U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29442629

Date: Sept. 27, 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) (2015).[1] This fifth preference (EB-5) classification makes immigrant visas available to noncitizens 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 record did not establish the Petitioner invested or was actively in the process of investing the required amount of capital of at least $500,000[2] in [redacted], the NCE, or document the lawful source of his purported EB-5 investment. *See* 8 C.F.R. § 204.6(e), (f), (j) (2015). Subsequently, in 2021, we dismissed the Petitioner's appeal on the two grounds identified in the Chief's decision. Additionally, we dismissed the Petitioner's appeal on the ground that he did not satisfy the job creation requirements. *See* 8 C.F.R. § 204.6(j)(4). We then dismissed the Petitioner's two combined motions to reopen and consider the matter, in 2022 and 2023, respectively. The matter is now before us on the third combined motions to reopen and reconsider the matter.

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 instant combined motions.

I. LAW

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). 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

[1] On March 15, 2022, President Joseph Biden signed the EB-5 Reform and Integrity Act, which made significant amendments to the EB-5 program, including the designation of targeted employment areas and the minimum investment amounts. *See* Section 203(b)(5) of the Act, 8 U.S.C. § 1153(b)(5) (2022). The Petitioner filed the instant petition, his second EB-5 petition, in June 2015, before the enactment of the EB-5 Reform and Integrity Act. In 2011, he filed his first EB-5 petition, which the Chief denied; we then dismissed the appeal of that denial.

[2] The Petitioner indicated in the instant petition that the NCE was in a targeted employment area, and that the required amount of qualifying capital was downwardly adjusted from $1,000,000 to $500,000. *See* 8 C.F.R. § 204.6(f)(2) (2015).

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. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome).

II. ANALYSIS

In our decisions on appeal and subsequent motions, we discussed the facts of this case, the evidence in the record, and explained in detail the multitude of reasons that supported our conclusion that the Petitioner did not establish eligibility for the EB-5 classification. The Petitioner did not overcome any of the reasons related to his ineligibility in his appellate and two subsequent motion filings. In the instant decision, we will not repeat all the reasons under which the Petitioner has failed to establish his eligibility; instead, we will limit this decision to his challenges on our most recent decision issued in June 2023 and explain why we will dismiss his instant combined motions to reopen and reconsider the matter. *See* 8 C.F.R. § 103.5(a)(1)(ii), (a)(4).

As discussed in our most recent decision issued in June 2023, the Petitioner did not establish eligibility for the EB-5 classification based on three separate and independent grounds: (1) he failed to demonstrate that he had invested or was actively in the process of investing at least $500,000 in the NCE at the time he filed the petition in June 2015; (2) he failed to document the lawful source of his purported EB-5 investment; and (3) he failed to show that he satisfied the job creation requirements. *See* 8 C.F.R. § 204.6(e), (f), (j). The Petitioner has not overcome any of these three grounds.

To support his instant motion to reopen, the Petitioner offers additional documents, some of which are already in the record. He offers: (1) documents related to [redacted] 2014 purchase of a property in [redacted] Ohio; (2) documents related to [redacted] purchase of assets in [redacted] Ohio; (3) [redacted] 2014 corporate formation documents that show the Petitioner as the majority shareholder; (4) the Petitioner's bank statements covering the period between June 2014 and August 2014; (5) [redacted] bank statements covering August 2014; (6) the Petitioner's federal tax forms for 2013 and 2014 that do not include signatures or proof of filing; (7) a July 2023 affidavit from [redacted] who claims to jointly own the NCE with the Petitioner; (8) bank records showing that the Petitioner remitted $100,000 to the NCE in December 2014; (9) bank records showing that the NCE received $100,000 from an unknown source in March 2017; (10) a July 2023 affidavit from [redacted] who claims to be an owner of [redacted] and [redacted] common stock certificate; (11) a July 2023 affidavit from [redacted] who claims to be the NCE's certified public accountant, and the NCE's 2017 financial statements; (12) a July 2023 affidavit from [redacted] who claims to have been an NCE employee since 2011; (13) documents purportedly listing the NCE's employees in July 2023 and July 2014; and (14) an online printout from the U.S. Department of Labor discussing job sharing.

First, upon considering the evidence submitted with the instant motion and the documents already in the record, we conclude that the Petitioner still has not established that at the time he filed the petition, he had already invested or was in the process of investing at least $500,000 in the NCE. *See* 8 C.F.R. § 204.6(j). On motion, the Petitioner claims that as of December 2017, he invested a total of $542,267 in the NCE. He points to July 2023 affidavits from [redacted] and [redacted] discussing his

investment as of December 2017, as well as the NCE's 2017 financial statements as supporting evidence. December 2017, however, is more than two years after the Petitioner filed the petition in June 2015. These documents therefore do not show that at the time he filed the petition, he had already invested at least $500,000 in the NCE. *See* 8 C.F.R. § 103.2(b)(1) (providing that a "petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request"); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Comm'r 1988) (providing that we "cannot consider facts that come into being only subsequent to the filing of a petition").

