



U.S. Citizenship
and Immigration
Services

Non-Precedent Decision of the
Administrative Appeals Office

MATTER OF Y-L-

DATE: JUNE 18, 2018

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, concluding that the Petitioner did not place at least \$500,000,¹ the required amount of capital, in the NCE.² On appeal, we found that the Petitioner did not overcome the Chief's basis for denial.³ In addition, we determined that he did not establish 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 three subsequent decisions.⁴

The matter is before us on the fourth joint motions to reopen and reconsider. The Petitioner offers copies of his and the NCE's 2015 and 2016 tax filings. He maintains that the documents confirm he had placed his funds "into the accounts of the NCE at the time of filing" and that they demonstrate he had placed at least \$500,000 at risk in the NCE. He also disputes that he had made material changes to the 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. Section 203(b)(5) of the Act; 8 C.F.R.

¹ The Petitioner claims that the NCE is located in a targeted employment area, and that 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 While the petition indicated that the NCE was [REDACTED] the evidence shows that the Petitioner remitted funds to [REDACTED] which later became [REDACTED]

³ See *Matter of Y-L-*, ID# 16384 (AAO May 10, 2016).

⁴ See *Matter of Y-L-*, ID# 12588 (AAO Nov. 1, 2016); *Matter of Y-L-*, ID# 282623 (AAO Apr. 26, 2017); *Matter of Y-L-*, ID# 680911 (AAO Nov. 16, 2017).

§ 204.6. To show that a petitioner has invested or is actively in the process of investing the required amount of capital, the investor must present evidence confirming that he or she has placed the capital at risk for the purpose of generating a return on the capital. 8 C.F.R. § 204.6(j)(2). In addition, the foreign national must demonstrate 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)(4)(i).

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

II. ANALYSIS

We will deny the Petitioner's motions because they do not satisfy the filing requirements. Specifically, they lack "a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed." Regardless, for the reasons we discuss below, the Petitioner has not shown his eligibility.

A. 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 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. *See* 8 C.F.R. § 103.5(a)(3).

On motion, the Petitioner contends that he has shown he placed at least \$500,000 at risk in the NCE from the time he filed his petition, in March 2013, through the adjudication. *See* 8 C.F.R. § 103.2(b)(1). He points to his bank statements and "his Business Plan" – but without specifying which one of the NCE's two plans⁵ – as evidence that he has satisfied the at risk requirement. In our previous decisions, we considered all relevant documents. Specifically, we discussed bank records confirming his remittance to the NCE in our November 2016 decision denying his motions. We also considered the NCE's business plans in our May 2016 decision dismissing his appeal, as well as in our November 2016 and April 2017 decisions denying his motions. We determined that the documentation was insufficient to establish he satisfied the at risk requirements.

Additionally, the Petitioner references "previously submitted invoices" as evidence that he meets the at risk requirements. He does not specify which "invoices" or clarify when he submitted such documentation. While the record includes some evidence of the NCE undertaking business

⁵ The record includes two business plans, dated August 2014 and March 2015, respectively.

activities, he has not explained how such documents establish that he placed at least \$500,000 at risk in the NCE at the time he filed the petition in March 2013, and through the adjudication. *See* 8 C.F.R. § 103.2(b)(1).

Moreover, the Petitioner's intent to invest does not satisfy the at risk requirements. On motion, he argues that we erred in not considering "how he intends to invest into his NCE" or "how he plans to put his investment at risk into the new [*sic*] NCE." The regulation at 8 C.F.R. § 204.6(j)(2) specifies: "Evidence 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. The alien must show actual commitment of the required amount of capital." His intent, therefore, is insufficient to demonstrate that he has placed at least \$500,000 at risk in the NCE.

Furthermore, the Petitioner maintains that we erred in concluding that the record contained inconsistencies relating to his investment. In our November 2016, April 2017, and November 2017 decisions denying his motions, we concluded that he did not meet the at risk requirements. We discussed conflicting evidence in the record relating to his ownership percentage in the NCE, a nonexistent business's (Ideal Investment CA Regional Center) ownership in and entitlement to annual distribution from the NCE, and the amount the NCE needs as its startup capital. These inconsistencies were not the result of "the fast pace of change in the business world" or the NCE's need to "change its business processes and ownership details," as the Petitioner claims on motion. Rather, these discrepancies undermined his claims that he had invested in the NCE and owned a certain percentage of the business.

In addition, the Petitioner contends that he did not materially change his petition, claiming that his submission after his filing of the petition "was merely sent for clarification of an already eligible filing and hence cannot be considered a material change." The record does not support his contention. He filed his petition in March 2013, and revised it in September 2014. As discussed in our previous decisions, the revised petition changed the NCE's location, business industry, corporate structure, and ownership interests. The Petitioner did not clarify with his September 2014 filing; rather, he attempted to qualify for the immigrant investor classification under a different set of facts. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998) (holding that we "cannot consider facts that come into being only subsequent to the filing of a petition").

Finally, the Petitioner's motion does not illustrate that he was eligible for the classification when he filed the petition in March 2013. Specifically, at the time, he did not establish that he met the job creation requirements, because he did not present evidence confirming that the NCE had already hired 10 full-time employees or provide a comprehensive and credible business plan showing that it would need at least 10 full-time employees. *See* 8 C.F.R. § 204.6(j)(4)(i)(A)-(B); *see also Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). Based on these reasons, the Petitioner has not demonstrated that we erred in our previous decision.

B. Motion to Reopen

In support of his motion, the Petitioner submits copies of his and the NCE's 2015 and 2016 tax returns. These documents, however, do not demonstrate that he had placed at least \$500,000 at risk in the NCE in March 2013, when he filed the petition; that his revised petition did not materially change his initial petition; or that he presented qualifying employment creation documents when he filed the petition. The recently submitted evidence therefore does not establish his eligibility for the classification.

On the contrary, the submission, specifically, the 2015 and 2016 Partner's Share of Income, Deductions, Credits, etc., Schedule K-1 of Internal Revenue Service (IRS) Form 1065, indicates that a nonexistent business, Ideal Investment CA Regional Center, owned 5% of the NCE. In his appellate brief, the Petitioner acknowledged that "no such Regional Center exists and never has existed." In addition, the balance sheets on page 5 of the NCE's 2015 and 2016 tax returns, including the line for "partners' capital accounts," do not confirm that the Petitioner invested \$500,000 in the NCE. The motion filing therefore further supports our conclusion that the record includes inconsistent evidence relating to ownership of the NCE, and that the Petitioner has not demonstrated that he met the at risk requirements.

III. CONCLUSION

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). In addition, upon a consideration of the evidence he offers on motion, together with previously filed documentation, we conclude that he has not overcome the grounds underlying our previous decision. *See* 8 C.F.R. § 103.5(a)(2).

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of Y-L-*, ID# 1242525 (AAO June 18, 2018)