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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

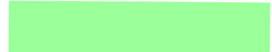


U.S. Citizenship
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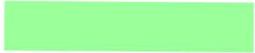


DATE: DEC 30 2013 OFFICE: CALIFORNIA SERVICE CENTER

FILE:



IN RE: PETITIONER:



PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Chief, Immigrant Investor Program, denied the preference visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the chief's decision based on procedural concerns; however, because the petition is not approvable, it is remanded for further action and consideration.

The petitioner seeks classification as an employment creation alien (EB-5) pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5). The record indicates that the petition is based on an investment in [REDACTED] a new commercial enterprise (NCE) associated with the [REDACTED] a designated regional center, pursuant to section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1828 (1992), as amended by section 116 of Pub. L. No. 105-119, 111 Stat. 2440 (1997); section 402 of Pub. L. No. 106-396, 114 Stat. 1637 (2000); section 11037 of Pub. L. No. 107-273, 116 Stat. 1758 (2002); section 4 of Pub. L. No. 108-156, 117 Stat. 1944 (2003); and section 1 of Pub. L. No. 112-176, 126 Stat. 1325 (2012). According to the evidence in the record, including an organizational chart entitled "[REDACTED] – Structure," the NCE aims to raise funds from up to 80 "Class A unit holders (EB-5 investors)" and "one Class B unit holder (the [REDACTED])" to lend to [REDACTED] to construct and operate a marina and associated businesses in [REDACTED] Florida. As the NCE proposes to create jobs within a targeted employment area, the required amount of capital in this case is \$500,000.

I. THE LAW

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

- (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
- (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

II. PROCEDURAL AND FACTUAL HISTORY

The petitioner filed the petition on October 4, 2011, supported by a number of documents, including: (1) an undated economic impact analysis and a January 2011 economic impact analysis; and (2) documents relating to [REDACTED]. On August 7, 2012, the Director, California Service Center, issued a Request for Evidence (RFE). The petitioner responded to the director's RFE with a letter from counsel, dated October 25, 2012, and supporting evidence, including: (1) an undated letter from [REDACTED] a partner at the [REDACTED] CPAs; (2) documents and

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bank statements relating to [REDACTED] and (3) a document entitled “[REDACTED] - RFE Response, 10/2012,” which includes a revised economic analysis dated October 2012. On January 22, 2013, the director issued a second RFE. The petitioner responded to the director’s second RFE with a letter from counsel, dated April 10, 2013, and supporting evidence, including: (1) a January 31, 2013 economic analysis; and (2) documents relating to [REDACTED]

In his July 13, 2013 decision denying the petition, the chief concluded that the petitioner’s evidence did not show that the claimed investment has created or will create at least 10 full-time positions for qualified employees. Specifically, the chief concluded that the petitioner did not resolve the inconsistencies among the economic analyses in the record – which were an undated economic impact analysis, a January 2011 economic impact analysis, a revised economic analysis dated October 2012, and a January 31, 2013 economic analysis – or provide sufficient evidence to support job creation estimates. In addition, the chief concluded that the petitioner’s evidence, including evidence relating to [REDACTED] did not establish the lawful source of the required amount of capital. The chief made “a finding of fraud relative to [the] funds utilized by the petitioner to make the requisite investment into the NCE.” While the chief did not reference this document, the record also contains the February 2010 economic analysis that [REDACTED] submitted in support of its approved regional center proposal. The record does not resolve when the chief added this document to the record of proceeding.

On appeal, counsel files a brief, dated August 8, 2013, and additional supporting evidence, including an online printout about [REDACTED] and a [REDACTED] online printout about [REDACTED]

The AAO will remand the matter back to the chief to consider whether a recent memorandum requires deference to the economic analysis and, if not, to provide notice to the petitioner of why not such that the petitioner can file a meaningful appeal. In addition, the chief must provide notice to the petitioner of any derogatory information on which he relies in compliance with the regulation at 8 C.F.R. § 103.2(b)(16)(i).

III. ANALYSIS

The first issue relates to the policy of deference set forth in the United States Citizenship and Immigration Services (USCIS) May 30, 2013 Policy Memorandum. If the regional center proposal the Director, California Service Center, approved on October 12, 2010 contained a comprehensive business plan satisfying the requirements set forth at *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm’r 1998), then that business plan, and the accompanying economic impact analysis, should be afforded deference. *EB-5 Adjudications Policy*, PM-602-0083, 14-15, 23 (May 30, 2013). On appeal, counsel asserts that the economic impact analyses submitted in support of the petition “utilized the same economic methodology and multipliers” as the economic impact analysis submitted in support of the regional center proposal, and contends that the chief should have given the analyses deference.

The chief’s July 13, 2013 decision does not reference the economic impact analysis filed in support of the regional center proposal. The chief’s decision also does not discuss if deference should be afforded

to any of the four economic impact analyses filed in support of the instant petition, or explain why deference should not be afforded. See *EB-5 Adjudications Policy* at 14-15, 23. The Policy Memorandum provides that under certain circumstances, the chief is not required to afford deference to USCIS's previous favorable determinations. For example, USCIS need not give deference to previous determinations that were based on hypothetical projects, that were legally deficient, or where the underlying facts have materially changed. See *EB-5 Adjudications Policy* at 14-15, 23. In this case, if the chief concludes that the underlying facts have materially changed, he must provide notice to the petitioner of that fact, supported by examples.

