U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-R-

DATE: AUG. 4, 2016

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

PETITION: FORM I-526, IMMIGRANT PETITION BY ALIEN ENTREPRENEUR

The Petitioner seeks classification as an immigrant investor. *See* Immigration and Nationality Act (the Act) section 203(b)(5), 8 U.S.C. § 1153(b)(5). 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 that will benefit the United States economy and create at least 10 full-time positions for qualifying employees.

The Director of the California Service Center within U.S. Citizenship and Immigration Services (USCIS), initially granted the petition. The Chief of the Immigrant Investor Program Office (IPO) later sent a notice of intent to revoke (NOIR) the petition because the Petitioner could no longer rely on an investment in a since-terminated regional center as a basis for his eligibility. The Petitioner responded to the NOIR but the Chief found the Petitioner's statements did not overcome the reasons for the NOIR and thus revoked the petition.

The matter is now before us on appeal. In his appeal, the Petitioner submits additional evidence and argues that the Chief erroneously revoked the petition for a number of reasons. The Petitioner also requested the opportunity to present an oral argument, which we deny as unnecessary to the resolution of this case.

Upon *de novo* review, we will dismiss the appeal.

I. LAW AND POLICY

A. Immigrant Investor Status

A foreign national may be classified as an immigrant investor if he or she invests the requisite amount of qualifying capital in a new commercial enterprise. The commercial enterprise can be any lawful business that engages in for-profit activities. The foreign national must show that his or her investment will benefit the United States economy and create at least 10 full-time jobs for qualifying employees.

Specifically, section 203(b)(5)(A) of the Act provides that a foreign national may seek to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) in which such alien has invested . . . or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
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> (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).

The implementing regulation at 8 C.F.R. § 204.6(j)(4)(i)(B) requires petitioners to show the requisite job creation either through documentation confirming such employees have already been hired, or through: "A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired."

An immigrant investor may personally invest the required funds in a new commercial enterprise, and show that at least 10 qualifying employees have been directly hired through that new commercial enterprise as a result. An immigrant investor may also invest in a "regional center," which is an economic unit involved with the promotion of economic growth through "improved regional productivity, job creation, and increased domestic capital investment." *See* 8 C.F.R. § 204.6(e) (defining "regional center").

Regional centers apply for designation as such with USCIS, and must file annual supplements to show their continued eligibility for designation. Designated regional centers identify and work with new commercial enterprises, which in turn are associated with a specific project, known as the "job creating entity." A job creating entity could be a new office building, mixed-use development project, or other tangible initiative that results in the qualifying job creation. 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). Indirect job creation is permitted only through investment in a regional center.

An individual seeking classification as an immigrant investor files a Form I-526, Immigrant Petition by Alien Entrepreneur. If USCIS grants the petition and an application to adjust status, the investor receives conditional permanent resident status. Approaching the end of a two-year period of conditional status, the investor must request that the conditions be removed by filing a Form I-829, Petition by Entrepreneur to Remove Conditions. If it determines that the investor has met all program requirements, USCIS will remove the conditions and grant unconditional lawful permanent resident status.

An immigrant investor thus goes through three stages in pursuit of lawful permanent resident status: (1) the period during which the Form I-526 is pending; (2) the two-year period of conditional permanent resident status after the Form I-526 and adjustment of status application approval; and (3) the unconditional lawful permanent resident status after the Form I-829 petition to remove the investor's conditional status is granted.

B. Material Changes

Critically, the investor must maintain his or her eligibility throughout the application process. Material changes to the investment arrangement require the filing of a new Form I-526 petition and are grounds for revocation of the original petition. The Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition . . . ." Section 205 of the Act, 8 U.S.C. § 1155. The Board of Immigration Appeals has discussed revocations on notice as follows:

> [A] notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.[1]

In the context of an EB-5 petition, an immigrant investor must establish eligibility at the time of filing and remain eligible until he or she receives lawful permanent resident status.[2] Should the initial petition be deficient, or circumstances materially change after its approval, the immigrant investor must file a new petition:

> A deficient Form I-526 petition may not be cured by subsequent changes to the business plan or factual changes made to address any other deficiency that materially alter the factual basis on which the petition was filed. The only way to perfect material changes under these circumstances is for the immigrant investor to file a new Form I-526 petition to correspond to the changed plans.
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> Similarly, if, after the approval of a Form I-526 petition but before an alien investor has been admitted to the United States or adjusted his or her status pursuant to that petition, there are material changes to the business plan by which the alien intends to comply with the EB-5 requirements, the alien investor would need to file a new Form I-526 petition. Such material changes would constitute

[1] *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).
[2] 8 C.F.R. § 103.2(b)(1); *see also Matter of Izummi*, 22 I&N Dec. 169, 175-176 (Assoc. Comm'r 1998) (USCIS cannot consider materially different facts that come into being only subsequent to the filing of a petition).

> good cause to revoke the approved petition and would result in the denial of admission or an application for adjustment of status.

USCIS Policy Memorandum PM-602-0083, EB-5 Adjudications Policy, at 25 (May 30, 2013).[3]

II. PROCEDURAL HISTORY

In May 2012, the Petitioner filed his Form I-526 petition based on an investment through a designated regional center, dba (the Regional Center). The petition identified an investment in a new commercial enterprise, (the NCE), associated with the Regional Center. The final business plan explained that the NCE would raise $12,000,000 from 24 foreign investors to purchase property where the job creating entity, would then develop, own, and operate eight restaurants.

On January 13, 2014, USCIS' California Service Center initially approved the immigrant investor petition. On February 13, 2015, USCIS' IPO Chief terminated the Regional Center's designation, finding that: (1) it was no longer serving the purpose of promoting economic growth; (2) it was not meeting the monitoring and oversight responsibilities set forth in its designation letter; and (3) it was not properly accounting for capital investments.[4] The Regional Center appealed that termination.

On May 7, 2015, the Chief served the Petitioner and original counsel an NOIR regarding the Petitioner's immigrant investor petition based on the termination of the underlying Regional Center. The Chief afforded the Petitioner until June 9, 2015, to respond. By letter dated May 14, 2015, and received by USCIS on May 19, 2015, the Petitioner's original attorney of record notified USCIS that he had withdrawn his representation of the Petitioner. In his letter of June 8, 2015, received by USCIS on June 10, 2015, one day after the deadline for responding to the NOIR, the Petitioner's newly retained counsel requested a 90 day extension to reply to the NOIR. On June 25, 2015, the IPO Chief concurrently denied the extension request and revoked approval of the petition, which he did for the reasons stated in the NOIR, i.e., the Regional Center's termination. This office dismissed the appeal of the Regional Center termination in November 2015.

III. ANALYSIS

On appeal, the Petitioner submits a brief with additional evidence[5] and argues as follows: (1) that the Chief's revocation was premature while the appeal relating to the Regional Center's termination was

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[3] Found at https://www.uscis.gov/laws/policy-memoranda.

[4] Specifically, the Chief found that the Regional Center was not promoting economic growth because economic activities at its two enterprises had either ceased or had not been continuous. The Chief further concluded that the Regional Center had not met its monitoring and oversight responsibilities, as it could not account for the full amount of the investors' capital, had misused the investors' funds, and had not properly reimbursed the investors.

[5] The additional documentation consists of the brief that was filed in support of the Regional Center's appeal, and an email between former and present counsel that confirms former counsel's notification to the Petitioner that he had withdrawn from his representation and his May 19, 2015, notification to the Petitioner of the receipt of the NOIR. The

pending; (2) that the Chief should have afforded him more time to respond to the NOIR; and (3) that he should be able to proceed with his original Form I-526 petition without the involvement of the original Regional Center because the project continues to promote economic growth and job creation will occur within the requisite two-year period.

A. Timing of the Revocation

First, the Petitioner asserts the Chief's revocation of the instant petition was premature because an appeal of the Regional Center's termination was pending and, if that appeal were sustained, his petition would remain valid. While the Chief may have elected to wait for resolution of the Regional Center's appeal before revoking associated investor petitions, there is no affirmative requirement to do so. Here, the timing of the two events does not appear to have impacted the instant proceedings. On November 17, 2015, we dismissed the Regional Center's administrative appeal, which constituted final agency action on the Regional Center's termination. That termination preceded our consideration of the instant appeal on the revocation of the Petitioner's investor petition, and we have considered all arguments and supplemental evidence that the Petitioner subsequently advanced on appeal.

