REGIONAL CENTER DESIGNATION CANNOT BE SOLD OR TRANSFERRED *BUT THE UNDERLYING BUSINESS CAN*

By Joseph P. Whalen (Sunday, January 10, 2016)

I decided to re-read *Matter of K-R-C-, LLC*, ID# 14127 (AAO Nov. 17, 2015) because something which had previously left me ***unsettled***, started to nag at me some more; because the ***issue*** was ***becoming clearer***. Can you follow that at all? Anyway, I hoped that re-reading the case decision would help me find the underlying cause of my nagging feeling. To familiarize or remind the reader, this case is AAO's *non-precedent* decision upholding on appeal an Investor Program Office (IPO) *Regional Center* ***Termination***.

The parts of the case that give me heartburn relate to three primary areas of concern, the third one is the worst problem with *this* Regional Center, in my opinion:

1. misused or confusing terminology;
2. mixed-up descriptions of processes; and
3. certain issues relating to the *qualifications* or *knowledge, skills, and abilities* (KSAs) of the original applicant who obtained the initial Regional Center Designation. [***This is also a problem with many other Regional Centers***.]

I will expand on the above issues in turn. In the case decision, an appeal dismissal, someone is being referenced as "the Applicant" and while I can understand who that is, that person does not appear to have ever applied to USCIS for anything. The business he bought and its former owner had applied. In this twisted tale, a Regional Center Designation was obtained by someone whom I will call "Party A". "Party A" first obtained Regional Center status on April 29, 2010, which was prior to the effective date of Form I-924. The Form became required as of November 23, 2010. AAO's decision also states that an amendment was approved on June 25, 2013. The amendment did not include any information indicating a desired change of administration, management, or ownership of the underlying *entity* that had been granted Regional Center Designation.

The part of the procedural history that bothered me is the statement that "*the Applicant filed Form I-924A on March 28, 2014, to reflect a new managing company,* ***REDACTED*** *and a new principal,* ***REDACTED***[1]." *Id*. at p. 2. That statement bothered me in that the I-924A Supplement is not an application nor is it used for amendments. It is used for annual reporting about the amount of funds invested, the number of jobs created, and the businesses that received funding. I am guessing that the "new business owner or principal" was as clueless as the "former business owner or principal" was. I will hereafter refer to the "new business owner or principal" as "Party B". I doubt that AAO made any mistake here, instead, the fault likely lies with "Party B" by filing the wrong form. That basically covers items one and two, now I will tackle item three.

My final agenda item relates to issues concerning the *qualifications* or *knowledge, skills, and abilities* (KSAs) of the original applicant who obtained the initial Regional Center Designation, "Party A" and the intended successor. Upon a little more digging, it seems that "Party A" was the eventual son-in-law of "Party B". It will soon become clear why so many people believe that doing business with family is not a good idea. In this case, the change in ownership came about through the **settlement of a lawsuit** between family members. That must make family holiday dinners **extra** special for them!

> "Moreover, [?"Party B"?] states that after he had concerns regarding the [REDACTED] expenditures, he sued the [REDACTED] to recover [REDACTED] funds, and the [REDACTED] countersued alleging defaulted loan payments. Both parties entered into a settlement agreement that resulted in [REDACTED] with [?"Party B"?] as its sole principal, purchasing the Applicant." *Id*. at p. 3.

The above excerpt tells us how the change in ownership came about. Assuming *arguendo*, that this is an acceptable mechanism to affect a change of ownership of the underlying business entity, the Regional Center Designation is a separate matter. Form I-924 is required in order to seek approval for the "new business owner" to take over the rights, privileges, obligations, and responsibilities of the EB-5 Regional Center. Additionally, it appears that "the Applicant" in this excerpt is referring to the underlying

[1] This is most logically read as the new principal being "Party B".

business entity with RC status. At other times it seems that "the Applicant" refers to "Party B", but given the amount of redaction, it is difficult to figure out with any certainty.

I am deeply disturbed about some other factoids I found in the decision. It is obvious that "Party A" lacked sufficient KSAs to run a Regional Center because investment funds were not spent as intended. In fact, the original plan was abandoned without a word to USCIS for nearly five years and even then it had to be coaxed. In addition, it is also obvious that the Regional Center was underfunded, see here: "…*the Applicant asserted that waiting for the adjudication of immigrant investor petitions crippled the marketing and development progress. …*" *Id*. at p. 5 Also, investor funds were spent on trips to China for the purpose of seeking more investors.

> "The Applicant's current principal owner, [?"Party B"?], asserts that he neither had knowledge of the [REDACTED's] activities nor of the immigrant investor requirements. The Applicant, however, has not established that [?"Party B"?] was a "passive observer" and "had no real control over the project expenditures" during the [?"Party A"?] ownership of the Applicant. Although the Applicant submits the complaints and counterclaims between the parties, the submitted settlement agreement indicates that each party denied the claims and counterclaims. The Applicant did not submit any other documentation beyond [?"Party B's"?] declaration indicating that his role was limited to a passive observer, and he had no involvement in the [REDACTED's] activities." *Id*. at p. 4

In the above excerpt, "the Applicant" is a reference to the underlying business that had Regional Center status until its ownership changed from one person to another. It is an odd and confusing way to reference who "the Applicant" is. I have to say that even if a proper amendment had been filed, termination would have been the logical outcome. **How could anyone seek to takeover an EB-5 Regional Center without any knowledge of immigrant investor requirements? For that matter, how could someone seek E-5 funding without such knowledge.** It's incredulous.

