U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-Z-

DATE: OCT. 17, 2019

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 establish his eligibility. Specifically, the Chief found that the Petitioner had not demonstrated: (1) he made at least $500,000 available for job creation purposes;[1] and (2) his funds would create at least 10 full-time positions for qualifying employees. We dismissed the subsequent appeal.

The Petitioner now files combined motions to reconsider and reopen the matter. On motion, he submits additional evidence and maintains that he has established eligibility for the EB-5 classification.

Upon review, we will deny the motions.

I. LAW

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.

In addition, the regulation specifies motion filing requirements, providing that a petitioner must submit "a statement about whether or not the validity of the unfavorable decision has been or is the subject of

[1] The Petitioner does not allege, and the record does not demonstrate, that the NCE has already created the requisite number of jobs. *See* 8 C.F.R. § 204.6(j)(4)(i)(A). Rather, he claims that he has presented a credible and comprehensive business plan to satisfy the job creation requirements. *See* 8 C.F.R. § 204.6(j)(4)(i)(B).

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."

II. ANALYSIS

The Petitioner maintains that he is eligible for the EB-5 classification because he has invested at least $500,000[2] in [redacted], the NCE. According to a Business Plan Addendum, dated May 14, 2018 (2018 Addendum), which the Petitioner offers on motion, the NCE intends to raise up to $7,500,000 from 15 foreign national investors for a project in [redacted] Arizona, that converts an office building to a senior living facility. The Petitioner presents documents on motion that call the project "[redacted]"

As discussed in our previous decision, in [redacted] 2016, the Securities and Exchange Commission (SEC) brought a lawsuit against the NCE, related businesses, and [redacted] (an individual who was involved in the project). The SEC alleged that the businesses and Mr. [redacted] improperly diverted and misappropriated EB-5 funds.[3] The SEC action led to a federal district court judge appointing a receiver and placing the NCE as well as other entities into receivership. According to page 5 and 6 of a [redacted], 2018, motion that the receiver filed with the federal district court judge, documents showed that foreign national investors invested $7,500,000 into the NCE, the NCE's "accounting records, however, indicate[d] that only $4.768 million of these proceeds was invested in the project." The receiver concluded that "approximately [redacted] of investor funds appear to have been diverted elsewhere." The Petitioner has not challenged these allegations.

We will deny the Petitioner's combined motions because they do not satisfy the filing requirements under 8 C.F.R. § 103.5(a)(1)(iii)(C) and 8 C.F.R. § 103.5(a)(4). Specifically, he has not presented "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). In the alternative, we will deny the motions for the reasons set forth below.

A. Motion to Reconsider

On motion, the Petitioner contends that we erred in our finding concerning the "at-risk" requirements. The regulation at 8 C.F.R. § 204.6(j) states that "[an EB-5] petition must be accompanied by evidence

[2] 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).

[3] According to a [redacted] 2018 *Orange County Register* article, in [redacted] 2018, Mr [redacted], "[w]ithout admitting or denying guilt . . . agreed . . . to pay more than [redacted] to cover some of the losses, plus [redacted] more in penalties and interest." [redacted] 2018, available at https://www.ocregister.com/2018[redacted]/, accessed on October 8, 2019, a copy of the article has been incorporated into the record of proceedings.

that the alien has invested or is actively in the process of investing lawfully obtained capital" in a NCE. The regulation at 8 C.F.R. § 204.6(j)(2) explains:

> To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk . . . .

In addition, as explained in our previous decision, a petitioner must establish 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." *Matter of Izummi*, 22 I&N Dec. 169, 179 (Assoc. Comm'r 1998); *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 foreign national investor must show that his or her investment of at least $500,000, in its entirety, has been made available, without interruption, to the NCE for job creation. *See* 8 C.F.R. § 103.2(b)(1) (stating "[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").

In this case, the Petitioner has not demonstrated that we erred in our finding that he did not satisfy the "at-risk" requirements. The record shows, and he does not dispute, that a portion of the $500,000 that he initially invested in the NCE in 2015 has been diverted from the NCE and thus not been made available, without interruption, to the NCE for job creation purposes. As such, he fails to satisfy the "at-risk" requirements as relating to his initial $500,000 investment. *See* 8 C.F.R. § 103.2(b)(1); 8 C.F.R. § 204.6(j).

