U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22816025

Date: JAN. 20, 2023

Motion on Administrative Appeals 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) (2016). This fifth preference (EB-5) classification makes immigrant visas available to noncitizens 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.[1]

The Chief of the Immigrant Investor Program Office denied the petition on multiple independent and alternate grounds, including finding that the Petitioner did not document the lawful source of his purported EB-5 funds. *See* 8 C.F.R. § 204.6(e) (defining "capital") (2016); *see also Matter of Ho*, 22 I&N Dec. 206, 210-11 (Assoc. Comm'r 1998); *Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998). On appeal, the Petitioner did not challenge, address, or reference the Chief's adverse lawful source of funds finding. We therefore "deem[ed] the issue waived and [found] the Petitioner [had] failed to show, by a preponderance of the evidence, that his invested capital did not derive from unlawful means." We then dismissed the Petitioner's combined motions to reconsider and reopen the proceeding.

The matter is again before us on combined motions to reconsider and reopen the proceeding. On motion, the Petitioner submits a statement and additional documentation. 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). Upon review, we will dismiss the combined motions.

I. LAW

A motion to reconsider is based on an incorrect application of law or policy to the prior decision, and a motion to reopen is based on documentary evidence of new facts. The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3), and the requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates

[1] On March 15, 2022, President Joseph 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).

eligibility for the requested immigration benefit. In addition, by regulation, the scope of a motion is limited to "the prior decision." 8 C.F.R. § 103.5(a)(1)(i).

II. ANALYSIS

Page 2 of the petition alleges that the Petitioner made his initial investment of $92,500 in [redacted] Inc., the NCE, in March 2004. It further claims that his total capital investment was $2,728,000 at the time he filed the petition in 2016. On page 11 of a November 2018 letter, the Petitioner claimed that "[t]he source of funds used by [him] to invest in [the NCE] came from income earned by [him] and his wife . . . over the years as well as from the proceeds earned from the sale of two (2) residential properties . . . ." The 2018 letter then indicates that the Petitioner was employed "as an auto body repair man from 1985 until 1988" and worked "also as an auto body repair man from 1988 until 2005." The Chief explained in the decision that "USCIS [U.S. Citizenship and Immigration Services] records show the [P]etitioner received his initial work authorization card in 1999." The Chief concluded that the Petitioner did not establish he had received employment authorization between 1985 and 1999, and thus, did not sufficiently document the lawful source of the funds he claimed to have invested in the NCE.

As we explained on page 2 of our appellate decision, on appeal, the Petitioner did not challenge, address, or reference the Chief's adverse lawful source of funds finding. We therefore "deem[ed] the issue waived and [found] the Petitioner [had] failed to show, by a preponderance of the evidence, that his invested capital did not derive from unlawful means." After dismissing the appeal on a dispositive issue, we declined to consider and reserved consideration on the Chief's other independent and alternate grounds for denial.

Subsequently, we dismissed the Petitioner's combined motions to reconsider and reopen the proceeding. We dismissed his motion to reconsider the matter, finding that on motion, "the Petitioner has not argued our previous [appellate] dismissal was incorrect based on an incorrect application of law or policy." We explained in our motion decision that we "determined [in our appellate decision] the Petitioner had waived [the] issue [of lawful source of funds] on appeal for failure to raise it in his appellate brief or notice of appeal and [on motion,] he does not cite to any [legal authority] to establish that the [appellate] decision was defective in some regard." Next, we dismissed his motion to reopen the proceeding. We noted that the Petitioner had offered "an illegible copy of an employment authorization card" and that "much of the information on the card, including pertinent identification information, is obscured and the employment authorization is not otherwise verifiable in USCIS records."

The matter is again before us on motion. We will dismiss the Petitioner's motion to reconsider the matter. On motion, the Petitioner claims that he "has demonstrated by a preponderance of the evidence that the source of the funds which were invested in the NCE was lawful." The Petitioner, however, does not specifically address our appellate decision in which we found that he had waived this issue on appeal. Similarly, the Petitioner does not demonstrate, or even claim, that our motion decision – the prior decision – was based on an incorrect application of law or USCIS policy or was incorrect

based on the evidence before us when we issued the motion decision. As such, the Petitioner has not demonstrated that his filing meets the motion to reconsider requirements. *See* 8 C.F.R. § 103.5(a)(3).

Similarly, we will dismiss the Petitioner's motion to reopen the matter. In support of his motion, the Petitioner offers a 1989 document from the U.S. Department of Justice concerning an immigration application, and a copy of an employment authorization card issued in 1999. These documents, however, do not overcome, or address, the conclusion in our appellate decision that the Petitioner had waived the lawful source of funds issue on appeal because he did not timely raise it. *See*, *e.g.*, *Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009); *see also Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011) (finding that issues not raised in a brief are deemed waived). The Petitioner has not cited to any legal authority indicating that we should consider materials concerning an issue that he had waived on appeal, or that submission of such documentation on motion negates his waiver of a dispositive issue on appeal. As such, the Petitioner has not demonstrated that his filing meets the motion to reopen requirements. *See* 8 C.F.R. § 103.5(a)(2); *see also* 8 C.F.R. § 103.5(a)(1)(i) (noting that the scope of a motion is limited to "the prior decision").

ORDER: The motion to reconsider is dismissed.

FURTHER ORDER: The motion to reopen is dismissed.