U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33280844

Date: FEB. 18, 2025

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) (2016).[1] 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 U.S. economy and create at least 10 full-time positions for qualifying employees. Foreign nationals may invest in a project associated with a U.S. Citizenship and Immigration Services (USCIS) designated regional center. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, 106 Stat. 1828 (1992), section 610, as amended by section 575 of Pub. L. No. 114-113 (2015).

The Chief of the Immigrant Investor Program Office denied the petition, concluding that the record did not establish (1) that the job-creating entity (JCE) is principally doing business and creates jobs in a targeted employment area (TEA), (2) that the Petitioner has made a qualifying investment of the minimum required amount of capital, and (3) that the NCE will create at least 10 full-time positions for qualifying employees. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

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). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Chief's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Generally, an immigrant investor must invest at least $1,000,000 in capital in an NCE that creates not fewer than 10 jobs. An exception exists if the immigrant investor invests their capital in an NCE that

[1] On March 15, 2022, the EB-5 Reform and Integrity Act of 2022 was signed into law, revising general eligibility requirements, substantially reforming and codifying the Regional Center Program in section 203(b)(5) of the Act, and adding significant new integrity provisions. *See* section 203(b)(5) of the Act, 8 U.S.C. § 1153(b)(5) (2022). As the Petitioner had filed her petition in 2016, the relevant law then in existence governs this appellate adjudication.

is principally doing business in and creates jobs in a targeted employment area (TEA). In such a case, the immigrant investor must invest a minimum of $500,000 in capital. 8 U.S.C. § 1153(b)(5)(C)(ii); 8 C.F.R. § 204.6(f)(2) (2016). To establish eligibility for the reduced minimum investment threshold of $500,000, the immigrant investor must invest their capital in an NCE that is principally doing business in and creates jobs in a rural area or an area of high unemployment. 8 U.S.C. § 1153(b)(5)(B)(i)-(ii); 8 C.F.R. § 204.6(j)(6) (2016). Applicable statute and regulations define a TEA as, at the time of investment, a rural area or an area that has experienced unemployment of at least 150 percent of the national average rate. 8 U.S.C. § 1153(b)(5)(B)(ii); 8 C.F.R. § 204.6(e).

To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. 8 C.F.R. § 204.6(j)(2). Evidence 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. *Id.* The petitioner must show actual commitment of the required amount of capital. *Id.* For the capital to be "at risk" there must be a risk of loss and a chance for gain. *See Matter of Izummi*, 22 I&N Dec. 169, 186-87 (Assoc. Comm'r 1998).

To demonstrate that the petitioner has placed such capital at risk for the purpose of generating a return, the petitioner must first present evidence that they have made a qualifying investment of the minimum required amount of capital. The regulations define "invest" to mean a contribution of capital. 8 C.F.R. § 204.6(e). However, a contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the NCE does not constitute a contribution of capital and, thus, does not constitute a qualifying investment. *Id.*

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). For purposes of the Form I-526 adjudication and the job creation requirements, 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.

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 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 fewer than ten (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 NCE. 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). Mere conclusory assertions, however, do not enable USCIS to determine whether the job-creation projections are any more reliable than hopeful speculation. *Id.* Most importantly, the business plan must be credible. *Id.*

Petitioners investing in an NCE within a regional center may rely on economic methodologies to demonstrate that the investment will create indirect jobs as a result of the investment in the NCE, but such methodologies must be reasonable. *See* Pub. L. No. 102-395; 8 C.F.R. §§ 204.6(e), (j)(4)(iii), (m)(7)(ii). The petitioners must provide sufficient evidence for USCIS to determine whether methodologies used are reasonable.

Indirect jobs are those that are held outside of the NCE but are created as a result of the NCE. *See generally* 6 *USCIS Policy Manual* G.2(D)(4), https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-2. For example, indirect jobs include, but are not limited to, those held by employees of the job-creating entity (JCE) (when the JCE is not the NCE) as well as employees of producers of materials, equipment, or services used by the NCE or the JCE. *Id.*

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. at 175; *see also* 8 C.F.R. § 103.2(b)(1).

