U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20419072

Date: JUL. 12, 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) (2017). 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 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 Petitioner's Immigrant Petition by Alien Entrepreneur (Form I-526) on the ground that he did not show the new commercial enterprise, [redacted] (NCE), would likely create at least 10 full-time positions for qualifying employees for each of the investors seeking EB-5 classification. *See* 8 C.F.R. § 204.6(g)(1), (j)(4)(i) (2017). Specifically, the Chief concluded that the Petitioner did not submit a comprehensive and credible business plan showing that the NCE, or its wholly-owned subsidiary, [redacted] would likely create the requisite number of jobs. *See* 8 C.F.R. § 204.6(j)(4)(i)(B); *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). The matter is now on appeal. On appeal, the Petitioner submits a brief and additional evidence, asserting that he has established eligibility for the EB-5 classification.

In these proceedings, it is the Petitioner's burden to establish, by a preponderance of the evidence, his eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012); *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).[1] Upon 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 an NCE. An NCE can be a commercial enterprise as well as "a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-

[1] If a petitioner submits relevant, probative, and credible evidence that leads us to believe that the claim is "more likely than not" or "probably" true, he or she has satisfied the preponderance of the evidence standard. *Chawathe*, 25 I&N Dec. at 375-76.

profit activity formed for the ongoing conduct of a lawful business." 8 C.F.R. § 204.6(e) (defining "commercial enterprise").

An investor seeking EB-5 classification must show that his or her investment will benefit the United States economy and create at least 10 full-time jobs for qualifying employees. 8 C.F.R. § 204.6(j)(4). An NCE may be relied upon by multiple investors each seeking EB-5 classification, provided that each investor has invested or is actively in the process of investing the required amount, and that each individual investment results in the creation of at least 10 full-time positions for qualifying employees. 8 C.F.R. § 204.6(g)(1). The regulation defines "an employee" as "an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise." 8 C.F.R. § 204.6(e) (defining "employee").

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.[2]

Prospective job creation must be demonstrated through submission of a comprehensive business plan. The precedent decision *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998), explains 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" and that "[i]t should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions." *Matter of Ho*, 22 I&N Dec. at 213, specifies that to be "comprehensive," a business plan "must be sufficiently detailed to permit [U.S. Citizenship and Immigration Services (USCIS)] to draw reasonable inferences about the job-creation potential." "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.*

[2] 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* G.2(D)(5), https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-2.

II. ANALYSIS

According to page 2 of the petition, the Petitioner invested $500,000[3] in the NCE. He presented to the Chief two business plans, dated June 2016 and October 2020, respectively.[4] Page 5 of the 2016 business plan indicates that the NCE intends to fund "the establishment of a [redacted] Hotel and Suites in the area of [redacted]." Pages 8 and 9 of the 2016 business plan explain that the NCE "is owned at 100% by [redacted]" and is seeking $5 million investment from 10 foreign national investors. The 2016 business plan states that the NCE "will loan the entire EB-5 funds to [redacted] who will make an equity contribution to [redacted] in order to finance the construction of the [redacted] Hotel and Suites." Page 9 of the 2016 business plan reiterates that the "EB-5 investments will go into [the NCE]; however, the investments will be used by [redacted] for the construction of the [redacted] Hotel and Suites." The 2016 business plan claims that "[redacted] owns 26% of [redacted]" which "holds the leasehold interest in the land" where the hotel will be developed. The 2016 business plan also indicates that the NCE "and its wholly-owned subsidiary [redacted] will manage the hotel and provide all staffing." The October 2020 business plan includes the same information.

The Petitioner, through his counsel, explains on page 2 of a December 2020 letter:

> [T]he NCE has two lines of businesses: (1) making the loan to [redacted] which will be used as partial funding to construct the [redacted] Hotel [and Suites] and will earn a profit through the interest payments made on the loan; and (2) providing the staffing for the management and operations of the Hotel and being paid pursuant to the Management Agreement for this service.

