Seeking EB-5 Regional Center Status Is Not to be Entered Into Lightly

By Joseph P. Whalen (August 9, 2014)

INTRODUCTION

On July 24, 2014, USCIS' AAO dismissed an appeal from the denial of a *Proposal for Designation as a Regional Center* [1] (RC) that had been filed pursuant to Section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1874 (1992), [8 U.S.C. § 1153 Note: Pilot Immigration Program, *as amended* (2010)] under the signatory authority of Ron Rosenberg, Chief, Administrative Appeals Office (AAO) of U.S. Citizenship and Immigration Services (USCIS) within the Department of Homeland Security (DHS). The text from pages 2-4 of that *non-precedent administrative decision* are presented below along with inserted commentary and various added emphasis. A copy of the decision as it appears posted on the agency website is appended.

In the Initial Agency Decision (Denial) issued on December 8, 2011, the Chief (*of Service Center Operation*) determined that the proposal:

> **(1)** did not demonstrate the promotion of economic growth within the selected geographic area;
> **(2)** did not establish the regional or national impact of the regional center;
> **(3)** did not show job creation; and
> **(4)** contained redemption agreements between the alien investors and the regional center.

In that the RC Proposal was received by USCIS on November 22, 2010[2], (one day before implementation of the then-new USCIS Form I-924, *Application For Regional Center Under the Immigrant Investor Pilot Program)*, it seems that it may have been somewhat rushed. The Proposal seems to have fallen short on all the major key points. AAO, however, focused on the fact that the "entity" that applied eventually ceased to be an active business after filing the I-290B Notice of Appeal. I will address the significance of that treatment further below when discussing the concept of a "*continuing application*".

[1] Full web address: http://www.uscis.gov/sites/default/files/err/K1%20-%20Request%20for%20Participation%20as%20Regional%20Center/Decisions_Issued_in_2014/JUL242014_01K1610.pdf (last visited August 9, 2014).

[2] See 57 FR (No. 185, Part IV) 58961-58991, September 24, 2010.

DISCUSSION: The Chief, Immigrant Investor Program (IPO), denied the proposal for designation as a regional center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant seeks designation as a regional center pursuant to section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1828 (1992), as amended by section 116 of Pub. L. No. 105-119, 111 Stat. 2440 (1997); section 402 of Pub. L. No. 106-396, 114 Stat. 1637 (2000); section 11037 of Pub. L. No. 107-273, 116 Stat. 1758 (2002); section 4 of Pub. L. No. 108-156, 117 Stat. 1944 (2003); and section 1 of Pub. L. No. 112-176, 126 Stat. 1325 (2012). The applicant proposes to establish regional center status for the [******I N F O H A S B E E N R E D A C T E D*******] that is based on the formation of a limited partnership, [***NAME WAS REDACTED***], which will use invested funds to build a hotel and resort facility.

The chief determined that the proposal (1) did not demonstrate the promotion of economic growth within the selected geographic area; (2) did not establish the regional or national impact of the regional center; (3) did not show job creation; and (4) contained redemption agreements between the alien investors and the regional center. On appeal, the applicant submits revised documentation and claims that the issues raised by the director have been addressed. For the reasons discussed below, the regional center proposal may not be approved.

I. LAW

Section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5), as amended by Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

(i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and

(ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

Section 610(a) of the Departments of Justice and Related Agencies Appropriations Act, 1993, as amended, provides:

> Of the visas otherwise available under section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. § 1153(b)(5)), the Secretary of State, together with the Secretary of Homeland Security, shall set aside visas for a program to implement the provisions of such section. Such program shall involve a regional center in the United States, designated by the Secretary of Homeland Security on the basis of a

general proposal, for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment. A regional center shall have jurisdiction over a limited geographic area, which shall be described in the proposal and consistent with the purpose of concentrating pooled investment in defined economic zones. The establishment of a regional center may be based on general predictions, contained in the proposal, concerning the kinds of commercial enterprises that will receive capital from aliens, the jobs that will be created directly or indirectly as a result of such capital investments, and the other positive economic effects such capital investments will have.

II. FACTUAL AND PROCEDURAL HISTORY

On November 22, 2010, the applicant filed the proposal along with supporting documentation. On September 20, 2011, the applicant responded to a June 17, 2011 request for evidence (RFE). The director denied the proposal on December 8, 2011, determining that the documentation did not demonstrate eligibility for a regional center. On January 10, 2012, the applicant filed an appeal with revised documentation.

