U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25965853

Date: JUNE 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). 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.

The Chief of the Immigrant Investor Program Office denied the petition, concluding that the record did not establish that the Petitioner has invested or is actively in the process of investing the required amount of capital in [redacted], the new commercial enterprise (NCE), and that the capital, which has been invested by the Petitioner or which the Petitioner is actively in the process of investing, is capital that has been obtained through lawful means. We subsequently dismissed the appeal and combined motions to reopen and consider on the two grounds identified in the Chief's decision. In addition, we concluded that the Petitioner did not satisfy the job creation requirements. The matter is now again before us on second combined motions to reopen and reconsider.

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 motions.

I. LAW

A motion to reopen must state new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration, establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy, and establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen or reconsider to instances where the petitioner has shown "proper cause" for that action. Thus, to merit reopening or reconsideration, a petitioner must not only meet the formal filing requirements (such as submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee) but also show

proper cause for granting the motion. We cannot grant a motion that does not meet applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).

II. ANALYSIS

As a preliminary matter, we note that, by regulation, the scope of a motion is limited to "the prior decision." 8 C.F.R. § 103.5(a)(1)(i). The issue before us is whether the Petitioner has established that we erred in dismissing the prior motion to reopen for failure to state new facts supported by affidavits or other documentary evidence and that our decision to dismiss the prior motion to reconsider was based on an incorrect application of law or USCIS policy.

We incorporate our prior decision by reference and will repeat only certain facts and evidence as necessary to address the Petitioner's claims on motion. While we may not address each piece of evidence individually, we have reviewed and considered each one.

A. Motion to Reopen

Initially, we note that motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial based on newly discovered evidence. *INS v. Doherty,* 502 U.S. 314, 323, (1992) (citing *INS v. Abudu,* 485 U.S. 94, 108 (1988)); *see also Selimi v. Ashcroft,* 360 F.3d 736, 739 (7th Cir. 2004). There is a strong public interest in bringing proceedings to a close as promptly as is consistent with giving both parties a fair opportunity to develop and present their respective cases. *INS v. Abudu,* 485 at 107.

Based on its discretion, USCIS "has some latitude in deciding when to reopen a case" and "should have the right to be restrictive." *Id.* at 108. Granting motions too freely could permit endless delay when noncitizens continuously produce new facts to establish eligibility, which could result in needlessly wasting time attending to filing requests. *See generally INS v. Abudu,* 485 U.S. at 108. The new facts must possess such significance that, "if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *Matter of Coelho,* 20 I&N Dec. 464, 473 (BIA 1992); *see also Maatougui v. Holder,* 738 F.3d 1230, 1239-40 (10th Cir. 2013). Therefore, a party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu, 485* at 110. With the current motion, the Petitioner has not met that burden.

On motion, the Petitioner contends that he submits additional evidence to show that he has invested or is in the process of investing $500,000 in the NCE, to document the source of funds he invested, and to show that he satisfied the job-creation requirements. The Petitioner submits (1) copies of various photographs taken at the place of the NCE's family entertainment business, (2) Form 1120 (U.S. Corporation Income Tax Return) of the NCE from 2014 to 2021, (3) a duplicate copy of a check for $100,000 issued by the Petitioner to the NCE on December 30, 2014 and a transaction receipt showing a deposit of $100,000 into the NCE's PNC Bank account ending in [redacted] on December 30, 2014, (4) a deposit slip and a transaction receipt showing a deposit of $100,000 into the NCE's PNC Bank account ending in [redacted] on March 24, 2017, (5) a duplicate copy of a bank statement of the Petitioner for his PNC Bank account ending in [redacted] for the period covering from December 30, 2014 to January 23, 2015, (6) a bank statement of the NCE for its PNC Bank account ending in [redacted] for the period covering from November 29, 2014 to December 31, 2014, and (7) unaudited financial

statements of the NCE as of July 31, 2021. These documents do not overcome the grounds upon which we dismissed the prior motions and do not demonstrate his eligibility for the immigrant investor visa classification.

Regarding the job-creation requirements, the Petitioner contends that that the NCE cannot operate its business without a minimum of 13 full-time positions based on its operating hours of at least 74 hours per week and that the quarterly reports to the State of Michigan demonstrated that there are over 30 employees in job-sharing positions. However, the record does not contain job-sharing agreements or other sufficient evidence to demonstrate that over 30 employees of the NCE are in job-sharing arrangements as claimed. The photographs taken at the place of the NCE's business, the NCE's tax returns, and unaudited financial statements of the NCE may support the actual undertaking of business activity of the NCE. However, they do not demonstrate that most of the employees of the NCE who worked less than 35 hours per week had job-sharing arrangements to demonstrate that the Petitioner has satisfied the job-creation requirements.

