U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Y-L-

DATE: APR. 26, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: 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). 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 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. The Chief concluded that the Petitioner did not place the required amount of capital at risk in an NCE. On appeal, we found that the Petitioner did not overcome the Chief's basis for denial. In addition, we determined that the Petitioner did not establish his eligibility at the time he filed his petition, and that he made impermissible material changes to his petition in an effort to satisfy the statutory and regulatory requirements. We also denied the Petitioner's subsequent motion to reopen our decision.

In support of the instant motion to reopen and motion to reconsider, the Petitioner provides a brief and a copy of a previously submitted operating agreement, and asserts that we erred in our analysis regarding the at-risk nature of his investment, and the material changes to his original petition.

Upon review, we will deny the motions.

I. LAW

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 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.

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentation. *See* 8 C.F.R. § 103.5(a)(2). However, any new facts must relate to eligibility at the time the Petitioner filed the petition. *See* 8 C.F.R. § 103.2(b)(1), (12); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A motion to reconsider must offer the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the previous

decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. *See* 8 C.F.R. § 103.5(a)(3). A motion to reconsider is based on the existing record and the Petitioner may not introduce new facts or new evidence relative to his or her arguments. A motion to reconsider contests the correctness of our original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new materials. *Compare* 8 C.F.R. § 103.5(a)(3) *and* 8 C.F.R. § 103.5(a)(2).

II. ANALYSIS

A. At-Risk Investment

In our previous decision on motion, we reaffirmed our determination that the Petitioner did not place at least $500,000 at risk for the purpose of generating a return.[1] We also observed that while the Petitioner presented a revised subscription agreement removing references to a nonexistent entity, it still relied on a July 2013 operating agreement that identified that entity as a member and owner of the NCE.[2]

In the instant motion, the Petitioner asserts that the NCE, was legally formed, that he transferred his investment capital into the NCE, and as such, the evidence establishes that he made an investment at risk in the NCE in accordance with 8 C.F.R. § 204.6(j)(2). However, he has not sufficiently addressed our previous concerns regarding the conflicting evidence of the ownership and operational structure of the NCE. The additional copy of an updated operating agreement for the NCE provided on motion, dated June 2016, references the July 2013 operating agreement signed by and the NCE. The June 2016 operating agreement indicates that it supersedes the July 2013 agreement, and lists the Petitioner as the sole owner of the NCE based on his $500,000 investment. The Petitioner maintains that because he is now sole owner, his investment in the NCE is at-risk. However, it is still not apparent how a nonexistent entity can be a party to the February and July 2013 operating agreements. Further, no documentary evidence has been provided to show the transfer of shares and return of capital to the other owners in order for the Petitioner to gain sole ownership of the NCE. Based on the inconsistent information, the Petitioner still has not established, by a preponderance of the evidence, that he has placed at least $500,000 of his funds at risk for the purpose of generating a return on the capital. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

B. Material Change and Eligibility at the Time of Filing

In the instant motions, the Petitioner emphasizes that the standard for material change, following *Kungys v. U.S.*, 485 U.S. 759, 770-72 (1988), is whether the change had "a natural tendency to

[1] *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) ("Doubt cast on any aspect of [a] petitioner's proof may . . . lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.").

[2] The July 2013 operating agreement specifies the same capital investment and profit and loss allocations at the February 2013 operating agreement.

influence" or is "predictably capable of affecting" the decision. He maintains that the changes that were made to the petition after filing "are the natural changes any business will incur as it grows." We disagree. For instance, the initial petition indicated in Part 3 that the Petitioner's capital investment in the NCE was for the purpose of investing in a retail establishment. The NCE's Statement of Information, subsequently filed with the State of California, indicated that it was a "Wholesale & Retail" business, located in [redacted] California. Later on, the Petitioner presented an updated Statement of Information filed with the State of California that noted that the NCE was a "Realty & Investment Services" business, located in [redacted] California. Page 1 of the NCE's business plan, also provided after the petition was filed, indicated that the NCE "focuses on real estate purchase, sales, refurbishing and investment services." However, the Petitioner offers no evidence showing that NCE is in the wholesale or retail industry.

To establish a petitioner's eligibility for the immigrant investor classification, he or she must show that the requisite amount of investment capital has or will be invested in the NCE. The regulation at 8 C.F.R. § 204.6(f) explains that the minimum investment amount is generally $1,000,000, but may be adjusted down to $500,000 if the investment is in a targeted employment area (TEA). Therefore, a change in the location of the NCE would "have a tendency to influence" or would be "predictably capable of affecting" our determination of eligibility for immigrant investor purposes as the location of the investment determines the required capital investment threshold. *See Kungys v. U.S.*, 485 U.S. 759, 770-72 (1988).

Likewise, the regulation at 8 CFR 204.6(j)(4) explains that evidence the NCE has created or will create the necessary jobs can include evidence of existing new jobs or a comprehensive business plan. In this case, the Petitioner had yet to create new jobs at the time of filing of the petition. However, he indicated that the jobs would be created as a result of the NCE's investment in a retail establishment. The business plan that was later provided indicated that jobs would be created through realty and investment services. The Petitioner has not explained how this change in business focus (e.g. from retail to realty and investment services) is a natural progression of the business. Further, such a modification in the nature of the NCE's business activities would be "predictably capable of affecting" our determination of whether the Petitioner will prospectively create the requisite qualifying jobs. *Id.*

We conclude that the Petitioner's revised petition constitutes an impermissible material change to his original petition. *See Matter of Izummi*, 22 I&N Dec. 175-76 (Assoc. Comm'r 1998) (USCIS cannot "consider facts that come into being only subsequent to the filing of a petition."). An investor must maintain his or her eligibility throughout the application process. He or she must establish eligibility at the time of filing and remain eligible until adjustment to lawful permanent resident status.[3] Here, the Petitioner has materially changed his original petition and so has not done so.

[3] 8 C.F.R. § 103.2(b)(1); *see also Izummi*, 22 I&N Dec. at 175-76.

Finally, with the instant motions, the Petitioner offers no arguments or evidence relating to our previous finding that he did not show his eligibility for the classification at the time he filed his petition. *See* 8 C.F.R. § 103.2(b)(1), (12); *Katigbak*, 14 I&N Dec. at 49.

III. CONCLUSION

We have considered the evidence offered on motion, along with previously filed documentation, and conclude that the Petitioner has not shown his eligibility for the immigrant investor classification. We will therefore deny his motion to reopen. In addition, the Petitioner has not demonstrated that our previous decision was based on an incorrect application of law or USCIS policy. We will thus deny his motion to reconsider.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of Y-L-*, ID# 282623 (AAO Apr. 26, 2017)