

Recent Revocations and Enforcement May Change the EB-5 Landscape

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INTRODUCTION

Those considering the use of an EB-5 regional center as a means of raising income should be aware of recent regional center terminations. The U.S. Citizenship and Immigration Services (USCIS) has used its ability to terminate participation of EB-5 regional centers four times in the past three years. The reasons for these terminations were based on a lack of economic growth and potential fraud. Owners and developers should be aware of USCIS' ability to terminate regional centers and adjust their practices to ensure ongoing viability. Not only will this knowledge prevent economic loss and litigation among current and potential developers, it will give investors the opportunity to adjust their practices so as to successfully plan and operate their current or future regional centers.

REVOCATION OF REGIONAL CENTER'S DESIGNATION

From December 2011 to the present, there have been four official revocations of Regional Center Designations by the USCIS. The rationale for the revocations has been as follows:

1. The USCIS will revoke a regional center's designation for lack of job creation. When undertaking a project, the jobs created *before* the investor's investment cannot be counted towards job *creation*. In order to count the jobs from a project that existed before the investor's investment, the regional center must show that investors were investing in a *troubled business* and that the project *preserved* jobs.
2. The USCIS will use certain factors to determine whether a regional center is promoting economic growth, which include:
 - a. How many investors have invested into the regional center in the last few years?
 - b. Has the regional center or the General Partner of the regional center filed for bankruptcy?; and
 - c. Does the regional center actually own the property, as they purported to own, on which the project will be built?

If the regional center is not promoting economic growth, then the USCIS will revoke its designation.

3. The USCIS will revoke a regional center's designation if it has failed to demonstrate that its projects will create jobs in verifiable detail based upon a

business plan and economic analysis that employs reasonable methodologies for estimating job creating through an EB-5 capital investment.

4. The USCIS will also revoke a regional center's designation for no longer promoting economic growth if the regional center's projects are no longer viable, and if the regional center is no longer overseeing the projects and investments that were outlined in the original request for regional center designation.

Below, we list each of the regional centers' revocations, summarize the regional centers' case history, and details the reasons for their termination. Furthermore, below are outlines of the cases of two regional centers whose promoters have found themselves in federal court facing charges of misrepresentation and fraud.

Current Immigration Law Regarding Regional Centers

Pursuant to 8 CFR Section 204.6(m)(6), the USCIS may terminate a regional center's designation for various reasons, including:

1. If the regional center fails to submit required information; or
2. If the USCIS determines that the regional center no promotes economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.

If the regional center is issued a Notice of Intent to Terminate (NOIT), then the regional center "must be provided 30 days, from receipt of the NOIT, in which to submit evidence in opposition to the ground or grounds alleged in the NOIT. Furthermore, if the USCIS determines that the regional center's participation in the Pilot Program should be terminated, the USCIS shall notify the regional center of the decision and of the reasons for termination.

Victorville Regional Center

In the recent case of the Regional Center of Victorville Development, Inc. (Victorville Regional Center or Victorville RC), the Victorville Regional Center was terminated by the USCIS on May 24, 2011, and the Administrative Appeals Office affirmed the Director's decision on December 21, 2011.

A timeline of Victorville Regional Center's case history:

1. June 19, 2009 Victorville RC approved
2. October 20, 2010 Director of California Service Center (CSC) terminated the Regional Center
3. November 19, 2010 Victorville RC filed a Motion to Reopen and Reconsider
4. December 14, 2010 Director issued a Request for Evidence
5. May 24, 2011 Director issued a Final Notice of Termination

6. December 21, 2011 Administrative Appeals Office affirmed Director's decision to Terminate the Regional Center

The USCIS' stated rationale for terminating the Victorville Regional Center was the regional center failed to promote economic growth through job creation. According to the decision adjudicated by the Administrative Appeals Office, the Victorville Regional Center sought to invest EB-5 capital only *after* the jobs in question had already been created.

According to the record, the Victorville Regional Center undertook an Industrial Waste Water Treatment Facility project (IWWTF) which involved bridge financing. Due to the structure of the bridge financing, the IWWTF began hiring employees and construction of the project reached 90% completion before the investors had contributed and invested their EB-5 capital. Therefore, according to the USCIS, Victorville Regional Center was improperly claiming immigrant investor job creation credit for jobs that existed before EB-5 capital was invested into the project.

