U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-J-C-

DATE: AUG. 8, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner seeks classification as an immigrant investor based on an investment in , a new commercial enterprise (NCE). *See* Immigration and Nationality Act (the Act) section 203(b)(5), 8 U.S.C. § 1153(b)(5). The NCE owns and operates retail stores and is engaged in the leasing and sale of electronics and furniture under franchise agreements with . This fifth preference employment-based classification (EB-5) makes immigrant visas available to foreign nationals who invest the requisite amount of qualifying capital in a 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. He concluded that the Petitioner did not invest, and was not in the process of actively investing, at least $500,000 in the NCE.[1] He also found that she did not demonstrate the NCE would create at least 10 jobs for qualifying employees or that she would engage in the management of the NCE. We summarily dismissed her appeal, determining that she did not specifically identify any erroneous conclusion of law or statement of fact for the appeal. We then denied her combined motions to reopen and reconsider our decision, finding that she did not demonstrate an at-risk investment in the NCE or the required job creation.[2] The matter is now before us on second combined motions to reopen and reconsider. We will deny the motions.

I. LAW

A motion to reopen is based on documentary evidence of *new facts*, and a motion to reconsider is based on an incorrect application of law or policy. The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2), and the requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

[1] As the NCE is located in a targeted employment area, the required amount of capital is downwardly adjusted from $1,000,000 to $500,000. *See* 8 C.F.R. § 204.6(f)(2).

[2] Although we denied the previous combined motions, we agreed with the Petitioner that she will be engaged in the management of the NCE.

II. ANALYSIS

The Petitioner files second combined motions to reopen and reconsider the matter. The filing does not meet the requirements for a motion to reconsider. As noted above, a motion to reconsider must establish that our previous decision was based on an incorrect application of law or policy, and that the decision was incorrect based on the evidence in the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). While the Petitioner requests that we reconsider our previous decision denying her first combined motions, she does not explain how we had incorrectly applied any law or policy, or how we had otherwise erred. Thus, we will deny her motion to reconsider.

Similarly, the motion to reopen will be denied because the evidence the Petitioner presents on motion does not demonstrate her eligibility for the classification. *See* 8 C.F.R. § 103.5(a)(2). On motion, she submits additional documents and maintains that (1) she has invested at least $500,000 in the NCE, and (2) her investment in the NCE has created full-time jobs for 10 qualifying employees. For the reasons discussed below, however, the record, including materials that she offers on motion, does not sufficiently support her assertions. We will thus deny her motion to reopen.

A. Capital Investment

The documentation provided in support of the motion to reopen, along with the previously submitted material, does not show that the Petitioner was actively in the process of investing in the NCE at the time she filed the petition. *See* section 203(b)(5)(A)(i) of the Act; 8 C.F.R. § 103.2(b)(1). We denied the previous combined motions, in part, because her prospective investment arrangement with the NCE did not constitute a commitment of funds at the time of filing.[3] Page 2 of the petition indicated that the Petitioner began investing in the NCE in September 2012, and had invested a total of $114,000 when she filed the petition in December 2013. The funds that she provided to the NCE, however, were characterized as loans to the NCE in its federal tax returns and other documentation in the record.

For example, we noted in our previous decision that the Schedule L of the NCE's IRS Form 1065, U.S. Return of Partnership Income; and California Form 568, Limited Liability Company Return of Income, for 2013 and 2014 show a note payable to the Petitioner in the amount of $114,000. Likewise, the NCE's February 2013 resolution indicates that its officers would sign a promissory note for the benefit of the Petitioner in the amount of $114,000. A debt arrangement between the Petitioner and the NCE does not constitute qualifying contributions of capital. *See Matter of Soffici*, 22 I&N Dec. 158, 162 (Assoc. Comm'r 1998); 8 C.F.R. § 204.6(e) (defining "invest").

