U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26766714

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) (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. Noncitizens 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 on multiple grounds, concluding the Petitioner did not establish that: (1) he invested or was in the process of investing the required amount of capital in [redacted] (the NCE) at the time of filing; (2) the funds he invested in the NCE were derived from a lawful source; and (3) his investment in the NCE created or would likely 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 dismiss the appeal.

[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 in April 2016, the relevant law then in existence governs this appellate adjudication.

I. LAW

Under 8 C.F.R. § 204.6(j)(4)(i), a petitioner must establish that their 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 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 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).

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.

Volume 6, Part G, Chapter 3 of the *USCIS Policy Manual* articulates USCIS' policy regarding deference to previous agency determinations.

> As a general matter, USCIS does not reexamine determinations made earlier in the EB-5 process, and such earlier determinations will be presumed to have been properly decided. When USCIS previously concluded that an economic methodology is reasonable to project future job creation as applied to the facts of a particular project, USCIS defers to this determination for all related adjudications directly linked to the specific project for which the economic methodology was previously approved.
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> Conversely, USCIS does not defer to a previously favorable decision in later proceedings when, for example, the underlying facts upon which a favorable decision was made have materially changed, there is evidence of fraud or misrepresentation in

> the record of proceeding, or the previously favorable decision is determined to be legally deficient. A change is material if it would have a natural tendency to influence or is predictably capable of affecting the decision. *See Kungys v. United States*, 485 U.S. 759, 770-72 (1988). When a new filing involves a different project from a previous approval or the same previously approved project with material changes to the project plan, USCIS does not defer to the previous adjudication.

See generally 6 USCIS Policy Manual G.3(A)(2), https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-3.

II. ANALYSIS

The record indicates that between April 2016 and September 2016, the Petitioner invested a total of $500,100[2] into [redacted] (NCE), which is associated with [redacted] pursuant to the Immigrant Investor Program. According to the Confidential Private Placement Memorandum, the NCE proposed to raise $36,000,000 from 72 immigrant investors and lend the entire amount to [redacted] (JCE). The JCE intends to develop, construct, and operate a multi-faceted senior care facility in [redacted], California.

Except where a different standard is specified by law, a petitioner must prove eligibility for the requested immigration benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. at 375-76. Under the preponderance of the evidence standard, the evidence must demonstrate that the petitioner's claim is "probably true." *Id.* at 376. We will examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. Here, we conclude that the Petitioner has not established by a preponderance of the evidence that he is eligible for the visa classification sought.

A. No Deference After Material Change

The Chief determined that deference to the prior determination is not appropriate because the NCE's project plans have materially changed. Specifically, the Chief found the business plan of the project is no longer credible due to the inability of the project to meet established timelines and the developer's inability to obtain senior financing. On appeal, the Petitioner contends that because the Chief approved the Form I-526 exemplar project in 2018, we should give deference at a subsequent stage in the EB-5 process, including the Petitioner's instant petition, and approve his petition.

We determine that the facts relevant to the adjudication materially changed between the approval of the Form I-526 exemplar project in 2018 and the adjudication of this petition in 2023, such that affording deference is not warranted. The regulation requires the Petitioner to submit a credible and comprehensive business plan showing that job creation will occur within two years, making the project

[2] In this case, the Petitioner filed his petition in 2016 and asserted that the project would be located in a targeted employment area. Therefore, the requisite amount of capital investment was downwardly adjusted from $1,000,000 to $500,000. *See* 8 C.F.R. § 204.6(f)(2) (2016).

timeline material to determining E-5 eligibility and deference.[3] *See* 8 C.F.R. § 204.6(j)(4)(i)(B). Here, the JCE has modified its project development timeline, including completion dates, multiple times.

According to the Petitioner's original business plan, dated June 2015, a conditional use permit was expected to be obtained by August 2015, a building permit was projected to be pulled by March 2017, construction was projected to be completed by May 2019, and the senior care facility was estimated to be opened in January 2020. However, the Petitioner's December 2017 addendum to the business plan shows that those items had not been completed. Instead, new projected completion dates were pushed to July 2020, March 2023, and March 2025, respectively, for the building permit, construction, and grand opening of the senior care facility. An update to the business plan, submitted in June 2020, again moved completion dates even further back to March 2021, December 2023, and December 2025, respectively, for the building permit, construction, and grand opening of the senior care facility. The previous approval was based on a different set of facts – including the earlier version of the project timeline – than those currently before us, and thus, the Chief correctly concluded that deference to the prior determination is not appropriate due to material changes. *See generally 6 USCIS Policy Manual, supra,* at G.3(A)(2).

B. Job Creation

The Chief determined the record did not establish that the NCE will create at least 10 full-time positions for qualifying employees and that the requisite number of jobs will be created using reasonable methodologies. Specifically, the Chief found the Petitioner has not established that the business plan is both comprehensive and credible because none of the business plans contain sufficient evidence to support the capital stack and timeline.

