WHAT CAN WE LEARN FROM
Matter of A-C-R-C-, LLC, ID# 16195 (AAO Apr. 28, 2016)

By Joseph P. Whalen (Sunday, June 26, 2016)

Introduction - Background

It has been another slow year in terms of posted AAO[1] Decisions concerning EB-5 petitions and applications. There have been numerous EB-5 related lawsuits filed but only a few of the complaints have been made available, and little else.[2] The SEC has filed a few EB-5 related complaints.[3] Administratively, between last year (2015) and the date of this writing there have been only three Regional Center (RC) AAO Decisions posted. They consist of two I-924 Application-based decisions and one RC Termination. *See chart below*. I have previously commented on most I-526s, and would have commented on any I-829s, if there had been any. This missive will stick primarily to the Regional Center decisions, especially, *Matter of A-C-R-C-, LLC*, ID# 16195 (AAO Apr. 28, 2016). I have already commented on the two 2015 non-precedents but include a recap for the reader's convenience.

AAO's Latest EB-5 Regional Center Decision is an I-924 Remand

In the non-precedent decision identified as "***Matter of A-C-R-C-, LLC*, ID# 16195 (AAO Apr. 28, 2016)**", AAO found reasons that led them to remand the case for further proceedings, or at least a new decision. If the new decision is adverse, it must be certified to AAO for review. The Chief, Immigrant Investor Program Office (IPO), denied the application, *concluding* that the proposal did not demonstrate in "verifiable detail" how the requisite jobs would be created. During its *de novo* review, AAO identified certain overlooked issues for the Chief to address *in the first instance* on remand.

During the course of the adjudication at IPO, the Chief issued a request for evidence (RFE), which was later reissued, the Chief then issued a notice of intent to deny

[1] Administrative Appeals Office (AAO) is the primary DHS Appellate Body for immigration issues. AAO posts non-precedent decisions at: https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/aao-non-precedent-decisions (there is a new search function; and citation strings were added in September 2015.) SEVP Appeals for school certification and SEVIS access (formerly Form I-17) are handled by ICE; find more info at: https://www.ice.gov/sevis/appeals .
[2] I post what I find at: http://www.slideshare.net/BigJoe5
[3] I also re-post what I find at the above link.

(NOID) before finally denying the application. Through the back and forth correspondence, certain deficiencies were identified, to which the applicant responded in attempts to supplement, correct, satisfy, rebut, and finally, bargain or negotiate. In other words, the Applicant sought to *perfect the application* in order to secure Regional Center Designation. AAO observed that the Chief's formal written Decision (Form I-292) failed to address all of the pertinent issues presented in, and the evidentiary value of, the rebuttal materials, and failed to articulate the deficiencies therein.

Maybe We Will Have Something Good To Look For In The Near Future? A Matter of First Impression Perhaps?

The Chief did not address the Applicant's efforts to *perfect the application*. **If** the Chief had done so, **then** AAO would have been in a position to opine upon, and meaningfully address, *that* issue; most likely as *a matter of first impression*[4]. We will simply have to wait and see what actually happens. ***Hey, I can dream. Can't I?***

The Chief doubted the feasibility of the proposed *actual* project presented in the business plan, or at least certain portions of it. In direct response to the Chief's doubts, the Applicant provided additional market and demand analyses to bolster those portions with which the Chief expressed doubts. In anticipation of further opposition, the Applicant also put forth not one, but two, fallback positions. The Chief failed to solidly address either of the alternative fallback positions. The Chief apparently failed to address the underlying question of '*What modifications are permissible?*' as allowed by the USCIS Policy Memorandum PM-602-0083, *EB-5 Adjudications Policy* (May 30, 2013). Notably, the Policy Memo states, in footnote 3, on page 14, the following:

> [3] **In cases where the Form I-924 is filed based on actual projects that do not contain sufficient verifiable detail, the projects may still be approved as**

[4] **Matter of first impression**

First impression (known as *primae impressionis* in Latin) is a legal case in which there is no binding authority on the matter presented. Such a case can set forth a completely original issue of law for decision by the courts. A first impression case may be a first impression in only a particular jurisdiction. In that situation, courts will look to holdings of other jurisdictions for persuasive authority.

In the latter meaning, the case in question cannot be decided through referring to and/or relying on precedent. Since the legal issue under consideration has never been decided by an appeals court and, therefore, there is no precedent for the court to follow, the court uses analogies from prior rulings by appeals courts, refers to commentaries and articles by legal scholars, and applies its own logic. In cases of first impression, the trial judge will often ask both sides' attorneys for legal briefs.

In some situations, a case of first impression may exist in a jurisdiction until a reported appellate court decision is rendered.

See: https://en.wikipedia.org/wiki/Precedent#Matter_of_first_impression

> **hypothetical projects if they contain the requisite general proposals and predictions.** The projects approved as hypotheticals, however, will not receive deference. **In cases where some projects are** approvable as actual projects, and others are not approvable or **only approvable as hypothetical projects, the approval notice should contain a statement identifying which projects have been approved as actual projects** and will be accorded deference **and those projects that have been approved as hypothetical projects** but will not be accorded deference.
>
> **[Emphases Added]**

In large part, AAO remanded the case so that the Chief could fully consider and properly address:

(a.) the applicant's *requests* and *offers* to alter:

(i.) its business plans and job creation projections;

(ii.) *the breadth* of the Regional-Center's proposed *actual* project;

(b.) whether its *hypothetical* projects were approved or not; and

(c.) whether its proposed *actual* project could be approved as a *hypothetical* project instead; if IPO still had minor doubts about it as an *actual* project.

