U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Y-Y-

DATE: JULY 6, 2017

APPEAL OF IMMIGRANT INVESTOR PROGRAM 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 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, concluding that the Petitioner had made an impermissible material change to the original business plan.

On appeal, the Petitioner submits additional evidence and asserts that the change was not material according to United States Citizenship and Immigration Services (USCIS) policy, training resources, precedent, and federal case law.

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

I. LAW

A foreign national may be classified as an immigrant investor if he or she invests the requisite amount of qualifying capital in an NCE. 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.

The petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. 8 C.F.R. § 204.6(j)(2). Beyond transferring the funds to the NCE's account, a petitioner must document the actual undertaking of business activity; otherwise, no assurance exists that the funds will in fact be used to carry out the business of the commercial enterprise. *Matter of Ho*, 22 I&N Dec. 206, 210 (Assoc. Comm'r 1998).

Regarding job creation, a petitioner who has not created the necessary number of jobs prior to filing the petition must submit a "comprehensive business plan" which demonstrates that due to the nature and projected size of the NCE, the need for not fewer than 10 qualifying employees will result

within the next two years. 8 C.F.R. § 204.6(j)(4)(i)(B). Moreover, the full amount of money must be made available to the business(es) most closely responsible for creating jobs. *Matter of Izummi*, 22 I&N Dec. 169, 179 (Assoc. Comm'r 1998). Finally, after filing, a petitioner may not make material changes to the petition in an effort to make an apparently deficient petition conform to USCIS requirements. *See id.* at 175.

II. ANALYSIS

The Petitioner bases her eligibility on a $500,000 investment in the NCE.[1] The NCE's Operating Agreement indicates that the Petitioner owns 75 percent of the business, while owns the remaining 25 percent. Initially, she proposed that the NCE would operate a fast food restaurant franchise, in , California. The initial business plan (business plan 1) did not anticipate any catering services. The staffing included cashiers and counter help. She submitted a proposed lease, a franchise agreement, and indicated that anticipated expenses would include franchise and architectural fees, construction costs, and funds for equipment and furniture.

She then filed an amended petition explaining that she was no longer pursuing that project. Instead, she contended that she had entered into a joint venture agreement with which operates its own restaurant, , in , California. Under the Joint Venture and Space Sharing Agreement, demised 2,373 square feet to the NCE for [*sic*] and Preparing postpartum nourishment diet for , Delivery Service." The new business plan (business plan two) indicated that the NCE would be "engaged in the catering and delivery services of brands operated under "

The record contains a third business plan (business plan three). This plan advises that the NCE "is engaged in [a] Chinese seafood cuisine restaurant, delivery and catering business." It states that the NCE is operating as , which "produces its food by using a catering central kitchen method of operation, therefore for the economic needs, the company had signed a common use agreement with in which to rent and share the use of equipment from its neighbor restaurant " A screenshot of a website for provides that it is "[n]ext to " The Director denied the petition, concluding that business plans two and three constituted an impermissible material change to the original one.

On appeal, the Petitioner provides USCIS training resources indicating that a change in the type of restaurant is not a material change. She further asserts that impermissible changes are those that attempt to correct a deficiency at the time of filing. For the reasons discussed below, we find that the new business plans do constitute an impermissible material change to a deficient initial filing. In

[1] The Petitioner indicates that the NCE is located in a targeted employment area, and that the requisite amount of qualifying capital is downwardly adjusted from $1,000,000 to $500,000. *See* 8 C.F.R. § 204.6(f).

addition, the new business plans are deficient and the record does not demonstrate that the full amount of the Petitioner's investment will be made available to the NCE for job creation purposes.

A. Material Change

First, the Petitioner's initial filing was not approvable due to insufficient business undertakings at the time she filed the petition. *See Ho*, 22 I&N Dec. at 210. Specifically, the initial submission was supported by a lease proposal, draft lease, seller's permit, and a franchise agreement. While the documentation established the NCE's intent to lease a commercial space, it did not confirm that the NCE had signed a lease agreement at the time the Petitioner filed the petition. Regardless, the action of signing a lease agreement, without more, is not enough activity to show the funds are at risk. *Id.*

The record contains a check the NCE drafted to , one of the NCE's two members, for $25,000 in November 2014. A receipt corroborates that deposited a check for that amount two days later. The Petitioner has not explained the purpose of this check. In addition, the franchise agreement to operate a fast food restaurant is with The check deposited with , therefore, does not reflect a payment for the franchise. As the record contains evidence of no more than *de minimis* business activity as of the date of filing, the Petitioner has not shown that her investment was at risk at that time. *See Ho*, 22 I&N Dec. at 210. In other words, the Petitioner's initial submission was deficient at the time of filing.