We conclude that the Petitioner has not provided a business plan that is both comprehensive and credible. *See* 8 C.F.R. § 204.6(j)(4)(i)(B); *Matter of Ho*, 22 I&N Dec. at 213. Therefore, he has not demonstrated that the JCE will likely create at least 10 full-time positions for qualifying employees within two years as projected in the business plans and economic impact reports.

First, the record contains insufficient evidence that the JCE will likely have sufficient capital for the project. The 2015 business plan claims that the project will need (1) EB-5 capital of $42,000,000 from 84 immigrant investors and (2) developer equity of $41,093,959 to fund the total project cost of $83,093,959. The 2017 addendum to the business plan states that in addition to (1) the EB-5 capital of $36,000,000 from 72 immigrant investors and (2) developer equity of $27,500,000, the JCE will seek (3) construction financing of $30,837,176 to fund the total project cost of $94,337,176 because, in part, the NCE did not attract as many immigrant investors as it had initially projected. The June 2020 update to the business plan provides that in addition to (1) the EB-5 capital of $10,000,000 from 20 immigrant investors and (2) developer equity of $17,500,000 in land contribution, the JCE will seek (3) increased construction financing of $66,837,175[4] via a proposed joint venture with [redacted] to fund the same project cost of $94,337,176, due to a shortfall of the anticipated EB-5 capital.

[3] *See Kungys v. United States*, 485 U.S. at 770-72 (stating that a change is material if the changed circumstances would have a natural tendency to influence or are predictably capable of affecting the decision).

[4] The June 2020 update to the plan specifies at page 7 that this amount would include $13,367,435 in equity from the proposed new joint venture and a construction loan of $53,469,740.

The Chief found the record did not contain sufficient evidence of any secured senior financing or the reasonableness of the developer equity contribution in the form of land valued at $17,500,000. The Chief added that the only financing secured since 2015 remains EB-5 capital of $10,000,000 from 20 immigrant investors. The Petitioner claims on appeal that the developer had talked to several potential senior financing partners, but all of them had concerns and hesitated when they learned that USCIS had repeatedly issued requests for evidence to the project's investors.

The record does not demonstrate by a preponderance of the evidence that the JCE has obtained or is likely to obtain the construction financing required to complete the project. The June 2020 project update submitted in response to the NOID indicates on page 7 that there were plans to form a new joint venture company with [redacted] for the development of the project and that this joint venture would make up the needed capital from the capital stack due to the reduced EB-5 funds raised to develop the project.[5] However, as of the date of this decision, the record does not contain any evidence of the establishment of a joint venture company between the developer and [redacted] The record also does not contain sufficient evidence to show that the claimed joint venture company has contributed or is likely to contribute the $66,837,175 in equity and construction loan financing which is necessary to fund the project. While we acknowledge the developer's difficulty in obtaining construction financing, the inability of the JCE to obtain the required construction financing to fund the project significantly undermines the claimed credibility of the business plan.

Second, the record does not contain sufficient evidence to establish that the claimed developer equity of $17,500,000 in land contribution (19.12% of the capital stack) to fund the total project cost of $91,529,304 is reasonable and credible. Regarding the reasonableness of the developer equity contribution in the form of land valued at $17,500,000, the Chief noted the June 2020 addendum to the business plan referenced three comparable commercial sites in [redacted] California, that served as the basis for the revised land valuation of $17,500,000 from the original land valuation of $27,500,000 in the 2017 addendum to the business plan. The Chief found the comparable commercial sites are neither relevant nor probative in establishing the true value of the land because the size and location of the parcel were not comparable to the project site, and because of the inconsistency regarding the price per acre in the third comparable listing and in a commercial property listing for a property located near the project site. The Chief also added the land deeds for the project site did not disclose how much the developer paid to acquire the project site.

Instead of submitting an appraisal report for the project site, a settlement statement for the purchase of the project site, real estate tax bills, or other sufficient evidence to establish the true value of the land to address the concerns of the Chief, the Petitioner contends that he does not need to argue about the land value because the land "does not count on job creation" and is therefore irrelevant to USCIS' job creation analysis. While we acknowledge that the cost of land purchase cannot be included in an input and output model to demonstrate job creation for regional center petitioners, this is not the issue in this case. As the Chief noted, the developer's willingness to reduce the land value estimate from $27,500,000 in 2017 to $17,500,000 in 2020 by $10,000,000 casts doubt upon the reasonableness and credibility of the original land valuation of $27,500,000 and the true value of the land contribution.

[5] A chart depicting the project structure as of June 2020 identified the project developer as [redacted] rather than [redacted] as indicated in the 2015 business plan and 2017 addendum.