Changes that occur in accordance with a business plan and other supporting documents as filed will generally not be considered material. In general, if, at the time of adjudication, the petitioner is asserting eligibility under a materially different set of facts that did not exist when they filed the immigrant petition, the petitioner must file a new immigrant petition.[2] *See generally* 6 *USCIS Policy Manual, supra* at G.3(C)(1).

II. ANALYSIS

The Petitioner asserts that on October 19, 2016, she invested $500,000[3] in [redacted] (NCE), which is sponsored by [redacted][4] pursuant to the Immigrant Investor Pilot Program. According to the Confidential Private Placement Memorandum (PPM), dated 2016, the NCE proposes to raise $8,500,000 from 17 immigrant investors and invest in

[2] As explained in *Doe v. USCIS*, 410 F. Supp. 3d 86, 101 (D.D.C. 2019), an approved Form I-526 is given a priority date as of the date the petition is properly filed. 8 C.F.R. § 204.6(d). If petitions did not have to meet the EB-5 requirements at the time of filing and could be changed at will, then petitioners could file incomplete petitions in order to receive a better priority position for obtaining a visa. Allowing later changes to incomplete petitions would be unfair to those petitioners who waited to file their forms until the appropriate time when they had the evidence necessary to establish all EB-5 requirements. *See also Wang v. USCIS*, 375 F. Supp. 3d 22, 36-40 (D.D.C. 2019).

[3] The Petitioner filed her petition in 2016 and indicated that the investment has been made in a TEA. Therefore, the requisite amount of qualifying capital was downwardly adjusted from $1,000,000 to $500,000. *See* 8 C.F.R. § 204.6(f)(2)(2016).

[4] [redacted] is a USCIS designated regional center to participate in the EB-5 program. *See* 8 C.F.R. § 204.6(e) (defining a "regional center").

[redacted] (JCE) in exchange for limited liability membership interests in the JCE. The JCE intends to develop and construct [redacted] a learning facility to be developed in [redacted] Florida, that will provide educational and therapeutic services to children diagnosed with autism and other developmental delays.

A. Targeted Employment Area

In response to the Chief's request for evidence (RFE), the Petitioner claimed that due to insufficient development funds and development delays associated with insufficient funding, the project site proposed in the business plan, [redacted] Florida, was abandoned and that in 2017, the JCE purchased an existing facility located at [redacted] Florida, and completed renovation and construction of the project. The Chief found that the abandonment of the original project site in [redacted] Florida, and the subsequent acquisition and use of the alternate site in [redacted] Florida, to develop and complete the project invalidated the original TEA designation, thereby rendering the Petitioner ineligible for the benefit sought at the time of filing her petition.

On appeal, the Petitioner offers a letter from the Chief of Bureau of Labor Market Statistics, Florida Department of Economic Opportunity, dated September 28, 2017, which verifies that the project site at [redacted] Florida, qualifies as a TEA based on a 2016 annual average unemployment rate for the area that was 11.9 percent, above the qualifying rate of 7.4 percent for that time period.[5] However, the Chief has not had an opportunity to review this 2017 letter to determine if the Petitioner has established her eligibility for the reduced minimum investment threshold of $500,000. *See* 8 C.F.R. §§ 204.6(e), (j)(6).

B. Capital at Risk

The Chief found that because of the material change in the project location resulting in the retroactive invalidation of the original TEA designation for the initial and abandoned project site in [redacted] Florida, the Petitioner did not have the sufficient amount of capital at risk at the time of filing the petition in October 2016 and determined that the Petitioner has not made a qualifying investment of the minimum required amount of capital.

