Those Who Fail to Learn From the Past Are Doomed to Repeat It!
Comparing: *V Real Estate Group (VREG)* & *American Export Limited Partnership (AELP):* The EB-5 Regional Center from *Matter of Izummi* 22 I&N Dec. 169 (AAO 1998)[1]

By Joseph P. Whalen (January 17, 2015)

There is a case wending its way through the U.S. District Court in Nevada[2] which is reminiscent of one of the 1998 EB-5 Precedent Decisions. The current case involves EB-5 Immigrant Investors who have sunk money into a Business Model that requires each of them to set up their own ***franchised*** real estate companies as their individual new commercial enterprises (NCEs). These investors are still in China so they are relying on another entity to help get things going in Clark County, Nevada. That company is V Real Estate Group, Inc. (VREG). VREG is the lead plaintiff in the current case along with the several EB-5 NCEs. The primary problem that I see is that *VREG et al.* have brought suit against USCIS for having revoked the individual investors' I-526 Petitions. It is unclear if any of the actual EB-5 investors filed an appeal of the revocations with AAO. It is noted that the courts nearly universally demand exhaustion of administrative remedies before they will entertain Administrative Procedures Act (APA) challenges of agency actions because the agency action is usually not yet final for APA filing purposes.

> "Plaintiffs in this suit include VREG and the four NCEs established by the Immigrant Investors (collectively "Plaintiffs"). Plaintiffs rely on Section 702 of the Administrative Procedure Act ("APA") to bring this action as "person[s] suffering legal wrong" because of the USCIS's decision to revoke the Immigrant Investors' I-526 petitions. 5 U.S.C. § 702. The Complaint contains three causes of action: (1) intentional or negligent interference with economic advantage; (2) intentional interference with business relations; and (3) declaratory judgment. Plaintiffs initially sought a preliminary injunction of the USCIC's revocation, which the Court denied. (ECF No. 35). The USCIS now moves for dismissal of the

[1] *Matter of Izummi*, 22 I&N Dec.169(AAO 1998) ***See***: http://www.justice.gov/eoir/vll/intdec/vol22/3360.pdf

[2] *V. Real Estate Group, Inc. et al. v. United States Citizenship and Immigration Services et al.*, No. 2:14-cv-1096-RCJ-CWH (D.NV) *Latest* **ORDER** Filed January 9, 2015. (*VREG*) ***See***: http://docs.justia.com/cases/federal/district-courts/nevada/nvdce/2:2014cv01096/102184/46

case for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1), or alternatively, for Plaintiffs' failure to state a claim for which relief can be granted pursuant to Rule 12(b)(6)." *VREG* at p. 4

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"**CONCLUSION**

IT IS HEREBY ORDERED that the USCIS's Motion to Dismiss (ECF No. 30) is GRANTED in part and DENIED in part.

The Motion is GRANTED with prejudice as to Plaintiffs' first cause of action for intentional or negligent interference with economic advantage and as to Plaintiffs' second cause of action for intentional interference with business relations.

The Motion is DENIED as to Plaintiffs' third cause of action for declaratory judgment.

IT IS SO ORDERED. ..." *VREG* at p. 20

The *VREG* case shall next move forward through a "discovery" phase at the very least, in the Nevada District Court. The reason that I am so intrigued by this case is the similarities between VREG and AELP. Both are very dependent on the ability to draw fees from the EB-5 investor's minimum investments. Both were spreading the investments over as wide an area as they could manage to make feasible. Admittedly, AELP did a much worse job of that task than VREG which at least is venturing to keep the investments, *which are all at the reduced rate*, in acceptable Targeted Employment Areas (TEAs). AELP failed big time on that aspect but heck, it has been approximately 20 years or so, and it is *a small but critical detail to get right* this time around. If you want greater detail about the various assertions put forth by VREG et al. then please follow the link in footnote 2, above. VREG like AELP seems to be siphoning off quite a bit in various "fees" this time it is "franchise fees". In addition, the funds were not being made *immediately available* to the various NCEs. Instead, the funds were being released from escrow to VREG, which is NOT one of the EB-5 investors' NCEs. Overall, USCIS realized that the funds were not really being placed into "at-risk" investments and, upon taking a closer look; the full-time job counts did not seem feasible either. I think that USCIS will have to chalk up this mistake to a slow climb up the EB-5 learning curve. Please compare the following excerpt from *Izummi* which can be accessed in full through the link in footnote (1) to the *VREG* **ORDER** linked in footnote (2), above.

