The Evolution of Regional Center Designation Adjudication

I. BACKGROUND

The Immigrant Investor Pilot Program in which the Regional Centers reside finds its origin in Section 61 0 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, as amended by section 402 of the Visa Waiver Permanent Program Act of 2000, which provides:

> (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 a 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**.
>
> *****
>
> (c) In determining compliance with section 203(b)(5)(A)(iii) of the Immigration and Nationality Act, and notwithstanding the requirements of 8 CFR 204.6, the Attorney General shall **permit aliens admitted under the pilot program described in this section to establish *reasonable methodologies* for determining the number of *jobs* created by the pilot 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 pilot program.

Paragraph (a) above is the statutory source of the undefined "pilot program" and "regional center" while (c) is the source of the inclusion of "indirect jobs" as determined by "reasonable methodologies". The statute directs the Attorney General [subsequently replaced by the Secretary of Homeland Security] to "implement the provisions" [which translates to: write implementing regulations] which was initially delegated to INS [subsequently replaced by USCIS]. Congress did not provide much raw material to work with so the "immigrant investor pilot program" and the requirements for designation as a "regional center" under that program are largely regulatory in nature as the regulations were pretty much a blank canvass to be creative with. Unfortunately, the implementing regulations were written by Legacy INS, which was much more Law Enforcement oriented than today's USCIS charged with being Customer Service oriented in delivering benefits.

II. INTRODUCTION

Prior to the creation of form I-924, *Application For Regional Center Under the Immigrant Investor Pilot Program*, an entity wishing to be designated as a Regional Center submitted a "proposal" without any standardized form or fee for the adjudication of that request. Both the applicants and the adjudicators only had the raw statute and early regulations to guide them. In the early days of implementation many issues involving the eligibility requirements for designation, evidentiary requirements, and the procedures to be followed were uncharted territory for the former INS and the individuals seeking designation of their organizations as

Regional Centers. Bad decisions were made on sub-standard evidence in poor quality investment opportunities. The earliest Regional Centers offered insufficient investment vehicles that resulted in insufficient job creation and attracted scam artists and fraudsters. The EB-5 program languished for years. Many of the early investors did not make full investments and their Regional Center promoter "partners" made improper "redemption agreements" so that the investment capital was not placed at risk for the intended purpose of creating jobs for qualified U.S. workers.

III. REINVENTING EB-5 REGIONAL CENTERS

Direct consultation with USCIS personnel and deep involvement by both the government and private sector participants in the development of suitable investment vehicles and the valid methods by which job creation could be predicted and what evidence would be required to show eligibility was not only commonplace but necessary for both sides. After an initial exploratory period of open discourse back and forth between USCIS and the EB-5 stakeholder community, improvements in the quality of Regional Center proposals and associated procedures took place. During the formation of the ground rules for the revitalized EB-5 Regional Center Program, an increasing distance became the proper stance for USCIS to take. At first, this distance began to grow in a natural way without either the government actors or the private sector applicants even being aware of their respective distancing behaviors.

The "Regional Center Proposal process" was in its infancy and pre-adolescence for a long time. Then puberty hit and the awkward stage began in earnest. Instead of easy access and open involvement in the formation of business plans, investment projects, methodologies, and documentary evidence, USCIS began to put forth more comprehensive substantive information for a wider audience. USCIS switched over to a line of communication of a more programmatic style. The hand-holding and coddling fell away and arms-length communication grew in use. A dedicated Immigrant Investor Program e-mail came into use and, with widespread dissemination of informal written instructions on How to Apply for Regional Center Designation, quality and volume of proposals increased greatly. Plans began to be formulated for a new USCIS form and associated fee as well as centralization of everything EB-5 at a single location for the sake of consistency and increased oversight of USCIS Designated Regional Centers.

