U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF R-F-

DATE: MAR. 19, 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. *See* 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 make a qualifying equity investment of the requisite amount in a new commercial enterprise (NCE) that will benefit the United States economy and create at least 10 full-time positions for qualifying employees. An immigrant investor may invest the required funds directly in a NCE, or through a "regional center."[1]

The Acting Chief of the Immigrant Investor Program Office denied the petition, concluding that the record did not establish, as required, that the Petitioner's investment into the NCE would create the requisite number of qualifying jobs. On appeal, the Petitioner provides a brief as well as additional exhibits, and asserts that the Chief erred in reaching her decision and that the instant petition 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, as the Petitioner has done in this case. *See* 8 C.F.R. § 204.6(j)(4)(iii). For a new commercial enterprise not located within a regional center, the full-time positions must be created directly by the new commercial enterprise to be counted. This means that the new commercial enterprise (or its wholly owned subsidiaries) must itself be the employer of the qualifying employees.[2]

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

[2] *See* 8 C.F.R. § 204.6(e). *See also* USCIS Policy Memorandum PM-602-0083, *EB-5 Adjudications Policy* 18 (May 30, 2013), https://www.uscis.gov/legal-resources/policy-memoranda; 6 *USCIS Policy Manual* G.2(D)(4), https://www.uscis.gov/policymanual.

II. ANALYSIS

In the instant petition, the Petitioner seeks classification as an immigrant investor based upon his $1,000,000 investment into [redacted] (the NCE) in February 2014. The NCE is not affiliated with a regional center, and intends to create direct jobs through two wholly owned subsidiaries, [redacted], a real estate development, and [redacted] a commercial bakery.

In June 2016, the Chief issued a request for evidence (RFE) asking the Petitioner to provide additional evidence of the lawfulness of the funds transferred to the NCE, establish the credibility of the business plan, and demonstrate that it would create the required number of jobs. Additionally, the Chief asked the Petitioner to confirm the ownership of the NCE's subsidiaries responsible for job creation.

The Chief then issued a notice of intent to deny (NOID), noting that while the Petitioner's response to the RFE addressed her concerns regarding lawful source of funds, it had not overcome the questions regarding the credibility of the business plan and job creation. In this NOID, the Chief notified the Petitioner that she may have made an impermissible material change to the petition. Following the Petitioner's response to this NOID, the Chief issued the denial, finding that the Petitioner had not shown, as required, that the NCE will create the required number of jobs. On appeal, the Petitioner argues that the NCE will do so, and accordingly that she has established eligibility for the benefit sought.

A. Job Creation

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

> (A) Documentation consisting of photocopies of relevant tax records, Forms 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
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> (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.[3]

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products or services, and its objectives. *Matter of Ho*, 22 I&N Dec. 206, 210 (Assoc. Comm'r 1998). Elaborating on the contents of an acceptable business plan, *Ho*, 22 I&N Dec. at 213, states that the plan should contain a market analysis, the pertinent processes and suppliers, marketing strategy, organizational structure, personnel's experience, staffing requirements, timetable

[3] 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)(4).

for hiring, job descriptions, and projections of sales, costs, and income. The decision concludes: "Most importantly, the business plan must be credible." *Id.*

Here, the Petitioner provided a 2014 business plan, a revised 2016 business plan, as well as tax records and copies of Forms I-9, Employment Eligibility Verification. In determining that the Petitioner had not established that the NCE would create the required number of jobs, the Chief concluded that the 2016 business plan was not credible, and that the record did not sufficiently establish that sufficient number of jobs would be created. Regarding the credibility of the plan, she identified several discrepancies in the number of proposed employees between the 2014 business plan, 2016 business plan, the Petitioner's responses to her RFE, and her response to her NOID. The Chief further noted the changes in hiring timelines, and job creation delays. She also pointed out discrepancies between the projected revenues in the 2014 and 2016 business plans. The Chief found that the Petitioner had not sufficiently resolved these inconsistencies.[4] She also questioned the credibility of operational plans and revenue projections, finding "it is unclear whether is still in operation or engaged in business." The Chief cited public sources which indicated "the NCE scheduled an auction of equipment… on June 6, 2018" and concluded that "based on the list of equipment for auction, it appears that… may not be engaged in business activity."

