U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Y-L-

DATE: NOV. 16, 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.[1] 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 reaffirmed our findings in two subsequent decisions.[2]

The matter is now before us on a third motion, a joint motion to reopen and reconsider, in which the Petitioner offers additional evidence, and asserts anew 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 both 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.

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[1] *See Matter of Y-L-*, ID# 16384 (AAO May 10, 2016).
[2] *See Matter of Y-L-*, ID# 12588 (AAO Nov. 1, 2016); *See Matter of Y-L-*, ID# 282623 (AAO Apr. 26, 2017).

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentation.[3] As noted in our previous decisions, however, the new facts must demonstrate eligibility as of the date of filing; a petition cannot be approved at a future date after a Petitioner becomes eligible under a new set of facts.[4] Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence.[5] A party seeking to reopen a proceeding bears a "heavy burden."[6]

A motion to reconsider must offer the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy.[7] 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 the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new materials.[8]

II. ANALYSIS

A. Motion to Reopen

Our decision on the Petitioner's second joint motion reaffirmed our previous ones sustaining our dismissal of his appeal. We explained in our previous decisions that based on the inconsistent information in the record, the Petitioner had not established that he has placed at least $500,000 of his funds at risk in the NCE for the purpose of generating a return on the capital. *See* 8 C.F.R. § 204.6(j)(2); *See* also *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Specifically, we found that inconsistencies in the record regarding the ownership of the NCE and the distribution of its profits undermined the Petitioner's claim that he had placed his capital at risk.

Additionally, we previously concluded that the Petitioner's revised Form I-526, submitted in October 2014, over 15 months after the filing of the original petition, constituted an impermissible material change to his original petition. *See Matter of Izummi*, 22 I&N Dec. 175-76 (BIA 1998) (USCIS cannot "consider facts that come into being only subsequent to the filing of a petition."). As explained in our prior decisions, 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.[9]

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[3] 8 C.F.R. § 103.5(a)(2).

[4] 8 C.F.R. § 103.2(b) (1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971); *see also Matter of Izummi*, 22 I&N Dec. 169, 175 (BIA 1998) adopting the holding in *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176.

[5] *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)).

[6] *Id.* at 110.

[7] 8 C.F.R. § 103.5(a)(3).

[8] *Compare* 8 C.F.R. § 103.5(a)(3) *and* 8 C.F.R. § 103.5(a)(2).

[9] 8 C.F.R. § 103.2(b)(1); *see also Matter of Izmir*, 22 I&N Dec. at 175-76.

In the instant motion, the Petitioner submits copies of the NCE's 2016 IRS Form W-2s for its employees.[10] This new evidence focuses on the NCE's job creation activities, which does not relate to issues addressed in our decision on the second motion: placing the required amount of capital at risk in an NCE, making impermissible material changes to his original petition, or establishing his eligibility at the time of filing the petition. Thus, the new evidence does not relate to any issue before us on motion. As the Petitioner does not identify any new facts or present new evidence in the current motion regarding our denial of his second motion, the filing does not meet the requirements for a motion to reopen. *See* 8 C.F.R. § 103.5(a)(2)

B. Motion to Reconsider

The Petitioner's filing does not meet the requirements for a motion to reconsider. As noted above, a motion to reconsider must be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy, and that the decision was incorrect based on the evidence in the record at the time of the decision. *See* 8 C.F.R. § 103.5(a)(3). In this motion, the Petitioner contends that we are "mis-stating" *Matter of Izummi*, 22 I&N Dec. 175-76, and *Kungys v. U.S.*, 485 U.S. 759, 770-72 (1988). While the Petitioner requests that we reconsider our previous decision denying his motions, and maintains that our previous decisions were erroneous, he does not support his position with any precedent decision demonstrating USCIS incorrectly applied any law or policy.

III. CONCLUSION

We have considered the evidence offered on motion, together with previously filed documentation, and conclude that it does not overcome the grounds underlying our previous decision. *See* 8 C.F.R. § 103.5(a)(2). The Petitioner has not shown that we incorrectly applied any law or policy, or otherwise erred in our previous decision. *See* 8 C.F.R. § 103.5(a)(3).

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of Y-L-*, ID# 680911 (AAO Nov. 16, 2017)

[10] The Petitioner indicates in his motion that the NCE's 2015 federal tax return was also provided, but the document is not present in the record.