U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24706542

Date: MAR. 22, 2023

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 classification makes immigrant visas available to noncitizens who invest the requisite amount of qualifying capital in a new commercial enterprise that will benefit the U.S. economy and create at least 10 full-time positions for qualifying employees. Noncitizens may invest in a project associated with a U.S. Citizenship and Immigration Services (USCIS) designated regional center. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, section 610, as amended.

The Chief of the Immigrant Investor Program Office denied the petition, concluding that the record did not establish that [redacted] the new commercial enterprise, will create at least 10 full-time positions for qualifying employees. The matter is now before us on appeal. 8 C.F.R. § 103.3. On appeal, the Petitioner contends that the Chief violated USCIS policy by refusing to give deference to previous agency determinations. The Petitioner also contends that the Chief applied the clear and convincing standard and the beyond a reasonable doubt standard in adjudicating his petition and violated his constitutional due process right by not requesting for evidence about the reasonableness of economic methodology.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

Volume 6, Part G, Chapter 6 of the USCIS Policy Manual articulates USCIS' policy regarding deference to previous agency determinations. As a general matter, USCIS does not reexamine determinations made earlier in the EB-5 process, and such earlier determinations will be presumed to have been properly decided.[1] When USCIS previously concluded that an economic methodology is reasonable to project future job creation as applied to the facts of a particular project, USCIS defers to

[1] *See generally* 6 USCIS Policy Manual G(6), https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-6.

this determination for all related adjudications directly linked to the specific project for which the economic methodology was previously approved.[2]

Conversely, USCIS does not defer to a previously favorable decision in later proceedings when, for example, the underlying facts, upon which a favorable decision was made, have materially changed, there is evidence of fraud or misrepresentation in the record of proceeding, or the previously favorable decision is determined to be legally deficient.[3] A change is material if it would have a natural tendency to influence, or is predictably capable of affecting, the decision.[4] When a new filing involves a different project from a previous approval, or the same previously approved project with material changes to the project plan, USCIS does not defer to the previous adjudication.[5]

As required by 8 C.F.R. § 204.6(j)(4)(i), the petition must establish that the investment of the required amount of capital in a new commercial enterprise will create full-time positions for at least 10 qualifying employees within two years. *See also* 8 U.S.C. § 1153(b)(5)(A)(ii). For purposes of the Form I-526 adjudication and the job creation requirements, the two-year period described in 8 C.F.R. § 204.6(j)(4)(i)(B) is deemed to commence six months after the adjudication of the Form I-526.

According to 8 C.F.R. § 204.6(j)(4)(i), to show that a new commercial enterprise will create full-time positions for at least 10 qualifying employees within two years, the petition must be accompanied by:

> (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 fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

A petition is not required to demonstrate that 10 full-time positions for qualifying employees have already been created by the commercial enterprise. However, where the jobs have not already been created, the petition must include a comprehensive business plan demonstrating the need for at least 10 employees within the next two years. *Matter of Ho* explained that a comprehensive business plan must be sufficiently detailed to permit USCIS to draw reasonable inferences about job-creation potential. 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). Additionally, *Matter of Ho* held that a "comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives." *Id.*

Under the statute and regulations, petitioners investing in a new commercial enterprise within a regional center may rely on economic methodologies to demonstrate that the investment will create indirect jobs as a result of the investment in the NCE, but such methodologies must be reasonable.

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[2] *Id.*
[3] *Id.*
[4] *See Kungys v. United States*, 485 U.S. 759, 770-72 (1988).
[5] *See generally* 6 *USCIS Policy Manual*, *supra*, at G(6)

See Pub. L. No. 102-395; 8 C.F.R. §§ 204.6(e), (j)(4)(iii), (m)(7)(ii). Petitioner must provide sufficient evidence for USCIS to determine whether methodologies used are reasonable.

Indirect jobs are those that are held outside of the new commercial enterprise but are created as a result of the new commercial enterprise. They include jobs that may be considered "economically direct," such as jobs created directly by a job-creating entity that is not also the new commercial enterprise. They also include economically indirect jobs, such as those further down the supply chain, or induced jobs created through increased spending.

II. ANALYSIS

The Petitioner asserts eligibility based on an investment in [redacted] pursuant to the Immigrant Investor Program.[6] On page 2 of his petition, the Petitioner indicated that he has invested $500,000[7] into [redacted] the new commercial enterprise (NCE). According to the Confidential Private Placement Memorandum (PPM), the NCE proposed to pool up to $42,000,000 from up to 84 immigrant investors. The PPM further states that the NCE will lend the entire amount to [redacted] the job-creating entity (JCE). According to the business plan of the NCE, the JCE intends to develop, construct, and operate a senior care facility located in [redacted] California.