IV. FURTHER DISTANCING OVER TIME

USCIS communication gradually changed from numerous face-to-face in-depth "consultations" to more generalized "informational meetings" then to "stakeholder engagements". The latter were by teleconferences and large group informational sessions. Questions were, and continue to be, submitted in advance for well considered responses delivered to groups of stakeholders whether orally at stakeholder meetings with verbatim write-ups and slideshow presentations or via teleconferences followed up with executive summaries and some individual responses

(submitted for general question only) through a publicly available programmatic e-mail inquiry system. These various avenues of inquiry have resulted in formal written summaries and Q&A's posted on the public website after careful editing.

V. FORMALIZATION OF THE REGIONAL CENTER PROCESS

Following the formalization of the application process including the refinement of communication and later, the creation of an actual form, with a fee, for the adjudication and designation as a Regional Center, the general underlying principles applied to other applications and petitions had to be affirmatively applied to Regional Center designation proceedings. Certain participants had, and some continue to have, difficulty in adjusting to the more formal information dissemination, application and, adjudication processes.

USCIS previously freely participated in informal discussions as to how to proceed in a procedural void that offered no formal guidance on how to apply and required no application or petition to be filed for an adjudication for which there was no fee. That situation could be construed as *ex-parte communications*[1]. Certain applicants sought to continue that customary practice which **was allowed** and necessary at that time which was before a radical formalization of the application process.

In the absence of formal guidance or any formal procedures or fee for a determination, the very issues that would need to be addressed for the good of all potential applicants and the entire program had yet to be fully identified. Up to a certain point in time, which remains unclear, so-called *ex-parte communication* was as beneficial to Legacy INS and USCIS as it was to the potential applicants. Some applicants, quite misguidedly and unfortunately, have tried to assert total fabrications and/or gross misinterpretations that they falsely or mistakenly claimed to be such *ex-parte communications* as binding pre-adjudication decisions that USCIS must abide by. Naturally, USCIS has clamped down on that approach and thrown up a brick wall to it. It was a necessary evil to cut off free and open communications and discourse when it was misused by bad actors. This was, and remains, a detriment to all participants, which includes USCIS and all private sector participants including Regional Centers, their immigrant and domestic investors.

VI. MATERIAL CHANGE PROHIBITION

Then along came the concept of "material change". What is "material change"? The USCIS administrative appellate body, the Administrative Appeals Office (AAO) has offered some

[1] "…AAO notes that ex *parte* communications are prohibited by the Administrative Procedure Act (APA), 5 U.S.C. § 706. According to section 551 (14) of the APA, "ex parte communication" is defined as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter."" Non-Precedent AAO Decision on a Regional Center Proposal Denial Appeal http://www.uscis.gov/err/K1%20-%20Request%20for%20Participation%20as%20Regional%20Center/Decisions_Issued_in_2008/Nov182008_01K1610.pdf

guidance on this topic and generally follows prior precedent by the Board of Immigration Appeals (BIA)[2] in its prior decisions but has expanded on the concept and given it this name.

*Matter of Izummi***,** 22 I&N Dec. 169 (BIA[3] 1998) holds, in pertinent part:

> (3) A petitioner may not make material changes to his petition in an effort to make a deficient petition conform to Service requirements.

That same decision goes on to further explain the underlying requirement, thus:

> "A petitioner **must establish eligibility at the time of filing**[4]; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements." **[emphasis added]**

Matter of Katigbak, 14 I&N Dec. 45 (Reg, Comm., 1971) is often cited with regard to the general principle, as restated in *Izummi* , that one "must establish eligibility at the time of filing" and as expanded upon in the 3rd prong of the 13 prong holding in *Izummi*, prohibiting the making of material changes subsequent to filing to remedy deficiencies. This is not to be confused with a mere matter of supplying further evidence in response to a request for evidence. The prohibition is against creating new circumstances and new facts for which no evidence previously existed in the absence of a material change made subsequent to filing.

