U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-L-

DATE: JULY 11, 2018

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 (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, concluding the record did not establish, as required, that , the NCE, would create the necessary number of jobs. On appeal, the Petitioner submits additional evidence and asserts that the record establishes her eligibility for the benefit sought.

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 a NCE. 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. An immigrant investor may invest the required funds directly in an NCE or through a regional center,[1] as the Petitioner has done in this case. Regional centers apply for designation as such with the United States Citizenship and Immigration Services (USCIS). Designated regional centers identify and work with NCEs, which in turn are associated with a specific investment project, taken on either directly by the NCE, as it is the case here, or by one or more separate entities known as the "job creating entity." Regional centers can pool immigrant (and other) investor funds for qualifying projects that create jobs directly or indirectly. 8 C.F.R. § 204.6(j)(4)(iii).

The regulation at 8 C.F.R. § 204.6(j)(4)(i) provides that to establish job creation, a petitioner must submit:

[1] A regional center is an economic unit involved with the promotion of economic growth, "including . . . improved regional productivity, job creation, and increased domestic capital investment." *See* 8 C.F.R. § 204.6(e).

(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.[2]

Prospective job creation must be demonstrated through submission of a comprehensive business plan. The precedent decision *Matter of Ho* held that, to be "comprehensive," a business plan "must be sufficiently detailed to permit [USCIS] to draw reasonable inferences about the job-creation potential." 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). "Mere conclusory assertions [, however,] do not enable [USCIS] to determine whether the job-creation projections are any more reliable than hopeful speculation." *Id.* The decision concludes: "Most importantly, the business plan must be credible." *Id.*

In addition, the regulation explains that the job creation projection should be based on reasonable methodologies and economically or statistically valid forecasting tools, which include, but are not limited to, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and/or multiplier tables. 8 C.F.R. § 204.6(j)(4)(iii), (m)(3).

II. ANALYSIS

In this case, the Petitioner invested $500,000[3] in the NCE, which is associated with a USCIS-designated regional center, [redacted] The record includes six business plans – five for the NCE and one for the [redacted] – as well as five economic reports. These documents state that the NCE will pool up to $67,500,000 EB-5 capital from 135 foreign national investors to build a complex with approximately 460,000 square feet[4] of leasable space in [redacted] California, near the United States-Mexico border. The Petitioner indicates in the appellate brief that the NCE is part of "the [redacted] an international trading mall, which will include a luxury hotel, an international-brand shop street, an international trade wholesale center . . . as well as an international convention and exhibition center . . . ." The NCE models itself after the [redacted]

[2] 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, *EB-5 Adjudications Policy* 19 (May 30, 2013), https://www.uscis.gov/legal-resources/policy-memoranda; *see also* 6 *USCIS Policy Manual* G.2(D)(5), https://www.uscis.gov/policymanual/HTML/PolicyManual.html.

[3] 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).

[4] According to pages 1 and 8 of the January 2011 business plan, the NCE will build a 475,000 square feet complex, which will include two buildings with a combined leasable space between 460,000 and 470,000 square feet.

in [redacted] China, and intends to rent the space to wholesale and retail merchandisers, who, according to the Petitioner, would have competitive advantage by being near the border. The business plans and economic reports provide that the NCE will create jobs during the construction and operation phases of the project.[5]

The Chief issued a request for evidence (RFE), requesting additional documentation that demonstrated the Petitioner's eligibility for the classification, including evidence relating to the NCE's projected employment creation. After reviewing the response, the Chief issued a notice of intent to deny (NOID) the petition, notifying the Petitioner that the submissions, including the NCE's three business plans and four economic reports in the record at the time,[6] did not establish that the NCE would likely create the requisite number of jobs for qualifying employees within two years. *See* 8 C.F.R. § 204.6(j)(4)(i)(B). Specifically, the Chief raised concerns regarding the multiple and extensive delays in the project's construction. In the NOID response, the Petitioner presented additional evidence, including the NCE's March 2017 business plan, entitled "Business Plan Supplement in Response to NOID," and maintained that she had satisfied the employment creation requirements.

After reviewing the record, the Chief denied the petition, finding that none of the business plans or economic reports demonstrated that the NCE would likely create the requisite number of jobs within two years. *See* 8 C.F.R. § 204.6(j)(4)(i)(B). On appeal, the Petitioner indicates that the NCE has attracted 121, not 135, EB-5 investors. She contends that she has shown her eligibility for the classification and offers additional documentation, including the NCE's fifth business plan, dated November 2017; and its fifth economic report, entitled [redacted] dated December 2017.

