



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 17927686

Date: FEB. 24, 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 the record did not establish, as required, that he placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk or that he is, or will be, engaged in the management of the NCE. On appeal, the Petitioner submits an appellate brief asserting that the record establishes his eligibility for the benefit sought.

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" and "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." 8 C.F.R. § 204.6(j)(2). The regulation further specifies "[e]vidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing" and "[t]he alien must show actual commitment of the required amount of capital." *Id.* Additionally, a Petitioner must provide evidence of the actual undertaking of business activity as merely establishing and capitalizing a NCE and signing a commercial lease are not sufficient to show that an immigrant investor has placed his or her capital at risk. *See Matter of Ho*, 22 I&N Dec. 206, 209-210 (Assoc. Comm. 1998).

II. ANALYSIS

The Petitioner indicates he invested \$500,000¹ in [REDACTED] the NCE, on December 10, 2015. According to the business plan, the NCE intends to operate a [REDACTED] restaurant franchise located in [REDACTED] California.

The Chief issued a request for evidence (RFE) and a notice of intent to deny (NOID) the petition, notifying the Petitioner that he did not submit sufficient evidence documenting the actual undertaking of business activity or that the Petitioner is, or will be, engaged in the management of the NCE. Among other things, the Chief raised concerns regarding extensive delays in the project such as the Petitioner being unable to obtain a commercial lease for over four years since the date of his investment in the NCE. In the NOID response, the Petitioner indicated that there were delays in obtaining a commercial lease since there was an existing restaurant located on the parcel being prepared for the development of the NCE but an anticipated opening for the restaurant was set for December 2020.

After reviewing the record, the Chief denied the petition, finding that the Petitioner had not shown any evidence his project was being developed or that he had obtained a lease agreement or licenses and permits required for the project since the Petitioner's investment in the NCE five years ago. The Chief also found the Petitioner's submission of a draft franchise agreement did not indicate he is, or will be, engaged in the management of the NCE as the franchise agreement did not indicate the Petitioner had any ownership interest in the NCE. On appeal, the Petitioner contends that he has shown his eligibility for the classification.

A. Capital at Risk

Considering the record in its totality, we find that the Petitioner has not demonstrated he has placed his capital at risk as he has not provided evidence of the NCE engaging in the actual undertaking of business activity. *Id.* The record indicates that the Petitioner was still in negotiations working toward finalizing a commercial lease nearly two years after making his investment in the NCE. Additionally, the Petitioner still had not obtained a commercial lease or provided any licenses or permits required to develop and operate the NCE five years after his investment in the NCE. On appeal, the Petitioner has not submitted any additional evidence indicating a commercial lease has been obtained or that the project has moved forward in a way that would indicate the NCE has engaged in the actual undertaking of business activity. Without some evidence of business activity, no assurance exists that the funds will be used to carry out the business of the commercial enterprise. *Id.*

On appeal, the Petitioner indicates he still does not have a commercial lease or the licenses and permits required to develop the project but claims the COVID-19 pandemic has caused delays with the project. However, as the Chief noted in her RFE, NOID, and denial, the project experienced significant delays with no evidence of the NCE engaging in the actual undertaking of business activity for nearly five years before the COVID-19 pandemic. Additionally, Petitioner's counsel asserts that the Petitioner has not provided licenses or permits because the restaurant "building must be completed in order to obtain permits and licenses from state or city agencies" but did not submit any documentary evidence to

¹ 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).

support this assertion. Assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). The Chief's decision noted a number of claims that lacked evidentiary support. On appeal, the Petitioner has not submitted new evidence to overcome the concerns identified by the Chief or to otherwise demonstrate that the NCE is engaged in the actual undertaking of business activity.

A petitioner must show that the NCE engaged in the actual undertaking of business activity. *Ho*, 22 I&N at 209-210. Here, for the reasons discussed, the Petitioner has not made such a showing.

B. Engaged in the Management of the NCE

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 whether he is, or will be, engaged in the management of the NCE. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to 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

The Petitioner has not established that he placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk." 8 C.F.R. § 204.6(j)(2).

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.