The December 2020 letter reiterates: "the NCE will earn a profit by extending the loan and earning interest on the loan . . . as well as through fees earned pursuant to the Management Agreement when it staffs the Hotel with its direct employees."

The record includes a 2016 Loan Agreement between the NCE and [redacted] indicating that the NCE will lend [redacted] up to $5 million, and that [redacted] "intends to use the [loan] proceeds . . . to make a capital contribution to [redacted] which will constitute a portion of the financing needed to develop and renovate the hotel." Page 3 of the agreement notes that [redacted] will use such capital contribution for the development, renovation, and operation of the [hotel] Project and for the general working capital needs." Page 3 of the agreement further provides that the loan "shall bear interest at the rate of four percent (4.0%) per annum," which "shall be paid quarterly." In a March 2021 statement, [redacted] claims that the NCE "raised $5 million from ten (10) EB-5 investors" and that the NCE "made a loan to [him,] and in turn, [he] invested the proceeds in [redacted] to finance the ongoing construction of the project."

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[3] On March 15, 2022, President Biden signed the EB-5 Reform and Integrity Act, which made significant amendments to the EB-5 program, including the designation of targeted employment areas and the minimum investment amounts. *See* Section 203(b)(5) of the Act, 8 U.S.C. § 1153(b)(5) (2022). In this case, the Petitioner indicates that, at the time of filing, the NCE was located in a targeted employment area and that the requisite amount of qualifying capital was downwardly adjusted from $1,000,000 to $500,000. *See* 8 C.F.R. § 204.6(f)(2) (2017).

[4] On appeal, the Petitioner submits a third business plan, dated September 2021.

The record also includes an October 2016 Hotel Management Agreement between [redacted], and [redacted] noting that [redacted] is "to direct, supervise, manage, and operate the Hotel."[5] Page 11 of the agreement indicates that [redacted] will be compensated with "Management Fees" which will comprise of "a Base Management Fee" and "an Incentive Management Fee." Page 5 of the agreement specifies that [redacted], "shall open and operate the Hotel's bank accounts . . . in [redacted] name" and that "[a]ll sums received from the operation of the Hotel and all items paid by [redacted] arising by virtue of [the] operation of the Hotel shall pass through [the] bank accounts." While page 4 of the agreement indicates that "[a]ll Hotel Personnel shall be employees of [redacted]," it also states on page 3 that "the cost of wages, salaries . . . and other necessary employee costs . . . paid to or for personnel employed for the operation of the Hotel" are considered part of the [redacted] Hotel and Suites' operating expenses. Page 10 of the agreement specifies that before [redacted] begins its operation of the hotel, [redacted] "shall maintain cash in the Hotel accounts ("Operating Funds") sufficient in amount to properly operate the Hotel." Exhibit A of the 2016 Hotel Management Agreement notes that [redacted] must maintain a "minimum operating funds balance [of] $100,000."

According to page 16 the 2016 business plan [redacted] "will create at least 107 new full-time jobs to staff the hotel," which will include positions in the departments of "front desk," "housekeeping," "maintenance," "food" and "catering." Page 25 of the 2016 business plan claims that the "managerial team will be hired 3 months prior to the opening of the hotel, and the remaining employees will be hired 1 month prior to the operating of the hotel." The October 2020 business plan presents similar information, except it claims on pages 16, 25, and 36 that [redacted] will create 108 full-time positions.

A. Job Creation

The Petitioner does not allege, and the record does not demonstrate, that the NCE or its wholly-owned subsidiary has already created any jobs. As such, to satisfy the job creation requirements, the Petitioner must present a comprehensive and credible business plan showing that the NCE and/or its wholly-owned subsidiary will likely use his $500,000 remittance to create at least 10 full-time positions for qualifying employees within the next two years. *See* 8 C.F.R. § 204.6(j)(4)(i)(B); *Matter of Ho*, 22 I&N Dec. at 213. The record is insufficient to demonstrate that the Petitioner has satisfied these requirements.