A. Deference Policy

On appeal, citing the deference policy, the Petitioner maintains that the Chief erred in denying the instant petition, because he had approved petitions of the NCE's other EB-5 investors. As an initial matter, we note that, on appeal, we exercise *de novo* review of all issues of fact, law, policy, and discretion. *See Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

Moreover, a previously favorable decision may not be relied on where facts have materially changed, when evidence of fraud or misrepresentation is discovered, or if the prior decision is determined to have been legally deficient. USCIS Policy Memorandum PM-602-0083, *supra*, at 23;

[5] The economic reports indicate that the construction phase of the project will be less than two years, and thus, credit the NCE with creating indirect jobs during the construction of the project, as well as direct and indirect jobs during its operation. *See* USCIS Policy Memorandum PM-602-0083, *supra*, at 17; *see also* 6 *USCIS Policy Manual*, *supra*, at G.2(D)(3) (qualifying jobs are those lasting at least two years).

[6] At the time the Chief issued the NOID, the record contained an undated [redacted] business plan, and three NCE's business plans, dated January 2011, December 2012, and 2016, respectively. In addition, the record also included four economic reports, prepared by [redacted] and [redacted] (who authored two reports), respectively.

6 *USCIS Policy Manual*, *supra*, at G.6. In this case, facts relevant to the adjudication materially changed between the approvals of the earlier petitions and the instant adjudication, such that affording deference is not warranted.[7] A business plan must show that job creation will occur within two years, making the timeline material to determining deference. *See* 8 C.F.R. § 204.6(j)(4)(i)(B). Here, the NCE has modified its project timeline, including completion date, multiple times. Page 32 of the December 2012 business plan provides that construction would end in December 2014. The Gantt chart, which the Petitioner submitted in response to the Chief's NOID, however, states that construction would end approximately three years later, in January or February 2018.[8] Page 12 of the November 2017 business plan that the Petitioner offers on appeal similarly provides that construction would complete in the beginning of 2018. Nevertheless, the Petitioner's appellate brief further pushes back the construction completion date to May 2019. The previous approvals were based on a different set of facts – including the earlier versions of the project timeline – than those currently before us, and thus, do not warrant deference.

B. Business Plans

Considering the record in its totality, we find that the Petitioner has not provided a business plan that is comprehensive or credible. Specifically, the most recent plan, dated November 2017, considered together with other documents, including the previous plans and economic reports, is neither credible nor comprehensive. *See* 8 C.F.R. § 204.6(j)(4)(i)(B); *Ho*, 22 I&N Dec. at 213. Therefore, the Petitioner has not demonstrated that the NCE will likely create at least 10 jobs for each of the 121 EB-5 investors, or 1,210 jobs, within two years, as projected in the most recent plan or economic report.

First, the record contains inconsistent evidence on the amount of investment the NCE will need and the source of the required capital for the project. In light of these discrepancies, the Petitioner has not established that the employment creation projections, predicated on the completion of the project, are credible. The December 2012 business plan provides that the NCE's construction will cost $67,032,070. Page 6 of the March 2017 business plan, however, indicates that the project will cost $79,801,444, with $67,500,000 coming from EB-5 investors and $12,300,000 coming from [redacted],[9] the NCE's general partner. Pages 4 and 9 of the November 2017 business plan present a different set of numbers, stating that the project cost will be $60,557,524.89, with $60,500,000 coming from EB-5 investors and $57,524.89 coming from the NCE's general partner.

[7] 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. *See Kungys v. United States*, 485 U.S. 759, 770-72 (1988).

[8] While the Gantt Chart provides that the project's construction would end in January 2018, the Petitioner's NOID response states that it would end in February 2018.

[9] Some documents in the record refer to the NCE's general partner as [redacted]

On appeal, the Petitioner states that the project will cost the NCE $60,557,524.89,[10] as indicated in the November 2017 business plan, not $79,801,444, as noted in the March 2017 business plan. She explains that the higher amount included approximately $19,243,000[11] of "tenant improvements . . . [which] will actually be paid for by the tenants," not by the NCE. This statement, however, is inconsistent with the information contained in the March 2017 business plan, page 6 of which says the NCE's general partner will offer $12,300,00 and the EB-5 investors will provide $67,500,000 to fund the project. This business plan does not indicate that future tenants will be responsible for any expenses, let alone approximately $19,243,000 in tenant improvements.

