassessing the project." [redacted] further states that "we are unsure how long this process will take." *See* [redacted] https [redacted] (last accessed on September 19, 2018, and incorporated into the record of proceedings).

supermarkets that purchase Asian vegetables and the average quantities sold per day, the record does not establish that the NCE has secured contracts or finalized agreements to distribute its produce.

In regard to the financial projections, according to page 45 of the 2013 business plan, because "the NCE has not located any publically-available cost and income data for a similar business to provide as a comparison," it has "endeavored to show through this business plan that its projections are internally consistent," and that they are "in line with its production plan and with verifiable data on the market and pricing." However, the 2013 plan and the 2017 addendum contain financial projections, revenue assumptions, and a production plan based on market and pricing data that are not supported by verifiable evidence.

For example, page 17 of the 2017 addendum states that the NCE's estimated gross sales are based on assumptions regarding "production volume and pricing when the farm is operating at full capacity." The addendum further states that it "is anticipated that farming will begin in 2019 with full capacity being reache[d] approximately three years after farming begins." The 2017 addendum projects the same total sales revenue estimate ($2,480,400) as the 2013 business plan, and similarly, relies on identical "average sales price per box" for the NCE's three initial crops: bittermelon, sinqua, and amaranth. While the 2013 plan's "Pricing Strategy" section referred to the United States Department of Agriculture's (USDA) 2011 to 2012 daily pricing samples for sinqua and bittermelon, the Petitioner does not provide the source of the 2017 addendum pricing projections, or explain why the NCE has not updated its pricing projections and revenue assumptions.[6] Therefore, the record does not contain verifiable data to support the NCE's revenue projections.

In addition, the Petitioner has not demonstrated that the 2017 addendum credibly shows the NCE will create the necessary number of jobs because the record lacks sufficient evidence to support its cost projections. Specifically, the addendum contains variable and fixed cost estimates that are not supported by verifiable data. For example, it does not update the 2013 plan's annual "production labor wages" ($1,349,200) for the 70 "farm workers" that, according to the addendum's hiring timeline, will now be employed beginning in the third quarter of 2019. Further, though the addendum lists the farm worker position's "hourly wage range" as $10-15 wage and "minimum hours per week" as 35, the $1,349,200 appears to be insufficient to comply with California's mandatory annual minimum wage increases.[7] Because the 2017 addendum's cost estimate for "production labor wages" is not sufficient for the NCE to pay the required minimum wage for the 70

[6] We note that the USDA daily pricing samples for sinqua and bittermelon included with the 2013 business plan are not consistent with current data. *See* United States Department of Agriculture, Agricultural Marketing Service, https://www.marketnews.usda.gov/ (last accessed on September 19, 2018, and incorporated into the record of proceedings).

[7] According to the State of California, Department of Industrial Relations, "Effective January 1, 2017, the minimum wage for all industries will be increased yearly. From January 1, 2017, to January 1, 2022, the minimum wage will increase for employers employing 26 or more employees." The mandatory minimum wage for employers "with 26 employees or more" is $11 per hour as of January 1, 2018. https://www.dir.ca.gov/dlse/FAQ_MinimumWage.htm/ (last accessed on September 19, 2018, and incorporated into the record of proceedings). Under the mandatory minimum wage law, 70 employees working 35 hours per week, 52 weeks per year, would require at least $1,401,400 annually.

projected farm workers, the Petitioner has not demonstrated that the financial projections are credible or supported by verifiable evidence.

Moreover, the itemized cost estimates on page 15 of the 2017 addendum include the same annual "water" and "utilities" costs ($15,000 and $4,000) listed in the 2013 business plan. The Petitioner does not provide the source of the 2017 addendum's water and utilities cost estimates, or explain why they would not change since 2013, even though the NCE has since purportedly installed its own well and established a new electricity supply to power the well. Additionally, the record does not establish the amount of water required for the project's sustained operations and the addendum does not indicate the amount of water the purported new well supplies to the NCE. Though the submitted evidence includes a print-out depicting the 2015 well development and testing, this is not sufficient to demonstrate that the NCE has installed a new well and it is supplying the project's water requirements.

Further, the 2017 addendum states the NCE has leased "refrigerated space in a whole sale produce building in [redacted] to process, store and sell its produce," and the 2013 business plan and 2017 addendum cost estimates include an annual "rent expense – warehouse" of $24,300. However, the record does not contain the referenced lease or other documentation that supports the rent expense line item. Similarly, the 2017 addendum does not update the 2013 business plan's cost estimate for seed purchases ($11,100). Though the Petitioner provided a 2013 purchasing price quote from [redacted] the evidence does not demonstrate that the 2017 seed cost estimate is based on updated and verifiable data.

Based on these deficiencies and upon considering the record as a whole, we conclude that the Petitioner has not presented a comprehensive or credible business plan showing that, due to the nature and projected size of the NCE, it will hire no fewer than 10 qualifying employees for each of the 17 EB-5 investors within the next two years. *See* 8 C.F.R. § 204.6(j)(4)(i)(B).

III. CONCLUSION

The Petitioner has not submitted a comprehensive and credible business plan 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. Accordingly, he has not demonstrated eligibility for the immigrant investor classification.

ORDER: The appeal is dismissed.

Cite as *Matter of X-W-*, ID# 1185667 (AAO Nov. 30, 2018)