The USCIS interpreted Victorville as a case of job *preservation* which does not meet the statutory requirement of job *creation*. Under 8 CFR 204.6 (j)(4)(ii), investors can be credited with preserving jobs, but only for investments in a troubled business. However, Victorville Regional Center did not claim or document that the investors would be investing in a troubled business. The USCIS denied Victorville Regional Center's job creation arguments and terminated its regional center designation.

When undertaking a project, the jobs created *before* the investor's investment, cannot be credited towards job *creation*. In order to count existing jobs, the regional center would need to show that the project *preserved* these jobs, and that the investors were investing in a troubled business. For job *creation* counting purposes, the Regional Center can only count those jobs created *after* the investor made the investment.

El Monte Regional Center

In the recent case of El Monte Regional Center (El Monte RC), the regional center was terminated by the USCIS on September 19, 2011 and the Administrative Appeals Office affirmed the Director's decision to terminate the regional center on July 23, 2012.

A timeline of El Monte Regional Center's case history:

1. June 25, 2008 El Monte RC approved
2. July 11, 2011 Director of CSC issued a NOIT
3. July 21, 2011 Director of CSC re-issued a NOIT because counsel had withdrawn from the case
4. August 2, 2011 Director of CSC re-issued a NOIT to include a copy of the bankruptcy docket and 2010 Annual Report
5. September 19, 2011 Director of California Service Center terminated the Regional Center
6. October 21, 2010 El Monte RC filed a Motion to Reopen and Reconsider

7. July 23, 2012 Administrative Appeals Office affirmed Director's decision to Terminate the Regional Center

El Monte Regional Center was terminated because the USCIS and subsequently the Administrative Appeals Office determined that the regional center had not demonstrated that it remained in a position to promote economic growth.

El Monte Regional Center submitted annual reports in 2009 and 2010. In the 2009 annual report, El Monte Regional Center identified a single investor, and in the 2010 report, it identified a second investor. On July 11, 2011, the USCIS issued a NOIT to El Monte Regional Center citing as factors that:

1. The center had only recruited 2 investors;
2. It had insufficient financial resources as evidenced by its bankruptcy proceedings; and,
3. The regional center did not have title to the property it purported to own.

The Administrative Appeals Office concurred with the Director that the recruitment of only two investors during the 26-month period from El Monte Regional Center's approval date was indicative that the regional center was not promoting economic growth. Furthermore, upon filing for bankruptcy, El Monte Regional Center was no longer in a position to promote economic growth because bankruptcy serves as a remedy for companies with significant debt or liquidity problems. Lastly, El Monte Regional Center failed to demonstrate that it owned interest in the property, which was the purported site for the project.

Lake Buena Vista Regional Center

In the recent case of Lake Buena Vista Regional Center (LBV RC), the regional center was terminated by the USCIS on July 23, 2012.

A timeline of LBV RC's case history:

1. September 18, 2008 LBV RC approved
2. September 25, 2009 The USCIS approved Amendment #1 (LBV RC qualified as a "troubled business")
3. January 28, 2010 The USCIS approved Amendment #2 (LBV RC designated as TEA in addition to being a "troubled business")
4. November 22, 2010 LBV filed for Amendment #4 (LBV RC sought to include a new project and requested seven additional NAICS codes)
5. February 11, 2011 The USCIS approved Amendment #3 (the USCIS recognized and approved a revised exemplar Form I-526)
6. December 19, 2011 The USCIS issued a NOIT
7. March 28, 2012 The USCIS conducted an interview of the LBV RC
8. July 23, 2012 The USCIS terminated the LBV RC

Lake Buena Vista Regional Center was terminated by the USCIS because the regional center failed to establish continuing eligibility and compliance with program requirements. The USCIS declared that LBV RC did not serve “the purpose of promoting economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.”

In a carefully worded, outlined, and substantiated termination notice, the USCIS claimed that a statistically valid job creation analysis was not submitted. They claimed this error in submission was due to errors in data sources and methodologies used to estimate the economic impacts of the project. The USCIS found the statistical trends referenced by the economic impact report to be incredible and inconclusive. Additionally, LBV RC presented a competitor analysis which showed that within the LBV region and market, there was a significant excess capacity in accommodation services. According to the USCIS, LBV RC’s ability to meet the requisite EB-5 job creation requirements cannot be predicated on a claim of increase in visitor spending based upon the given occupancy rates for the market.