It should be remembered that both of these Precedent Decisions, *Katigbak* and *Izummi* involved visa petitions that are tied inextricably to the "filing date as the priority date" for purpose of obtaining a place in a potentially very long line for an immigrant visa. Such immigrant visas being among the visa preference categories for which there are numerical limitations and country of origin quotas. There has never been full utilization of all available EB-5 visas in any year of the visa's existence but they do have actual statutorily prescribed numerical limits in addition to the overall country quotas. Regional Centers do not rely on a priority date for issuance of its "Designation" instead imperfect filings can be perfected as a precursor to subsequent mass filings by individual immigrant investors. USCIS shares responsibility with the Regional Centers to get the preliminary matters in order as a service to the ultimate customer, the EB-5 immigrant.

---

[2] The Board of Immigration Appeals (BIA or Board) was previously a part of the former Immigration and Naturalization Service(INS), then was spun off on January 9, 1983, through an internal Department of Justice (DOJ) reorganization which combined the BIA with the Immigration Judge functions previously performed by INS and became a sister agency with oversight responsibility over INS but also within DOJ. The remainder of the former INS was abolished on March 1, 2003, and is now part of the Department of Homeland Security (DHS) but EOIR was retained in DOJ.

[3] Although the decision as noted on the EOIR website lists this as a BIA precedent and the actual I&N Decision credits it to, then INS, Regional Commissioner, it was actually rendered by the AAU, of what was then INS (now AAO of USCIS).

[4] On April 17, 2007, 72 FR at 19105 added 8 CFR **§ 103.2 Applications, petitions, and other documents.** (b)(1) *Demonstrating eligibility at time of filing.* An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition. http://edocket.access.gpo.gov/2007/pdf/E7-7228.pdf

VII. MISAPPLICATION OF I&N PRECEDENTS[5]

In short there are two guiding principles under consideration:

1. That one must establish "eligibility at the time of filing", per *Katigbak* and
2. That one "may not make material changes to his petition in an effort to make a deficient petition conform to [USCIS] requirements." Per *Izummi.*

These principles have invaded the psyche of many USCIS Adjudicators and, obviously, the AAO. They are being misunderstood and misapplied to inapplicable benefit applications. That decision in *Katigbak* relates to the filing of and the individual beneficiary's qualifications for an employment-based preference immigrant visa petition because the filing date sets a priority date for visa issuance purposes as stated in Title II of the INA (see generally, INA 203). This general principle has clear applicability to certain other petitions and applications but does not apply to everything.

The "I-924 applicant" need not demonstrate full eligibility, in all respects, at time of filing. The approval of an I-924 does not in itself provide an actual immigration benefit. It only provides a label, i.e. "USCIS Designated Regional Center under the Immigrant Investor Pilot Program". That designation allows for the marketing of a business venture to a wider audience with the inducement of an easier immigration visa process and perhaps the only avenue for U.S. immigration available to the immigrant investor. The Regional Center affiliated immigrant investor may rely on "indirect jobs" forecast through an "economic model" which has been provided by the Regional Center and at least reviewed by USCIS as to its methodology either for an actual project or an exemplar project similar enough to the subsequent actual investment vehicle to instill confidence in successful attainment of an EB-5 immigrant visa.

Similar to an N-400, *Application for Naturalization*, only certain prerequisites need be demonstrated in order to file, while other eligibility factors are subject to modification after filing. For example, if the "I-924 applicant" is a variety of partnership (LLP or LLC), Company (Co.) or Corporation (Inc. or Corp.), then *such entity* must actually exist by having properly applied for and received such designation in accordance with governing laws and regulations in order to file an I-924 application as *such entity*[6].

On the other hand, an I-924 applicant may initially request a certain geographic area, for instance an entire State, but might submit an economic model that addresses only certain parts of that State. This disparity may be addressed in more than one way. USCIS may work with the

[5] Full Title: "Administrative Decisions Under Immigration and Nationality Laws of the United States", cited as "vol. #", I&N Dec."page #" (source, Year), i.e., (AAO or BIA or A.G., 2011)

[6] "The regulation at 8 C.F.R. § 204.6(j) notes that additional evidence other than that specified in the regulations may be required. Clearly, only an entity that exists can be designated as a regional center. Thus, it is reasonable to require evidence of the proposed regional center's existence." From a non-precedent AAO Decision at: http://www.uscis.gov/err/K1%20-%20Request%20for%20Participation%20as%20Regional%20Center/Decisions_Issued_in_2008/Nov182008_01K1610.pdf at page 5.

