U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-Z-

DATE: SEPT. 23, 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 initially approved the immigrant investor petition and subsequently sent a notice of intent to revoke (NOIR), notifying the Petitioner that the petition was approved in error. The Petitioner responded to the NOIR but the Chief found the statements and additional evidence did not overcome the reasons for the NOIR and thus revoked the petition, concluding the record did not establish, as required, that [redacted],[1] the NCE, would create the necessary number of jobs.[2] On appeal, the Petitioner submits a brief 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,[3] 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."

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[1] Some documents in the record refer to the NCE as [redacted]

[2] 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).

[3] 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).

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:

> (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
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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.[4]

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).

Regarding revocations of approved petitions, the Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition . . . ." Section 205 of the Act, 8 U.S.C. § 1155. The Board of Immigration Appeals has discussed revocations on notice as follows:

> [A] notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any

[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. 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.

evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.[5]

II. ANALYSIS

In this case, the Petitioner invested $500,000[6] in the NCE, which is associated with a USCIS-designated regional center, [redacted] Regional Center. The record includes six business plans – five for the NCE and one for the Regional Center – as well 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[7] 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] Center, 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] 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.[8]

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, 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 he had satisfied the employment creation requirements.

The Chief subsequently approved the immigrant investor petition in error then sent a notice of intent to revoke (NOIR) the petition. The Chief reviewed the response, which included additional documentation, such as the NCE's fifth business plan, dated November 2017,[9] and its fifth economic report, entitled "A Job Creation Memo of the [redacted] Project," dated December 2017.[10] She

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[5] *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime,* 19 I&N Dec. 450 (BIA 1987)).

[6] 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).

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

[8] 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).

[9] The most recent business plan in the record is undated. In the appellate brief and exhibit list, the Petitioner alternately refers to this plan as the December and November 2017 business plan. We will refer to it as the November 2017 business plan.

[10] The Petitioner also noted in his NOIR response that the NCE has attracted 121, not 135, EB-5 investors.

revoked 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 provides a brief, along with previously submitted documentation, and contends that he has shown his eligibility for the classification.

A. Deference Policy

On appeal, citing the deference policy, the Petitioner maintains that the Chief erred in revoking the instant petition, and indicated she had previously 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; 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.[11]

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 Revised January 2011 business plan provides that construction would end in December 2014. Page 5 of the March 2017 "Business Plan Supplement in Response to the NOID" and page 12 of the November 2017 business plan provide that construction would complete in the beginning of 2018. Nevertheless, the Petitioner's NOIR response and appellate brief further pushes back the construction completion date to May 2019. The previous approvals, prior to the instant case, 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. As we explain further below, the instant adjudication contains significant revisions to the business plan, project costs, and completion date.

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.

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

[11] 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).

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 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 Revised January 2011 business plan that construction will end in December 2014. He then changed the completion date to February 2018 in the NOID response and in the NCE's November 2017 business plan. Subsequently, he alleges in the appellate brief and NOIR response 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 February 2018 completion date, he 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 and in his NOIR response, he again pushes back the completion date to May 2019. While he lists a number of circumstances surrounding the delays in the appellate brief, most of them predate March 2017, when he 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, he 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.

While the record supports the revocation of the instant petition, we note additional concerns not discussed in the Chief's decision. First, though 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 Revised January 2011 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.

However, the record contains insufficient evidence to substantiate the 86% anticipated occupancy rate. Though the 2016 business plan and additional documentation indicate 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 expressed interest in leasing units from the NCE, these documents do not substantiate the 86% anticipated occupancy rate. The evidence in the record does not contain sufficient documentation of the lessors' intent or ability to lease space in the project to justify the occupancy rate used in the economic report.

[12] See *supra* footnote 4.

Second, 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 Revised January 2011 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][13] 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.

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 Revised January 2011 business plan. The Petitioner has not explained why the project would cost approximately $6,500,000 less in 2017 than in 2011, especially in light of the claims in the appellate brief that the project has experienced multiple, significant delays. 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.

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).

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. Accordingly, he has not demonstrated eligibility for the immigrant investor classification and we affirm the Chief's revocation.

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 C-Z-*, ID# 04194515 (AAO Sept. 23, 2019)

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