On appeal, the Petitioner asserts that the projected job creation will be realized. He indicates that there has been substantial progress in building the bakery in the past four years and attributes delays in opening for production to financial difficulties. In addressing the NCE's business activities, he explains that "has built a brand new commercial bakery." The Petitioner provides a list of activities has carried out, by year, in building out this project and states "the bakery is 95% finished." The Petitioner indicates in the appellate brief that the NCE has also secured an additional $2 million to "take us to the finish line." In order to demonstrate imminent opening for production, the Petitioner provides a plan containing photos showing what appears to be the bakery with equipment installed. In this plan, also indicates that it will open for production "when $2 million funding is made available." However, the Petitioner has not provided evidence that this funding was provided to or used by The Petitioner provides copies of permits and licenses previously obtained to operate the bakery, but also states "[T]he only thing that needs to do in terms of permits and certificates is to renew some of them that become expired." Moreover, the Petitioner submits an August 2018 letter identifying as the former tenant at the same address, and noting that some of equipment remains there while it attempts to raise additional funds. We also note that a search of public records available from the Florida Division of Corporations indicates that is inactive and that as of /2018, had requested "admin dissolution for its annual report."[5]

In addition, the Petitioner submits tax records, Forms I-9, and employee lists to establish the past job creation, and argues that "[T]his was pre I-526 adjudication employment which, the Petitioner

[4] A petitioner must resolve discrepancies 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).

[5] State of Florida Division of Corporations, *Detail by Entity Name*, http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResultDetail?inquirytype=EntityName&directionType=Initial&searchNameOrder= (last visited 3/8/2019)

believes, "should help reasonably conclude that the business will potentially create the number of jobs required, not the contrary." Even if we were to take this favorable view, the Petitioner has not sufficiently demonstrated that the bakery will commence operations as asserted. Thus, we cannot conclude that the Petitioner has demonstrated that the projected operational job creation will result in a sufficient number of qualifying jobs, as required. *See* 8 C.F.R. § 204.6(j)(4)(i).

B. Material Change

While not addressed by the Chief in her decision, we note that the Petitioner made an impermissible material change to her petition in presenting modified documents in an effort to make a deficient petition conform to eligibility requirements. *See Matter of Izummi*, 22 I&N Dec. at 169, 175-56 (Assoc. Comm'r 1998) (stating that "a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts" and USCIS "cannot consider facts that come into being only subsequent to the filing of a petition"; *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 affection the decision.) Specifically the Petitioner provided a revised 2016 business plan removing the real estate development business activities of a subsidiary not wholly owned by the NCE, and an amendment to the NCE's operating agreement doing the same.

The Petitioner initially indicated that the NCE would create jobs through two wholly owned subsidiaries. The 2014 business plan and the December 2013 private placement memorandum (PPM) anticipated 17 immigrant investors, each of whom would contribute $1,000,000 in exchange for 2% ownership of the NCE.[6] The 2013 PPM states that the NCE "currently has two projects under its control and membership." The first is "an upper scale riverside vacation home development located West Virginia" and the second "is the building of a commercial bakery plant in Florida." It also indicated that these two projects "will be able to create minimum170 [*sic*] full time jobs. Thus, it is suitable for EB-5 investment."

The 2014 business plan also described these two projects, each of which would be managed by a wholly owned subsidiary. One, , is "a management company of a commercial bakery located in CA." The 2014 business plan stated that this subsidiary planned to employ 200 to 300 employees. Page 3 of the PPM indicated that the NCE would invest a total of $5 million into this project. It stated the NCE would also own "100 % percent [*sic*] of the bakery till [*sic*] the investment is recouped." The plan indicated that the other subsidiary, PRE, "will supervise the real estate development project that started about seven years ago." According to the 2014 business plan, the NCE "is now planning to invest $10 million over the next five years to build homes…." Page 3 of the private placement memorandum (PPM) confirmed that the NCE would invest an estimated $10 million in total capital into this real estate project.[7] However, the PPM also stated that the NCE "will own

[6] Page 4 of the 2014 business plan stated that "[E]ach immigration investor will own 2% share of the company as a Class B Member in [the NCE]….The total number of shares reserved for Class B members is 34%." Pages 1-2 of the PPM similarly state, "[T]he remaining 34% of shares will be offered to immigration investors known as EB-5 investors in Class B Unit shares with $1,000,000 for each Two Units."