The Petitioner contends that bank documents in the record confirm the path of funds from her personal bank account to the NCE and then to the JCE. As supporting evidence, the Petitioner points to bank statements and a letter from the manager of the JCE to substantiate her claim that she remitted her EB-5 investment to the JCE's account. It appears that the Petitioner has satisfied concerns discussed in *Matter of Izummi* because she had made her funds available to the JCE, the business most closely responsible for job creation in this regional center case. *See Matter of Izummi*, 22 I&N Dec. at 179. The Chief has not sufficiently explained how the Petitioner failed to demonstrate that she had placed at least $500,000 at risk for the purpose of generating a return on the capital. *See* 8 C.F.R.

[5] The Chief stated that in response to the RFE, the Petitioner submitted a letter from the Chief of Bureau of Labor Market Statistics, Florida Department of Economic Opportunity, dated December 3, 2019, certifying that the JCE's alternate project site at [redacted] Florida, is located in a TEA based on a 2015 annual average unemployment rate for the area that was 8.8 percent, above the qualifying rate of 8.0 percent for that time period. However, the record does not include this 2019 letter.

§ 204.6(j)(2); 8 C.F.R. § 103.3(a)(1)(i) (providing that when the Chief denies a petition, the Chief shall explain in writing the specific reasons for denial).

C. Job Creation

The Chief determined that the record did not establish that the NCE will create at least 10 full-time positions for qualifying employees because the evidence in the record did not demonstrate that the business plan is *Matter of Ho* compliant. Specifically, the Chief found that the executed Operating Agreement of the JCE and executed Purchase of Limited Liability Equity Interest Agreement were premised upon construction and completion of the project at the original project site in [redacted] Florida, and because the original project site was abandoned and an alternate project site in [redacted] Florida, was secured and used for the development and completion of the project, the record was insufficient to establish the JCE's actual undertaking of credible job creating activities.

However, the Chief has not addressed the other evidence submitted in response to the Chief's RFE and has not explained why this evidence was insufficient to demonstrate the JCE's actual undertaking of credible job creating activities. This evidence includes the NCE's federal tax return for 2018, employer's quarterly reports of the JCE from 2017 to 2019, wage and tax statements issued to the employees of the JCE from 2017 to 2018, the JCE's financial statements from 2016 to 2019, project photos, an invoice issued to the JCE, real estate tax bills, a local business tax receipt, a 2019 letter from the renovation manager of the project providing project updates, an interior renovation permit, and a list of the JCE's employees. In addition, the Petitioner presents additional evidence on appeal to support her claim that the project has been completed. This additional evidence includes printouts from the [redacted] website, the JCE's capital expenditures, and a 2020 letter from the manager of the JCE providing project updates, all of which the Chief has not had an opportunity to review and to determine whether the record supports the claimed comprehensiveness and the claimed credibility of the business plan. *See* 8 C.F.R. § 204.6(j)(4)(i); *Matter of Ho*, 22 I&N Dec. at 213.

The Chief also determined that the record did not demonstrate that the requisite number of jobs will be created using reasonable methodologies. The Chief explained that because the evidence in the record did not establish that the business plan is *Matter of Ho* compliant, she was unable to conclude that the economic methodology used is reasonable. The Petitioner now offers an Addendum to the EB-5 Economic Impact Analysis, dated December 2019, which uses actual capital expenditures incurred to date and updated year four projected revenues as inputs for the calculation of jobs and related outputs. She claims that this addendum accurately reflects the impact of revised external conditions since its original submission. Again, the Chief has not had an opportunity to review this 2019 addendum to the economic impact analysis to determine whether the requisite number of jobs will be created using reasonable methodologies. *See* 8 C.F.R. §§ 204.6(e), (j)(4)(iii), (m)(7)(ii).

In light of our discussion on TEA, capital at risk, and job creation requirements, we decline to discuss the Chief's other ground for denial, an impermissible material change, and reserve this for future consideration should the need arise. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (per curiam) (holding that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision).

III. CONCLUSION

In light of the deficiencies we have identified in this decision and the Petitioner's submission of additional evidence on appeal that the Chief has not had an opportunity to review, we are remanding the matter to allow the Chief to consider all materials in the record and for the entry of a new decision.

ORDER: The Chief's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.