Moreover, the most recent project cost, $60,557,524.89, is substantially lower than the initial projected cost of $67,032,070, as specified in the December 2012 business plan. The Petitioner has not explained why the project would cost approximately $6,500,000 less in 2017 than in 2012, especially in light of the claims in the appellate brief that the project has experienced multiple delays that "were extraordinary, and not either foreseeable by the [p]roject team, or within their control." The record contains inconsistent documentation relating to the cost of the project and the source of the required capital, which must be resolved with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The Petitioner has not done so here.

Furthermore, even if we were to accept her explanation on the $79,801,444 project costs specified in the March 2017 business plan, the Petitioner has not offered documentation verifying that future tenants, i.e., wholesale and retail merchandisers, have access to or are willing to spend $19,243,000 on tenant improvements. While the record includes some documents confirming certain individuals and entities' interests in leasing space from the NCE, it does not contain sufficient evidence substantiating their ability or intent on funding tenant improvements. Without additional corroboration, the Petitioner has not established that the employment creation projections, which rely, in part, on the assumption that future tenants will occupy and operate businesses in 86% of the approximately 460,000 square feet commercial space, are credible. *See Ho*, 22 I&N Dec. at 213 (a business plan "must be sufficiently detailed to permit [USCIS] to draw reasonable inferences about the job-creation potential"); *see also NCE's December 2012 Business Plan*, 8 (the NCE "expects to have an occupancy rate of about 86% at thirty months").

Second, the Petitioner has not demonstrated that the most recent business plan or economic report – whose employment creation projection was based on the assumptions that the NCE would complete construction and rent at least 86% of its commercial space – credibly shows that the NCE will create the requisite number of jobs within two years.[12] Specifically, the record contains conflicting

[10] There appears to be a typographic error in the appellate brief, which lists the costs as $60,557,525.89, rather than $60,557,524.89.

[11] $79,801,444 minus $60,557,524.89 is approximately $19,243,000. According to a November 2016 letter the Petitioner submitted in support of the response to the Chief's NOID, [redacted] estimated that the tenant improvement will cost $19,282,000.

[12] See *supra* footnote 4.

information on when the NCE will complete construction. *See* 8 C.F.R. § 204.6(j)(4)(i)(B). As discussed, the Petitioner initially claimed on page 32 of the December 2012 business plan that construction will end in December 2014. She then changed the completion date to January or February 2018 in the NOID response and in the NCE's November 2017 business plan. Subsequently, she alleges in the appellate brief that construction will finish in May 2019. While some delays in construction might not affect the credibility of the business plan, in this case, a delay of approximately four and a half years, for which the Petitioner has not reasonably explained, renders the most recent business plan, including its projected completion date, not credible.

Significantly, when the Petitioner presented the January or February 2018 completion date, she specified on page 7 of the NOID response that "[n]o additional delays are currently anticipated, and the source of the past delays has been resolved." Notwithstanding this assurance, on appeal, she again pushes back the completion date to May 2019. While she lists a number of circumstances surrounding the delays in the appellate brief, most of them predate March 2017, when she filed the NOID response, and none of them sufficiently explains a further delay of over a year. Based on the multiple delays in this project, for which the Petitioner has not adequately explained, she has not credibly demonstrated when the NCE will complete construction of the project or that it will create at least 10 jobs for each of the 121 EB-5 investors within two years.

Third, while the NCE's employment creation projection is based on the assumption that it would have an 86% occupancy rate, the Petitioner has not presented sufficient evidence to substantiate this assumption. Pages 14 and 15 of the November 2017 business plan provide that upon construction completion, the NCE will have two buildings with a total of approximately 460,000 square feet, or 400 units (each between 1,000 and 1,200 square feet), of leasable space. The business plan further states that the "lease rate [will be] $2.5 per square foot per month." According to page 8 of the December 2012 business plan, the NCE "expects to have an occupancy rate of about 86% at thirty month." Based on this assumption, the December 2012 economic report from [redacted] determined that the NCE's commercial space will create 909 direct jobs. All subsequent economic reports relied on the 86% anticipated occupancy rate and 909 direct jobs from future tenants' retail activities to calculate the NCE employment creation projections.