As required by 8 C.F.R. § 204.6(j)(4)(i), a petitioner 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. The regulation defines "full-time employment" as employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week. 8 C.F.R. § 204.6(e). The regulation further states that a job-sharing arrangement whereby two or more qualifying employees share a full-time position shall count as full-time employment provided the hourly requirement per week is met and that this definition shall not include combinations of part-time positions even if, when combined, such positions meet the hourly requirement per week. *Id.*

With respect to the required amount of capital investment requirement, the Petitioner contends that the NCE's federal tax return for 2017 shows that additional paid-in capital is $542,266.65, which exceeds the minimum threshold required by statute for investment in a targeted employment area (TEA). The NCE's tax returns reflect that the NCE is owned by three shareholders: (1) the Petitioner (60%), (2) [redacted] (10%), and (3) [redacted] (30%). Schedule L (Balance Sheets per Books) of the NCE for 2017 indicates that as of December 31, 2017, the shareholders' equity was $845,360, which includes $10,000 in common stock, $542,267 as additional paid-in capital, and $293,093 as retained earnings. Since the NCE is owned by three shareholders who made capital contributions to the NCE for their respective ownership interests in the NCE, the fact that the NCE's tax returns shows $542,267 as additional paid-in capital as of December 31, 2017 does not establish that the Petitioner alone made capital contributions of $542,267 in the NCE.

Applicable statutory and regulatory provisions provide that the immigrant investor must generally invest or be actively in the process of investing at least $1,000,000 of capital in a new commercial enterprise. 8 U.S.C. §§ 1153(b)(5)(A)(i), (C)(i); 8 C.F.R. §§ 204.6(f)(1), (j)(2). Alternatively, an immigrant investor can invest or be actively in the process of investing a reduced amount ($500,000) of capital if the new commercial enterprise into which the immigrant investor is investing is principally doing business in and creates jobs in a TEA. 8 U.S.C. §§ 1153(b)(5)(A)(i), (B)(i), (C)(ii); 8 C.F.R. §§ 204.6(f)(2), (j)(2), (j)(6).

Next, we address the lawful source of funds requirement. Regarding the $100,000 deposited into the NCE's PNC Bank account ending in [redacted] on December 30, 2014, the Petitioner contends that he sold his interest in a business for $100,000. The record contains a stock purchase agreement by the Petitioner (Seller), [redacted] (Purchaser), dated December 30, 2014. The agreement states that on December 30, 2014, the Petitioner agreed to sell 10 shares of stock of [redacted] for $100,000 to [redacted] and that closing would occur prior to December 30, 2014. However, the record does not contain sufficient evidence to demonstrate the claimed sale of the shares of the company by the Petitioner and also to demonstrate that the source of funds used by the Petitioner to acquire ownership interests in the company derived from lawful means. A petitioner must demonstrate by a preponderance of the evidence that the capital was his or her own and was obtained through lawful means. 8 C.F.R. § 204.6(j)(3); *see also Matter of Ho*, 22 I&N Dec. 206, 210 (Assoc. Comm'r 1998).

With respect to the claimed additional capital contribution, the record does not contain sufficient evidence to demonstrate that the Petitioner was the legal owner of the $100,000 deposited into the NCE's PNC Bank account ending [redacted] on March 24, 2017. A petitioner must show that he or she has placed his or her own capital at risk, i.e., that he or she was the legal owner of the invested capital. *Matter of Ho*, 22 I&N Dec. 206; *see also Matter of Soffici*, 22 I&N Dec. at 165 n.3 (interpreting 8 C.F.R. § 204.6(e) as requiring that a petitioner establish the funds invested are his or her own). Moreover, the record does not contain sufficient evidence to demonstrate that the $100,000 was the Petitioner's own funds and was obtained through lawful means. A petitioner must demonstrate by a preponderance of the evidence that the capital was his or her own and was obtained through lawful means. 8 C.F.R. § 204.6(j)(3); *see also Matter of Ho*, 22 I&N Dec. at 210.

The record remains insufficient to establish that the Petitioner has invested or is actively in the process of investing the required amount of capital; that the capital, which has been invested by the Petitioner or which the Petitioner is actively in the process of investing, is capital obtained through lawful means; and that the Petitioner has satisfied the job-creation requirements. Accordingly, we conclude that the Petitioner has not shown proper cause for reopening the proceeding.

B. Motion to Reconsider

As stated above, in order to have established merit for reconsideration of our latest decision, a petitioner must both state the reasons why he or she believes the most recent decision was based on an incorrect application of law or policy and specifically cite laws, regulations, precedent decisions, or binding policies that the petitioner believed we misapplied in that prior decision. Thus, to prevail in his motion to reconsider, the Petitioner cannot merely disagree with our conclusions but rather must demonstrate how we erred as a matter of law or policy in that immediate prior decision. *See Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006) (finding that a motion to reconsider is not a process by which the party may submit, in essence, the same brief and seek reconsideration by generally alleging error in the prior decision).

While we acknowledge the Petitioner's claims on motion, the Petitioner does not directly address the conclusions we reached in our immediate prior decision nor he provides reasons for reconsideration of those conclusions. The brief in support of the current motions lacks any cogent argument as to how

we misapplied the law or USCIS policy in dismissing the prior motions to reopen and reconsider. The Petitioner reiterates his previous arguments, but these assertions were thoroughly discussed in our prior decision dismissing the appeal and again in our prior decision dismissing the prior motions. As such, we incorporate our prior decisions by reference. The Petitioner does not identify any incorrect application of law or policy by us in our prior decision dismissing the prior motions.

The Petitioner has not shown that our prior decision contained errors of law or policy or that the decision was incorrect based on the record at the time of that decision. Therefore, the instant motion does not meet the requirements of a motion to reconsider.

III. CONCLUSION

The Petitioner's motion to reconsider has not shown that our prior decision was based on an incorrect application of law or USCIS policy, and the evidence presented in support of the motion to reopen does not overcome the grounds underlying our prior decision. Therefore, we will dismiss the combined motions for the reasons stated above.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.