[7] The initial record also contained the Certificate of Authority of a Foreign Limited Liability Company authorizing this entity to transact business in West Virginia, a copy of a settlement agreement for land sale, and documentation pertaining to the development of property in West Virginia.

51% of the riverside vocational home development through [PRE]."[8] As noted by the Chief in her RFE, the Petitioner's initial filing did not establish that the NCE wholly owned either subsidiary, and therefore any jobs these subsidiaries created could not be counted toward the minimum 170 required jobs, as the NCE asserted would happen in the initial PPM.[9]

In response to this RFE, the Petitioner claimed that PRE was never meant to create direct jobs for the NCE.[10] He provided an April 2016 amendment to the NCE's operating agreement and a 2016 business plan, among other evidence.[11] In the 2016 amendment, the NCE is described as "the holding or management company that accepts immigration investment." It further describes the NCE's legal structure as one in which "[the NCE] would own 51% of [PRE] when in paper" after acquiring real estate lots. The amendment modifies this project structure such that the NCE "will not invest any money in [PRE], nor will [PRE] have any obligations to sell lots at costs [*sic*] or to reserve lots for the [NCE]." Within the amendment, the management partners acknowledge "immigration investors… may feel that they were made to believe that [the NCE] owned a portion of the West Virginia project…However, [the NCE] … owned only an option to purchase lots at cost." The management partners then state their belief that "investment in the commercial real estate that [redacted] is leasing its facility from presents more promising business opportunity." The amendment alters the Petitioner's ownership interest, assigning him a one percent share in the entity [redacted] and changing her status from a Class B member to a Preferred member. As a Preferred member, the amendment provides the Petitioner with a "preferred rate of distribution from all incomes generated by [the NCE]."

The Petitioner also provided a revised August 2016 business plan that removed all references to the West Virginia housing development project. According to this plan, the BCB would be the NCE's sole direct job creator,[12] and the total equity investment sought would be $8 million from immigrant investors, in contrast with the 2014 business plan which estimated that $5 million of $17 million raised would be provided for the bakery project. In the 2016 business plan, the estimated initial number of jobs was revised upward to 75-80 employees from the projected 60 in the 2014 business plan. The plan does not reference the proposed commercial real estate investment described in the amendment to the NCE's operating agreement. The 2016 business plan removed the business activities of the problematic subsidiary such that the NCE would create only eligible jobs. The amendment to the operating agreement did the same. As these changes were made to cure the deficiencies noted by the Chief in her RFE, this constitutes an impermissible material change to the petition. Accordingly, for this additional reason the Petitioner has not established her eligibility for the benefit sought.

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[8] The record alternately describes the [redacted] project as a vacation home development.

[9] *See* 8 C.F.R. § 204.6(e). *See also* USCIS Policy Memorandum PM-602-0083, *supra* at 18; 6 USCIS Policy Manual, *supra* at G.2(D)(4), https://www.uscis.gov/policymanual/HTML/PolicyManual.html.

[10] As discussed above, the record does not support this assertion. In addition, the minutes of the NCE's first directors meeting stated that the NCE would raise $17 million from immigrant investors and proposed that the "West Virginia vacation home project and … commercial bakery project were to be funded first."

[11] The Petitioner provided documentation related to capital investment from non-EB5 investors, a market analysis for the real estate project, and materials related to [redacted] including current employment levels, projected revenues, and training manuals.

[12] We note that the Petitioner provided evidence establishing [redacted] as a wholly owned subsidiary of the NCE, despite the Acting Chief's conclusions to the contrary in the subsequent NOID.

III. CONCLUSION

The Petitioner has not established, as required, that the entity most closely responsible for job creation will create at least 10 qualifying positions. Further, the record contains an impermissible material change. She therefore has not demonstrated eligibility for the benefit sought.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of R-F-*, ID# 2289983 (AAO Mar. 19, 2019)