The USCIS concluded that LBV RC had failed to demonstrate its projects would create jobs in verifiable detail, based upon a business plan and economic analysis that employed reasonable methodologies for estimating job creation through EB-5 capital investment.

Mamtek Regional Center

In the recent case of Mamtek Regional Center (Mamtek RC), the regional center was terminated by the USCIS on April 11, 2012.

A timeline of Mamtek RC’s case history:

1. August 10, 2011 Mamtek RC approved
2. October 28, 2011 The USCIS issued a NOIT
3. April 11, 2012 The USCIS terminated the Mamtek RC

Subsequent to Mamtek RC’s Regional Center designation, the USCIS received several I-526s for a project undertaken by the Mamtek RC. Upon closer inspection, it was determined that the four capital investment projects were not in fact, viable. However, Mamtek RC continued to promote the projects.

Mamtek RC was a single member LLC with Mamtek, U.S., Inc. According to the initial business plan, Mamtek U.S., Inc. was the operating company and full owner of the Mamtek Regional Center. However, the USCIS later discovered that the Mamtek Regional Center was no longer overseeing the projects and investments that Mamtek Regional Center had outlined in its original request for regional center designation. Instead, Mamtek Regional Center was being controlled by a new company and supervised by the City of Moberly. Therefore, the USCIS determined that the Mamtek Regional Center could no longer claim credit for the job creation related to the projects.

In its decision, the USCIS noted that even though an Involuntary Petition for Bankruptcy was filed against Mamtek U.S., Inc., Mamtek Regional Center was a separate entity. Thus, the existence of bankruptcy proceedings against Mamtek U.S., Inc. did not preclude the USCIS from exercising its power to ensure that Mamtek Regional Center had fulfilled its statutory and regulatory obligations as a regional center. However, the USCIS terminated the approval of the Mamtek Regional Center because it determined that the regional center no longer served the purpose of promoting economic growth.

FRAUD WITHIN REGIONAL CENTERS

From March 2012 to the present, two cases exist in which complaints were filed against a regional center on the basis of fraud: 1) Intercontinental Trust Center of Chicago (IRCTC) and 2) City of New Orleans Regional Center. The IRCTC case involves a regional center that violated federal securities law by misrepresenting to the USCIS the facts of the regional center activities and by utilizing EB-5 administrative costs for non EB-5 purposes. The City of New Orleans Regional Center case involved the regional center diverting millions of dollars to themselves and other non-EB-5 projects, thereby breaching their fiduciary duty to the investors.

Intercontinental Trust Center of Chicago

SEC v. A Chicago Convention Center, LLC involves claims that Anshoo Sethi, A Chicago Convention Center, LLC (ACCC), and Intercontinental Trust Center of Chicago (IRCTC) violated federal securities law, specifically Securities Act Sections 17(a)(1) & (2) and Exchange Act Section 10(b).

Sec. 17(a)(1) & (2) states

(a) It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 3(a)(78) of the Securities Exchange Act) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

- (1) to employ any device, scheme, or artifice to defraud, or
- (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

Exchange Act Section 10(b) states

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-

Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

The claims allege that Sethi (Managing Member and Agent of ACCC and IRCTC), the ACCC, and the IRCTC (the defendants) were involved in a large scale investment scheme to exploit the EB-5 federal visa program as a means to defraud investors. Over \$145 million in securities were fraudulently sold and an additional \$11 million was collected in administrative fees from more than 250 investors, primarily from China, since November 2011. The ACCC Offering Memorandum (OM) offered to sell 499 membership interests.