Similarly, the evidence in the record is insufficient to show that at the time he filed the petition in June 2015, he was in the process of investing at least $500,000 in the NCE. In his initial filing, the Petitioner, through counsel, discussed a $800,000 promissory note as evidence of his intent to invest in the NCE. We discussed this promissory note in our 2021 appellate decision, explaining that he did not show his assets sufficiently secured the promissory note or that the security interest associated with the note had been perfected. *See Matter of Hsiung*, 22 I&N Dec. 201, 202-03 (Assoc. Comm'r 1998). Moreover, the Petitioner has not argued, and the record does not show, that his claimed total investment of $542,267 as of December 2017 was associated with the $800,000 promissory note or any other documents confirming his actual commitment of funds in the NCE at the time he filed the petition. *See* 8 C.F.R. § 204.6(j)(2) (providing that "[e]vidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing" and that the petitioner "must show actual commitment of the required amount of capital"). He, therefore, has not demonstrated that he was in the process of investing at least $500,000 in the NCE in June 2015.[3]

Second, upon considering the evidence submitted with the instant motion and the documents already in the record, we conclude that the Petitioner still has not established his purported EB-5 funds, in their entirety, originated from lawful sources. *See* 8 C.F.R. § 204.6(e), (j). As noted in our previous decisions, the Petitioner claimed that $100,000 of his purported investment in the NCE derived from his December 2014 sale of 10% interest in [redacted], to [redacted] The amount the Petitioner received, as documented in his bank account records, was $101,758.50, which is inconsistent with the amount he claimed to have received from the purported sale, $100,000. We again explained in our most recent decision that he did not sufficiently demonstrate that his purported sale of 10% interest in [redacted], to [redacted] funded his $100,000 remittance to the NCE in December 2014.

On motion, the Petitioner continues to claim that in December 2014, he remitted $100,000 to the NCE as EB-5 capital, and that the $100,000 came from his December 2014 sale of 10% interest in [redacted] As supporting evidence, he presents [redacted], common stock certificate and July 2023 affidavits from [redacted] and [redacted] that claim the Petitioner received $100,000 for the purported sale. These documents, however, do not resolve the inconsistency in the amounts discussed in our previous decisions. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (instructing that "[i]t is incumbent upon [the petitioner] to resolve the inconsistencies by independent objective evidence" and that "[a]ttempts to

[3] The Petitioner claims on motion to have invested $100,000 in the NCE in March 2017. In his initial 2015 filing in support of the instant petition, however, he made no reference to the March 2017 $100,000 remittance or his intent to remit these funds to the NCE. *See* 8 C.F.R. § 204.6(j)(2).

explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice"). Also, these documents are insufficient to verify that the funds the Petitioner's bank account received in December 2014, $101,758.50, were associated with the purported sale. As noted in our 2021 appellate decision, the bank records do not reveal the source of these funds. The Petitioner's instant motion is therefore insufficient to document the lawful source of the $100,000 he claimed to have invested in the NCE in December 2014.

As a separate issue, in his instant motion filing, the Petitioner alleges that he had initially acquired his interest in [redacted] in August 2014 with lawfully obtained funds. The record, however, is insufficient to substantiate this proposition. Rather, the documents he presents indicate that in June 2014, he along with other individuals formed [redacted] in August 2014, [redacted] bought a property in [redacted] Ohio, from [redacted] and in August 2014, [redacted], bought assets including "liquor permit," and "salable inventory items." The Petitioner's bank statements include handwritten notations circling debit entries for a June 2014 check in the amount of $10,000; a July 2014 withdrawal of $11,500; an August 2014 check in the amount of $20,000; and an August 2014 withdrawal of $157,000. He claims that these amounts confirm his investment in [redacted] The record, however, does not confirm that [redacted], had received the funds that the Petitioner circled in his bank statements.

Also, the record does not reveal how the Petitioner had obtained these funds that he circled in his bank statements. While he has offered his 2013 and 2014 unsigned federal tax documents to show he had earned funds to invest in [redacted] he has presented insufficient documents showing that he had retained enough of his income to invest in [redacted] in 2014, the 10% interest of which he claimed to have sold to finance the $100,000 he remitted to the NCE in December 2014 as EB-5 investment.

Moreover, in his instant motion filing, the Petitioner repeatedly references funds in [redacted] [redacted] business account as his personal funds that he could use as investment capital, and [redacted] and [redacted] purchases of assets in August 2014 as his purchases of these assets. As explained in our 2021 and 2022 decisions, a corporation is a separate and distinct legal entity from its owners or shareholders, regardless of the number of shareholders or their relationship with one another. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, Att'y Gen. 1958); *Matter of Aphrodite Investments Ltd.*, 17 I&N Dec. 530, 531 (Comm'r 1980); *Matter of Tessel*, 17 I&N Dec. 631, 633 (Act. Assoc. Comm'r 1980). Funds of a business, without evidence such as profit or dividend distributions, do not constitute funds that its owner could claim as his own. In short, the record does not support a finding that the Petitioner has documented the lawful source of his purported EB-5 funds. *See* 8 C.F.R. § 204.6(e), (j).