This calls into question the claimed credibility of the business plan. Because the record does not contain sufficient evidence to demonstrate the true value of the land, we are unable to determine whether the claimed developer equity of $17,500,000 in land contribution to fund the total project cost of $91,529,304 is reasonable and credible.

In addressing the project's financing on appeal, the Petitioner asserts that the developer has now obtained senior financing, stating that the project "now resumes and will be completed accordingly." In support of this claim the Petitioner submits a letter dated March 3, 2023, from [redacted] addressed to an individual identified as the managing partner of [redacted] The letter states that [redacted] "is interested in considering this application from [redacted] for a preferred equity investment" in the amount of $10,000,000 in a property described as a "160 unit to-be-built senior apartment community with full amenities, located at [redacted], CA." It stipulates that the preferred equity would be used "as a portion of the total funding needed to capitalize the property," and that [redacted] agrees that "total project costs are expected to be $46,000,000 or less." The letter bears a signature indicating that [redacted] accepted [redacted] proposed terms and conditions in order to proceed with its application. However, the appeal does not contain evidence that the application was ultimately approved, or that any funds have been disbursed.

Further, neither the 2015 business plan, the 2017 addendum, nor the 2020 business plan updates identify [redacted] as a company affiliated with the NCE's project and the Petitioner has neither explained nor documented whether or how [redacted] fits into the project structure. The record therefore does not support the Petitioner's claim that "the developer" has obtained senior financing. Finally, even assuming, arguendo that this $10,000,000 investment was secured for use by the JCE, the amount is well short of the $66,837,175 in required financing detailed in the June 2020 update to the business plan. While the letter from [redacted] suggests that there has been a significant reduction in total expected project costs (from over $94,000,000 in 2020 to "$46,000,000 or less"), the record on appeal similarly lacks any explanation for this revised figure. Accordingly, the new evidence does not support the Petitioner's claim that the developer has secured an equity investment of $10,000,000 or that this amount is sufficient to move the project forward to completion based on the project's total costs. For all these reasons, the record contains insufficient evidence that the JCE will likely have sufficient capital for the project.

In addition, the evidence in the record does not substantiate the development timeline, which in turn does not demonstrate that the project will likely create a sufficient number of jobs for the Petitioner and other investors seeking EB-5 classification within the required two-year time frame. *See* 8 C.F.R. § 204.6(j)(4)(i)(B); *see also* 8 C.F.R. § 204.6(g) (providing that each individual investor's investment must result in the creation of at least 10 full-time positions for qualifying employees). As noted above, the project timeline has changed multiple times. The most recent addendum to the business plan, dated June 2020, anticipates a delay of four years for the building permit from 2017 to 2021, a delay of over four years for construction from May 2019 to December 2023, and a delay of six years for grand opening of the senior care facility from January 2020 to December 2025.

The Chief noted that with the City of [redacted] approval of a conditional use permit to construct the senior care facility in October 2019, the developer had about six months to pull construction permits and begin developing the project before the State of California issued stay-at-home orders in March

2020 due to the COVID-19 pandemic. The Chief further stated that the inability to start construction during this timeframe calls into question the credibility of the overall project success.

On appeal, the Petitioner does not provide any updates on the status of the project or other sufficient evidence to establish the JCE has achieved development milestones or evidence to support the claimed credibility and comprehensiveness of the business plan and subsequent addenda to that plan. Given that the project is significantly behind on construction and has had several business plan modifications due to timeline pushbacks, the Petitioner has not offered a business plan that is both credible and comprehensive. *See* 8 C.F.R. § 204.6(j)(4)(i)(B); *Matter of Ho*, 22 I&N Dec. at 213.

In addition, the record does not sufficiently demonstrate that the requisite number of jobs will be created using reasonable methodologies. *See* 8 C.F.R. §§ 204.6(j)(4)(iii), (m)(7)(ii). In order to demonstrate that the requisite number of jobs will be created using reasonable methodologies, the Petitioner offered (1) an economic and job creation impacts report, dated June 2015, (2) a job creation report, dated December 2017, and (3) a partial update to the business plan, dated June 2020.

The Chief determined that because the business plan is neither credible nor comprehensive, the specific job creation information used from the business plan as a basis to support the inputs into the economic model is not credible for demonstrating that the requisite number of jobs will be created. The Petitioner contends that he provided a revised economic impact analysis and job creation report, dated December 2017, and a partial update to the business plan, all of which were prepared by "famous economic experts." He states that these reports contain all relevant elements, such as sales, costs, and income projections and detailed bases for these projections. He argues that the adjudicator who denied the petition is a lay person who does not have professional knowledge to decide whether the methodology is reasonable or not reasonable; therefore, the denial decision was wrongful and should be changed.