Regional Center principal(s) to refine the geographic area by limiting the Regional Center to certain contiguous counties or metropolitan statistical areas that are covered by the economic model already on hand. In the alternative, USCIS may allow new evidence to be submitted in the form of a new and/or revised economic model. These interactions will be handled through issuance of, *either* 1.) a request for evidence (RFE) and the additional evidentiary materials submitted in response, *or* 2.) a Notice of Intent to Deny (NOID) and the rebuttal evidence submitted in response, with the new evidence being evaluated and added to the record of proceeding (ROP).

Similarly, the templar documents (subscription agreements, partnership agreements, operating agreements, etc…) to be utilized by the Regional Center in its individual immigrant investor transactions may be modified during the pendency of the I-924 in order to make them conform to the EB-5 laws and regulations that those documents as legal instruments of the investment will be required to comply with **at time of filing** the individual I-526, *Immigrant Petition by Alien Entrepreneur*. This aspect of the I-924 adjudication is where much confusion lies with USCIS adjudicators, Regional Center applicants and their counsel, as well as AAO.

Until such time as actual immigrant investors file their individual I-526 petitions, the Regional Center is able to make changes to their templar documentation, business plans, economic forecasts, investment schemes, side agreements with other parties, etc… Any substantive material changes made *after* USCIS Designation through the I-924 adjudication but *before* any such materially affected or substantially altered standard document, or revised business plan and/or economic model is *submitted* to USCIS *with* an actual *petition* seeking an actual immigration benefit, re-adjudication may be required. Improper changes may negate that prior determination as to that altered substantive evidence submitted that is anything other than what was previously vetted by USCIS during the I-924 adjudication. Commonly, this action can be termed as "bait and switch". This circumstance may have unwanted and detrimental ramifications on the alien investor's ability to qualify for the immigrant classification for an EB-5 immigrant visa for the alien entrepreneur and his/her spouse and unmarried children under age 21.

VIII. TAKING STOCK—CLARIFICATION OF INQUIRY

Upon arriving at this point in this discussion, it is important to stop and clarify the pertinent questions to be considered in I-924 and associated I-526 and I-829 adjudications. What constitutes a "material change"? When does the "material change" need to be addressed? By what mechanism does a "material change" get addressed? What are the consequences of a "material change"? What steps must be taken to continue with the immigration process for the immigrant investor based on a "material change" made by the Regional Center?

The following is an excerpt from an AAO non-precedent decision involving an I-526 found at: http://www.uscis.gov/err/B7%20-%20Form%20I-526%20and%20I-829/Decisions_Issued_in_2010/Sep212010_01B7203.pdf

> "In *Matter of Izummi*, 22 I&N Dec. at 175, the AAO considered counsel's assertion that a nonprecedent decision by the AAO had approved a "completely different business plan that abandoned the troubled-business claim and substituted a plan to create a new business instead." The AAO responded that the decision referenced by counsel was not a binding precedent pursuant to 8 C.F.R. § 103.3(c) and concluded "that acceptance of the new business plan at such a late date was improper and erroneous." Id. at 175. While the facts in *Matter of Izummi* involved amendments to agreements rather than a business plan, that decision opines that the reasoning requiring a petition to be approvable when filed applies to material changes in business plans as well. *See also* ***Spencer Enterprises* v. *U.S.*,** 229 F.Supp.2d 1025, 1038 n. 4 (E.D. Cal. 2001) *aff'd* 345 F.3d 683 (9th Cir.2003)[7] (accepting an AAO determination that business plan amendments submitted for the first time on appeal could not be considered)."

