U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13472888

Date: SEP. 20, 2021

Appeal of Immigrant Investor Program 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 eligibility for the EB-5 classification. Specifically, the Chief determined that the Petitioner did not show he placed the required amount of capital invested in [redacted] the NCE, at risk as required by 8 C.F.R. § 204.6(j)(2). The chief also determined the Petitioner had not documented the lawful sources of all capital invested in the NCE or that the NCE would create the necessary number of jobs. On appeal, the Petitioner submits additional evidence and maintains that he has shown eligibility for the EB-5 classification.

Upon de novo review, we will sustain the appeal.

I. LAW

To be eligible for the EB-5 classification, a petitioner must show that he or she "has invested or is actively in the process of investing the required amount of capital." 8 C.F.R. § 204.6(j)(2). The regulation defines "invest" to mean "to contribute capital," and specifies that capital includes "cash, equipment, inventory, other tangible property," and "cash equivalents." 8 C.F.R. § 204.6(e). The full amount of money must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi,* 22 I&N Dec. 169, 179 (AAO 1998).

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, as in this case, or through a regional center.

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

(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.[1]

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.*

Additionally, 8 C.F.R. § 204.6(g) states:

> Multiple investors-(1) General. The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an immigrant investor by more that one investor, provided each petitioning investor has invested or is actively in the process of investing the required amount for the area in which the new commercial enterprise is principally doing business, and provided each individual investment results in the creation of at least ten full-time positions for qualifying employees. The establishment of a new commercial enterprise may be the basis of a petition for classification as an immigrant investor even though there are several owners of the enterprise, including persons who are not seeking classification under 203(b)(5) of the act and non-natural persons, both foreign and domestic, provided that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means.

II. ANALYSIS

The Petitioner indicates he invested $500,000 in the NCE on March 9, 2017.[2] According to the submitted business plan, the NCE intends to operate a [redacted] movie theater in [redacted] Nevada. On October 12, 2018, the Chief issued a notice of intent to deny (NOID). On February 13, 2019, the Chief denied the petition due to abandonment but reopened the matter on Petitioner's motion and

[1] 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.

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

issued a second NOID on February 13. 2020. The Chief then denied the petition and the Petitioner subsequently appealed the decision.

A. Capital Made Available to the Business(es) Most Closely Responsible for Job Creation

In this case, Petitioner alleges his $502,000 investment fund was received in the NCE's escrow account on March 13, 2017, and $500,000 of these funds were then remitted to the NCE's business checking account on April 19, 2017. In support of his assertions, the Petitioner provided wire transfer confirmations showing his investment funds were remitted to the NCE escrow account as well as an NCE escrow bank account statement showing receipt of the funds. However, the Chief determined that the Petitioner had failed to show his investment funds had been made available to the NCE because he had failed to provide the full escrow account bank statements showing the funds had been maintained in escrow until April 2017. We disagree. The Petitioner provided a sworn declaration from [redacted], the escrow account holder, confirming the details of the transaction but stating the bank statement from [redacted] was not then available. The Petitioner also provided its business checking account statement showing receipt of $500,000 from the escrow account. Here, the record shows by a preponderance of the evidence that the Petitioner's investment funds were deposited in escrow and then made available to the NCE in April 2017.

The Chief also found the Petitioner's capital was not made available to the NCE because the funds were used for "film rights payments and operating and branding licensing fees" according to a Branding and Exclusive Operating License Agreement as well as a Film Rights Acquisition Agreement. These agreements provide for $2,000,000 in payments from the NCE to the rights owner and procurement owner, [redacted] The Chief determined these payments to [redacted] "detract the full amount of capital" made available to the NCE and a "lack of information provided on the uses of EB-5 capital and the full market value of the license and acquisition agreements casts considerable doubt that the full amount of capital will be used to promote economic growth in accordance with EB-5 program requirements." However, the Petitioner provided evidence in the record that these film rights and branding licensing fees are necessary for the theater to operate under the [redacted] business name and also necessary to show films in its theater. The agreements were included in the record as well as estimated costs of using investment funds to obtain these rights and licenses. We are satisfied that the record shows the Petitioner's capital was made available to the business most closely responsible for job creation.

B. Invested Capital Obtained Through Lawful Means

According to Schedule A of the NCE's Limited Partnership Agreement, the NCE's managing member, [redacted] made a capital contribution of $6,000 into the NCE. The Chief issued a NOID requesting the Petitioner provide documentation of the lawful source of this $6,000 as required by 8 C.F.R. § 204.6(g). In response, the Petitioner provided a sworn declaration from [redacted] indicating the funds were derived from the NCE's parent company, [redacted] stated the source of the funds included investments of $1,500,000 from US-based investors with the primary equity investor, [redacted] whose primary owner recently sold a technology company for $335,000,000. The Chief found [redacted]'s assertions were not sufficient to demonstrate the lawful source of the funds invested in the NCE.

On appeal, the Petitioner argues the sworn statement was sufficient to demonstrate the lawful source of these "*de minimis*" funds but further provided a promissory note between [redacted] and [redacted] in the sum of $1,500,000. We find that the evidence in the record is sufficient to identify the sources of capital invested in the NCE as well as show the capital invested in the NCE derived from lawful sources as required by 8 C.F.R. § 204.6(g).

C. Job Creation

On appeal, the Petitioner argues it is too premature to show the NCE has already created 10 full-time jobs but maintains the submitted business plan to create 10 full-time jobs is credible and comprehensive as required by *Matter of Ho*. The Chief determined the submitted business plan was not credible because there was not enough documentation indicating the planned 103 full-time positions would actually be full-time and the Petitioner had not provided sufficient evidence establishing the credibility of the film rights costs and operating license expenses so as to be a credible use of EB-5 funds.

In this case, the record includes NCE tax returns from 2017 to 2019 showing payroll expenses from $798,531 to $934,817. The record also includes agreements to obtain movie licenses as well as event lists showing multiple movies that were scheduled to be shown in the theater after a license is obtained. The Petitioner argues these documents show both that the NCE will create 10 full-time employees and that the record clearly indicates investment funds will be spent on expenses required for operating a movie theater. We find that the Petitioner has submitted a *Matter of Ho* compliant business plan that shows the NCE would create the necessary number of jobs.

III. CONCLUSION

The Petitioner has established eligibility for the immigrant investor classification. In visa petition proceedings, the petitioner bears the burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has been met.

ORDER: The appeal is sustained.