

Consistent With The **Purpose** Of Concentrating Pooled Investments In Defined Economic Zones

By Joseph P. Whalen (Wednesday, January 20, 2016)

Congress finally became clear about the main purpose of the EB-5 Regional Center Program when it amended the authorizing statutory language via Sec. 11037 of [P. Law 107-273 \(21st Century Dept. of Justice Appropriations Authorization Act\)](#),¹ enacted on Nov. 2, 2002. At that time, the then-*pilot* program's authorizing statutory language was amended to add much needed clarity. With only minor changes since 2002, it now reads:

(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.

Previously, it merely said this:

(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 Attorney General, shall set aside visas for pilot program to implement the provisions of such section. Such pilot program shall involve a regional center in the United States for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.

Originally, the *pilot* program² had the general purpose of *promoting economic growth* and it still does. The regional center initially had no stated purpose or parameters until 2002, a decade later. Vague statutory language throughout that decade led to confusion and abuse. Next came a re-examination of how the program was progressing. That re-examination led to the

¹ http://govinfo.library.unt.edu/amc/pdf/statute/amc_act.pdf

² In 2012, the word "pilot" was officially dropped, after the program had been in existence for 20 years!

issuance of the four EB-5 Precedent Decisions in 1998, followed by lawsuits. Fast-forward to 2005-2007, and we see USCIS attempt to drum up some interest in EB-5 through the Regional Center Unit at HQ. To make a long story short, interest has blossomed immensely beginning in ~2008.

As more businesses sought cheap EB-5 financing, intermediaries sprang forth looking to “cash in”. Such folks were clueless but did not let that stop them. It is the surge in interest that has led to more lawsuits. Some of the investor lawsuits against USCIS were misdirected, they should have sued their lawyers and Regional Centers. Much of the fraud in EB-5 is like immigration fraud in general. While some groups are targeted for other reasons, such as money, affinity fraud is also huge in EB-5. Affinity fraud happens when the con artists and their targets, *i.e. victims*, share a trait, usually cultural affinity. Hispanics tend to target other Hispanics, Arabs target Arabs, Africans target Africans, Russians target Russians, etcetera. There is usually some cross-over fraud beyond the primary target sector, perhaps, shared language, race or religion is the primary point of affinity. It is sad that someone would use their religion to find fraud victims.

USCIS went through a period where the adjudicators were too demanding. That situation saw increasing processing times with high denial rates for Regional Centers. Then we saw a reversal of misfortune characterized by the lowering of standards in the extreme. As a result, too many ill-equipped “No Deference” Regional Centers have been authorized. Now we are seeing a backlash. The SEC and FBI have been alerted by USCIS to some “bad actors” who have been shut down and formally charged, convicted, and sentenced. Beyond the *criminal elements* which are in the *minority*, there are many more incompetent players in the EB-5 field than crooks. “No Deference” Regional Centers obtained status by meeting a very low standard based on the “general proposal” allowed by the authorizing statute. Amid vigorous arguments and much obfuscation, and let us not forget AAO’s liberal (but permissible) interpretation of the EB-5 Adjudication Policy Memo, the bar was lowered down into the muck and mire. I think that too many “No Deference” Regional Centers followed that path because they were operating on tiny budgets and relying on getting investors on board quickly, paying large fees just to join. Other “No Deference” Regional Centers did it that way for expediency and do have the resources to produce satisfactory plans, analyses, and other documentary evidence in support of future filings. These “No Deference” Regional Centers will seek outside help from experienced EB-5 Service Providers, or perhaps have sufficient knowledgeable staff on board in the underlying business entity that obtained USCIS-

Designated Regional Center status. Still others will hire new employees just to deal with their “No Deference” Regional Center for them. Time will tell.

Regardless of how these “No Deference” Regional Center come into existence their activities must be “*consistent with the purpose of concentrating pooled investment in defined economic zones*”. Many such RCs are real estate developers or construction companies and deal primarily with large “*pooled investments*”. Such “*pooled investments*” tend to be large construction projects and will have significant impacts on their regional economy. The actual location for the development will have been selected for its viability as well as its prospects for success and profit. In other words, the project will be *in a defined economic zone*.

I think that the casual observer of the EB-5 industry (*and to the detractors out there—yes, EB-5 is an industry unto itself*), can clearly see that the Regional Center Program does involve large pooled investments. The other requirement as to the investment being in a *defined economic zone* is **fact-specific** and **fact-dependent**. The selection of the individual project location is a big decision. Locations might be selected by, or require approval of, local planning boards. There might be targeted tax credits or incentives from federal, state, or local government agencies. There might be tight restrictions from historic preservation or environmental protection factions that dictate where developments may take place.

In other words, it's just not that simple!



/s/ *Joseph Patrick Whalen*