U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF O-T-N-

DATE: OCT. 11, 2019

MOTION ON ADMINISTRATIVE APPEALS 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 that the Petitioner had not established that [redacted],[1] the NCE, and [redacted] the job creating entity (JCE), would create the necessary number of jobs.[2] In addition, the Chief found that the Petitioner had not invested the required amount of capital. We dismissed the Petitioner's appeal, affirming the Chief's determination.

The Petitioner now files combined motions to reconsider and reopen the matter. On motion, she submits additional evidence and maintains that she has established eligibility for the classification.

Upon review, we will deny the motions.

I. LAW

A motion to reconsider is based on an incorrect application of law or policy, and a motion to reopen is based on documentary evidence of new facts. The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3), and the requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

In addition, 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."

[1] Some documents in the record refer to the NCE as [redacted]

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

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."

II. ANALYSIS

The Petitioner maintains that she qualifies for the EB-5 classification based on a $500,000[3] investment in the NCE, a business that is associated with a USCIS-designated regional center,[4] Regional Center. *See* 8 C.F.R. § 204.6(j)(4)(iii). According to the NCE's 2014 and 2017 business plans,[5] the NCE will pool up to $33,000,000 EB-5 capital from 66 foreign national investors to lend to the JCE for development of the Project, a cellulose-to-sugar conversion factory that will process raw natural waste – which the Petitioner has identified as biomass, biowaste, and feedstock – into industrial sugar syrup and its byproducts.[6] In her motion brief, the Petitioner indicates that the process is "new" and "patented." Page 10 of the 2017 business plan states that, among other uses, the JCE's products can be "ferment[ed] . . . to produce ethanol, a clean, renewable energy source." The 2017 business plan and the 2014 economic impact analysis provide that the JCE will create jobs during the planning, construction, and operation phases of the factory.

In our previous decision, we concluded that the Petitioner did not establish her eligibility because she did not present a credible and comprehensive business plan demonstrating that, due to the nature and projected size of the project, the NCE and JCE would create at least 10 full-time positions for each foreign national investor seeking EB-5 classification within two years.[7] *See* 8 C.F.R. § 204.6(g)(2), (j)(4)(i)(B); *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998).

A. Motion to Reconsider

1. Job Creation

The Petitioner maintains that we erred in our decision, because we "decided to take issue with, and require evidence of points that are ultimately not crucial to finishing the development of the Project." On pages 4 and 5 of her motion brief, she claims that we "are essentially at this point asking [the JCE] to build the entire project before EB-5 funding is approved" and that we "expect the entire project to already be built before approving" the petition. The record does not support the Petitioner's contentions.

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

[4] 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).

[5] Both the 2014 and 2017 business plans are entitled "Confidential Business Review."

[6] Certain sections of the business plans refer to "industrial sugar syrup" as "cellulosic sugar" and "glucose syrup."

[7] 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.

As discussed, we review a motion to reconsider based on the evidence before us at the time of our previous decision. *See* 8 C.F.R. § 103.5(a)(3). At the time, the NCE's most current business plan, dated 2017, indicated that the JCE would build and operate a cellulose-to-sugar conversion plant in Florida that would be capable of processing approximately 453,976 tons of biomass by its second year of operation.[8] Based on the record at the time, we concluded: (1) the Petitioner did not show that the JCE would likely secure the needed biomass; (2) she offered inconsistent or inadequate evidence relating to the location, construction, and operation of the factory, (3) she did not show that the JCE would likely obtain the necessary funds to complete the project, and (4) the 2017 business plan did not include sufficient information about the JCE's competitors. *See Ho*, 22 I&N Dec. at 213. Based on the above and upon a review of the record in its entirety, we found that the Petitioner did not demonstrate the 2017 business plan was comprehensive and credible, such that the JCE would, more likely than not, operate or create jobs in accordance with the plan. *See* 8 C.F.R. § 204.6(j)(4)(i)(B); *see also* USCIS Policy Memorandum PM-602-0083, *supra*, at 19; 6 *USCIS Policy Manual*, *supra*, at G.2(B).