Third, upon considering the evidence submitted with the instant motion and the documents already in the record, we conclude that the Petitioner still has not established he satisfied the job creation requirements. *See* 8 C.F.R. § 204.6(j)(4). As explained in our previous decisions, while the record included evidence of job creation, most of the jobs created were part-time, not full-time, positions. On motion, the Petitioner submits a July 2023 affidavit from [redacted] who claims that "job sharing arrangement and company policies were explained to [him] when [he] started the job" in 2011. He further alleges that the NCE's "policy is firm on the job sharing definition where 2 or more

employees are responsible for the same collective duties, and are responsible for covering the collective full time hours without management's help." The Petitioner also provides documents purportedly listing the NCE's full-time employees and job sharing employees in July 2014 and in July 2023.[4]

These documents the Petitioner offers on motion materially change the nature of employment as presented in evidence the Petitioner initially filed in 2015. Specifically, in his initial filing, the Petitioner made no mention of any job sharing arrangement among the employees. Instead, he, through his counsel's June 2015 letter, referenced the NCE's employees as full-time and part-time employees, and noted that his evidence included a "chart showing hours worked by full time and part time positions with [the NCE], and a "chart showing part time positions with [the NCE]." The first time the Petitioner claimed that the NCE had any job sharing arrangements was after we dismissed his appeal in 2021 on the job creation ground. The documents the Petitioner presents on motion represent a material change to his petition.[5] A petitioner may not make material changes to a petition that has already been filed to make an apparently deficient petition conform to U.S. Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. at 175. In short, the record does not support a finding that he has satisfied the job creation requirements. *See* 8 C.F.R. § 204.6(j)(4).

Based on the reasons we have discussed above, we will dismiss the Petitioner's motion to reopen the proceeding, because his motion does not overcome any of the grounds upon which we initially dismissed his appeal and subsequently dismissed his motions. *See Matter of Coelho*, 20 I&N Dec. at 473 (requiring that new evidence have the potential to change the outcome); *see also* 8 C.F.R. § 103.5(a)(2).

Similarly, we will dismiss the Petitioner's motion to reconsider the matter because his motion fails to establish that our most recent decision issued in June 2023 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. *See* 8 C.F.R. § 103.5(a)(3). The Petitioner's broad and unsubstantiated statement that we erred in our most recent decision, without pointing to any specific errors, is insufficient to support his motion to reconsider the matter.

[4] As discussed on pages 9 and 10 of our 2022 decision, some of the employees who the Petitioner claimed were sharing one position received different hourly wages to purportedly work in the same position. Additionally, the document that the Petitioner presents on motion that claims to list job sharing positions in July 2014 lists one employee in two different job sharing arrangements with different people, working overlapping shifts on the same days. Similarly, the document that the Petitioner presents on motion that claims to list job sharing positions in July 2023 lists employees who were purportedly sharing the same position but working at the same time or in overlapping shifts.

[5] A change is material if it would have a natural tendency to influence or is predictably capable of affecting the decision. *Kungys v. United States*, 485 U.S. 759, 770-72 (1988).

III. CONCLUSION

On motion to reopen, although the Petitioner has submitted additional evidence in support of the motion, he has not established eligibility for the EB-5 classification.[6] On motion to reconsider, the Petitioner has not established that our most recent decision issued in June 2023 was based on an incorrect application of law or policy at the time we issued our decision. Therefore, we will dismiss his instant combined motions to reopen and reconsider the matter. *See* 8 C.F.R. § 103.5(a)(4).

The scope of a motion is limited to "the prior decision" and "the latest decision in the proceeding." 8 C.F.R. § 103.5(a)(1)(i), (ii). The Petitioner's contentions on motion merely reargue facts and issues we have already considered in our previous decisions. *See e.g., Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006) ("a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior Board decision"). We will not re-adjudicate the petition anew and, therefore, the underlying petition remains denied.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

[6] There are other eligibility issues that we discussed in our prior decisions that the Petitioner has not overcome; thus, he has not shown he is eligible for the EB-5 classification. For example, we noted that funds he claimed to have invested in the NCE were documented as loans in bank documents and the NCE's tax and financial documents. *See* 8 C.F.R. § 204.6(j). Also, he failed to establish the lawful source of his other purported cash investments not discussed in this decision. *See Matter of Ho*, 22 I&N Dec. at 206, 210-11 (Assoc. Comm'r 1998); *Matter of Izummi*, 22 I&N Dec. at 195; 8 C.F.R. § 204.6(e), (j).