A. Deference

The Chief determined that deference to the prior determination is not appropriate because the project plans have materially changed. Specifically, the Chief stated that the business plans of the NCE were no longer credible due to the inability of the project to meet established timelines and the developer's inability to obtain senior financing.

On appeal, the Petitioner contends that since the Chief approved the Form I-526 exemplar project on January 23, 2018, we should give deference at a subsequent stage in the EB-5 process, including the Petitioner's instant petition, and approve the petition. However, the record supports the Chief's determination that the project plans have materially changed since the approval of the Form I-526 exemplar project in 2018 due to the developer's inability to obtain necessary financing to fund the project and the inability of the project to meet development timelines for the reasons discussed below. As such, we conclude that the Chief is not required to defer to the previous adjudication.

B. Job Creation

The Chief determined that the business plan of the NCE is not *Matter of Ho* compliant because the record did not contain sufficient evidence to support the capital stack and timeline.

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[6] Section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1828 (1992), as amended (hereinafter the "Appropriations Act").

[7] On March 15, 2022, President Joe Biden signed the EB-5 Reform and Integrity Act of 2022, which made significant amendments to the EB-5 program, including the designation of a targeted employment area (TEA) and the minimum investment amounts. *See s*ection 203(b)(5) of the Act, 8 U.S.C. § 1153(b)(5) (2022). In this case, the Petitioner filed his petition in 2015 and asserted that the JCE would be principally doing business within a TEA. Therefore, the requisite amount of capital investment was downwardly adjusted from $1,000,000 to $500,000. *See* 8 C.F.R. § 204.6(f)(2) (2015).

The record contains a business plan of the NCE, dated July 2015, and an addendum to the business plan, dated December 2020. The 2015 business plan indicates that the total development costs for the project is $83,093,959 and that the project will be funded by (1) the developer equity of $41 million and (2) EB-5 capital of $42 million from 84 immigrant investors. The December 2020 addendum to the business plan indicates that the total development costs for the project is $91,529,304.44 and that the project will be funded by (1) the developer equity of $17.5 million land contribution, (2) construction financing of $64,029,304 via a joint venture between the developer and [redacted] and (3) EB-5 capital of $10 million from 20 immigrant investors. The Chief found that the record did not contain sufficient evidence to support the senior loan acquisition or the reasonableness of the developer equity contribution in the form of land valued at $17.5 million. The Chief added that the only financing secured since 2015 remains EB-5 capital of $10 million from 20 immigrant investors.

On appeal, the Petitioner asserts that the developer has talked to a few potential senior financing partners, but all of them had concerns and hesitated when they have noticed that the Chief repeatedly issued requests for evidence to the investors of this project. The 2020 addendum to the business plan states that final negotiations between the developer and [redacted] (a real estate development company) are underway to form a new joint venture company for the development of the project and that this joint venture is expected to be finalized and established in December 2020. However, as of the date of this decision, the record does not contain any evidence of the establishment of a joint venture company between the developer and [redacted] The record also does not contain sufficient evidence to show that the claimed joint venture company has obtained or is likely to obtain a senior construction loan of $64,029,304, which is necessary to fund the project. While we acknowledge the developer's difficulty in obtaining senior financing, the inability of the developer to obtain the required senior financing to fund the project significantly undermines the claimed credibility of the business plan.

Regarding the reasonableness of the developer equity contribution in the form of land valued at $17.5 million, the Chief noted that the July 2020 addendum to the business plan referenced three comparable commercial sites in [redacted] California, that served as the basis for the revised land valuation of $17.5 million in the July 2020 addendum to the business plan from the original land valuation of $27.5 million in the 2015 business plan. The Chief found that the comparable commercial sites are neither relevant nor probative in establishing the true value of the land because the size and location of the parcel were not comparable to the project site, because of the inconsistency regarding the price per acre in the third comparable listing and in a commercial property listing for a property located near the project site, and because the land deeds for the project site did not disclose how much the developer paid to acquire the project site.

Instead of submitting an appraisal report for the project site, a settlement statement for the purchase of the project site, real estate tax bills, or other sufficient evidence to establish the true value of the land to address the concerns of the Chief, the Petitioner, on appeal, asserts that he does not need to argue about the land value because the land does not count on job creation so it has nothing to do with whether enough jobs will be created. While we acknowledge that the cost of land purchase cannot be included in an input and output model to demonstrate job creation for regional center petitioners, this is not the issue in this case. As the Chief noted, the developer's willingness to reduce the land value

estimate from $27.5 million in 2015 to $17.5 million in 2020 by $10 million casts doubt upon the reasonableness and credibility of the original land valuation of $27.5 and the true value of the land contribution. This calls into question the claimed credibility and the claimed comprehensiveness of the business plan. Since the record does not contain sufficient evidence to demonstrate the true value of the land, we are unable to determine that the claimed developer equity of $17.5 million land contribution to fund the total projects costs of $91,529,304.44 is reasonable and credible.