IX. MAKING MATERIAL CHANGES—BY REGIONAL CENTERS

The form I-924 may be filed for an amendment by a previously designated Regional Center to "proof" altered standard documentation or an actual business plan and economic model for an actual venture (as opposed to just an exemplar submission whether based on one or not) to be subsequently filed *en masse* by individual immigrant investors in support of their individual I-526 petitions. This amendment process is available to the Regional Centers in order to protect the individual investors' subsequent petitions, expand their geographic scope, expand their areas of economic activities and/or industries, financial management concepts (direct investments vs. leveraged financing vs. loans), as supported by new and/or updated economic models, subscription agreements, financial transaction mechanisms (escrow arrangements, OFAC licenses, etc…) and also to protect their own reputations and avoid denials of individual petitions. All parties would likely agree that it is most undesirable when these overall Regional Center coordinated aspects and functions have to be re-adjudicated ad-hoc at the wrong time in the process due to a "surprise" "material change" made after the approval of the Regional Center Designation but before the individual petitions are filed by the alien investors.

USCIS adjudication processes, in general, and, especially in the EB-5 sphere, have always been highly attuned to detect fraud. Certain "material changes" made after the Regional Center was first approved or most recently amended are easily seen as attempts at fraud through "bait and switch" tactics even if they are true inadvertent oversights. Documentation used as supporting evidence in I-526 petitions by numerous immigrant investors that has been fully vetted and that remains **materially unaltered** helps to speed the immigration process for the alien investors and move the investment project along most expeditiously.

7 Spencer v. INS found at: http://archive.ca9.uscourts.gov/ca9/newopinions.nsf/752876AC2E72D7B088256DA3007BDB70/$file/0116391.pdf?openelement

X. LATE STAGE MATERIAL CHANGES

The amendment process afforded by the I-924 is the best way to address major "material changes" early in the process. Sometimes, however, due to a variety of external pressures and economic realities, circumstances may dictate that "material changes" will happen at later stages in the project which is the object of the investment by the immigrant investor. Depending on the individual investor's progression in a project and immigration process, they may need to file a new I-526 with a new business plan and/or new or updated economic model, or they may need to file a new I-526 and then an I-407 (to give up the conditional resident status) along with a [first or new] I-485 and attain new conditional status. Re-adjustment extends to the dependents and children may be in danger of "aging-out" as a dependent. CSPA[8] does apply but has its particular quirks unto itself. That second investor process may come before or after filing an I-829, *Petition by Entrepreneur to Remove Conditions*. Coming after the filing of an I-829 is the least desirable position for everyone. It is nerve-wracking to the investor and family, it is potential bad press for the Regional Center and to the program overall. The EB-5 program is under the oversight of USCIS/DHS and is the brainchild of the U.S. Congress. None of the participants in EB-5 likes bad press, especially folks who get plenty of it anyway.

XI. CHANGES AFTER THE FACT--NOT SOMETHING NEW UNDER THE INA

By comparison, a naturalization applicant must meet a minimum physical presence requirement and must have had their status for a minimum period of time, in most cases, before they may file an N-400, but, continuous residence can be broken and good moral character can be lost *or* proven **after filing**. A long absence from the United States or an affirmative change of residence abroad after filing an N-400 can make one ineligible. A crime committed or prosecuted after filing may negate good moral character, while the end of probation for an otherwise non-determinative crime or violation may serve to rehabilitate and cement eligibility for naturalization, after filing, despite the prohibition against naturalizing (as in administering the Oath to) a person who is still on probation.

Naturalization has aspects towards eligibility that are *prerequisite* to filing the application but it is not complete until the final administration of the Oath of Renunciation and Allegiance. An N-400 is only "recommended for approval" until such time as the applicant is admitted to citizenship. The premise of an investment as asserted in a Regional Center application, i.e. the business plan, and the previously vetted written documentation, are only "recommended for a favorable determination" as supporting prima facie evidence of eligibility for a future I-526 and even further I-829. A *prima facie showing of eligibility*, through use of previously vetted plans and documentation, is a good starting point but is not the final word. An individual applicant *must still prove complete eligibility for a favorable determination* on the individual petition.

