U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31260755

Date: JAN. 15, 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).[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 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 the Petitioner did not establish that the invested capital was made available to the business(es) most closely responsible for job creation and the new commercial enterprise (NCE), [redacted] would likely create at least 10 full-time positions for qualifying employees. In the denial, the Chief declined to defer to the exemplar application associated with this NCE and the favorable determinations related to job creation, concluding that the underlying facts have materially changed. 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

A noncitizen may be classified as an immigrant investor if they invest the requisite amount of qualifying capital in an NCE. 8 C.F.R. § 204.6(e) (defining "commercial enterprise"). A noncitizen may invest the required funds directly in an NCE or through a regional center, as the Petitioner has done in this case. Regional centers can pool immigrant (and other) investor funds for qualifying projects that create jobs directly or indirectly. 8 C.F.R. § 204.6(j)(4)(iii). An investor seeking EB-5

[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). As the Petitioner had filed his petition on September 2, 2016, the relevant law in existence on that date governs this appellate adjudication.

classification must show that their investment will benefit the U.S. economy and create at least 10 full-time jobs for qualifying employees. 8 C.F.R. § 204.6(j)(4). An NCE may be relied upon by multiple noncitizen investors each seeking EB-5 classification, provided that each investor has invested or is actively in the process of investing the required amount, and that each individual investment results in the creation of at least 10 full-time positions for qualifying employees. 8 C.F.R. § 204.6(g)(1).

According to 8 C.F.R. § 204.6(j)(4)(i), to show that a new commercial enterprise 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 petitioner 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, at 213. Additionally, *Matter of Ho* held that a "comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives." *Id.*

Under the statute and regulations, petitioners investing in a new commercial enterprise 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 Petitioner must provide sufficient evidence for USCIS to determine whether methodologies used are reasonable.

II. ANALYSIS

The Petitioner asserted his eligibility based on an investment of $500,000 into the NCE on September 2, 2016. The NCE proposed to pool $23 million from 46 immigrant investors, along with other sources of funding, to finance construction of a hotel and casino in [redacted] Mississippi. Thereafter, the NCE project changed to a proposed hotel, casino, and amusement park in [redacted] Mississippi.

The Chief concluded that the Petitioner did not establish that the business plan was compliant with *Matter of Ho*, or that the Petitioner's investment will create at least 10 full-time positions for qualifying employees. The Chief stated that "based on a review of [publicly] available sources, . . . there is no evidence that construction of the hotel/casino has started" and noted the significant delays in the construction despite the proposed timeline in the original business plan or the updated business plan.

The Chief further determined that the Petitioner did not establish that economic methodologies used to demonstrate the creation of indirect jobs were reasonable because the information used as a basis to support the inputs into the economic model are from the business plan that the Chief determined to be not credible.

On appeal, the Petitioner contends that the project has made sufficient progress. The Petitioner submits additional evidence to demonstrate that an amusement park (a condition for building a casino according to the Mississippi Administrative Codes) has been built and operating since 2023 and asserts that jobs have been created by the amusement park even though the originally planned hotel and casino have not been built yet. The Petitioner also submitted a revised business plan and market analysis with projections for the hotel and casino construction as well as documents showing that loans for such construction are in the closing process.

Upon review, we conclude that the Chief did not properly notify the Petitioner of the derogatory information considered in denying the petition. If a decision will be adverse to a petitioner and is based on derogatory information considered by USCIS and of which the petitioner is unaware, the petitioner must be advised of this fact and offered an opportunity to rebut the information and present information on its behalf before a decision is rendered. 8 C.F.R. § 103.2(b)(16)(i). Here, the notice of intent to deny (NOID) did not identify the "publicly available sources" relied on by the Chief and did not sufficiently identify specific derogatory information regarding the progress of the construction project.[2] As a result, the NOID did not provide adequate notice of the derogatory information and did not provide a meaningful opportunity for the Petitioner to address it. Additionally, pursuant to 8 C.F.R. § 103.2(b)(16)(ii), "a determination of statutory ineligibility shall be based only on information contained in the record of proceeding" which is disclosed to the petitioner. Here, the "publicly available sources" are not contained in the record.

The Chief also concluded that the Petitioner did not establish that the required amount of capital has been made available to the business most closely responsible for job creation, citing *Matter of Izummi*, 22 I&N Dec. 169, 179 (Assoc. Comm'r 1998). *Matter of Izummi* provides that for an investor to establish that they have placed their investment funds at risk for the purpose of generating a return, "[t]he full amount of [EB-5] money must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based." However, in making this determination, the Chief again relied on unidentified "public sources" that show a lack of progress in construction of the hotel and casino. Accordingly, we remand the matter so that the Petitioner has an opportunity to rebut derogatory information from outside the record of proceeding, as required by 8 C.F.R. § 103.2(b)(16)(i). In addition, the Chief should reconsider the issue of capital at risk according to *Matter of Izummi* and analyze whether the evidence supports that the Petitioner made the required capital contribution to the NCE at the time this petition was filed, and such capital was actively used by the NCE to fulfill the project completion without any guarantee of return.

[2] In addition, the Chief's request for evidence (RFE) on September 4, 2018, only discussed the lawful source of the Petitioner's investment funds and did not include any information about the publicly available sources that formed the basis of the Chief's denial. Although the Petitioner responded to the RFE with various evidence supporting his claim that the investment funds were derived from his accumulated earnings from his employment, the Chief's decision did not further analyze the lawful source of the Petitioner's funds.

Based on the foregoing, we will withdraw the Chief's decision and remand the matter for further review, including review of the additional evidence submitted on appeal, the issuance of a new request for evidence if necessary, and entry of a new decision.

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