The record, however, contains insufficient evidence to substantiate the 86% anticipated occupancy rate. The Petitioner acknowledges in the appellate brief that the NCE "represents a unique product type that is currently unavailable in the market," it "is not a traditional real estate offering," and "there are no readily available comparable properties." Instead, the Petitioner offers the 2016 business plan and additional documentation, indicating that a number of individuals, including 105 of the NCE's 121 EB-5 investors; municipalities, such as [redacted] China, and [redacted] Mexico; and businesses have agreed to lease approximately 340 units from the NCE. The Petitioner concedes in the appellate brief that while the documents might show "there is interest in the [p]roject," it does "not [confirm] that the [p]roject has been pre-leased prior to being built." These documents, therefore, do not substantiate the 86% anticipated occupancy rate. In addition, the record lacks sufficient information on the abovementioned potential renters' financial situation. As such, even if they have the intention to rent from the NCE, the record does not verify that they have the means to

do so. As discussed, "[m]ere conclusory assertions do not enable [USCIS] to determine whether the job-creation projections are any more reliable than hopeful speculation." *Ho*, 22 I&N Dec. at 213..

Based on these deficiencies and upon considering the record as a whole, we conclude that the Petitioner has not presented a comprehensive or credible business plan showing that, due to the nature and projected size of the NCE, it will hire no fewer than 10 qualifying employee for each of the 121 EB-5 investors within the next two years. *See* 8 C.F.R. § 204.6(j)(4)(i)(B).

C. Source of Funds

While not discussed in the Chief's decision, in addition to not establishing the job creation requirements, the Petitioner has also failed to document the lawful source of the $500,000 he remitted to the NCE. A petitioner's invested capital must not derive, directly or indirectly, from unlawful means. 8 C.F.R. § 204.6(e). To show the lawful source of the funds, an investor must submit, for example, foreign business and tax records or documentation identifying any other sources of funds. 8 C.F.R. § 204.6(j)(3). Bank letters or statements corroborating the deposit of funds by themselves are insufficient. *Ho*, 22 I&N Dec. at 210-11; *Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998). The record must trace the path of the funds back to a lawful source.[13] *Ho*, 22 I&N Dec. at 210-11; *Izummi*, 22 I&N Dec. at 195. Where these records are not available, the petitioner must also demonstrate their lack of availability. *See* 8 C.F.R. §103.2(b)(2)(ii).

In this case, the Petitioner indicates that she obtained a loan from [redacted] secured by real estate property, to fund her EB-5 investment. She provides the associated loan documents stating the real estate property is valued at 3,800,000 renmimbi (RMB).[14]

While the record includes a real estate certificate of ownership establishing that she is the owner of the property securing the loan, she has not documented how she obtained the funds to purchase the property in December 2002. The record contains a Source of Funds Declaration for the real estate purchase signed jointly by the Petitioner and her husband, explaining that the funds to purchase the property came from their joint income earned through employment. The record lacks corroborating materials for this declaration, such as employment or income verifications for her and her spouse. In addition, it does not include evidence, such as bank documentation, confirming that either the Petitioner or her spouse had lawfully acquired 350,000 RMB, the claimed purchase price of the

[13] These requirements confirm that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Cal. 2001) (holding that a petitioner had not established the lawful source of her funds because she did not designate the nature of all of her employment or submit five years of tax returns), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

[14] We note that the record lacks evidence corroborating the value of the property. As the Petitioner is investing the proceeds of indebtedness, the failure to establish the value of the collateral property may disqualify from the funds from being considered capital under 8 C.F.R. §204.6(e). The Petitioner must address this issue in any future filing.

property.[15] Within this Declaration, she explained that she and her husband could not provide these verifications or supporting bank records due to the amount of time that had lapsed since she purchased the home. However, she did not demonstrate that this evidence is not available or provide secondary evidence as required pursuant to 8 C.F.R. §103.2(b)(2).

Based on the above, the Petitioner has not documented the lawful source of the funds she and her spouse used to purchase the property, which she later used as collateral for a loan that funded her EB-5 investment. As a result, she has not shown the complete path or demonstrated the lawful source of her EB-5 capital.

III. CONCLUSION

The Petitioner has not submitted a comprehensive and credible business plan showing that, due to the nature and projected size of the NCE, it will need at least 10 qualifying employees for each of the 121 EB-5 investors within the next two years. In addition, she has not documented the lawful source of the funds he invested in the NCE. Accordingly, she has not demonstrated eligibility for the immigrant investor classification.

ORDER: The appeal is dismissed.

Cite as *Matter of W-L-*, ID# 1244776 (AAO July 11, 2018)

[15] While she provides a real estate certificate of ownership showing that she is the owner of this property, the translation of this certificate lists the "value of rights (yuan)" as "illegible." The record lacks any other materials documenting the purchase price of the property, such as a sales contract, mortgage documents, or other materials.