The complaint states that the defendants conducted fraudulent, misleading, and deceptive activities through a variety of actions that involved the marketing of a project to finance and build the “World’s First Zero Carbon Emission Platinum LEED certified” hotel and conference center in the Chicago area. The major points of the complaint are outlined below:

- In an effort to secure preliminary approval from the USCIS, the defendants submitted an OM stating that the project was progressing and that several major hotel chains had signed-on. The application included letters of support from Starwood, Intercontinental Hotel Group, and Hyatt. The SEC claims that none of these hotels have executed franchise agreements and that the letters of support are fake. In addition, the claims allege that agreements with Starwood and Intercontinental had been terminated before the project began, and that Sethi used \$35,000 in administrative fees paid by investors to settle a prior lawsuit with Wyndham Hotels.
- The OM stated that in addition to the \$249 million to be raised through EB-5 investors, the defendants would raise funding for the project by their contribution of the real estate site worth approximately \$177,000,000, and through other funds from government bond offerings and tax credits. On June 7, 2012, the USCIS sent defendant ACCC a Request for Evidence of a commitment from the State of Illinois to provide financing. The defendant responded by submitting a letter from the Qatar Investment Authority stating the Qatar Investment Authority "is prepared to move forward with the funding of' \$340 million for the Defendants' project. The Qatar Investment Authority later informed the SEC that the letter was not authentic. Furthermore, the SEC claimed that the land to be contributed by the defendants was highly overpriced, as the land actually costs less than \$10 million.
- The claims state that the defendants inflated costs listed in the business plan and economic studies submitted to the USCIS in order to artificially increase projected revenues and job creation. The SEC believes these inflated figures were submitted in an attempt to secure preliminary approval from the USCIS by demonstrating that the appropriate numbers of jobs would have been created by the project.
- The claims state that the defendants raised \$11 million in administrative fees by collecting \$41,400 in fees per investor. The OM stated that these fees are fully refundable if the investor’s I-526 petition is denied. The claims state that the defendants have spent

over 90% of the administrative fees collected, some of which have been transferred to Sethi's personal bank account in Hong Kong.

- The OM stated that all necessary permits and approvals to construct the project were secured, yet this is not true, as the defendants acquired only very minor permits.
- The OM stated that the developers have 35 years of experience, which is grossly exaggerated when realized that the developer was organized in 2010.

The Complaint requests, among other demands, for an order freezing the assets of the defendants, and an injunction to prevent them from engaging in further transactions. This lawsuit is still pending in federal court.

It is clear that when a regional center and its managing partners/members exploit the EB-5 visa program to defraud investors by using the EB-5 administrative fees to pay for non-EB-5 expenses, or to transfer the funds into the managing member's personal bank account, then federal litigation will be taken by the SEC against the regional center.

City of New Orleans Regional Center

Filed March 15, 2012, *Sumpter et al v. Hungerford et al*, concerns investors who are limited partners in the Noble Real Estate Fund, L.P. Defendants, William B. Hungerford, Jr. and Timothy O. Milbrath of Noble-Real Estate-GP, LLC, general partner of the Fund are charged with claims of gross mismanagement, breach of fiduciary duty, intentional interference with contract, conversion of the Fund's assets, and unjust enrichment. .

The claims allege that Hungerford and Milbrath failed to adhere to their commitment to use the investments to further the mission of the Fund and allow the investors to seek permanent residency through the EB-5 Program. The plaintiffs allege the defendants took the money invested and used it for their own gain and/or for other unnecessary and wasteful projects, in breach of their fiduciary duty to the Fund. The plaintiffs allege the defendants fraudulently diverted at least \$9 million in funds to themselves for consulting services and to pay for operating expenses of the New Orleans Regional Center's operations. The lawsuit also claims of gross mismanagement on behalf of the Fund, unjust enrichment on behalf of the Fund against the wives of Hungerford and Milbrath, and misappropriation on behalf of the Fund for their involvement in regional center projects and sham-companies owned by Hungerford and Milbrath that do not generate any revenues or provide any legitimate services.

In the complaint, the plaintiff lists 12 causes of action:

1. A derivative action for breach of fiduciary duty on behalf of the Fund against Mr. Hungerford, Col. Milbrath, and NobleRealEstate;
2. A derivative action for gross mismanagement on behalf of the Fund against Mr. Hungerford, Col. Milbrath, and NobleRealEstate;
3. A derivative action for conversion and misappropriation on behalf of the Fund against Mr. Hungerford, Col. Milbrath, and NobleRealEstate;