III. ANALYSIS

On May 5, 2014, we issued a notice of adverse information and intent to dismiss the appeal, advising the applicant of derogatory information with an opportunity to respond before rendering a final decision pursuant to the regulation at 8 C.F.R. § 103.2(b)(16)(i). Specifically, according to the Tennessee Secretary of State's public website, on May 22, 2013, the Secretary of State changed [REDACTED's] status from "Active" to "Active-Dissolved." According to the relevant section of the Tennessee Code, the Secretary of State may administratively dissolve a limited liability company under various circumstances, including the limited liability company's failure to deliver its annual report to the Secretary of State within two months of the report's due date. Tenn. Code Ann.§ 48-245-301. On June 4, 2013, the Tennessee Secretary of State issued [REDACTED] a notice of determination. On August 13, 2013, the Tennessee Secretary of State changed [REDACTED's] filing status from "Active-Dissolved" to "Inactive-Dissolved (Administration)." Under section 48-245-302(c) of the Tennessee Code, "a[n] LLC administratively dissolved continues its existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under § 48-245-501 and notify claimants under § 48-245-502." Therefore, since August 13, 2013, [REDACTED] has been a dissolved limited liability company and ineligible to conduct business in Tennessee as proposed in its request for designation as a regional center.

The regulation at 8 C.F.R. § 103.2(b)(13)(i) provides:

> Failure to submit evidence or respond to a notice of intent to deny. If the petitioner or applicant fails to respond to a request for evidence or to a notice of intent to deny by the required date, the benefit request may be summarily denied as abandoned, denied based on the record, or denied for both reasons ....

The applicant was afforded 30 days to respond to our notice. As of the date of this decision, however, the applicant has not responded to our notice. As the applicant has not overcome the evidence that the entity seeking designation as a regional center is dissolved, the applicant is ineligible to conduct the business that is the basis of the regional center proposal. Therefore, the appeal will be dismissed based on the applicant's failure to respond to our notice and on the dissolution of the entity. 8 C.F.R. § 103.2(b)(13)(i). Moreover, **any further discussion** regarding any of the other statutory and regulatory requirements **is now moot**.

III. CONCLUSION

The appeal will be dismissed for the above stated reasons. In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden.

ORDER: The appeal is dismissed.

The I-924 Treated as a "Continuing Application"

The "continuing application" concept is addressed in the following recent Precedent Decisions:

Matter of M-L-M-A-, 26 I&N Dec. 360 (BIA 2014) **ID 3808**

1) Because an application for special rule cancellation of removal under section 240A(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(2) (2006), is a continuing one, false testimony given by the respondent more than 3 years prior to the entry of a final administrative order should not be considered in determining whether she is barred from establishing good moral character under section 101(f)(6) of the Act, 8 U.S.C. § 1101(f)(6) (2006). *Matter of Garcia*, 24 I&N Dec. 179 (BIA 2007), and *Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005), *followed*.

(2) Although the respondent was divorced from her abusive husband and subsequently had a long-term relationship with another man, she had not previously been granted special rule cancellation of removal based on her abusive marriage and had significant equities that merited a favorable exercise of discretion. *Matter of A-M-*, 25 I&N Dec. 66 (BIA 2009), *distinguished*.

Matter of GARCIA, 24 I&N Dec. 179 (BIA 2007) **ID 3565**

An application for special rule cancellation of removal is a continuing one, so an applicant can continue to accrue physical presence until the issuance of a final administrative decision. *Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005), *reaffirmed*; *Cuadra v. Gonzales*, 417 F.3d 947 (8th Cir. 2005), *followed in jurisdiction only*.

Matter of ORTEGA-CABRERA, 23 I&N Dec. 793 (BIA 2005) **ID 3516**

(1) Because an application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1) (2000), is a continuing one for purposes of evaluating an alien's moral character, the period during which good moral character must be established ends with the entry of a final administrative decision by the Immigration Judge or the Board of Immigration Appeals.

(2) To establish eligibility for cancellation of removal under section 240A(b)(1) of the Act, an alien must show good moral character for a period of 10 years, which is calculated backward from the date on which the application is finally resolved by the Immigration Judge or the Board.

The BIA has stated and restated that an application (*for cancellation of removal*) is a "continuing one". Let's explore what that really means and how it may be *generalized from the specific* for broader application across contexts.