In the "PROCEDURAL HISTORY" section of the decision, AAO observed that the Chief (of IPO) issued a notice of intent to terminate (NOIT) **because** the Applicant was

not meeting the *monitoring and oversight responsibilities set forth in its designation letter*, and was not able to account for all of the capital investment funds. I wish to remind the reader that the initial designation was awarded in April 2010, and the earlier designation letters included different advisal language. Several different versions were tried before settling on the current version of the letter. It is likely the letter in question was very comprehensive about oversight and monitoring responsibilities. I should know because I put together a massively comprehensive Approval Notice--Designation Letter with multiple paragraphs of advisory language.[2] If the RC had that comprehensive advisory then playing dumb would not be an option, not that ignorance of the law has ever been an acceptable excuse anyway.

This case is troubling to me from three different perspectives. First, the original Applicant may have presented a seemingly good case upfront. The proposal may have been professionally written and included all the bells and whistles, buzzwords, and properly addressed all of the key areas needed in order to convince USCIS that appropriate and sufficient *monitoring and oversight* methods and procedures were in place. In short, they may have merely played lip service to their duties, obligations, and responsibilities, *i.e.;* lied through their teeth.

The second alternative is simply that USCIS got very sloppy and approved the RC request in error. Neither of those two possibilities is appetizing to me, they turn my stomach. Therefore, I choose to believe in a third alternative, which is that it was a bit of both of the first two. Perhaps the original applicant had every *intention* of providing sufficient oversight but overestimated his own ability to do so. Despite that overestimate, the approach outlined in the proposal was sufficient to lead USCIS to give them the *benefit of the doubt* judging on the *preponderance of the evidence* presented. So, I am letting them both off the hook, but nevertheless, this time *the road to **termination** was paved with good intentions* which unfortunately fell short of the mark.

[2] See http://www.slideshare.net/BigJoe5/how-to-apply-for-regional-center-designation

The foregoing remarks end the discussion of my *initial concerns*. However, as I checked and re-checked the language in the decision, I found more to talk about, here goes. As others have noted, AAO tends to delve into tedium when justifying and upholding an unfavorable decision. Some are annoyed, others are enamored by tedium. I stand at the crossroads and am unsure as to how much tedium I can stand. In the end, my answer is "It depends."

In the instant case, my tedium level was reached but only because of the extreme redaction. What I was able to synthesize from it is that there were some abrupt changes in the direction of business plans and developments. It also seems that there may have been some questionable real estate transactions and inappropriate expenditures. For instance, it appears that investor funds were being used to equip the offices of the underlying business with Regional Center designation in addition to travel and marketing expenses of the Regional Center principal. There is life after "tedium" because AAO does reword and rephrase its findings in summary fashion in such a way that I can honestly say that I got some broader lessons by re-reading this case decision.

In closing, I note that AAO gives us the following critical topics for serious study.

- **The NOIT is not an opportunity** for the Applicant **to** show that it will **begin** promoting economic growth or that it will begin promoting economic activity again after it had already ceased for an extended period of time.
- An applicant's **past** achievements or activities are **indicative of** its **future** achievements or activities.
- Even after the change of ownership, the **new owner used immigrant investor funds for the Applicant**, such as on trips to promote the Applicant, rather than on job creating projects and thus did **not** engage in promoting economic growth through the **full investment of funds** raised through this program.
- **The issue** here, however, is not whether the Applicant was permitted to make investments in technology companies. Rather, the issue is the Applicant's submission of inaccurate and inconsistent information.
- The Applicant's **statement** that was submitted with the immigrant investors' Forms 1-526 that their capital would be invested in the restaurant was **inaccurate** as funds were also used in technology companies.

- As the Applicant used immigrant investor capital other than for the purpose of promoting economic activity, the Applicant has **not** demonstrated that it had **properly monitored the capital and expenditures**.
- The Applicant's **misuse of and unaccounted for immigrant investor capital** has **not promoted economic activity**, and therefore has ***not complied with its monitoring and oversight responsibilities.***
- The Chief also found that the Applicant **did not comply with the end of the fiscal year filing requirements** because it did not submit all of the required information to USCIS on Form I-924A. … the Applicant submitted **inaccurate information** and **omitted information** that was required pursuant to the filing instructions for Form I-924A and **has yet to account for the missing immigrant investment capital**.
- **8 C.F.R. § 103.2 Submission and adjudication of benefit requests.**

  (a) *Filing.*

  (1) *Preparation and submission.*

  Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission. …..

Finally, I observe from this case that the change in ownership of the underlying business entity does not provide a clean slate for EB-5 purposes, ***especially*** if the new owner wants to seek a transfer of Regional Center Designation, too. Keep reading!

Submitted for your perusal, I don't need your approval.