[8] The Child Status Protection Act (CSPA) guidance memo and AFM Update: http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2008/cspa_30apr08.pdf

XII. INAPPLICABILITY OF "ELIGIBILITY AT TIME OF FILING" TO I-924

The holding in *Katigbak* is actually:

> To be eligible for preference classification under 203(a) (3) of the Immigration and Nationality Act, as amended, **the beneficiary must be a qualified member of the professions at the time of the filing of the visa petition**. Education or experience acquired subsequent to the filing date of such visa petition may not be considered in support thereof since to do so would result in according the beneficiary a priority date for visa issuance at a time when not qualified for the preference status sought. **[emphases added]**

Preference visas are allocated on a first-in, first-out system of quotas by country based on specific pre-existing relationships of a family-based category or pre-existing relationships and/or qualifications of an employment-based category. For I-140, I-130, I-526, I-730 and most I-360[9] visa petitions, this concept generally makes sense. The form I-526 lays the foundation for an immigrant investor to build upon.

Izummi deals with very complex issues ranging from an individual immigrant investor's I-526 petition to requirements related to designation as a Regional Center (something now applied for via an application form I-924 but previously merely by a "Proposal" at the time of that AAO decision.) The underlying Regional Center designation, associated economic analysis, business concepts and organization have further implications on the individual investor's I-526[10] visa classification petition and the associated follow-up I-829 petition to remove conditions.

The whole of EB-5 is intertwined in a highly complex manner that dictates that the separate petitions and applications overlap one another. That unique and highly complex set of circumstances is not a proper Precedent outside its particular sphere any more than *Katigbak*. Broad-brush generalization from the specific has its limits in any discipline and Immigration Law is not any different in that respect.

A. The Form I-526 Stage:

The form I-526 is supported by a viable business plan that makes a credible projection as to job creation which is supported by the reasonable assumptions in a statistically valid economic model based on an excepted methodology. Through the I-526, the immigrant investor says: "This is what I am going to do and here is how I am going to create the required jobs." The plan asserted at this stage is the one against which the later I-829 will be assessed for follow through. If the plan has been materially changed from what the investor originally put forth, then what

[9] VAWA based petitions which may involve the underlying I-130, a subsequent I-360 or an I-751and may be renewed after a divorce is concluded, so a changed circumstance is not an absolute determinative factor of the final outcome on the petition(s).
[10] The USCIS EB-5 Memo of December 11, 2009, allows a new I-526 to be filed and re-adjustment due to material changes, see: http://www.uscis.gov/USCIS/Laws/Memoranda/Static%20Files%20Memoranda/Adjudicating%20of%20EB-5_121109.pdf

follows at the I-829 stage becomes an unknown quantity. That is not the appropriate stage of the process to assert a new business plan and a new economic model.

B. The Form I-829 Stage:

The form I-829 stage should be a straight forward fact-checking process the purpose of which is to determine if the assumptions put forth at the I-526 stage have come to fruition.

Example #1: The model predicts at the I-526 stage that the infusion of X amount of money invested in project/company Y will result in Z number of jobs. At the I-829 stage one must show that X actually was invested in Y and USCIS should accept that Z number of jobs, have been created.

Example #2: The model predicts that one will invest in a mall and X number of mall tenant's jobs will be created and because of that, Y number of indirect jobs will be created based on investment of Z amount of money. Here, the investor would need to show that Z was invested in the mall and tenants have taken leases on the stores in the mall. Because of this, one can assert that X number of tenant jobs have been created, therefore, Y number of indirect jobs have also been created and one has met the requirements to lift conditions on residence status.

C. Contrasting to the Form I-924:

In contrast to an I-526 or I-829, an I-924 invites material changes and it is a major function of USCIS to do all it can to help the Regional Centers get all their ducks in a row. USCIS would not have to view itself as being altruistic. Instead, this approach can rightfully be seen as a self-serving function. The better the quality of initial submissions by immigrant investors, the easier the adjudication of the subsequent petitions. The underlying Congressional intent in creating the pilot program and its Regional Centers was to facilitate immigrant investment. Congress sought to attract foreign capital in order to infuse the U.S. economy with needed capital investments and promote regional economic benefits and stimulate job creation. Hence, the immigrant visa is known as the employment creation visa.