B. Timeframe for the NOIR Response

Second, the Petitioner maintains that the Chief erred in not authorizing more time to respond to the NOIR. The USCIS Adjudicator's Field Manual (AFM) at Chapter 20.3(b)(1) specifies a timeframe of "usually 30 days" for responding to an NOIR. Here, the Chief authorized 33 days, from May 7, 2015, for a response.[6] The Petitioner states that both he and his new counsel received the NOIR on May 19, 2015, through previous counsel, and he claims that the remaining 21 days was insufficient to respond. The Chief issued the NOIR both to the Petitioner and to counsel of record, as indicated on the most current Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative. The record does not substantiate the Petitioner's assertion that he did not receive the Chief's NOIR until 12 days after the date of issuance but, in any event, the Petitioner had an additional 21 days to timely and substantively respond to the NOIR. He did not do so.

We do not identify an error in the Chief's denial of the untimely extension request. The AFM does permit the Chief to exercise discretion to grant additional time for a petitioner to respond to an NOIR if the petitioner "needs it to obtain documentation from abroad or other meritorious reasons."[7] The Petitioner has not demonstrated that the Chief abused his discretion in denying the late-filed extension request. In any event, the Petitioner has now had ample opportunity during this administrative appeal to raise arguments and submit additional evidence. Consequently, we do not find that the Chief's denial of the extension request has prejudiced the Petitioner.

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effective date of former counsel's withdrawal is the date USCIS received the withdrawal of representation letter on May 19, 2015. *See* 8 C.F.R. § 292.4(a).

[6] The three additional days are required because the notice was mailed. 8 C.F.R. § 103.8(b).

[7] AFM Chapter 20.3(b)(1).

C. Impact of Regional Center Termination

Third and most saliently, the Petitioner maintains that he should be able to pursue his immigrant investor visa even without being part a regional center that formed the basis of his initial Form I-526 petition. Specifically, he states a lack of the Regional Center involvement does not impact his eligibility because the project continues and will create a sufficient number of direct jobs within the two-year period.

As discussed in greater detail below, there are several problems with that argument here. First, we've already determined in a separate proceeding that the Regional Center is not promoting economic growth. Second, proceeding without a regional center may require material changes to the plan, as individual investors may only rely on direct job creation and job creation must occur in the new commercial enterprise or a wholly-owned subsidiary. And finally, the timeframe to create jobs does not annul the rule disallowing material changes to the plan.

1. Investor's Collateral Challenge to Regional Center Termination

In support of his argument that the project in which he invested is, in fact, currently promoting economic growth, the Petitioner offers a copy of the Regional Center's appeal brief addressing this point. As noted above, we have dismissed the Regional Center's appeal, and concluded that the center did not continue to promote economic growth. Moreover, the requirement of promoting economic growth is a requirement specific to regional centers; it is not an element of investor eligibility. Therefore, the Petitioner's position that the project continues to promote economic growth constitutes an impermissible collateral challenge to our prior decision in the separate proceeding relating to the Regional Center.

2. Eligibility without Regional Center Involvement

In support of his claim that he can continue to pursue his immigrant investor visa independent of the since-terminated Regional Center, the Petitioner cites to the USCIS Policy Memorandum: "USCIS should not reexamine earlier determinations made in the EB-5 process unless there is reason to believe a prior adjudication involved an objective mistake of fact or law." PM-602-0083, *supra*, at 24. But the memorandum also indicates that a material change to an immigrant investor petition necessitates a new petition:

> [I]f, after the approval of a Form I-526 petition but before an alien investor has been admitted to the United States or adjusted his or her status pursuant to that petition, there are material changes to the business plan by which the alien intends to comply with the EB-5 requirements, the alien investor would need to file a new Form I-526 petition.

