U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF L-X-

DATE: DEC. 10, 2018

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

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

The Petitioner seeks EB-5 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 did not establish her eligibility. Specifically, the Chief found that the Petitioner had not demonstrated: (1) she made at least $500,000 available for job creating purposes; (2) her funds would create at least 10 full-time positions for qualifying employees. On appeal, the Petitioner provides additional evidence and a brief. She maintains that the record, including documentation she submits on appeal, establishes her eligibility for the benefit sought.

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

I. LAW

A foreign national may be classified under section 203(b)(5)(A) of the Act as an immigrant investor if he or she invests the requisite amount of qualifying capital in an NCE. The NCE can be any lawful business that engages in for-profit activities. The investor must show that his or her investment will benefit the United States economy and create at least 10 full-time jobs for qualifying employees. 8 C.F.R. § 204.6(j).

II. ANALYSIS

The record shows that the Petitioner invested $500,000[1] in [redacted], the NCE, which intends to use $7,500,000 investment funds from 15 EB-5 investors to convert an office building to a senior living facility and to operate the establishment in [redacted] Arizona.[2]

The Petitioner acknowledges that in December 2016, the Securities and Exchange Commission (SEC) brought a lawsuit against the NCE, related businesses, and [redacted],[3] in the U.S. District Court for the [redacted] of California, alleging diversion and misappropriation of EB-5 funds to finance [redacted] own businesses and luxury lifestyle. Since January 2017, the NCE and other defendant entities have been in receivership. According to page 10 of the receiver's June 2017 report,[4] "preliminary accounting shows that the EB-5 Investors invested $7,500,000 into [the NCE]," the project "accounting records, however, indicate that only $4.768 million of these proceeds was invested in the project." The receiver concludes that "approximately $2.7 million of investor funds appear to have been diverted elsewhere." He "is exploring approaches to restructuring [the NCE] or selling the asset" and has retained "[a] senior living real estate broker . . . to seek out a new financial partner or buyer in an effort to preserve the current intended use as an assisted living facility."

On appeal, the Petitioner claims that she and one other EB-5 investor in the NCE executed a Letter of Intent with [redacted] an institutional investor, and a number of businesses "to amend the NCE's Limited Partnership Agreement to replace [redacted] and affiliates, remove the NCE from [r]eceivership, provide necessary funding to the NCE, and complete and operate the [p]roject." While we are sympathetic to the Petitioner's situation, for which she might be able to seek redress in a different forum, for reasons we discuss below, she has not shown her eligibility for the classification because she has not satisfied the job creation requirement.

A. Availability of Funds

To demonstrate eligibility for the EB-5 classification, a petitioner must establish that his or her investment has created or will create at least 10 full-time jobs for qualifying employees. *See* 8 C.F.R. § 204.6(j). *Matter of Izummi*, 22 I&N Dec. 169, 179 (Assoc. Comm'r 1998), explains that it is insufficient for a petitioner to show that he or she has remitted funds to a NCE. *Id.* n.7. Rather,

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[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)(2).

[2] According to the NCE's 2014 business plan, the name of the project was [redacted] The 2016 business plan, however, indicates that the project name was later changed to [redacted]

[3] Page 46 of the NCE's 2016 business plan provides that [redacted] is the chief executive officer for [redacted] (one of the named defendants in the SEC lawsuit), which owns [redacted] the NCE's general partner. According to a July 2017 letter from the receiver, [redacted] has had no involvement with the project as of January 2017.

[4] This is the most recent receiver's report in the file. The Petitioner has not offered updated receiver's reports in support of her petition or appeal.

the investor must demonstrate that "[t]he full amount of [his or her] funds [are] made available to the business(es) most closely responsible for creating the employment upon which the petition is based." *Id.* at 179; *see also* USCIS Policy Memorandum PM-602-0083, *EB-5 Adjudications Policy* 16, 25 (May 30, 2013), https://www.uscis.gov/legal-resources/policy-memoranda; 6 *USCIS Policy Manual* G.2(A)(2), https://www.uscis.gov/policymanual/HTML/PolicyManual.html. In other words, the Petitioner must demonstrate that her $500,000 investment, in its entirety, has been made available to the NCE to create jobs. Here, she has not made such a showing.

On appeal, the Petitioner acknowledges that "approximately $2.732 million out of the $7.5 million of EB-5 funds was diverted from the NCE," and that "some of [her] money was not deployed into the [p]roject." The entire amount of her $500,000 therefore has not been made available to the NCE for job creation purposes. In light of this deficiency, the Petitioner proposes that the 15 EB-5 investors, including her, "make additional capital contributions to the NCE to bring their total EB-5 investment amount up to $500,000 (currently anticipated at $182,133.33 per investor)." She submits a March 2018 statement, stating that she is "in the process of and committed to investing another $182,133.33 of lawfully sourced funds to make sure that [she has] invested a total of $500,000."

As an initial matter, the Petitioner has not shown that replacing diverted capital, even with additional funds from her, would satisfy the capital at-risk requirement. *See Izummi*, 22 I&N Dec. at 179; *see also* 8 C.F.R. § 204.6(j)(2) (requiring that each investor establish that he or she has placed the required amount of capital at risk for the purpose of generating a return). Each immigrant investor must establish that his or her investment of capital will result in the creation of at least 10 jobs for qualifying employees to establish eligibility. *See* 8 C.F.R. § 204.6(j). Because of this, the replacement of EB-5 capital with other funds does not equate to a return of the original capital attributed to the investor, even if both originate from the same source. Here, the Petitioner has not demonstrated that her proposal to replace her initial EB-5 capital with other funds, as explained below, would result in qualifying job creation.

