U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23791790

Date: JAN. 31, 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).[1] 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.

The Chief of the Immigrant Investor Program Office denied the petition, and subsequent motions. We dismissed the Petitioner's appeal, finding that she did not sufficiently document "all invested capital [in [redacted] LLC, the NCE,] has been derived by lawful means," as required under 8 C.F.R. § 204.6(g)(1) (2016). The Petitioner has filed a motion to reconsider the matter. On motion, the Petitioner maintains that we have "erred in understanding some material facts."

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 motion to reconsider the matter.

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 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).

[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).

II. ANALYSIS

As discussed in our appellate decision, the Petitioner offered documents indicating that the NCE has multiple investors. In her motion filing to the Chief, the Petitioner presented a document entitled "[The NCE], Capital Accounts and Member Registry, Capital Accounts, 09-Jan-20" that lists 50 investors, both natural and non-natural persons, including three individuals who seek EB-5 classification. We explained on page 3 of our appellate decision that "none of the documents in the record identify the sources of any of the funds invested in the NCE from other investors" and that "the letter from the manager of the NCE alleging all sources of funds invested in the NCE derived from lawful means is not sufficient to demonstrate, by a preponderance of the evidence, the lawful sources of the funds invested."

On motion, the Petitioner argues that we erred in requiring her to show the lawful source of all investments in the NCE. Instead, she claims that under 8 C.F.R. § 204.6(g)(1) and the regulatory definition of "capital," she is only required to show the lawful source of her own invested funds. Specifically, she argues that under the regulatory definition, capital, as referenced in 8 C.F.R. § 204.6(g)(1), refers only to capital of individuals are seeking EB-5 classification; and as such, she asserts that she need not show the lawful source of investors who are not seeking EB-5 classification. *See* 8 C.F.R. § 204.6(e).

The plain language of the regulation does not support her contention. The regulation specifies:

> . . . The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur even though there are several owners of the enterprise, including persons who are not seeking [EB-5] classification . . . and non-natural persons, both foreign and domestic, provided that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means.

8 C.F.R. § 204.6(g)(1). As illustrated above, the regulation specifically references investments from "persons who are not seeking [EB-5] classification" and then requires a showing that "all invested capital has been derived by lawful means." The plain language of the regulation does not support a finding that the Petitioner is required to document only the lawful source of her own funds.

Additionally, the regulation defines "capital" as "cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness." 8 C.F.R. § 204.6(e). The definition references "alien entrepreneur" when discussing "indebtedness," but not when listing other forms of capital, including "cash, equipment, inventory, other tangible property, [and] cash equivalents." The language of the regulatory definition thus does not support the Petitioner's position that "capital," as referenced in 8 C.F.R. § 204.6(g)(1), only pertains to capital invested by those who seek EB-5 classification.

On motion, the Petitioner also states that "[i]t is not possible for [her] to vouch for the capital invested by other investors," because "it is not possible for [her] to obtain private and confidential financial information about all investors in the project." Notwithstanding her claims, the regulatory requirement

is that she must document "the source(s) of all capital invested," showing that "all invested capital has been derived by lawful means." 8 C.F.R. § 204.6(g)(1). The Petitioner's purported inability to offer sufficient supporting evidence does not eliminate this requirement. As noted in our appellate decision, "[i]t is the Petitioner's burden to establish eligibility for the immigration benefit sought." *See Matter of Chawathe*, 25 I&N Dec. at 375-76; *see also* 8 C.F.R. § 103.2(b)(2)(i) (stating that "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility").

The Petitioner argues on motion, as she did on appeal, that U.S. Citizenship and Immigration Services (USCIS) should approve her petition, because it approved the petition of one of the NCE's other investors. As explained in our appellate decision, "we are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous."[2] *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988); *see also Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). Furthermore, we are not bound to follow a contradictory decision of the Chief. *La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *3 (E.D. La. 2000), *aff'd*, 248 F.3d 1139 (5th Cir. 2001); *see generally* 6 *USCIS Policy Manual* G.6, https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-6 (noting "USCIS will . . . conduct a de novo review of each prospective immigrant investor's lawful source of funds and other individualized eligibility criteria").[3]

Based on these reasons, we will dismiss the motion to reconsider the matter because the Petitioner has not shown that our appellate 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 decision. *See* 8 C.F.R. § 103.5(a)(3).[4]

ORDER: The motion to reconsider is dismissed.

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[2] Additionally, we note that our adjudication is limited to the matter before us, and the record before us does not establish the Petitioner's eligibility.

[3] On motion the Petitioner expresses, as she did on appeal, her dissatisfaction with the management of the NCE and the services she received from her prior counsel. A motion filing, however, is not the proper mechanism to voice and redress these issues. Additionally, as noted in our appellate decision, "to the extent the Petitioner alleges ineffective assistance of counsel, she has not complied, either strictly or substantially, with the procedural requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988)."

[4] While the Petitioner has offered additional materials on motion, she has not filed a motion to reopen the proceeding. *See* 8 C.F.R. § 103.5(a)(2). As such, we consider the materials only as support for her motion to reconsider and conclude that they do not satisfy the motion to reconsider requirements.