U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10133828

Date: OCT. 1, 2024

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, concluding that the Petitioner did not establish 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). We dismissed a subsequent appeal. The matter is now before us on motion to reconsider. The Petitioner contends that our prior appeal decision and the Chief's decision on the issue of potential job creation were incorrect based on the evidence of record.

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). Upon review, we will dismiss the motion.

I. LAW

A motion to reconsider must establish that our prior 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). Our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit.

As required by 8 C.F.R. § 204.6(j)(4)(i), the petition must establish that the investment of the required amount of capital in an NCE will create full-time positions for at least 10 qualifying employees within two years. *See also* 8 U.S.C. § 1153(b)(5)(A)(ii). The two-year period described in 8 C.F.R. § 204.6(j)(4)(i)(B) is deemed to commence six months after the adjudication of the Form I-526.

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

According to 8 C.F.R. § 204.6(j)(4)(i), to show that an NCE will create full-time positions for at least 10 qualifying employees within two years, the petition must be accompanied by:

> (A) Documentation consisting of photocopies of relevant tax records, Forms I-9, or other similar documents for 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 NCE, the need for at least 10 qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

A petition is not required to demonstrate that 10 full-time positions for qualifying employees have already been created by the commercial enterprise. However, where the jobs have not already been created, the petition must include a comprehensive business plan demonstrating the need for at least 10 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. 206, 213 (Assoc. Comm'r 1998).

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998); *see also* 8 C.F.R. § 103.2(b)(1).

II. ANALYSIS

A. Job Creation

The Petitioner has not shown we erred in our previous determination that she did not demonstrate that the NCE would likely create at least 10 full-time positions for qualifying employees for each investor seeking EB-5 classification. *See* 8 C.F.R. § 204.6(g)(1), (j)(4)(i)(B); *Matter of Ho*, 22 I&N Dec. at 213. The Petitioner claimed on page 2 of the petition that she invested $1,000,000 in the NCE.[2]

According to a 2014 business plan, the NCE will be the parent company of several project management companies: (1) [redacted] which will supervise a real estate development project; (2) [redacted] which will manage a commercial bakery; and (3) [redacted] which will lease equipment to [redacted] for the bakery operation. Page 1 of the 2014 business plan states that the NCE's current focus of the business projects are the real estate development and commercial bakery. Page 2 of the NCE's 2013 Private Placement Memorandum (PPM) similarly states that the NCE currently has two projects under its control and management: (1) an upper scale riverside vacation home development in [redacted] West Virginia, and (2) the

[2] The Petitioner filed her petition in 2014, and the applicable regulation specifies that the amount of capital necessary to make a qualifying investment in the United States is $1,000,000. 8 C.F.R. § 204.6(f)(1) (2014).

building of a commercial bakery plant in Florida. The PPM states that the two projects will be able to create minimum of 170 full-time jobs; thus, it is suitable for EB-5 investment.

The PPM provides additional information about the NCE. Page 3 of the PPM states that the NCE plans to accept up to 17 immigration investors, each contributing $1,000,000 to the NCE. The PPM explains how the NCE intends to use the anticipated $17 million EB-5 capital. It specifies on page 3 that the bakery in Florida will need $5 million operational capital and that the capital investment needed for the building of 17 houses at the [redacted] development is estimated to be $10 million.

The record also includes a second business plan, a 2016 [redacted] Business Plan. Page 8 of the 2016 business plan provides that the initial workforce would be approximately 75 to 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 her response to a request for evidence (RFE), the NCE decided not to pursue the West Virginia waterfront house development project as part of EB-5 investment scheme.

In response to a notice of intent to deny (NOID) issued by the Chief, the Petitioner claimed that the NCE would need an additional $2 million investment to satisfy the job creation requirements through the commercial bakery operation. However, in her motion brief, the Petitioner does not confirm the availability of the needed investment. Rather, she alleges that the NCE's management is negotiating new investment to fund the production. The Petitioner's unsubstantiated statement is insufficient to establish that our decision was an error of law or policy.

In addition, the evidence then before us did not confirm that [redacted] was in operation. Specifically, at the time we issued our prior decision, the State of Florida listed [redacted] as inactive and, therefore, ineligible to conduct business in the State of Florida.[3] Similarly, the Petitioner admitted on page 13 of her appellate brief that the business's permits and certificates needed to be renewed because some of them had expired. The record also includes an August 2018 letter from the manager of the landlord who owned the project site located in [redacted] Florida, who referred to [redacted] as a former tenant, stating that the location that housed the commercial bakery operation was currently vacant and that they were 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

[3] On motion, the Petitioner submits a certificate from the State of Florida, noting that [redacted] has paid all fees and filed appropriate documents with the State of Florida and that its status was active as of April 2019. However, a search of public records available from the Florida Division of Corporations on September 18, 2024 indicates that the business had again became inactive as of [redacted] 2020 due to administrative dissolution for failure to file annual reports. State of Florida, Division of Corporations, *Search by Entity Name*, https://search.sunbiz.org/Inquiry/CorporationSearch/SearchResultDetail?inquirytype=EntityName&directionType=Initial&searchNameOrder=[redacted] (last visited September 18, 2024).