> "Before the enactment of section 240A(d)(1) of the Act, we consistently treated the continuous physical presence period, and consequently the good moral character period, as continuing to accrue through the time that we decided an alien's appeal. *See, e.g.*, *Matter of Castro*, 19 I&N Dec. 692 (BIA 1988). We did this by construing the "application" in the continuous physical presence portion of the suspension of deportation statute as a continuing one. *See* section 244(a)(1) of the Act, 8 U.S.C. § 1254(a)(1) (1988)[3] (providing that an applicant be physically present for a continuous period of "not less than seven years immediately preceding the date of such application"). This approach allowed physical presence, as well as good moral character, to accrue up to and including the date that the application was resolved on appeal.[1] *See, e.g., Matter of Castro, supra*. However, the "stop-time" rule altered the calculation of continuous physical presence by halting the accrual of such presence with the service of the charging document. *See* section 240A(d)(1) of the Act.
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> In the wake of the IIRIRA, there are three possible interpretations of the applicable good moral character period, assuming that it encompasses a maximum of 10 years, an issue we will address infra. First, the applicable period may be the 10-year period coterminous with that used to determine the length of continuous physical presence, which is bounded at the end by service of the charging document. Second, it may be the 10-year period ending on the date that the application for cancellation of removal is first filed with the court. Third, the period may be gauged by looking backward 10 years from the time a final administrative decision is rendered; that is, consistent with our long-established practice, the application would be treated as continuing beyond the date it is filed until a resolution by an Immigration Judge or the Board of Immigration Appeals is completed."
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> [1] We continue to treat the good moral character period in this manner for purposes of determining eligibility for voluntary departure granted at the conclusion of proceedings. See section 240B(b)(1)(B) of the Act, 8 U.S.C. § 1229c(b)(1)(B) (2000) (providing that to be eligible for voluntary departure an alien must, inter alia, have been a "person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure").

See Matter of Ortega-Cabrera, at 794-795.

[3] Hyperlink is to the oldest version posted on www.gpo.gov which is 1994.

In the context of determining eligibility for cancellation of removal the pertinent issues are somewhat guided by and somewhat clouded by the peculiar wording chosen by Congress when writing the statutory provisions that control the eligibility for that form of relief from removal. Please keep in mind that a *defensive application* for "relief from removal", while exceedingly similar, is only *nearly synonymous* with an *affirmative application* for a "benefit under the immigration laws of the United States." I say *nearly synonymous* because the denial of a defensive application for relief tends to result in actual physical removal from the United States while the denial of an affirmative application for a benefit does not have to result in removal from the United States. For example, the denial of a Form N-400, *Application for Naturalization*, usually leaves the applicant in the same position as when they applied, specifically, they remain lawful permanent residents. This is true even if their encounter with USCIS in a failed naturalization proceeding results in the issuance of a Notice to Appear (NTA) for *Removal Proceedings*. In that scenario the Immigration Judge would assume jurisdiction and take charge to determine if the individual should be removed or, if any options are available, to be granted relief from removal.

Conversely, in the benefits adjudications realm, and specifically the USCIS Form I-924, *Application For Regional Center Under the Immigrant Investor Pilot Program*, it seems that the question of treatment as a "*continuing application*" remains somewhat murky. In early non-precedent administrative appellate decisions for Proposals and forms I-924, AAO tended to be rigid in demanding full eligibility "at time of filing" the I-924 (or Proposal) even though the underlying initial adjudications were not as rigid. Later, AAO began to loosen up a bit and recognized the applicant's right to submit new evidence on appeal because the I-290B Notice of Appeal or Motion specifically allowed for it in the form instruction. Form instructions are incorporated into the controlling regulation as per 8 CFR §103.2(a)(1). However, AAO also sought to invoke portions of the Administrative Procedures Act (APA) in order to justify its rigidity. Specifically, AAO invoked, 5 USC § 557(b) "....On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. ..." To which AAO has been countered that there is no such limiting rule in the controlling statute or regulations for the Regional Center adjudication.

In that AAO started the ball rolling on the applicability of the APA in the Regional Center adjudications context, it has also been put forth that this particular application is much more of *an application for a license* than all other adjudications performed by the agency, save one. That other application is the USCIS Form I-905, *Application for Authorization to Issue Certification for Health Care Workers*. The **single** posted *non-precedent administrative decision* for the appeal of a denied form I-905 found at: *Nov092006_01M4212.pdf*, itself refers to the benefit bestowed as "licensure". The precise words used were:

> "In the space on the Form I-905 application labeled "Occupations for which you are seeking authorization" the applicant entered, "[****REDACTED****] is one of the partner and member *[sic]* of evaluation team. We need approval of all medical profession." The applicant did not otherwise state the medical positions it is seeking licensure to certify and did not demonstrate that its evaluators are competent to certify the educational credentials of those medical professionals seeking such certifications." At p. 7

Licensure under the APA is addressed in more than one section but for the purposes of this article, please see:

5 USC § 551. Definitions

For the purpose of this subchapter—

* * * * *

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;
(7) "adjudication" means agency process for the formulation of an order;
(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;
(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;
(10) "sanction" includes the whole or a part of an agency—
(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;
(B) withholding of relief;
(C) imposition of penalty or fine;
(D) destruction, taking, seizure, or withholding of property;
(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;
(F) requirement, revocation, or suspension of a license; or
(G) taking other compulsory or restrictive action;
(11) "relief" includes the whole or a part of an agency—
(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;
(B) recognition of a claim, **right**, immunity, **privilege**, exemption, or **exception**; or
(C) taking of **other action** on the application or petition of, and beneficial to, a person;
(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;
(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

Getting back to the actual statute and regulations governing the USCIS Designation of an entity as an EB-5 Regional Center, let us look at the infamous "Section 610" of the (Judiciary Appropriations Act of 1993), as amended to date. Here is the actual text of the pertinent paragraphs highlighted and emphasized for easy skimming.

