U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12161631

Date: MAR. 28, 2022

Appeal of Immigrant Investor Program Office Decision

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 eligibility for the EB-5 classification. Specifically, the Chief determined that the Petitioner did not establish she placed the required amount of capital at risk into [redacted], the NCE, as required by 8 C.F.R. § 204.6(j)(2). On appeal, the Petitioner maintains that he has shown eligibility for the EB-5 classification and submits new evidence.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Upon de novo review, we will dismiss the appeal.

I. LAW

To be eligible for the EB-5 classification, a petitioner must show that he or she "has invested or is actively in the process of investing the required amount of capital." 8 C.F.R. § 204.6(j)(2). The regulation defines "invest" to mean "to contribute capital," and specifies that capital includes "cash, equipment, inventory, other tangible property," and "cash equivalents" but states that a contribution of capital "in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien investor and the [NCE] does not constitute a contribution of capital for the purposes of this part." 8 C.F.R. § 204.6(e). In addition, a petitioner must show that she has invested her own capital. *Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998).

II. ANALYSIS

In this case, the Petitioner alleged in her initial application that she invested $599,047 into the NCE when it was established in 2013 along with an additional $2,788,861 in 2016.[1] Later, in response to the Chief's notice of intent to deny (NOID), the Petitioner alleged she invested an additional $4,416,650 into the NCE in 2018. The Chief's decision, among other things, questioned whether the Petitioner's contributions made in 2016 and 2018 met the regulatory definition of invest. In her decision to deny the petition, the Chief indicated the Petitioner provided copies of notes dated 2014 and 2016 indicating the Petitioner and her spouse, equal owners of the NCE, had loaned the amounts of $1,622,102.56 and $2,788,861, respectively, to the NCE. The Chief determined that the Petitioner had not met the regulatory definition of invest as her note with the NCE does not constitute a contribution capital under 8 C.F.R. § 204.6(e).

We agree with the Chief's determination that the Petitioner's note with the NCE does not meet the regulatory definition of "invest" according to 8 C.F.R. § 204.6(e). Both notes list the borrower as the NCE while the Petitioner and her spouse are listed as the lenders. The notes also list the amounts of $2,788,861 and $4,416,650 which the Petitioner claims as the capital invested in the NCE in order to meet the $1,000,000 required amount of capital requirement under 8 C.F.R. § 204.6(j)(2). These notes do not meet the regulatory definition of "invest" and therefore the Petitioner has not shown that she "has invested or is actively in the process of investing the required amount of capital" as required under 8 C.F.R. § 204.6(j)(2).

On appeal, the Petitioner submits corporate records from the NCE indicating that loans made to the NCE in the amount of $4,416,650 at 1.29% interest are converted to paid-in-capital as of October 8, 2018. The Petitioner, however, had already been put on notice of the required evidence, was given a reasonable opportunity to provide this evidence through the Chief's NOID, and the evidence was reasonably available to the affected party at the time it was supposed to have been submitted.[2] We will therefore review the record without considering this additional evidence submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (providing that if "the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose").[3]

Since the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding her ownership of the funds submitted to the NCE. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to

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[1] The Petitioner does not allege that the NCE is located in a targeted employment area, and therefore the requisite amount of qualifying capital is $1,000,000. *See* 8 C.F.R. § 204.6(f)(1).

[2] *See Oyeniran v. Holder*, 672 F.3d 800, 808–09 (9th Cir. 2012) ("It is not sufficient that the evidence physically existed in the world at large; rather, the evidence must have been reasonably available to the petitioner."). *See also INS v. Doherty*, 502 U.S. 314, 324 (1992) (the Attorney General did not abuse his discretion by denying motion to reopen to apply for asylum and withholding based on lack of new material evidence).

[3] Additionally, the corporate record of conversion is dated after the Petitioner's time of filing her petition and likely constitutes a material change. The affected party has the burden of proof to establish eligibility for the requested benefit at the time of filing the benefit request and continuing until the final adjudication. 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971) (providing that "Congress did not intend that a petition that was properly denied because the beneficiary was not at that time qualified be subsequently approved at a future date when the beneficiary may become qualified under a new set of facts.").

make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

Based on the reasons stated above, we conclude that the Petitioner has not shown she "has invested or is actively in the process of investing the required amount of capital." 8 C.F.R. § 204.6(j)(2). Specifically, she has not demonstrated, by a preponderance of the evidence, the funds alleged to have been invested in the NCE meet the regulatory definition of invest under 8 C.F.R. § 204.6(e).

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.