U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-H-

DATE: JUNE 6, 2019

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 Petitioner's capital investment in [redacted], the NCE, will create full-time positions for at least ten qualifying employees. On appeal, the Petitioner submits additional evidence and asserts that the record establishes his 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" (JCE). 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] Regional Center. The record includes a 2015 business plan that indicates the NCE was formed for the purpose of providing a loan to [redacted], the JCE, to finance the construction, development, and management of an [redacted] facility in [redacted] Alabama.

The Chief issued a request for evidence (RFE) seeking additional documentation, in part, that demonstrated how the use of the Petitioner's EB-5 investment will create the required jobs. The RFE noted that the business plan states the EB-5 capital will be used to repay part of the $3,000,000 the JCE borrowed from [redacted]. The associated unsecured promissory note between the two entities reflected an effective date of June 1, 2012, three years prior to the NCE's business plan and the Petitioner's 2015 investment. The Chief advised the Petitioner that the record did not demonstrate the 2012 financing was either temporary or contemplated to be replaced by immigrant investor capital.

[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).

The RFE response included the Petitioner's statement that "the plan was always to use EB-5 funds to finance the project" and the "promissory note and funds received" to build the facility were "always planned to be temporary in nature." The Chief denied the petition, finding that the Petitioner's statement was insufficient to show that the 2012 financing was either temporary or intended to be replaced with immigrant investor capital and therefore did not comply with USCIS requirements.[4]

On appeal, the Petitioner contends that the JCE did intend to repay the 2012 financing with EB-5 capital and for the first time submits new documentation to support this assertion. A 2018 statement from [redacted] the JCE's prior general counsel who helped draft the unsecured promissory note, indicates the company intended "at the outset" for the "developer capital to be quickly replaced with [EB-5] investor funds as soon as available." However, multiple factors such as delayed immigrant investor "adjudications, uncertain legislation, and fierce new competition in the market" caused the "temporary, bridge financing loan to extend into a years long investment period." [redacted] contends that because the promissory note was drafted prior to the 2013 "USCIS policy memo which was the first policy mention of bridge replacement parameters[,]" it "would not be logical to include verbatim text describing the intent of the bridge financing."

The Petitioner also submits for the first time a "Written Resolution" executed by the JCE's manager, with an effective date of May 21, 2012, and a "Loan Agreement" between the JCE and [redacted] with an effective date of May 30, 2012. The resolution states that the JCE resolves to have "temporary financing from [redacted] through a loan arrangement for the purpose of funding the construction and operation of a planned EB-5 project in [redacted] AL" and "any subsequent EB-5 funds infused in the [JCE] will be used to repay" the loan. Similarly, the newly submitted loan agreement states in section 2.3 that the loan proceeds "will be used to fund the property development and operational costs" of the [redacted] and for the "short-term temporary financing needs" of the JCE as the [redacted] will be partly funded by EB-5 investors soon afterwards." It further states that "[a]s long as the EB-5 funds invested into the [redacted] it will be used to repay the Lender." In addition, the Petitioner submits an August 2017 auditor's report "on the JCE's 2014 and 2015 financial statements." He refers to the report's note on page five that states the "loan was designed to be a bridge loan that would be repaid upon the recapitalization of the project by anticipated EB-5 investors."

Considering the record in its totality, we find that the Petitioner has not demonstrated that his EB-5 investment will create the requisite jobs or that he should receive credit for any created jobs.[5] As noted by the Chief, the [redacted] website shows the facility was completed and operational in 2014, one year prior to the Petitioner's investment.[6] Assuming *arguendo* that the JCE had completed the project and created new jobs, the Petitioner has not established that his 2015 funds were used to replace financing that was either temporary or contemplated to be replaced with EB-5 capital.

---

[4] *See* 6 *USCIS Policy Manual, supra,* at G.2(D)(1).

[5] The Petitioner does not allege that the NCE has already created the requisite number of jobs. *See* 8 C.F.R. § 204.6(j)(4)(i)(A).

[6] According to the [redacted] website for the [redacted] facility in [redacted], Alabama, the project was completed prior to the 2015 business plan and the Petitioner's 2015 investment. The website includes photographs with the label "[redacted] Operational Photos – August 27, 2014." *See* http://[redacted] (last accessed on May 31, 2019, and incorporated into the record).

The USCIS Policy Manual provides two situations where a JCE may use EB-5 capital to replace bridge financing and credit a foreign national investor with the jobs it had already created:

> Generally, the replacement of temporary or bridge financing with immigrant investor capital should have been contemplated prior to acquiring the original temporary financing. However, even if the immigrant investor financing was not contemplated prior to acquiring the temporary financing, as long as the financing to be replaced was contemplated as short-term temporary financing that would be subsequently replaced by more permanent long-term financing, the infusion of immigrant investor financing could still result in the creation of, and credit for, new jobs.

6 *USCIS Policy Manual, supra,* at G.2(D)(1).

Due to inconsistencies, the record does not establish that the 2012 financing was seen as short term or contemplated to be replaced by EB-5 capital. The Petitioner contends that the revised loan agreement with a May 2012 effective date was "created to replace the prior Unsecured Promissory Note." However, the promissory note in the record is dated June 2012, subsequent to the revised loan agreement. The Petitioner does not provide an explanation to clarify this inconsistency. Further, [redacted] who drafted the promissory note and served as the JCE's counsel at the time, does not make any reference to the revised loan agreement or resolution, despite their alleged effective date one month prior to the promissory note.

The Petitioner must resolve inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.* Here, the Petitioner has not resolved the inconsistencies noted above. Though the Petitioner contends that the 2017 auditor's report is further evidence of the JCE's intention to replace the loan with EB-5 capital, a report five years after the loan without corroborating documentation is not sufficient to support his assertion.

III. CONCLUSION

The Petitioner has not established that his investment in the NCE will create at least 10 qualifying employees within the next two years. Accordingly, he has not demonstrated eligibility for the immigrant investor classification.

ORDER: The appeal is dismissed.

Cite as *Matter of W-H-*, ID# 2916992 (AAO June 6, 2019)