IMMIGRATION PROGRAM[4]

Pub. L. 102–395, title VI, §610, Oct. 6, 1992, 106 Stat. 1874, as amended by Pub. L. 105–119, title I, §116(a), Nov. 26, 1997, 111 Stat. 2467; Pub. L. 106–396, §402, Oct. 30, 2000, 114 Stat. 1647; Pub. L. 107–273, div. C, title I, §11037(a), Nov. 2, 2002, 116 Stat. 1847; Pub. L. 108–156, §4, Dec. 3, 2003, 117 Stat. 1945; Pub. L. 111–83, title V, §548, Oct. 28, 2009, 123 Stat. 2177; Pub. L. 112–176, §1, Sept. 28, 2012, 126 Stat. 1325, provided that:

"(a) Of the visas otherwise available under section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)), the Secretary of State, together with the Secretary of Homeland Security, shall set aside visas for a program to implement the provisions of such section. Such program shall involve a regional center in the United States, designated by the Secretary of Homeland Security *on the basis of a general proposal, for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment.* A regional center shall have jurisdiction over a limited geographic area, which shall be described in the proposal and consistent with the purpose of concentrating pooled investment in defined economic zones. *The establishment of a regional center may be based on general predictions, contained in the proposal, concerning the kinds of commercial enterprises that will receive capital from aliens, the jobs that will be created directly or indirectly as a result of such capital investments, and the other positive economic effects such capital investments will have.*

"(b) For purposes of the program established in subsection (a), beginning on October 1, 1992, but no later than October 1, 1993, the Secretary of State, together with the Secretary of Homeland Security, shall set aside 3,000 visas annually until September 30, 2015 to include such aliens as are eligible for admission under section 203(b)(5) of the Immigration and Nationality Act [8 U.S.C. 1153(b)(5)] and this section, as well as spouses or children which are eligible, under the terms of the Immigration and Nationality Act [8 U.S.C. 1101 et seq.], to accompany or follow to join such aliens.

"(c) In determining compliance with section 203(b)(5)(A)(iii)[(ii)] of the Immigration and Nationality Act [8 U.S.C. 1153(b)(5)(A)(iii)[(ii)]], and notwithstanding the requirements of 8 CFR 204.6, the Secretary of Homeland Security shall permit aliens admitted under the program described in this section to establish reasonable methodologies for determining the number of jobs created by the program, including such jobs which are estimated to have been created indirectly through revenues generated from increased exports, improved regional productivity, job creation, or increased domestic capital investment resulting from the program.

"(d) In processing petitions under section 204(a)(1)(H) of the Immigration and Nationality Act (8 U.S.C. 1154(a)(1)(H)) for classification under section 203(b)(5) of such Act (8 U.S.C. 1153(b)(5)), the Secretary of Homeland Security may give priority to petitions filed by aliens seeking admission under the program described in this section. Notwithstanding section 203(e) of such Act (8 U.S.C. 1153(e)), immigrant visas made available under such section 203(b)(5) may be issued to such aliens in an order that takes into account any priority accorded under the preceding sentence."

From a reading of the text of the statute, I can find no definite answer to the question of whether or not the request for designation as a Regional Center can or cannot be treated as a "continuing application". The next step is to examine the implementing regulations found at 8 CFR § 204.6:

[4] This portion is a **note** found below the main text of the section.

(m) *Immigrant Investor Pilot Program*—

(1) *Scope*. The Immigrant Investor Pilot Program is established solely pursuant to the provisions of section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, and subject to all conditions and restrictions stipulated in that section. Except as provided herein, aliens seeking to obtain immigration benefits under this paragraph continue to be subject to all conditions and restrictions set forth in section 203(b)(5) of the Act and this section.

(2) *Number of immigrant visas allocated*. The annual allocation of the visas available under the Immigrant Investor Pilot Program is set at 300 for each of the five fiscal years commencing on October 1, 1993.