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 that the petitioner must resolve the inconsistencies by independent objective evidence and that attempts 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 to occur in June 2018. These documents did not support a conclusion that the NCE, through the commercial bakery operation, would likely create the requisite number of jobs.

The Petitioner asserts that the commercial bakery is 95% finished, a claim she had also made on appeal. She claims that the NCE created more than 18 full-time jobs between 2015 and 2018 and spent more than $8 million for purchasing equipment and building the bakery plant. In addition, she argues that she has about two or two and a half years before she is required to prove that 10 full-time jobs have been created as a result of her investment. *See* 8 C.F.R. § 204.6(j)(4)(i)(B).

As discussed in our previous decision, the Petitioner need not show actual job creation. But she 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); *Matter of Ho*, 22 I&N Dec. at 213. Although the record includes 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 for the commercial bakery project, lack of or diminished business activities of the bakery operation, and 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 the NCE would likely satisfy the job creation requirements. *See* 8 C.F.R. § 204.6(g)(1), (j)(4)(i)(B); *Matter of Ho*, 22 I&N Dec. at 213.

B. Material Change

We also 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. According to the 2014 business plan and the 2013 PPM, the NCE would create jobs through two projects: (1) a West Virginia real estate development and (2) a Florida commercial bakery. The Chief, on page 7 of the RFE, explained to the Petitioner that she 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 consists 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 reveals the ownership of the two projects, noting that the NCE will own 51% of the West Virginia real estate project and 100% of the bakery in Florida until the investment is recouped. Page 3 of the 2014 business plan similarly provides that the founding members of the NCE will own 66% shares of [redacted] which will supervise the West Virginia real estate development project. As the evidence in the record does 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 she and other foreign national investors could rely on jobs from the West Virginia real estate development project to satisfy the job 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 the 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 her RFE response, indicates that the NCE decided not to pursue the West Virginia real estate development project as part of EB-5 investment scheme. The Petitioner claimed that the West Virginia real estate development project was a scheme to diversify the EB-5 investment to reduce the risk and that it was never meant to be a job-creating entity in the first place. She further alleged that the NCE decided to delink the West Virginia project all together early in 2016.

The Petitioner contends that the elimination of the West Virginia real estate development project was the result of the NCE's scaling up and scaling down based on the availability of the capital investment. She 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. However, the record does not support this contention.

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, according to the PPM. Upon learning from the RFE that the NCE could not rely on the West Virginia real estate project to satisfy the job creation requirements because [redacted] the job-creating entity, is not a wholly owned subsidiary of the NCE, the Petitioner presented documents stating that the NCE would no longer invest in the West Virginia real estate development project.

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 through the commercial bakery operation. The changes in the NCE's business and investment activities constitute a new set of facts that has a natural tendency to influence or was predictably capable of affecting the outcome of our decision. *See Kungys v. United States*, 485 U.S. 759, 770, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988) (holding that a change is material if it has a natural tendency to influence or was capable of influencing the decision of the decision-making body to which it was addressed). Therefore, we find no error in our conclusion that these changes were made to cure the deficiencies noted in the RFE and they constitute an impermissible material change to the petition.

The Petitioner has not shown that our prior decision contains errors of law or policy and that the decision was incorrect based on the evidence of record at the time of the decision. The Petitioner's motion brief lacks any cogent argument as to how we misapplied the law or policy in dismissing her appeal. The Petitioner reiterates her previous arguments presented in response to the Chief's NOID and in support of her appeal. She has not identified any incorrect application of law or policy by us in our prior appeal decision. Because the motion does not meet the requirements of a motion to reconsider, we will dismiss the motion. *See* 8 C.F.R. § 103.5(a)(4).

III. CONCLUSION

The Petitioner has not established that our prior appeal decision was based on an incorrect application of law or policy or that the decision was incorrect based on the evidence of record at the time of the decision. Accordingly, the motion will be dismissed. We will not re-adjudicate the petition anew, and, therefore, the underlying petition remains denied.

ORDER: The motion to reconsider is dismissed.