Additionally, we determined in our previous decision that the record did not demonstrate the Petitioner held an equity interest in the NCE at the time she filed the petition; instead, she was a

[3] The regulation at 8 C.F.R. § 204.6(j)(2) provides that a mere intent to invest, or prospective investment arrangements entailing no present commitment, will not suffice to show that the Petitioner is actively in the process of investing. Instead, the Petitioner must show actual commitment of the required amount of capital.

creditor of the organization. The NCE's February 2012 and August 2016 resolutions show that she might become a member of the NCE at a future date. Specifically, the 2012 resolution states that membership will be granted to her "if and when her legal status changes to [that of an] EB[-]5 Investor." The 2016 resolution provides that she will become a member upon her "a) investing $500,000 in the business[,] and b) receiving a valid working immigration status in the United States." Her lack of an equity interest in the NCE did not support a finding that she had invested in the business. Based on the above, we found that she did not establish the funds she transferred to the NCE were capital invested for the purpose of generating a return. *See* 8 C.F.R. § 204.6(j)(2); 8 C.F.R. § 204.6(e).

On motion, the Petitioner maintains that she transferred $515,000 to the NCE through a succession of transactions. She further asserts that she became a member of the NCE in 2016. She provides an excerpt from the NCE's internal accounting records and a 2017 statement from its accountant, who explains that the NCE's general ledger incorrectly termed her remittances to the NCE as "Notes Payable" to her, instead of "Additional Equity" from her. He also indicates: "[e]ffective December 31, 2018 [*sic*], [the Petitioner] has accepted 51% share in the ownership of [the NCE]." The Petitioner offers the NCE's 2016 state and federal tax returns, which bear no indicia that they were filed with the taxing authorities, to show that she acquired 51% ownership of the NCE and that her loans to the NCE were reclassified as contributed capital in that year.

Assuming *arguendo* that for accounting purposes, the accountant mistakenly characterized the Petitioner's multiple remittances as loans to, rather than capital investment in, the NCE, the record includes other documents verifying the Petitioner's status as a creditor, not an investor, at the time she filed her petition. Specifically, the evidence that is contemporaneous to her remittances to the NCE reveals that her funds, at least $114,000 of them, were loans to the NCE. The NCE's February 2013 resolution states that its officers would execute a promissory note for the benefit of the Petitioner for $114,000. The company's 2013 and 2014 state and federal tax returns similarly reflect that the NCE owed the Petitioner $114,000. The purported accounting error does not sufficiently explain the presence of these documents.

Likewise, though the Petitioner asserts that she acquired membership in the NCE in 2016, she did not provide sufficient documentary evidence substantiating her statement. On motion, she submits the NCE's updated business plan, which references a December 2016 resolution that admitted her as a member. She, however, has not offered a copy of this resolution. In addition, while a copy of the 2016 IRS Form 1065, Schedule K-1, Partner's Share of Income, Deductions, Credits, Etc., indicates that she owns 51% of the NCE, she has not demonstrated that this form was executed or properly filed. In light of the above, the record as a whole does not establish that she has invested in the NCE, or placed at least $500,000 at risk "for the purpose of generating a return on the capital placed at risk." *See* 8 C.F.R. § 204.6(j)(2).

Moreover, as discussed, the Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. *See* 8 C.F.R. § 103.2(b)(1). To show her eligibility for the classification, she must

establish that at the time of filing, she invested or was actively in the process of investing at least $500,000 in the NCE. 8 C.F.R. § 204.6(j). Evidence of her intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that she was actively in the process of investing. 8 C.F.R. § 204.6(j)(2).

On motion, the Petitioner submits the NCE's tax documents that purportedly show she made her entire capital investment of $515,000 in 2016.[4] Assuming *arguendo* that she did in fact invest this sum and take on membership in the NCE in 2016, she would not be eligible for the classification because she did not demonstrate an actual commitment of at least $500,000 in the NCE at the time she filed the petition in December 2013. *See Matter of Izummi*, 22 I&N Dec. 169, 175-76 (Assoc. Comm'r 1998) (USCIS cannot "consider facts that come into being only subsequent to the filing of a petition."); 8 C.F.R. § 103.2(b)(1). While the evidence might reflect her intent to invest at the time of filing, it is insufficient to establish an actual commitment of the necessary amount of funds.