(3) *Requirements for regional centers*. Each regional center wishing to participate in the Immigrant Investor Pilot Program shall submit a proposal to the Assistant Commissioner for Adjudications, which:

(i) Clearly describes how the regional center focuses on a geographical region of the United States, and how it will promote economic growth through increased export sales, improved regional productivity, job creation, and increased domestic capital investment;

(ii) Provides in verifiable detail how jobs will be created indirectly through increased exports;

(iii) Provides a detailed statement regarding the amount and source of capital which has been committed to the regional center, as well as a description of the promotional efforts taken and planned by the sponsors of the regional center;

(iv) Contains a detailed prediction regarding the manner in which the regional center will have a positive impact on the regional or national economy in general as reflected by such factors as increased household earnings, greater demand for business services, utilities, maintenance and repair, and construction both within and without the regional center; and

(v) Is supported by economically or statistically valid forecasting tools, including, but not limited to, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and/or multiplier tables.

(4) *Submission of proposals to participate in the Immigrant Investor Pilot Program*. On August 24, 1993, the Service will accept proposals from regional centers seeking approval to participate in the Immigrant Investor Pilot Program. Regional centers that have been approved by the Assistant Commissioner for Adjudications will be eligible to participate in the Immigrant Investor Pilot Program.

(5) *Decision to participate in the Immigrant Investor Pilot Program*. The Assistant Commissioner for Adjudications shall notify the regional center of his or her decision on the request for approval to participate in the Immigrant Investor Pilot Program, and, if the petition is denied, of the reasons for the denial and of the regional center's right of appeal to the Associate Commissioner for Examinations. Notification of denial and appeal rights, and the procedure for appeal shall be the same as those contained in 8 CFR 103.3.

(6) *Termination of participation of regional centers*. To ensure that regional centers continue to meet the requirements of section 610(a) of the Appropriations Act, a regional center must provide USCIS with updated information to demonstrate the regional center is continuing to promote economic growth, improved regional productivity, job creation, or increased domestic capital investment in the approved geographic area. Such information must be submitted to USCIS on an annual basis, on a cumulative basis, and/or as otherwise requested by USCIS, using a form designated for this purpose. USCIS will issue a notice of intent to terminate the participation of a regional center in the pilot

program if a regional center fails to submit the required information or upon a determination that the regional center no longer serves the purpose of promoting economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment. The notice of intent to terminate shall be made upon notice to the regional center and shall set forth the reasons for termination. The regional center must be provided 30 days from receipt of the notice of intent to terminate to offer evidence in opposition to the ground or grounds alleged in the notice of intent to terminate. If USCIS determines that the regional center's participation in the Pilot Program should be terminated, USCIS shall notify the regional center of the decision and of the reasons for termination. As provided in 8 CFR 103.3, the regional center may appeal the decision to USCIS within 30 days after the service of notice.

(7) *Requirements for alien entrepreneurs.* An alien seeking an immigrant visa as an alien entrepreneur under the Immigrant Investor Pilot Program must demonstrate that his or her qualifying investment is within a regional center approved pursuant to paragraph (m)(4) of this section and that such investment will create jobs indirectly through revenues generated from increased exports resulting from the new commercial enterprise.

(i) *Exports.* For purposes of paragraph (m) of this section, the term "exports" means services or goods which are produced directly or indirectly through revenues generated from a new commercial enterprise and which are transported out of the United States;

(ii) *Indirect job creation.* To show that 10 or more jobs are actually created indirectly by the business, reasonable methodologies may be used. Such methodologies may include multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and other economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment.

(8) *Time for submission of petitions for classification as an alien entrepreneur under the Immigrant Investor Pilot Program.* Commencing on October 1, 1993, petitions will be accepted for filing and adjudicated in accordance with the provisions of this section if the alien entrepreneur has invested or is actively in the process of investing within a regional center which has been approved by the Service for participation in the Pilot Program.

(9) *Effect of termination of approval of regional center to participate in the Immigrant Investor Pilot Program.* Upon termination of approval of a regional center to participate in the Immigrant Investor Pilot Program, the director shall send a formal written notice to any alien within the regional center who has been granted lawful permanent residence on a conditional basis under the Pilot Program, and who has not yet removed the conditional basis of such lawful permanent residence, of the termination of the alien's permanent resident status, unless the alien can establish continued eligibility for alien entrepreneur classification under section 203(b)(5) of the Act.

In the event of an initial denial, the applicant for designation as a Regional Center may appeal administratively to the AAO following the procedures contained in 8 CFR § 103.3, as follows:

§ 103.3Denials, appeals, and precedent decisions.

(a) *Denials and appeals—*

(1) *General—*

(i) Denial of application or petition. When a Service officer denies an application or petition filed under § 103.2 of this part, the officer shall explain in writing the specific reasons for denial. If Form I-292 (a denial form including notification of

the right of appeal) is used to notify the applicant or petitioner, the duplicate of Form I-292 constitutes the denial order.