The Petitioner asserts on motion that we erred in raising concerns over the JCE's ability to acquire biomass for the project, claiming that "[w]aste and feedstock are available from many sources and are in fact a severe load to most landfill operations in the United States." As explained in our previous decision, the 2017 business plan specified that the project would need a large quantity of biomass. Yet, the Petitioner did not offer evidence showing that the JCE had secured any biomass, or had taken steps – such as engaged in contract negotiations – that would likely lead to the JCE securing the needed materials. Providing general information on potential biomass suppliers, without also submitting evidence – such as executed contracts or documents relating to contract negotiations – confirming that the JCE would likely acquire the necessary biomass for its project is insufficient to overcome our concerns. *See Ho*, 22 I&N Dec. at 213 (stating that a comprehensive and credible business plan "should detail any contracts executed for the supply of materials"); *see also* USCIS Policy Memorandum PM-602-0083, *supra*, at 19; 6 USCIS Policy Manual, *supra*, at G.2(B).

On motion, the Petitioner also claims that we erred in raising concerns over the 2017 business plan's lack of information on the JCE's competitors, which included "established sugar and ethanol producers," according to page 44 of the plan. She states that "since [the JCE has] already proven [its] price points, there is no need to discuss whether or not there are other competitors in the biomass/biowaste space." This position, however, is not supported by the aforementioned precedent decision, which explains that a credible and comprehensive business plan should include information about competitors. It provides that "[t]he plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures . . . ." *Ho*, 22 I&N Dec. at 213.

A petitioner must submit relevant, probative, and credible evidence that establishes, by a preponderance of the evidence, each eligibility requirement of the benefit. *See Matter of Chawathe*,

[8] Page 29 of the 2017 business plan states that by the second year, the plant will "be capable of processing 55,000 kilograms of raw biomass feed per hour. The plant will operate 24 hours per day for 312 days per year, for a total of 7,488 operating hours per year." These figures indicate that the JCE will be able to process approximately 453,976 tons of biomass per year (55,000 kilograms multiplied by 7,488 hours equals 411,840,000 kilograms per year; 411,840,000 kilograms are approximately 453,976 tons).

25 I&N Dec. 369, 375-76 (AAO 2010). In our previous decision, we did not, as the Petitioner alleges on motion, require her to produce documents not crucial to the project or to demonstrate the completion of the project. Rather, we required her to show that the 2017 business plan was comprehensive and credible, which is an eligibility requirement of the EB-5 classification. We observed that the record lacked sufficient evidence relating to the project's supply of materials, proposed factory, needed capital, and competing businesses; all of which are factors relevant to our determination of whether the 2017 business plan was credible and comprehensive. *See* 8 C.F.R. § 204.6(j)(4)(i)(B); *Ho*, 22 I&N Dec. at 213.

2. Investment of the Minimum Required Amount of Capital

In our dismissal of the appeal, we agreed with the Chief's finding that the Petitioner had not established that she invested or is actively in the process of investing the minimum required amount of capital. *See* 8 C.F.R. § 204.6(j)(2). In the initial filing, the Petitioner claimed that her spouse was in the process of transferring her $500,000 investment to the NCE; however, as of September 29, 2015, wire transfer confirmations were not available. Despite the Chief's specific request for supporting documentation, including bank statements, invoices, or transfer receipts, that demonstrates her investment into the NCE, the Petitioner had not submitted such evidence with her 2017 NOID response or on appeal. On motion, the Petitioner does not address these concerns nor provide additional documentation to remedy the deficiencies.

For the reasons we discussed above, we find the Petitioner has not demonstrated that we erred in our previous decision. She has not shown that our prior decision was based on an incorrect application of law or policy and that it was incorrect based on the evidence in the record at the time of the decision. *See* 8 C.F.R. § 103.5(a)(3). We will therefore deny her motion to reconsider the matter.

B. Motion to Reopen

1. Job Creation

On motion, the Petitioner states that she has presented "new evidence that was not previously available, and which is critical to eligibility for the benefit sought." She explains on pages 2 and 3 of her motion brief, that "due to financial and logistical reasons," the JCE will now "incorporate many mobile devices," rather than developing a single plant in Florida, as specified under the "Implementation of Business Plan" section on page 9 of the 2017 business plan. She claims that "[t]he brilliance of the idea revolves around creating mobile devices to go where the biomass is located and depending on the makeup of the feedstock provide production on-site." She indicates that "the ultimate objective for the [redacted] Project is that it is mobile, thus requiring a stationary property in the traditional sense [is presently] unnecessary." She reiterates that "[a]t this current stage of development, it is not necessary to purchase a physical location for the property – yet, development still continues."