4. A derivative action for unjust enrichment on behalf of the Fund against the wives of Mr. Hungerford and Col. Milbrath;
5. A derivative action for intentional interference with contract on behalf of the Fund against all defendants;
6. A derivative action for intentional interference with contract on behalf of the Fund against Mr. Hungerford and Col. Milbrath;
7. A derivative action for intentional interference with contract on behalf of the Fund against Mr. Hungerford and Col. Milbrath;
8. A derivative action for intentional interference with contract on behalf of the Fund against Mr. Hungerford and Col. Milbrath;
9. A derivative action for aiding and abetting the breach of fiduciary duty under LA. CIV. CODE ANN. art. 2324 on behalf of the Fund against NOR, Bay-NOLA-Mgmt, LLC, Bay-NOLA Ventures-MD, LLC, Bay-Bourbon-Ritas, LLC, VP NOLA, LLC, Noble-Franchise 1&3, LLC, Bay-One-Capital, LLC, Bywater Holdings, LLC, and Bay-Algiers-JV, LLC;
10. A derivative action on behalf of the Fund for aiding and abetting conversion and misappropriation under LA.CIV.CODE ANN. art. 2324 against the "Entity Defendants";
11. A derivative action for RICO violations on behalf of the Fund against Mr. Hungerford, Col. Milbrath, Timone, Bartone, NOR, Noble-RealEstate-GP, Bay-NOLA-Mgmt, Bay-Bourbon-Ritas, VP NOLA, Noble-Franchise 1&3, Bay-One-Capital, Bywater Holdings; and
12. A derivative action for violation of the Louisiana Racketeering Act on behalf of the Fund against Mr. Hungerford, Col. Milbrath, and Noble-RealEstate-GP.

The suit requests that a receiver be appointed to run the regional center and sham companies to “protect and/or preserve the plaintiffs’ immigration benefits that have been diverted to these entities.” The case is currently ongoing and the plaintiffs are looking for new counsel.

When a regional center and its managing members/partners use EB-5 investment funds for their own gain, or unnecessary and wasteful projects, then the SEC may take action and, a claim for breach of fiduciary duty may arise in federal court. Furthermore, gross mismanagement of certain companies, and the incorporation of sham companies may result in a claim of gross mismanagement, intentional interference with contract, and unjust enrichment.

CONCLUSION

In general, the USCIS has developed a pattern of terminating regional centers when the regional center is not promoting economic growth or the owners’ and/or managers’ representations do not stand the test of time. These most recent cases show that the USCIS will use the following factors in determining economic growth and viability:

- 1) the number of investors who have invested in the regional center in the past few years;

2) whether or not the regional center has demonstrated financial weakness such as filing for bankruptcy, poor tax returns, weak financial filings with other entities; or other external indicia of weakness;

3) whether the regional center's representation such as property ownership, permits issued, contracts signed or investors committed, bear out;

4) whether jobs are being created *after* the investment has been made or were pre-existing; and,

5) whether the regional center is continuing to oversee the projects and investments that were outlined in its original request for regional center designation.

The USCIS understands the potential for fraud in regional centers and is therefore increasing the level of scrutiny. As a general matter, the USCIS does not permit the licensing or transfer of a regional center's designation under the EB-5 program. The USCIS will look at whether or not a particular factual scenario involves the licensing or transfer of a regional center's designation based on specifics. An amendment to the I-924 application may be necessary since the I-924 application must fully describe and document the organization structure of the regional center. Owners and managers must also use caution when using service agreements that may be interpreted as "renting a center". They must be aware of the potentially catastrophic consequences that could ensue if the USCIS determines that such an agreement is not deemed to license or transfer the center's existing approval.

If the ownership and management of a regional center is undergoing structural changes, or the regional center is facing any other material change, then an amendment should be filed with USCIS within 30 days of the change. Owners must also file I-924As on an annual basis and be prepared for site visits from the Fraud Detection and National Security/USCIS, as well as potentially other agencies, to verify that the original representations and the annual updated representations are accurate.

If a regional center and its managing partners/members exploit the EB-5 visa program to defraud investors, mismanage funds, misrepresent elements of the projects, or otherwise breach their fiduciary obligations, there are various federal and state actions that can be brought by either the government or aggrieved parties.

Those considering the use of an EB-5 regional center as a means to raise funds should be aware of these recent regional center terminations and adjust their practices. Avoiding the mistakes of others will allow for future and current developers to successfully operate their regional centers and projects in a manner that engenders less risk of termination and federal litigation.