The Petitioner claims that he is in the process of investing additional funds in the NCE to replace the diverted funds. He submits bank records, asserting that between October 2018 and January 2019, he was "arranging the transfer of [an additional $185,000] to the NCE," and that he "should complete the transfer within a short time." The Petitioner, however, has not established that at the time he filed his petition in 2015, he invested or was actively in the process of investing the $185,000. *See* 8 C.F.R. § 204.6(j). As discussed in our decision, "the Petitioner has not shown that replacing diverted capital, even with additional funds from him, would satisfy the capital at-risk requirements." *See Izummi*, 22 I&N Dec. at 179; *see also* 8 C.F.R. § 204.6 (j)(2). "[T]he 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." His intention to replace the diverted funds, thus, does not establish that $500,000 of his capital has been made available since 2015, without interruption, to the NCE for job creation purposes. *See* 8 C.F.R. § 204.6(j).

Furthermore, the Petitioner has not demonstrated his "actual commitment" of the $185,000 to the NCE. As explained in our previous decision, the regulation requires him to "show actual commitment of the required amount of capital." 8 C.F.R. § 204.6(j)(2). Under 6 *USCIS Policy Manual* G.2(A)(2), a foreign national investor may satisfy the "at-risk" requirements if he or she places the capital in an

escrow account "until the investor has obtained conditional permanent resident status if the immediate and irrevocable release of the escrowed funds is contingent only upon:"

- Approval of the Immigrant Petition by Alien Entrepreneur (Form I-526); and
- Visa issuance and admission to the United States as a conditional permanent resident, or approval of the investor's Application to Register Permanent Residence or Adjust Status (Form I-485).

The documents the Petitioner offers on motion include bank records showing that he and his family members moved funds in and out of their accounts in 2018 and 2019. The record, however, does not show that the $185,000 has reached the NCE, or that the funds are in an escrow account and the release of them is contingent only upon the circumstances specified above. As such, the Petitioner and his family members' bank transactions, at best, confirm his "mere intent to invest, or of prospective investment arrangements entailing no present commitment," which is insufficient to satisfy the "at-risk" requirements. *See* 8 C.F.R. § 204.6(j)(2). For these reasons, we will deny his motion to reconsider the matter as he has not demonstrated that we erred in finding his initial $500,000 investment or his intent to invest an additional $185,000 does not satisfy the at-risk requirements. *See* 8 C.F.R. § 103.2(b)(1); 8 C.F.R. § 204.6(j).

B. Motion to Reopen

On motion, the Petitioner contends that he meets the job creation requirements, claiming on page 3 of his brief, that "[b]y year two [of operation], it is expected that the [p]roject will have 185 full time employees." He offers documents concerning the staffing needs of the senior living facility as well as the 2018 Addendum. In our previous decision, we determined that the Petitioner did not submit, as required, a comprehensive and credible business plan showing that the NCE would create at least 10 full-time positions for each foreign national investor seeking EB-5 classification. *See* 8 C.F.R. § 204.6(j)(4)(i)(B), (g)(1); *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). We noted that the record at the time contained two business plans, dated 2014 and 2016, respectively, but neither reflected the current status of the project; and thus, neither was comprehensive or credible.

The Petitioner has similarly not demonstrated that the 2018 Addendum and other documents he submits on motion qualify as a credible and "comprehensive business plan showing that, due to the nature and projected size of the [NCE], 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."[4] 8 C.F.R. § 204.6(j)(4)(i)(B), (g)(1); *Ho*, 22 I&N Dec. at 213. Specifically, his job creation projections are predicated on the completion of construction and the operation of the facility. He, however, has not presented sufficient evidence showing, by a preponderance of the evidence,[5] the project will likely have sufficient funds to complete its construction and to operate as planned.