Regarding development timeline of the project, the 2015 business plan indicates the developer would pull the construction permit by March 2017, complete the construction by May 2019, and open the senior care facility for business in January 2020. The December 2020 addendum to the business plan indicates that the developer would pull the construction permit by December 2021, complete the construction by June 2025, and open the senior care facility for business in June 2027. The Chief noted that with the City of [redacted] approval of a conditional use permit to construct the senior care facility on October 1, 2019, the developer had about six months to pull the construction permit and begin developing the project before the State of California issued stay-at-home orders on March 19, 2020 due to the COVID-19 pandemic. The Chief further stated that the inability to start construction during this timeframe calls into question the credibility of the overall project success.

The December 2020 addendum to the business plan states that the developer was negotiating with [redacted] to form a new joint venture company for the development of the project, that the joint venture would make up the needed capital to fund the project, that the developer intends to break down the larger development into phases for increased flexibility, and that the development was undergoing the tentative parcel map review by the City of [redacted] However, the Petitioner, on appeal, does not provide updates on the current status of the project or other sufficient evidence to establish that the developer has obtained or is likely to obtain the required senior financing and achieved development milestones set forth in the December 2020 addendum to the business plan to support the claimed credibility and the claimed comprehensiveness of the business plan.

The Petitioner submitted an economic and job creation impacts report, dated June 2015, and an addendum to the report, dated December 2020, to demonstrate that the requisite number of jobs will be created using reasonable methodologies. The Chief determined that since the business plan is neither credible nor comprehensive, the specific job creating information used from the business plan as the basis to support the inputs into the economic model (RIMS II) is also not credible for demonstrating that the requisite number of jobs will be created.

On appeal, the Petitioner contends that he provided a revised economic impacts report and an updated business plan, which were prepared by economic experts, and that these reports contain all of the detailed elements, such as sales, costs, and income projections and detailed basis for these projections. The Petitioner further contends that the adjudicator who made the denial decision is a lay person who does not have professional knowledge to decide whether the methodology is reasonable or not reasonable; therefore, the denial decision was wrongful and should be changed. However, the record of USCIS reflects that the project was reviewed by economists who have extensive experience in the EB-5 adjudications. While we acknowledge the Petitioner's concerns, the evidence in the record does not sufficiently demonstrate that the requisite number of jobs will be created using reasonable methodologies. In visa petition proceedings, the petitioner bears the burden of establishing eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966).

In addition, the Petitioner contends that the Chief violated his constitutional due process right by not requesting for evidence about the reasonableness of methodology. But the record reflects that the Chief issued a request for evidence (RFE) on October 23, 2020. In the RFE, the Chief explained the deficiencies found in the record and provided the Petitioner with an opportunity to provide an updated job creation report or any other evidence that overcomes the deficiencies noted in the RFE. In response to the RFE, the Petitioner submitted the December 2020 addendum to the economic impacts reports, which we have discussed above.

Lastly, the Petitioner claims that we should provide USCIS' method of the allocation of jobs created and will be created to all investors, including both approved petitioners and denied petitioners. The Petitioner further claims that we also should provide the scientific theory on how this allocation works. USCIS allocates full-time positions to immigrant investors based on the date their petitions to remove conditions were filed, unless otherwise stated in the relevant documents.[8] USCIS will recognize any reasonable agreement made among the immigrant investors in regard to the identification and allocation of such qualifying positions.[9] In general, multiple immigrant investors may not claim credit for the same job, and an immigrant investor may not seek credit for the same specifically identified job position that has already been allocated to another immigrant investor in a previously approved case.[10]

While we are sympathetic to the Petitioner's circumstances, the record lacks a comprehensive and credible business plan showing that, due to the nature and projected size of the NCE, the need for at least 10 qualifying employees will result within the next two years as required by 8 C.F.R. § 204.6(j)(4)(i)(B). Accordingly, the Petitioner has not satisfied the job creation requirements.

In light of our discussion on the Petitioner's failure to satisfy the job creation requirements, we need not consider any other eligibility grounds. We will reserve other eligibility issues for future consideration should the need arise.

III. CONCLUSION

As the evidence in the record does not sufficiently establish that the NCE will create at least 10 full-time positions for qualifying employees within the next two years, which commences six months after the adjudication of the Form I-526, the Petitioner has not demonstrated by a preponderance of the evidence eligibility for the immigrant investor visa classification.

ORDER: The appeal is dismissed.

[8] *See generally* 6 USCIS Policy Manual G(2), https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-2.
[9] *See* 8 C.F.R. § 204.6(g)(2).
[10] *See generally* 6 *USCIS Policy Manual*, *supra*, at G(2)