As discussed in the Chief's decision, assuming *arguendo* that the Petitioner could rely on the anticipated positions discussed in the 2016 and 2020 business plans as evidence of the NCE or [redacted] job creation, he had not sufficiently demonstrated that the job projection was credible or that the business plans, and the accompanying documents, were sufficiently detailed to permit USCIS to draw reasonable inferences about the job-creation potential. See *Matter of Ho*, 22

[5] According to page 2 of the 2016 Limited Liability Company Agreement of [redacted], "the business and affairs of [redacted] shall be managed by or under the direction of the Mangers [who are [redacted] (associated with the [redacted]), and [redacted]], acting jointly."

I&N Dec. at 213. Both the 2016 and 2020 business plans claim that the [redacted] report" indicates that the hotel will create 107 or 108 full-time jobs. In a June 2016 letter, the vice-president of human resources of the [redacted] states that the "hotel is in a high profit market with strong occupancy rate" and must therefore be staffed with 107 full-time employees in various departments. In a March 2021 letter, the senior vice-president of the [redacted] claims that his company "currently manages three full-service hotels," and that he "anticipate[s] an employee count of 111" for [redacted] Hotel and Suites. He also alleges: "Guidance provided by The Traditional Hotel Industry study, for a hotel with similar amenities and room count as the [redacted] has the employee ratio of 0.625:1."

As noted in the Chief's decision, however, the letters from the [redacted] and the business plans do not sufficiently support the claim that the hotel will likely need 107 or 108 full-time employees. The Chief noted that the record did not include the referenced "Traditional Hotel Industry study" or other corroborating evidence substantiating the employment projection figures presented by the [redacted], the business plans, or the Petitioner. The Chief further observed that the record lacked "balance sheets or payroll statements from the three hotels mentioned [in [redacted]' March 2021 letter] to corroborate the claims on employment." Additionally, [redacted] Hotel and Suites' departments that purportedly will require staffing as well as the alleged number of employees needed for various departments have changed between [redacted]' June 2016 and March 2021 letters. As the Chief explained in the decision, "[t]here is not sufficient detail in the business plan[s] or supporting documents to verify that the staffing projection for the hotel is reasonable." Without additional corroborating documentation concerning the hotel's staffing needs, and evidence in support of the changes in the purported staffing needs, the anticipated job creation figures constitute "[m]ere conclusory assertions" that "do not enable [USCIS] to determine whether the job-creation projections are any more reliable than hopeful speculation." *See Matter of Ho*, 22 I&N Dec. at 213.

Moreover, while both the 2016 and 2020 business plans allege that the Petitioner's $500,000 remittance to the NCE will lead to job creation by the NCE or its wholly-owned subsidiary, the evidence in the record does not support this claim. According to documentation in the record, including the 2016 and 2020 business plans, the 2016 Loan Agreement, as well as [redacted] March 2021 statement, the NCE received $5 million from the Petitioner and nine other foreign nationals seeking EB-5 classification. The NCE then loaned the $5 million to [redacted] to invest in [redacted], which purportedly used the amount in the development and construction of [redacted] Hotel and Suites. These documents indicate that if and when [redacted] hires employees for the hotel, neither the NCE nor [redacted] would have any funds from the 10 foreign national investors. In other words, neither the NCE nor its wholly-owned subsidiary would be using the $5 million that the foreign nationals invested to pay for the wages, salaries, or other remuneration of the 107 or 108 anticipated employees discussed in the 2016 and 2020 business plans. In addition, the record lacks financial documents confirming that either NCE or [redacted] will likely have the financial means to pay them. Without additional corroborating evidence, the Petitioner has not sufficiently shown that the business plans, specifically,

as relating to claims regarding the NCE or its wholly-owned subsidiary's job creation potential, are credible.[6] *See Matter of Ho*, 22 I&N Dec. at 213.