In support of her motion to reopen, the Petitioner submits additional documentation, including: (1) information on the cellulose-to-sugar (CTS) markets, (2) a report entitled "From the Sugar Platform to Biofuels and Biochemicals," (3) information about Harvest Farms and its biosolids drying

system and method that the Petitioner claims can assist the JCE's operation, (4) a letter from [redacted] Commissioner's Office, in Georgia, expressing interest in having a biomass processing plant in its landfill, and (5) diagrams and photographs of the cellulose-to-sugar conversion process and equipment. These documents, however, do not establish the Petitioner's eligibility, because they do not illustrate that the 2017 business plan credibly and comprehensively demonstrates that the JCE will likely create at least 10 jobs for each investor seeking EB-5 classification. *See* 8 C.F.R. § 204.6(g)(2), (j)(4)(i)(B); *Ho*, 22 I&N Dec. at 213.

Specifically, the documents that the Petitioner presents on motion do not resolve our concerns discussed in the previous decision. While they provide additional data on the cellulose-to-sugar markets, the conversion process and equipment, and the JCE's attempts to collaborate with other entities, they do not establish that the JCE will, more likely than not, acquire a large quantity of biomass necessary for the project, construct and operate a proposed factory as detailed in the 2017 business plan, or obtain needed financing to complete the project. The submission also does not present sufficient information on the JCE's competitors.

Moreover, while the Petitioner claims that the JCE will now use "many mobile devices" for its operation, instead of building and operating one plant in Florida, she has not offered an updated business plan or economic impact analysis explaining the JCE's job creation projections in light of this change. Based on the Petitioner's statements, the 2017 business plan and the 2014 economic impact analysis no longer reflect the JCE's business. Specifically, the 2017 plan provides that the JCE will build and operate one plant and will create jobs through its expenditures on "Hard Construction Costs," "Architecture & Engineering [Services]," "Purchases of FF&E [furniture, fixtures, or other equipment]," and its revenues from "Biomass Plant Operations." Now as the JCE has decided to rely on "many mobile devices" with "the ultimate objective for the [redacted] Project [to be] mobile," the Petitioner has not shown that the JCE's projected expenditures and revenues, which were used to calculate job creation data, remain valid.

In addition, the Petitioner has not demonstrated that the multipliers used to determine job creation projections remain valid. Specifically, according to the executive summary section of the 2014 economic impact analysis, job creation projections were determined using the "multipliers for the 3-county region of [redacted], [redacted], and [redacted] in Florida." While the Petitioner states on page 3 of her motion brief that the "*headquarters* for the mobile plants will be . . . in [redacted]" (emphasis added), she has not shown, or claimed, that the "many mobile devices" will operate in the three-county region in Florida. In fact, on motion, she submits a letter, indicating that the JCE or one of its associated entities has met with officials in [redacted] Georgia, to discuss biomass processing in its landfill. This information does not illustrate that the job creation projections in the 2017 business plan or the 2014 economic impact analysis, which relied on multipliers relevant to the three-county in Florida, remain valid.

Furthermore, in light of the changes in the JCE's business – which include its intent to use "many mobile devices" at unspecified locations instead of building and operating one plant in Florida – it appears that the Petitioner may have made impermissible material changes to her petition in an effort to make an apparently deficient petition conform to eligibility requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175-76 (Assoc. Comm'r 1998) (stating that "a petition cannot be approved at a

future date after the petitioner becomes eligible under a new set of facts" and USCIS "cannot consider facts that come into being only subsequent to the filing of a petition"); *Kungys v. United States*, 485 U.S. 759, 770-72 (1988) (holding 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).

2. Investment of the Minimum Required Amount of Capital

On motion, the Petitioner does not provide additional documentation to demonstrate that she invested or is actively in the process of investing the minimum required amount of capital. *See* 8 C.F.R. § 204.6(j)(2). Specifically, she has not submitted supporting documentation, including bank statements, invoices, or transfer receipts, that demonstrates her investment into the NCE.

For the reasons we discussed above, we find that the Petitioner has not stated new facts demonstrating her eligibility for the classification or supported the new facts with documentary evidence. We will therefore deny her motion to reopen the matter. *See* 8 C.F.R. § 103.5(a)(2).

III. CONCLUSION

The Petitioner has not established that we based our previous 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. Her motion to reconsider the matter will therefore be denied. In addition, the documentation she presents on motion does not demonstrate her eligibility for the classification. Her motion to reopen the proceeding will therefore be denied.

ORDER: The motion to reconsider is denied.

FURTHER ORDER: The motion to reopen is denied.

Cite as *Matter of O-T-N-*, ID# 04403834 (AAO Oct. 11, 2019)