(ii) Appealable decisions. Certain unfavorable decisions on applications, petitions, and other types of cases may be appealed. Decisions under the appellate jurisdiction of the Board of Immigration Appeals (Board) are listed in § 3.1(b) of this chapter. Decisions under the appellate jurisdiction of the Associate Commissioner, Examinations, are listed in § 103.1(f)(2) of this part[5].

(iii) Appeal—

(A) *Jurisdiction.* When an unfavorable decision may be appealed, the official making the decision shall state the appellate jurisdiction and shall furnish the appropriate appeal form.

(B) *Meaning of affected party.* For purposes of this section and §§ 103.4 and 103.5 of this part, *affected party* (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition. An affected party may be represented by an attorney or representative in accordance with part 292 of this chapter.

(C) *Record of proceeding.* An appeal and any cross-appeal or briefs become part of the record of proceeding.

(D) *Appeal filed by Service officer in case within jurisdiction of Board.* If an appeal is filed by a Service officer, a copy must be served on the affected party.

(iv) *Function of Administrative Appeals Unit (AAU).* The AAU is the appellate body which considers cases under the appellate jurisdiction of the Associate Commissioner, Examinations.

(v) *Summary dismissal.* An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. The filing by an attorney or representative accredited under 8 CFR 292.2(d) of an appeal which is summarily dismissed under this section may constitute frivolous behavior as defined in 8 CFR 292.3(a)(15). Summary dismissal of an appeal under § 103.3(a)(1)(v) in no way limits the other grounds and procedures for disciplinary action against attorneys or representatives provided in 8 CFR 292.2 or in any other statute or regulation.

(2) *AAU appeals in other than special agricultural worker and legalization cases—*

(i) *Filing appeal.* The affected party must submit an appeal on Form I-290B. Except as otherwise provided in this chapter, the affected party must pay the fee required by § 103.7 of this part. The affected party must submit the complete appeal including any supporting brief as indicated in the applicable form instructions within 30 days after service of the decision.

[5] The appellate jurisdiction listed in that *now repealed* regulation which existed until the creation of the Department of Homeland Security and U.S. Citizenship and Immigration Services remains in effect for USCIS' AAO with slight modifications. For up to date jurisdiction consult www.uscis.gov as well as USCIS Form I-290B and its instructions.

(ii) *Reviewing official.* The official who made the unfavorable decision being appealed shall review the appeal unless the affected party moves to a new jurisdiction. In that instance, the official who has jurisdiction over such a proceeding in that geographic location shall review it.

(iii) *Favorable action instead of forwarding appeal to AAU.* The reviewing official shall decide whether or not favorable action is warranted. Within 45 days of receipt of the appeal, the reviewing official may treat the appeal as a motion to reopen or reconsider and take favorable action. However, that official is not precluded from reopening a proceeding or reconsidering a decision on his or her own motion under § 103.5(a)(5)(i) of this part in order to make a new decision favorable to the affected party after 45 days of receipt of the appeal.

(iv) *Forwarding appeal to AAU.* If the reviewing official will not be taking favorable action or decides favorable action is not warranted, that official shall promptly forward the appeal and the related record of proceeding to the AAU in Washington, DC.

(v) *Improperly filed appeal—*

(A) *Appeal filed by person or entity not entitled to file it—*

(*1*) *Rejection without refund of filing fee.* An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

(*2*) *Appeal by attorney or representative without proper Form G-28—*

(*i*) *General.* If an appeal is filed by an attorney or representative without a properly executed Notice of Entry of Appearance as Attorney or Representative (Form G-28) entitling that person to file the appeal, the appeal is considered improperly filed. In such a case, any filing fee the Service has accepted will not be refunded regardless of the action taken.

(*ii*) *When favorable action warranted.* If the reviewing official decides favorable action is warranted with respect to an otherwise properly filed appeal, that official shall ask the attorney or representative to submit Form G-28 to the official's office within 15 days of the request. If Form G-28 is not submitted within the time allowed, the official may, on his or her own motion, under § 103.5(a)(5)(i) of this part, make a new decision favorable to the affected party without notifying the attorney or representative.

(*iii*) *When favorable action not warranted.* If the reviewing official decides favorable action is not warranted with respect to an otherwise properly filed appeal, that official shall ask the attorney or representative to submit Form G-28 directly to the AAU. The official shall also forward the appeal and the

relating record of proceeding to the AAU. The appeal may be considered properly filed as of its original filing date if the attorney or representative submits a properly executed Form G-28 entitling that person to file the appeal.