"The preference visa petition was denied by the Director, Texas Service Center, who certified the decision to the Associate Commissioner for Examinations for review. The decision of the director will be affirmed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5), and section 610 of the Appropriations Act of 1993. The director determined that the petitioner had failed to establish that he had placed the requisite capital at risk. The director made the following findings: $30,000 of the claimed contribution would be used for the expenses of the Partnership rather than being infused into the subsidiary commercial enterprise for the purpose of employment creation; the majority of the remaining capital would not be available for job creation because the Partnership was required to maintain it in reserves; part of the petitioner's capital contribution was not an investment because it was made in exchange for a debt arrangement; and another part of the petitioner's contribution would derive from guaranteed annual interest payments received from the Partnership.

In response, the petitioner submits two separate briefs, two supplemental briefs, and numerous exhibits. He contends that the director's decision misstates existing facts and mischaracterizes the provisions of the American Export Limited Partnership ("AELP") investor program. The petitioner also complains that the director's decision fails to mention, distinguish, or "explain away" approvals of other AELP petitions by both the Texas Service Center and Vermont Service Center; ..." *Izummi* at p. 170

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"In his brief, the petitioner explains that AELP has established a commercial credit corporation subsidiary, American Commercial and Export Credit Company, Inc., with its co-venturer, Resurgens Capital & Investment. This credit company makes asset-based loans and engages in receivables financing for small export companies "located throughout South Carolina and the southeastern United States." The capital provided by the alien investors to AELP is used to purchase stock in the credit company, and the credit company uses this money to secure loans from an institutional bank lender. This other lender will increase the capital by a factor of three or four. The petitioner claims that the credit company has succeeded in placing "several" loans already.

According to the materials submitted, the credit company has extended or purchased four loans to date. The credit company has purchased a $780,000 loan that had been extended to Pillow Perfect, Inc. by First Capital Bank; Pillow Perfect is located in Woodstock, Georgia. The credit company has purchased a

> $380,000 loan that had been extended to Pointe Services, Inc. by First Capital Bank; Pointe Services is located in Atlanta, Georgia. The credit company has extended a $200,000 loan to Advanced Technology Services, Inc. located in Atlanta, Georgia. Finally, the credit company has extended a $1,000 loan to Bitz America, Inc., in Martinez, Georgia.
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> It is not known how much the credit company paid to purchase the loans involving Pillow Perfect and Pointe Services. The above four loans evidence at most the use of only $1,361,000 of the funds obtained from the first 95 investors who were granted under this program.[2] ....."
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> "[2]This computes to approximately **$14,327** per investor, **far short of** the requisite **$500,000** per investor. ..." [**Bold Emphasis** and Highlighting Added.]

Id. at 172-173

Also of note is footnote (7) from *Izummi* on page 179:

> "7 Whether or not $500,000 must be made available for the loans to export companies or whether $500,000 must merely be made available to the credit corporation extending the loans, it is clear that making $500,000 available to **AELP** is not sufficient. AELP's primary purpose is apparently to locate potential alien investors. AELP does not extend the loans to the export companies and is not the entity most closely engaged in employment creation, indirect or otherwise." [**Bold** in Original, Highlighting Added.]

In its present form, EB-5 practical matters have changed, in part, from this very footnote. Presently and for several years at least, USCIS and EB-5 stakeholders alike now understand the difference between a new commercial enterprise (NCE) and the Job Creating Entity (or Enterprise) (JCE). The "Loan Model" has been honed into practical application in the Regional Center context. As far as I am concerned, the "Loan Model" cannot exist outside of the Regional Center context. Some folks have tried to champion the ability of a "Holding Company" to make loans to its "Wholly-Owned Subsidiaries". I have to ask: ***"Why the hell would you make a "loan" to "yourself"?"*** It does not make sense! Does it?

I do not favor recycling bad ideas that have already failed miserably. While it has indeed been a very long time, ***please remember and never forget*** that THE GOVERNMENT HAS A VERY, VERY LONG MEMORY!

About The Author

I tell you what you NEED to hear, not what you WANT to hear!

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NAICS Code: 611430 Professional and Management Development Training

2012 NAICS Definition: 611430 Professional and Management Development Training

This industry comprises establishments primarily engaged in offering an array of short duration courses and seminars for management and professional development. Training for career development may be provided directly to individuals or through employers' training programs; and courses may be customized or modified to meet the special needs of customers. Instruction may be provided in diverse settings, such as the establishment's or client's training facilities, educational institutions, the workplace, or the home, and through diverse means, such as correspondence, television, the internet, or other electronic and distance-learning methods. The training provided by these establishments may include the use of simulators and simulation methods.

That's My Two-Cents, For Now!

[3] See: 15 U.S.C. §80b–2. (a)(11)
or go to: http://uscode.house.gov/view.xhtml?req=(title:15%20section:80b-2%20edition:prelim)%20OR%20(granuleid:USC-prelim-title15-section80b-2)&f=treesort&edition=prelim&num=0&jumpTo=true