The AAO clearly points out that USCIS is strongly encouraged to accept assertions made during the Regional Center preliminaries later on at the I-526 stage of the process. This is a desirable outcome for USCIS because to be able to do so makes the subsequent I-526 adjudication easier. In order to fulfill such a request, the initial Regional Center evidence must be worthy of consideration later on. This is akin to *Chevron*[11] deference, except by an administrative agency towards a private sector entity in this case, the particular Regional Center. A Regional Center bears the burden of proof in laying the foundation upon which the future immigrant investor

[11] ***Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.***, 467 U.S. 837 (1984), was a case in which the United States Supreme Court set forth the legal test for determining whether to grant deference to a government agency's interpretation of a statute which it administers. *Chevron* is the Court's clearest articulation of the doctrine of "administrative deference," to the point that the Court itself has used the phrase "Chevron deference" in more recent cases

petition cases will be built. In order to serve its primary purposes of promoting economic growth, improved regional productivity, job creation, and increased domestic capital investment it must put forth the required evidence. Such evidence establishes a sound basis upon which to build. Such evidence necessarily will include a sufficiently detailed and comprehensive business plan supported by reasonable assumptions based in the current economic reality. It needs to be further supported by statistically valid forecasting tools, including, but not limited to, feasibility studies, market forecasts, and economic analyses. As stated earlier the distinction that comes will the attainment of the moniker of ***"USCIS Designated Regional Center under the Immigrant Investor Pilot Program"*** has advantages. That designation allows for the marketing of a variety of business ventures to a wider audience with the inducement of an easier immigration visa process and perhaps the only avenue for U.S. immigration available to the immigrant investor.

From a non-precedent AAO Decision of a Regional Center Proposal on certification found at: http://www.uscis.gov/err/K1%20-%20Request%20for%20Participation%20as%20Regional%20Center/Decisions_Issued_in_2009/Dec222009_02K1610.pdf

> "On certification the applicant submitted a business plan and a new economic analysis of the two projects identified by counsel. As stated above these documents were specifically requested by the director and the applicant chose not to comply with that request. On that basis alone the petition may not be approved. 8 C.F.R. § 103.2(b)(14). While counsel is correct that the regulations provide that specifics are required at the Form 1-526 petition stage and include provisions for terminating a regional center's designation, these provisions do not imply that USCIS is prohibited from requesting the business plan when considering a regional center proposal. In fact, USCIS regulations specifically provide that USCIS may request additional evidence "[i]f all required initial evidence has been submitted but the evidence submitted does not establish eligibility." 8 C.F.R. § 103.2(b)(8)(iii).
>
> In this case counsel appears to be suggesting that USCIS must approve a regional center proposal encompassing 14 counties and 11 types of businesses based on an analysis of three generic projects and three sample projects with no business plan explaining how the limited partnerships would identify, negotiate and invest in these projects. The regulation at 8 C.F.R. 204.6(m)(3)(ii) requires the applicant to provide "verifiable" detail as to how the jobs will be created. The director cannot determine whether an economic analysis is reasonable without some type of business plan explaining how the applicant plans to invest in the proposed projects. USCIS has a clear interest in evaluating the business plan at the regional center stage. Binding precedent makes clear that USCIS does not pre-adjudicate petitions or eligibility requirements. Each petition must be adjudicated on its own merits. *Matter of Izummi,* 22 I&N Dec. at 190-1 91. Despite this binding precedent we note that USCIS is encouraged to accept any projections previously submitted at the regional center stage when adjudicating the Form 1-526 petitions filed by individual alien investors, absent fraud and provided that there has been no material change.) USCIS will not, however, abdicate its authority to verify that the regional center proposals are reasonable. Thus, the director did not err in requesting a business plan and an economic

> analysis that takes into account the differences among all of the counties within the proposed regional center, and we need not consider the business plan or economic analysis submitted on certification. Nevertheless, for the reasons discussed below, the materials subsequently provided do not render the proposal approvable."