(B) *Untimely appeal*—

(*1*) *Rejection without refund of filing fee.* An appeal which is not filed within the time allowed must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

(*2*) *Untimely appeal treated as motion.* If an untimely appeal meets the requirements of a motion to reopen as described in § 103.5(a)(2) of this part or a motion to reconsider as described in § 103.5(a)(3) of this part, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

(vi) *Brief.* The affected party may submit a brief with Form I-290B.

(vii) *Additional time to submit a brief.* The affected party may make a written request to the AAU for additional time to submit a brief. The AAU may, for good cause shown, allow the affected party additional time to submit one.

(viii) *Where to submit supporting brief if additional time is granted.* If the AAU grants additional time, the affected party shall submit the brief directly to the AAU.

(ix) *Withdrawal of appeal.* The affected party may withdraw the appeal, in writing, before a decision is made.

(x) *Decision on appeal.* The decision must be in writing. A copy of the decision must be served on the affected party and the attorney or representative of record, if any.

(3) *Denials and appeals of special agricultural worker and legalization applications and termination of lawful temporary resident status under sections 210 and 245A.*

* * * * *

(b) *Oral argument regarding appeal before AAU*—

(1) *Request.* If the affected party desires oral argument, the affected party must explain in writing specifically why oral argument is necessary. For such a request to be considered, it must be submitted within the time allowed for meeting other requirements.

(2) *Decision about oral argument.* The Service has sole authority to grant or deny a request for oral argument. Upon approval of a request for oral argument, the AAU shall set the time, date, place, and conditions of oral argument.

(c) *Service precedent decisions.* The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, may file with the Attorney General decisions relating to the administration of the immigration laws of the United States for publication as precedent in future proceedings, and upon approval of the Attorney General as to the lawfulness of such decision, the Director of the Executive Office for Immigration Review shall cause such decisions to be published in the same manner as

> decisions of the Board and the Attorney General. In addition to Attorney General and Board decisions referred to in § 1003.1(g) of chapter V, designated Service decisions are to serve as precedents in all proceedings involving the same issue(s). Except as these decisions may be modified or overruled by later precedent decisions, they are binding on all Service employees in the administration of the Act. Precedent decisions must be published and made available to the public as described in 8 CFR 103.10(e).

Other than the provision to incorporate briefs and cross-appeals into the record of proceeding found at 103.3(a)(1)(iii)(C), I am not seeing much that clearly includes or excludes the treatment of an I-924 as a "continuing application". It is well-settled that ***preference*** *visa petitions* which depend on a "priority date" for visa issuance and allocation, or adjustment of status purposes must be "approvable when filed" for and by someone who is "eligible at time of filing" and that material changes after filing are prohibited in the vast majority of cases except for certain widows, orphans, survivors, or abused persons. So, even among that general class of benefit requests for preference visa petitions, some do constitute "continuing applications".

There are certain other benefit requests that are affirmatively acknowledged as "continuing applications" because they are clearly dependent upon all facts and factors in existence through time of final action and the bestowal of the benefit. In certain types of cases USCIS or an Immigration Judge can revoke or rescind a prior approval or strip one of a benefit previously bestowed. Anything bestowed, with the notable exception of naturalization as a citizen, can be undone administratively. Denaturalization demands a judicial proceeding. So, I see no reason why an I-924 should NOT be treated as a "continuing application" which may be finally decided one way or the other, while even incorporating material changes, all the way through a final adjudication decision, including through the administrative appeals process. If that position is affirmatively adopted by USCIS, then I think that any U.S. District Court or Circuit Court of Appeals would feel fully justified in being rigid in, and amendable to, ***sticking strictly to the Administrative Record of Proceeding, and thus flat out refusing to accept any new evidence or arguments from a petitioner*** in an APA review of an I-924 Application for USCIS Designation as an EB-5 Regional Center under 5 USC § 706.

That's my two-cents, for now.

About the Author

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DISCLAIMER: *Work is performed by a non-attorney independent business consultant and de facto paralegal. It is the client's responsibility to have any and all non-attorney work products checked by an attorney.* I provide ***highly-individualized training*** based on consultation with my clients. I serve Regional Center Principals and their counsel, potential EB-5 investors, immigration attorneys, and project developers. I am not an attorney myself although I have trained numerous attorneys and INS/USCIS adjudicators in complex issues within immigration and nationality law when I was an adjudicator there for many years. I do not prepare forms, write business plans, or create economic analyses. **I do review them for clients prior to submission and suggest corrections and/or modifications to run by your attorney and investment advisor.**

NOTE: I have over a decade of experience as an adjudicator for INS and USCIS and direct EB-5 Regional Center Adjudications experience having been instrumental in reviving, greatly enhancing, and expanding the EB-5 Regional Center Program for USCIS.