Relatedly, we note that the expressed intent of the Petitioner and one other EB-5 investor to attempt to remediate the shortfall in funding to the NCE caused by the diversion of EB-5 capital would likely present an impermissible material change. Seeking now to replace those missing funds to complete the same proposed project would effectively increase the minimum required investment into the NCE from $500,000 to $682,133.33. A "petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication." 8 C.F.R. § 103.2(b)(1). In addition, "a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts." *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Here, the Petitioner must establish the necessary job creation with capital invested at the time of filing, not based on a later infusion of additional funds.

Furthermore, the Petitioner's statement, at best, reveals her intention to invest an additional $182,133.33 to replace the diverted funds. First, the regulation at 8 C.F.R. § 204.6(j)(2) explains that "[e]vidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of

investing." Without evidence of the Petitioner's actual commitment of the funds, she has not shown that she has invested or is actively in the process of investing the additional capital. In addition, Annex D of the March 2018 Letter of Intent to restructure the project, which includes two capitalization tables showing pre- and post-restructuring figures, makes no reference to additional contributions from the NCE's current EB-5 investors. In light of the diverted funds and the lack of additional documentation, the record is insufficient to confirm that at least $500,000 of the Petitioner's capital has been made "available to the business(es) most closely responsible for creating the employment upon which the petition is based." *See Izummi*, 22 I&N Dec. at 179.

B. Credibility of Business Plan

To demonstrate eligibility for the EB-5 classification, a petitioner must establish that his or her investment has created or will create at least 10 full-time jobs for qualifying employees. *See* 8 C.F.R. § 204.6(j). The regulation provides that to establish job creation, a petitioner must submit:

> (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
>
> (B) 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.[5]

8 C.F.R. § 204.6(j)(4)(i). A comprehensive business plan "should contain, at a minimum, a description of the business, its products and/or services, and its objectives." *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). *Ho* concludes, "[m]ost importantly, the business plan must be credible." *Id.*

In this case, the record contains two business plans, dated June 2014 and June 2016, respectively. In his decision, the Chief discussed a number of inconsistencies and deficiencies of the two plans, including information relating to funds needed for the project, the use of EB-5 capital, and the NCE's projected expenditures. On appeal, the Petitioner states under section III of her brief that "in light of the restructuring[, which will include an] increase in project budget, an updated business plan will be drafted" and that "the inconsistency in some of the past numbers is no longer relevant in light of the updated budget . . . ." She, however, indicates that she "is not able to submit an updated business plan at this time."

[5] The two-year job creation period described in 8 C.F.R. § 204.6(j)(4)(i)(B) commences six months after the adjudication of the petition. USCIS Policy Memorandum PM-602-0083, *supra*, at 19; 6 USCIS Policy Manual, *supra*, at G.2(D)(5).

The Petitioner has not satisfied the job creation requirement, because she has not submitted a comprehensive and credible business plan, as required under 8 C.F.R. § 204.6(j)(4)(i)(B).[6] She acknowledges that the two business plans in the record, which contain inconsistencies and deficiencies, no longer reflect the current status of the project, but that she is unable to provide an updated plan showing that, due to the nature and projected size of the NCE, the need for not fewer than 10 qualifying employees will result. *See id.* In addition, without an updated business plan that credibly and comprehensively details the current status of the project and its job creation potential, we have insufficient evidence to conclude that the changes the Petitioner seeks to make to the project do not constitute impermissible material changes. *See Izummi*, 22 I&N Dec. at 175 (finding that "a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts"); *Kungys v. United States*, 485 U.S. 759, 770-72 (1988) (holding that a change in fact is material if the changed circumstances would have a natural tendency to influence or are predictably capable of affecting the decision).

Moreover, while the Petitioner has put forth a restructuring plan, she has not shown that it will, more likely than not, result in the NCE's creation of the requisite number of jobs within the next two years.[7] The NCE appears to remain under receivership, and the Petitioner has not demonstrated that the receiver or the U.S. district judge who appointed the receiver has approved, or will likely approve, the restructuring plan. Under section I of her appellate brief, the Petitioner concedes that "[t]he restructuring will take time to effect given that it needs court approval." In addition, although the Petitioner states that she and one other EB-5 investor have executed a letter of intent to restructure the project, she has not offered evidence confirming that the NCE's remaining EB-5 investors have similarly agreed to the terms specified in the document or that their approval is not needed for restructuring.

Furthermore, according to a March 2018 letter from [redacted] who claim to have been in negotiation "to get [the project] out of receivership," the "anticipated date for executing all documents pertaining to the restructuring of the deal is May 15th, 2018." As of the date of this decision, however, the Petitioner has offered no additional information on the status of the proposed restructuring. Similarly, according to a timeline she files on appeal, the project should have reached certain milestones, including executing "Definitive Restructuring Agreement," "Senior Loan Agreement," and obtaining "Financing (HUD [U.S. Department of Housing and Urban Development] Loan)," but the record lacks evidence confirming that such events have occurred. Without additional corroboration, the record is insufficient to establish that the Petitioner has made at least $500,000 available to the NCE for job creation purposes or that her investment will, more likely than not, create at least 10 full-time jobs for qualifying employees. *See Izummi*, 22 I&N Dec. at 179; 8 C.F.R. § 204.6(j)(4)(i)(B).

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[6] The Petitioner has not alleged, and the evidence does not demonstrate, that the NCE has already created any jobs. *See* 8 C.F.R. § 204.6(j)(4)(i)(A).

[7] *See supra* note 5 and accompanying text.

III. CONCLUSION

The Petitioner has not satisfied the job creation requirement. She has therefore not established her eligibility for the classification.

ORDER: The appeal is dismissed.

Cite as *Matter of L-X-*, ID# 1532575 (AAO Dec. 10, 2018)