On appeal, the Petitioner submits another business plan, dated September 2021, and additional documents he claims to relate to the hotel's job creation projections. We will not consider the additional evidence because the Chief had issued two notices of intent to deny (NOID) the petition, each one notifying the Petitioner that the record was insufficient to establish he met the job creation requirements. As the Petitioner had multiple opportunities to supplement the record before the Chief on this issue, we will not consider for the first time on appeal evidence that he should have presented to the Chief. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Based on the reasons we have discussed above, we conclude that the Petitioner has not sufficiently shown that his $500,000 remittance to the NCE will likely result in the NCE or its wholly-owned subsidiary, [redacted] directly creating at least 10 full-time jobs for qualifying employees. *See* 8 C.F.R. § 204.6(g)(1), (j)(4). Specifically, he has not submitted a credible and comprehensive business plan showing that the NCE or its wholly-owned subsidiary will likely create the requisite number of full-time positions for qualifying employees within the next two years. *See* 8 C.F.R. § 204.6(j)(4)(i)(B); *see also Matter of Ho*, 22 I&N Dec. at 213.

B. Qualifying Investment

In the alternative, the Petitioner has not demonstrated that his remittance to the NCE constitutes a qualifying investment. As noted on page 9 of the Chief's decision, the Petitioner has not submitted sufficient evidence showing "how [his $500,000] investment is directly responsible for creating jobs." *Matter of Izummi*, 22 I&N Dec. 169, 179 (Assoc. Comm'r 1998), specifies that "[t]he full amount of [EB-5] money must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based." In this case, the Petitioner claims that his $500,000 went from the NCE, to [redacted], to [redacted], which purportedly used the funds to develop and construct [redacted] Hotel and Suites. The record does not indicate, and the Petitioner does not allege, that his $500,000 was ever remitted to [redacted] the business he claims will hire the 107 or 108 full-time employees to satisfy the job creation requirements. *See* 8 C.F.R. § 204.6(j)(4)(i)(B). As such, the Petitioner has not shown that the full amount of his EB-5 funds has been made available to [redacted] the business most closely responsible for creating the purported employment upon which the petition is based. *See Matter of Izummi*, 22 I&N Dec. at 179; 8 C.F.R. § 204.6(j)(4); *see also* 6 *USCIS Policy Manual* G.2(A)(2), https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-2.[7]

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[6] Based on the Petitioner's assertion, it appears that, at best, [redacted] has used or will use his funds to create jobs associated with the development and construction of the hotel, which are jobs not directly created by either the NCE or its wholly-owned subsidiary. The development and construction jobs are therefore indirect jobs that do not satisfy the job creation requirements in this case. *See* 8 C.F.R. § 204.6(e) (defining "employee" and "full-time employment"), (j)(4)(iii), (m).

[7] In light of our discussion on the Petitioner's failure to satisfy the job creation requirements, we need not consider the Chief's additional concern relating to the viability of the project while [redacted], the majority owner of the NCE and an owner of [redacted], is going through divorce proceedings. We will instead reserve this and other eligibility issues for future consideration should the need arise.

III. CONCLUSION

The Petitioner has not presented a comprehensive or credible business plan showing that, due to the nature and projected size of the NCE, it or its wholly-owned subsidiary will likely hire at least 10 qualifying full-time employees for each foreign national investor seeking EB-5 classification within the next two years. *See* 8 C.F.R. § 204.6(g)(1), (j)(4)(i)(B); *Ho*, 22 I&N Dec. at 213. In addition, he has not sufficiently established that the full amount of his purported EB-5 funds has been made available to [redacted], the business most closely responsible for the job creation upon which the petition is based. *See Matter of Izummi*, 22 I&N Dec. at 179; 8 C.F.R. § 204.6(j)(4). Accordingly, the Petitioner has not demonstrated, by a preponderance of the evidence, his eligibility for the immigrant investor classification.

ORDER: The appeal is dismissed.