B. Job Creation

Even if the Petitioner had shown that she was in the process of investing at least $500,000 in the NCE at the time of filing,[5] she would not be eligible for the classification because she did not demonstrate that her investment created or would create at least 10 full-time positions. Specifically, the NCE was an existing business. As such, to meet the employment creation requirements, the Petitioner must show the creation of at least 10 new full-time positions.

In 2013, the NCE owned four retail stores operating under franchise agreements with [redacted] We denied the Petitioner's previous combined motions, in part, because while the record showed that the NCE employed a number of individuals, she did not document which positions were pre-existing prior to her transfer of funds to the NCE. Additionally, we observed that the NCE's federal tax returns revealed that its 2014 "salaries and wages (other than to partners)" fell by over half to $255,543 from the previous two years. Therefore, it appeared that the number of individuals the NCE employed decreased, not increased, after the Petitioner's initial remittance of funds to the NCE. We also noted that several of the employees on the payroll appeared to be employed on a part-time basis given their level of compensation. Individuals must be employed on a full-time basis to be qualifying employees for EB-5 purposes. *See* section 203(b)(5)(A)(ii) of the Act; 8 C.F.R. § 204.6(j)(4)(i). Lastly, we determined that at least four of the claimed new employees in the NCE's [redacted] California, store were members who own the NCE, whom the NCE employed prior to the Petitioner's transfer of funds, while the record did not reveal the hiring dates of the six other claimed employees.

On motion, the Petitioner explains that the NCE sold three of its [redacted] stores in 2013 and that the individuals employed in those locations now work for their successor employer, which is not associated with the NCE. She maintains that she has created at least 10 full-time positions at the

[4] As noted, the Petitioner has not demonstrated that these tax documents, like the 2016 IRS Form 1065, Schedule K-1, are executed or properly filed.

[5] For the reasons discussed above, she has not established an actual commitment of at least $500,000 in the NCE in 2013.

NCE's remaining [redacted] store, which is in [redacted] California. As supporting documents, she submits a list of 26 employees that notes each person's rate of pay and employment start date; Form I-9s, Employment Eligibility Verifications; and 2016 Form W-2s, Wage and Tax Statements. Of the 22 Form W-2s provided, at least 13 of the individuals earned less than $6,000 in 2016. The Petitioner has not demonstrated that these employees worked on a full-time basis. Two of the remaining employees have been members of the NCE since its inception in 2003. These two employees and another full-time employee were already employed by the NCE prior to the Petitioner's initial transfer of funds. In light of the above, the Petitioner has not verified that the NCE has created at least 10 new full-time jobs since she commenced transferring funds.

As the Petitioner has not established the requisite job creation, she must offer a comprehensive business plan verifying the NCE's need for not fewer than 10 full-time employees. *See* 8 C.F.R. § 204.6(j)(4)(i)(B). The business plans in the record do not demonstrate that the NCE will create the necessary number of jobs. We note that the NCE operated at a -$249,888 loss according to its 2016 federal tax return.[6] The updated business plan provided on motion gives general information about the [redacted] California, store, and the economic conditions present in that community, but lacks details on the prospective steps that the NCE will undertake to increase the scope of its operations or number of full-time employees. For these reasons, the Petitioner has not shown that the NCE has met or will meet the employment creation requirements. *See* 8 C.F.R. § 204.6(j)(4)(i)(B).

Accordingly, we will deny the Petitioner's motion to reopen because the record is insufficient to demonstrate she invested or was actively in the process of investing in the NCE at the time she filed the petition. She has additionally not established that the NCE has created or will create at least 10 full-time positions for qualifying employees as a result of her investment.

III. CONCLUSION

The Petitioner has not shown that we incorrectly applied any law or policy, or otherwise erred in our previous decision. Moreover, the record as a whole does not establish her eligibility for the immigration benefit sought.

ORDER: The motion to reconsider is denied.

FURTHER ORDER: The motion to reopen is denied.

Cite as *Matter of A-J-C-*, ID# 557776 (AAO Aug. 8, 2017)

[6] The NCE's 2016 IRS Form 1065 indicates that the "Ordinary business income (loss)" was -$249,888.