However, the record of USCIS reflects that the project was reviewed by economists who have extensive experience in EB-5 adjudications. While we acknowledge the Petitioner's concerns, we agree with the Chief that the record does not sufficiently demonstrate that the requisite number of jobs will be created using reasonable methodologies because the economic model is based on the job creation information from the business plan, which is found to be neither comprehensive nor credible due to the inability of the project to meet established development timeline and the JCE's inability to obtain the required construction financing to fund the project. In visa petition proceedings, the petitioner bears the burden of establishing eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966).

In addition, the Petitioner contends that the Chief violated his constitutional due process right by not requesting evidence about the reasonableness of methodology used in the economic analysis and job creation reports. USCIS administers the EB-5 program pursuant to statutory and regulatory authorities. We will consider the Petitioner's due process concerns as they relate to whether the Chief complied with the applicable statute and regulations.

The record reflects that the Chief had issued an RFE and a NOID prior to denying the petition. In the NOID, the Chief advised the Petitioner that the evidence in the record was insufficient to demonstrate that the requisite number of jobs will be created using reasonable methodologies for the reasons

explained in the NOID and requested updated evidence to address the deficiencies noted. In response to the NOID, the Petitioner presented a partial update to the business plan and job creation report of December 2017, dated June 2020. Because the Chief provided adequate notice regarding the deficiencies in the petition, the record does not support the Petitioner's contention. Moreover, although 8 C.F.R. § 103.2(b)(8)(iii) gives USCIS the discretion to issue an RFE or a notice of intent to deny, neither the Act nor the regulations compel us to do so.

Lastly, the Petitioner claims that the project has already created direct and indirect jobs and that according to the economic report prepared by economists, more jobs will be created directly and indirectly. He also asserts that as long as a petition satisfies the creation of at least 10 jobs within two years after the approval of the Form I-526, the Form I-526 should be approved. The Petitioner contends that he should be allocated more than 10 jobs created or that will be created and that his petition should be approved unless USCIS provides scientific theory on why he should be allocated fewer jobs than other investors.

As we have discussed above, the Petitioner has not offered a business plan that is both credible and comprehensive. He also has not sufficiently demonstrated that the requisite number of jobs will be created using reasonable methodologies. Accordingly, he has not established by a preponderance of the evidence that the investment of the required amount of capital in the NCE will create at least 10 full-time positions for qualifying employees within two years, which commence six months after the adjudication of the Form I-526. *See* 8 C.F.R. § 204.6(j)(4)(i). *See also* 8 U.S.C. § 1153(b)(5)(A)(ii).

With respect to the allocation of jobs, USCIS allocates full-time positions to immigrant investors based on the date their petitions to remove conditions were filed, unless otherwise stated in the relevant documents.[6] USCIS will recognize any reasonable agreement made among the immigrant investors in regard to the identification and allocation of such qualifying positions. 8 C.F.R. § 204.6(g)(2). In general, multiple immigrant investors may not claim credit for the same job, and an immigrant investor may not seek credit for the same specifically identified job position that has already been allocated to another immigrant investor in a previously approved case.[7]

III. CONCLUSION

Deference to the prior determination is not appropriate in this case because the underlying facts upon which a favorable decision was made have materially changed since the approval of the Form I-526 exemplar project due to the inability of the project to meet development timeline outlined in the business plans and the JCE's inability to obtain the necessary financing to fund the project. Furthermore, the record lacks a comprehensive and credible business plan showing that, due to the nature and projected size of the NCE, the need for at least 10 qualifying employees will result within the next two years as required by 8 C.F.R. § 204.6(j)(4)(i)(B). *See also Matter of Ho*, 22 I&N Dec. at 213. The record also does not sufficiently demonstrate that the requisite number of jobs will be created using reasonable methodologies. *See* 8 C.F.R. §§ 204.6(j)(4)(iii), (m)(7)(ii). Because the Petitioner has not satisfied the job creation requirements, he has not demonstrated by a preponderance of the evidence eligibility for the immigrant investor visa classification.

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[6] *See generally* 6 *USCIS Policy Manual, supra,* at G.2(D)(4).
[7] *See generally* 6 *USCIS Policy Manual*, *supra*, at G.2(D)(4).

This issue is dipositive of the appeal and therefore, we need not reach the Petitioner's appellate arguments regarding the additional grounds for denial articulated in the Chief's decision.[8] *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).

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.

[8] As noted, the Chief determined that the Petitioner did not establish, by a preponderance of the evidence, that he invested or was in the process of investing at the required amount of capital in the NCE at the time of filing and that the funds he invested in the NCE were derived from a lawful source. *See* 8 C.F.R. § 204.6(j)(2) and (3). The Chief's decision also noted other deficiencies in the record, such as the Petitioner's failure to submit certain evidence in response to the RFE and NOID, and the Petitioner's submission of an incomplete Form I-526, Immigrant Petition by Alien Entrepreneur.