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.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUL 24 2014 Office: IMMIGRANT INVESTOR PROGRAM FILE:

IN RE: Applicant:

PETITION: Proposal for Designation as a Regional Center Pursuant to Section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1874 (1992).

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

www.uscis.gov

DISCUSSION: The Chief, Immigrant Investor Program (IPO), denied the proposal for designation as a regional center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant seeks designation as a regional center pursuant to section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1828 (1992), as amended by section 116 of Pub. L. No. 105-119, 111 Stat. 2440 (1997); section 402 of Pub. L. No. 106-396, 114 Stat. 1637 (2000); section 11037 of Pub. L. No. 107-273, 116 Stat. 1758 (2002); section 4 of Pub. L. No. 108-156, 117 Stat. 1944 (2003); and section 1 of Pub. L. No. 112-176, 126 Stat. 1325 (2012). The applicant proposes to establish regional center status for the that is based on the formation of a limited partnership, , which will use invested funds to build a hotel and resort facility.

The chief determined that the proposal (1) did not demonstrate the promotion of economic growth within the selected geographic area; (2) did not establish the regional or national impact of the regional center; (3) did not show job creation; and (4) contained redemption agreements between the alien investors and the regional center. On appeal, the applicant submits revised documentation and claims that the issues raised by the director have been addressed. For the reasons discussed below, the regional center proposal may not be approved.

I. LAW

Section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5), as amended by Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

Section 610(a) of the Departments of Justice and Related Agencies Appropriations Act, 1993, as amended, provides:

> Of the visas otherwise available under section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. § 1153(b)(5)), the Secretary of State, together with the Secretary of Homeland Security, shall set aside visas for a program to implement the provisions of such section. Such program shall involve a regional center in the United States, designated by the Secretary of Homeland Security on the basis of a

> general proposal, for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment. A regional center shall have jurisdiction over a limited geographic area, which shall be described in the proposal and consistent with the purpose of concentrating pooled investment in defined economic zones. The establishment of a regional center may be based on general predictions, contained in the proposal, concerning the kinds of commercial enterprises that will receive capital from aliens, the jobs that will be created directly or indirectly as a result of such capital investments, and the other positive economic effects such capital investments will have.

II. FACTUAL AND PROCEDURAL HISTORY

On November 22, 2010, the applicant filed the proposal along with supporting documentation. On September 20, 2011, the applicant responded to a June 17, 2011 request for evidence (RFE). The director denied the proposal on December 8, 2011, determining that the documentation did not demonstrate eligibility for a regional center. On January 10, 2012, the applicant filed an appeal with revised documentation.

III. ANALYSIS

On May 5, 2014, we issued a notice of adverse information and intent to dismiss the appeal, advising the applicant of derogatory information with an opportunity to respond before rendering a final decision pursuant to the regulation at 8 C.F.R. § 103.2(b)(16)(i). Specifically, according to the Tennessee Secretary of State's public website, on May 22, 2013, the Secretary of State changed status from "Active" to "Active-Dissolved." According to the relevant section of the Tennessee Code, the Secretary of State may administratively dissolve a limited liability company under various circumstances, including the limited liability company's failure to deliver its annual report to the Secretary of State within two months of the report's due date. Tenn. Code Ann. § 48-245-301. On June 4, 2013, the Tennessee Secretary of State issued a notice of determination. On August 13, 2013, the Tennessee Secretary of State changed filing status from "Active-Dissolved" to "Inactive-Dissolved (Administration)." Under section 48-245-302(c) of the Tennessee Code, "a[n] LLC administratively dissolved continues its existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under § 48-245-501 and notify claimants under § 48-245-502." Therefore, since August 13, 2013, has been a dissolved limited liability company and ineligible to conduct business in Tennessee as proposed in its request for designation as a regional center.

The regulation at 8 C.F.R. § 103.2(b)(13)(i) provides:

> Failure to submit evidence or respond to a notice of intent to deny. If the petitioner or applicant fails to respond to a request for evidence or to a notice of intent to deny by the required date, the benefit request may be summarily denied as abandoned, denied based on the record, or denied for both reasons . . . .

The applicant was afforded 30 days to respond to our notice. As of the date of this decision, however, the applicant has not responded to our notice. As the applicant has not overcome the evidence that the entity seeking designation as a regional center is dissolved, the applicant is ineligible to conduct the business that is the basis of the regional center proposal. Therefore, the appeal will be dismissed based on the applicant's failure to respond to our notice and on the dissolution of the entity. 8 C.F.R. § 103.2(b)(13)(i). Moreover, any further discussion regarding any of the other statutory and regulatory requirements is now moot.

III. CONCLUSION

The appeal will be dismissed for the above stated reasons. In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden.

ORDER: The appeal is dismissed.