In considering if the underlying facts have materially changed, the chief should compare the February 2010 economic analysis that [REDACTED] submitted in support of its approved regional center proposal with the four economic impact analyses that the petitioner filed in support of the instant petition. The job projections increase from 449 direct jobs, 110 indirect jobs and 145 induced jobs for a total of 704 jobs in the February 2010 economic analysis to 637 direct jobs, 169 indirect jobs and 224 induced jobs for a total of 1,030 jobs in the undated and January 2011 economic impact analyses. Moreover, according to Exhibit A, Schematic Diagram, the retail broker positions increase from 100 to 200 from the economic analysis filed in support of the regional proposal to the economic analyses filed in support of the instant petition. Furthermore, section 9, part F, of the February 2010 economic analysis provides that "[c]urrent plans call for the establishment of a major retail brokerage firm with 100 full-time employees." Section 9, part F, of the undated and January 2011 economic impact analyses, however, provides that "[t]he developer plans to hire 300 people," with "about 200 people in real estate sales, 67 offering mortgage broker and financing services, 19 working on sales and service of the [REDACTED] and 14 selling insurance to day-boaters." Additionally, on page 3 of the October 12, 2010 regional center proposal approval, the director advises [REDACTED] that a Form I-526 petitioner investing through the regional center must submit "a copy of the job creation methodology . . . as contained in the final Regional Center economic analysis which has been approved by USCIS." The chief should consider if any of the four economic impact analyses the petitioner filed in support of the instant petition contain material changes from the February 2010 economic analysis that supported the regional center proposal.

As the chief did not explain why the economic impact analyses filed in support of the instant petition were not afforded due deference, the petitioner was unable to file a meaningful appeal. Thus, the AAO is remanding the matter to the chief to determine whether any of the four economic impact analyses in the record should be afforded deference. If the chief determines that deference is not warranted, the chief must explain that determination to the petitioner such that the petitioner may file a meaningful appeal.

The second issue relates to the chief's finding of fraud. As an initial matter, to constitute fraud, an alien must have made a false representation of a material fact, with knowledge of its falsity and with an intent to deceive a government official, and the misrepresentation must have been believed and acted upon by the official. *Sergueeva v. Holder*, 324 F. App'x 76, 78 (2d Cir. 2009) (citing *Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956)). A willful misrepresentation, however, only requires that the alien knowingly make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Id.* (citing *Matter of Kai Hing Hui*, 15

I&N Dec. 288, 289-90 (BIA 1975)). As the chief did not act upon the documents he determined to be false, the proper consideration is whether the petitioner made a material misrepresentation.

In his July 13, 2013 decision, the chief cites section 212(a)(6)(C)(i) of the Act, which provides that “[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.” A finding of material misrepresentation requires that the petitioner willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. at 289-90. The term “willfully” means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Tijam*, 22 I&N Dec. 408, 425 (BIA 1998); *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which “tends to shut off a line of inquiry which is relevant to the alien’s eligibility, and which might well have resulted in a proper determination that he be excluded.” *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

In addition, if the petitioner was unaware of the documents and information submitted in support of his own petition, then this failure to apprise himself constitutes deliberate avoidance and does not absolve him of responsibility for the content of his petition or the materials submitted in support. *See Hanna v. Gonzales*, 128 F. App’x 478, 480 (6th Cir. 2005) (unpublished) (an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application’s contents). The law generally does not recognize deliberate avoidance as a defense to misrepresentation. *See Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005); *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993).

Accordingly, to make a finding of material misrepresentation in a visa petition proceeding, the chief must determine: (1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; (2) that the misrepresentation was willfully made; and (3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

The chief’s decision provides that he bases his finding on: (1) the publicly available information on [REDACTED] indicating its director is not [REDACTED] as asserted in the petitioner’s evidence; and (2) materially altered documents the petitioner provided relating to [REDACTED]. The evidence in the record does not indicate that the chief provided a copy of the derogatory publicly available information to the petitioner and/or that, prior to issuing the final decision, the chief afforded the petitioner an opportunity to rebut the derogatory information pursuant to the regulation at 8 C.F.R. § 103.2(b)(16)(i).

In light of the above, the AAO remands the matter to the chief for a new decision that explains its compliance with the May 30, 2013 Policy Memorandum and provides notice of the derogatory information pursuant to the regulation at 8 C.F.R. § 103.2(b)(16)(i).

IV. ADDITIONAL ISSUES

As an additional issue, the regulation at 8 C.F.R. § 103.2(b)(3) states: “Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator’s certification that he or she is competent to translate from the foreign language into English.” Most of the English translations in the record, including those relating to the petitioner’s bank accounts, ownership of real estate properties in China and income tax filings, are not accompanied by a certificate of translation. The January 10, 2007 Lease Agreement between the petitioner and [REDACTED] includes a stamp, stating “This is to certify that this translation is in conformity with the original text in Chinese.” On remand, the chief should consider whether the lack of translations for some of the documents and the stamped translations comply with the regulation at 8 C.F.R. § 103.2(b)(3), and if not, the chief may wish to request translations that comply with the regulation at 8 C.F.R. § 103.2(b)(3).

Moreover, the chief should consider if the petitioner has provided sufficient evidence showing the lawful source of the \$500,000 that [REDACTED] allegedly lent to the petitioner to invest in the NCE. According to the Companies House online printout the petitioner filed on appeal, [REDACTED] was incorporated in the United Kingdom on January 6, 2011. Within two months of its incorporation, [REDACTED] lent \$500,000 to the petitioner. The chief should consider if the evidence in the record, including evidence that [REDACTED] purchased 400,000 RMB worth of pet furniture in July 2011, establishes that [REDACTED] had lawfully accumulated \$500,000 prior to lending the funds to the petitioner in March 2011.

V. SUMMARY

Based on the reasons stated above, this matter will be remanded. The chief must issue a new decision, containing specific findings that will afford the petitioner the opportunity to present a meaningful appeal. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The chief’s decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the chief for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.