Id. at 25.[8] As explained below, for the Petitioner to continue to pursue an EB-5 visa as an individual investor independent of the prior Regional Center, he would need to demonstrate both the requisite direct job creation and that the is a wholly-owned subsidiary of the NCE. The record does not currently reflect these conditions. Meeting these conditions would necessitate material changes and thus a new petition.

First, different rules apply to individual and regional center investments with respect to how qualifying jobs are tallied. The former Regional Center's business plan included *indirect* job creation figures, which are not available to an individual investor without a regional center's involvement. The Regional Center's final business plan claimed 256.9 jobs, of which 202 were direct jobs. But, for the 24 foreign national investors to be able to proceed independently of the since-terminated Regional Center, the project(s) must create a minimum of 240 direct positions (10 per investor). The now defunct Regional Center's business plan is short 38 direct jobs to support 24 independent foreign investors. As a result, the record does not establish that the Petitioner and his co-investors have met the direct job creation requirements.

Second, different rules apply to individual and regional center investments with respect to which entity must create the new jobs. For individual investors (not associated with a regional center), job creation must occur within a new commercial enterprise or within a wholly-owned subsidiary.[9] The new commercial enterprise's employees must provide "services or labor for the new commercial enterprise and [must receive] wages or other remuneration directly from the new commercial enterprise."[10] The Petitioner has not offered evidence that the in this case is a wholly-owned subsidiary of the NCE. Thus, the Petitioner has not shown that the job creation will occur within the NCE or that the employees of meet the regulatory definition of employees.[11] Proceeding without regional center involvement would require the NCE to absorb the and make it a wholly-owned subsidiary. This activity would constitute a material change to the original petition.

The Petitioner states that, in the event we dismiss the Regional Center's appeal of its termination, he would submit a new business plan that will demonstrate the NCE will complete the project and will create a sufficient number of jobs. USCIS received the Petitioner's appeal brief on August 27, 2015, and we dismissed the Regional Center's appeal on November 17, 2015. To date, the Petitioner has not submitted a new business plan. Accordingly, the Petitioner has not established that his investment scenario could continue without material change.

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[8] *See also Izummi*, 22 I&N Dec. at 175 (a petitioner may not make material changes to a petition that has already been filed to make it conform to requirements).

[9] *See* 8 C.F.R. § 204.6(j)(4); *see also* the definitions of commercial enterprise and employee at 8 C.F.R. § 204.6(e).

[10] 8 C.F.R. § 204.6(e) (defining employee).

[11] *Id.*

3. Allotted Time for Job Creation

Notwithstanding the issues described above, we will briefly address the Petitioner's final contention regarding the timeframe for job creation. In general, immigrant investors may show that the required jobs either were created or will be created within two years and six months (30 months) after USCIS adjudicates the Form I-526 petition.[12] The USCIS California Service Center Director approved the petition on January 13, 2014. The Petitioner maintains that he therefore should have been given until July 13, 2016, to exhibit sufficient job creation. The Petitioner indicates that the revocation was contrary to the regulation and USCIS policy.

The rule permitting a 30 month period within which to create the requisite jobs does not, however, annul the rule regarding material changes; the two rules coexist. During the period of conditional residence, a petitioner is expected to implement the business plan underlying the original petition, and USCIS guidance acknowledges that a petitioner may need to adjust his or her plans during this time. But when such changes are material, USCIS policy requires the investor to file a new petition. When the Chief terminated the Regional Center in which the Petitioner made his qualifying investment, the Chief acted properly in issuing the NOIR and subsequently revoking the petition.

IV. CONCLUSION

The Petitioner in this matter has not established that he remains eligible for the benefit sought without the involvement of a regional center. Accordingly, we affirm the Chief's revocation.

It is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, the Petitioner has not met that burden. The Petitioner may file a new Form I-526 on the basis of a new regional center, or different business methodologies, or both, but a new petition is required.

ORDER: The appeal is dismissed.

Cite as *Matter of W-R-*, ID# 15486 (AAO Aug. 4, 2016)

[12] 8 C.F.R. § 204.6(j)(4)(i)(B); USCIS Policy Memorandum PM-602-0083, *supra*, at 19.