[4] 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. 6 *USCIS Policy Manual*, *supra*, at G.2(D)(5). The business plan filed with the petition should reasonably demonstrate that the requisite number of jobs will be created by the end of this period. *Id.*

[5] If a petitioner submits relevant, probative, and credible evidence that leads us to believe that the claim is "more likely

According to page 16 of the 2018 Addendum, the total project cost is now $48,600,000, which must include a $41,500,000 U.S. Department of Housing and Urban Development (HUD) insured loan (85% of the project cost) and $1,000,000 additional EB-5 investment (2% of the project cost). While the Petitioner indicates that the NCE has begun the process of securing a HUD insured loan and that foreign national investors have shown interest in investing additional capital, he has not submitted sufficient evidence verifying that the project will more likely than not secure such necessary financing.

On motion, the Petitioner presents the receiver's May 1, 2018, declaration and the June 6, 2018, "Borrower's Final Settlement Statement," indicating that the NCE has secured a $5,600,000 18-month term bridge loan. This amount and the NCE's other available capital, however, are insufficient to cover the anticipated project cost. Moreover, although page 16 of the 2018 Addendum and the motion brief state that the foreign national investors have until December 15, 2018, to make any additional EB-5 investments, as of the date of this decision, the Petitioner has not submitted evidence confirming that any of the foreign national investors has invested additional funds in the NCE. Without additional corroboration on the NCE's access to the needed financing, the Petitioner has not shown that the job creation projections, as presented in the 2018 Addendum and other documents, are credible or comprehensive.

In addition, while the Petitioner claims on motion that the federal district court judge has approved the receiver's motion to restructure the project, he has presented inconsistent information on the project cost and the HUD insured loan. The 2018 Addendum claims that the project will need $48,600,000, which will include a $41,500,000 HUD insured loan. A document entitled '[redacted] 2018," however, indicates that the project will need $52,453,213, including a $44,384,400 HUD insured loan. The Petitioner has not resolved these inconsistencies, and the inconsistent evidence does not support a finding that the NCE will more likely than not have sufficient funds to complete the project and create the necessary number of jobs. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (a petitioner must "resolve the inconsistencies by independent objective evidence").

Moreover, on motion, the Petitioner has presented a number of documents that list milestones that the project should have reached. Yet, he has not shown that the project has met them as anticipated. For example, page 9 of the 2018 Addendum indicates that in June 2019, the NCE would obtain the HUD insured loan and the '[redacted]' provides that in July 2019, the NCE would "close on Construction Financing." In addition, according to a detailed timeline attached to the 2018 Addendum as well as the Petitioner's motion brief, construction of the project would begin in July 2019. As of the date of this decision, however, the Petitioner has not demonstrated that the NCE has met these financing and construction milestones. Without additional corroboration, the Petitioner has not demonstrated, as required, that the NCE will likely create the necessary number of jobs within the specified period under 8 C.F.R. § 204.6(j)(4)(i)(B). For these reasons, we will deny his motion to reopen the proceeding as he has not submitted a credible and comprehensive business plan showing that the NCE will likely create the requisite number of jobs within the specified timeframe. *See* 8 C.F.R. § 103.5(a)(2).

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than not" or "probably true," the petitioner has satisfied the "preponderance of the evidence" standard of proof. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010); *see also* 6 *USCIS Policy Manual*, *supra*, at G.2(E).

III. CONCLUSION

As discussed in our previous decision, we are sympathetic of the Petitioner's situation, for which he may seek redress in a different forum. Indeed, the receiver has recommended on page 5 of his [redacted] 2018, motion to the federal district court judge that the Petitioner and other foreign national investors "be allowed to retain an allowed claim against [the NCE and related businesses] in the full amount of their principal investment," which was $500,000 each.

As relating to this proceeding, we will deny the Petitioner's combined motions under 8 C.F.R. § 103.5(a)(1)(iii)(C), (a)(4). In the alternative, we will deny his motion to reconsider the matter because he has not established that we based our previous decision on an incorrect application of law or policy, or that the decision was incorrect based on the evidence in the record at the time of the decision. In addition, we will deny his motion to reopen the proceeding because the documentation he presents on motion does not demonstrate his eligibility for the classification.

ORDER: The motion to reconsider is denied.

FURTHER ORDER: The motion to reopen is denied.

Cite as *Matter of W-Z-*, ID# 4810817 (AAO Oct. 17, 2019)