Second, the NCE's business plans two and three constitute a material change to the original one because they represent far more than a change in food styles. The Petitioner initially proposed to operate a fast food restaurant in California, and indicated that the NCE would use her investment for renovations, equipment purchase, and franchise fees. Subsequent plans, however, characterize the NCE as a catering and delivery business in California, that would rent and share the use of equipment and space of an operational restaurant, Thus, in addition to the type of food, business plans two and three include changes to the NCE's nature of business, services offered, location, start-up costs, and staffing needs. These changes are material and are made to correct a deficiency in the original submission.

A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to regulatory requirements. *See Izummi*, 22 I&N Dec. at 175. That decision adopts the holding in *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), and concludes that we "cannot consider facts that come into being only subsequent to the filing of a petition." *Izummi*, 22 I&N Dec. at 176. If, at the time of adjudication, the investor is asserting eligibility under a materially different set of facts that did not exist when she filed the petition, the investor must file a new petition. 6 USCIS Policy Manual G.4(C), https//www.uscis.gov/policymanual. The subsequent business plans changed the NCE's location, nature of the services provided, anticipated expenses, and staffing needs as stated in the initial plan. These amendments constitute an impermissible material change to a deficient petition. Regardless, as discussed below, even if we reviewed the current proposal, the record does not demonstrate the Petitioner's eligibility.

B. Job Creation

The most recent Form 941, Employer Quarterly Federal Tax Return, in the record covers the second quarter of 2016 and reflects that the NCE hired four employees. Therefore, the Petitioner must provide a business plan that credibly projects the NCE's need for at least 10 full-time workers. *Ho*, 22 I&N Dec. at 210; 8 C.F.R. § 204.6(j)(4)(i)(B). The record contains two business plans relating to the joint venture catering and delivery business. Neither, however, meets the regulatory job creation requirements.

The plans suggest a relationship between the NCE and beyond a sublease. Business plan two indicates that the NCE would invest in "the catering service of " The projected staffing includes cooks, an accountant, operators, and delivery personnel. The third plan explains that the NCE will rent space and share the equipment of "its neighbor restaurant, ." In addition, it will "have full access of operation in the food catering and delivery services of The staffing projections for the NCE continue to list several chefs.

Other evidence, however, does not support a finding that the NCE and operate a joint venture,[2] as referenced in business plans two and three. Specifically, the Joint Venture and Space Sharing Agreement does not include collaborative business terms consistent with a joint venture; rather, it allows the NCE to use equipment and space for a catering and delivery service.

Moreover, the record lacks sufficient evidence confirming that the NCE will create at least 10 full-time positions. For example, the Petitioner has not supplied lease corroborating that it is authorized to sublet its kitchen space and equipment to another business, or that the kitchen size can support both a restaurant and a full-time catering and delivery operation. The record also lacks that company's business plan and staffing information, which might show that the location can support the NCE's 10 full-time employees in addition to those working for or For all these reasons, the NCE's business plans two and three do not credibly demonstrate that the NCE is likely to create the necessary number of full-time jobs.

In addition, the current record does not show that all of the Petitioner's investment will be made available for job creation. A balance sheet as of mid-2016 indicates that the NCE has made a $226,672.74 investment in which represents almost half of the Petitioner's contribution to the NCE. The start-up costs in the most recent business plan do not include an investment in . The record also does not explain how making an investment in another restaurant is placing that money at risk in the NCE for job creation purposes. Thus, the

[2] If the Petitioner and the owners of are jointly investing in a restaurant and catering project, and the investors in are seeking immigrant investor status, then the joint venture must support 10 full-time jobs for each investor. 8 C.F.R. § 204.6(g)(2). The Petitioner has not advised whether owners include any immigrant investors.

Petitioner has not sufficiently established that those funds are available to the NCE to create jobs. *See Izummi*, 22 I&N Dec. at 179.

III. CONCLUSION

The Petitioner's second and third business plans constitute an impermissible material change to the initial filing. Regardless, even if we considered those plans, they do not credibly establish that the NCE will create the necessary number of jobs. Finally, the Petitioner has not shown that the NCE's investment of nearly half of the Petitioner's capital in another business makes those funds available to the NCE for employment creation purposes.

ORDER: The appeal is dismissed.

Cite as *Matter of Y-Y-*, ID# 350827 (AAO July 6, 2017)