An I-924 is similar to an N-400 in terms of reciprocity also. In the case of: Luria v. United States, 231 U.S. 9, 34 S. Ct. 10, 58 L. Ed. 101 (1913), quoted below, it was recognized by the U.S. Supreme Court that a grant of naturalization is a mutual agreement between the naturalization applicant and the United States of America. The designation as Regional Center can be viewed in a similar light. There must be a mutual agreement between the parties to respect their agreement. Each party bears a responsibility to the other.

The Regional Center must prove itself to get the desired chance and then it must fulfill its promise through its actions. Just as a naturalization applicant can perfect his/her N-400 application during the process, so too, can a Regional Center applicant perfect its I-924 application. A naturalization applicant automatically has two chances to pass INA § 312 English and civics requirements and is afforded more chances through a "Second Hearing" (N-336 'appeal') and three further tiers of judicial review. A Regional Center should be afforded ample opportunities to perfect its application for designation due to the benefits that it is expected to provide in return for that honor. Many high standards and promises are extracted from the applicant in order to attain status and gain rights and privileges in an air of mutual agreement to assume and bear obligations and duties on both sides in a formal exchange between them.

> "Citizenship is membership in a political society, and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other…….
>
> ……These requirements plainly contemplated that the applicant, if admitted, should be a citizen in fact as well as in name,—that he should assume and bear the obligations and duties of that status as well as enjoy its rights and privileges. In other words, it was contemplated that his admission should be mutually beneficial to the government and himself, the proof in respect of his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than for what they told of the past."

XIII. CONCLUSION

Regional Centers are supposed to be supported by USCIS in their efforts to aid the immigrant investors in meeting the statutory requirements as set by Congress in order to attain their immigrant status and that of their dependent family members as a thank you for investing in America. While it is the function of USCIS to evaluate the individual applicants and petitioners as to their eligibility for the benefit sought under the INA, it is not the function of USCIS to make the application or petition process any more difficult than it already is, or deny any benefit unjustly.

The Regional Center is supposed to be a welcoming benevolent agent of the U.S. that draws foreign investors into the U.S. economy. Regional Centers are supposed to be partners to USCIS. They are unofficial ambassadors of the U.S. and their purpose is to make the attainment of immigration benefits (immigrant visas for the investor and family) easier by doing the hard work of project planning and coordinating multiple investors (foreign and domestic), providing sound investment strategies designed to create sufficient jobs which are supported by reasonable and valid economic predictions.

In the realm of Regional Center Designation it is the responsibility of USCIS to do all it can to make the process function as well as it can for all concerned. Proofreading, editing and causing material changes to standard business documents to be used, overall business plans, and associated economic models is well within the realm of USCIS adjudicators in evaluating the evidence submitted with an I-924. It is not in the best interest of USCIS to accept documentation at the I-924 stage that will not be acceptable at the I-526 stage of the process. It is in the best interest of USCIS, the Regional Centers, the immigrant investors and most especially the U.S. economy and the U.S. workers, to help perfect I-924 applications and do it most expeditiously.

XIV. FOR EASY REFERENCE

8 CFR § 204.6 Petitions for employment creation aliens.

(e) *Definitions.* As used in this section:

*****

Regional center means any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales [if any], improved regional productivity, job creation, and increased domestic capital investment.

*****

(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.

*****

(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[12], 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

[12] For proposals submitted by regional centers under the Immigrant Investor Pilot Program, the regulations provide that proposals must be submitted to the "Assistant Commissioner for Adjudications," a position held at the Headquarters of the former Immigration and Naturalization Service (INS). However, this position was rendered obsolete following the abolishment of INS in March 2003. *See* 6 U.S.C. 291; Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135 (Nov. 25, 2002). No parallel position is present in USCIS. In the absence of further guidance, regional centers wishing to participate in the Immigrant Investor Pilot Program had been submitting their proposals to the Chief of Service Center Operations. This was shifted to the Director of the California Service Center as noted in 74 FR 912 (Jan. 9, 2009).

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.

*****

(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.

*****

(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.