AAO directed the Chief to evaluate the evidence submitted in support of the various proposed alternatives. AAO also gently chided the Chief for failing to make clear whether either of the projects presented initially as *hypothetical* could be approved as such.

They Always Look At How The Money Is Being Spent And Accounted For!

Finally, AAO noted serious inconsistencies revealed through an in-depth examination and analysis of the transactional documents *as compared to* the economic impact analysis. Due to the redaction of identifying information in the public copy of the Appeal Decision, it is difficult to trace and follow all of the intricacies and inconsistencies among the various projects that the applicant proposed. It was messy going! While remembering the foregoing difficulty, there is one thing in particular that stands out in my mind. AAO's dissection of a subscription agreement and associated confidential offering memorandum revealed a discrepancy concerning the $50,000.00 *subscription* or *administrative* fees of 80 investors. Regarding that $4,000,000.00 in fees, the Applicant appears to be "double-counting" these fees for use by both the regional center to cover operating expenses and the new commercial enterprise (NCE). This mistake skews the job creation calculations due to the use of incorrect data & inputs in the economic model.

AAO has made it clear in many remanded cases across numerous categories of applications and petitions that the deciding official (*usually "the Director" but here, "the Chief"*) must describe the deficiencies underlying the denial, and must do so with *specificity*. AAO has taken the firm position that the Director/Chief has *an affirmative duty to explain* the reasoning for the decision. *See* 8 C.F.R. § 1 03.3(a)(i)[5]; *see also Matter of Q-V-A-*, ID# 13990 (AAO Oct. 5, 2015)[6], at p. 1. Another noteworthy item in *A-C-R-C-LLC,* is that AAO is once again stressing that **if** the Chief issues a new denial, **then** the *notice must contain specific findings* that would afford the Applicant the *opportunity to present a meaningful appeal*. Just like many remanded cases, AAO required an **adverse** decision to be returned on certification. This could be read either way. Does this forebode "approval" with denial unlikely? (I doubt it.) Does this instead forebode a forthcoming certification expected to be like a "meaningful appeal"? We will have to wait and see.

A-C-R-C-, LLC Brings Up Several Pertinent Ideas About EB-5 Regional Centers;

- *Gross errors* in job creation predictions do not instill confidence in anyone seeking EB-5 Regional Center Designation, especially with USCIS Adjudicators.
- It may matter less whether said *gross errors* are a sign of incompetence or dishonesty what matters most is the mere fact of their existence.
- Negotiation ***is*** an option during I-924 adjudication ***but*** the limits of such negotiation remains unclear.
- *Full eligibility* is determined at the end of the adjudication process in the final decision, therefore one need only show a *prima facie* case upon filing an I-924.
- Making "*material changes*" to plans during I-924 adjudication is not strictly impermissible because the overriding timing consideration is "*at time of final decision*".[7] *{If that were not so, why remand this case for further proceedings?}*
- In *A-C-R-C-, LLC* (at p. 5), AAO once again hauls out this well-worn, *and in my opinion*, inappropriate blurb:

> "… Eligibility must be established at the time of filing. *See Matter of Izummi*. 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998); 8 C.F.R. § 103.2(b)(1). Approval cannot occur if, after filing, eligibility exists under a new set of facts or circumstances. *Id.*"

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[5] http://www.ecfr.gov/cgi-bin/text-idx?SID=db12cda7180bde682b6f98ba53cfc9e8&mc=true&node=se8.1.103_13&rgn=div8

[6] https://www.uscis.gov/sites/default/files/err/H4%20-%20Application%20for%20Reentry%20after%20Removal%20or%20Aggravated%20Felony%20Conviction%20-%20212%28a%29%289%29%28A%29%28iii%29,%20212%28a%29%289%29%28B%29%28v%29,%212%28d%29%283%29%28A%29/Decisions_Issued_in_2015/OCT052015_01H4212.pdf

[7] I hope that this is soon made clear in new EB-5 regulations.

I-924 Has No "Priority Date" Issue to Worry About! Why Borrow Trouble? Plus My Thoughts on the Dreaded "Material Change" Prohibition!

I say that *this* concept of "material change", and *this* precedent (*Izummi*), are inappropriate *for*, and inapplicable *to*, the Form I-924, because they apply specifically to a "*preference visa petition*". Originally, this prohibition was applied to an I-140 immigrant visa petition that was submitted for a "member of the professions" in *Matter of Katigbak*, 14 I&N Dec. 45 (R.C. 1971). That visa classification would now be encompassed within category EB-2, or EB-3, depending on level of education required for the profession in question and/or the particular position to be filled through the petition.[8]

> "... 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."

In *Matter of Izummi*, the general concept of "eligibility at time of filing" was specifically adopted *for*, and applied *to*, an I-526 which is also a "*preference visa petition*". Such a petition involves a "priority date" which is the "filing date" of an *approved* petition. A "priority date" establishes the beneficiary's place in line for a limited number of visas. As observed in *Katigbak*, it is simply unfair to allow a person to reserve an early "priority date" by prematurely filing a visa petition for an unqualified beneficiary.

As applied to the I-526 for an EB-5 visa, the *self-petitioner* may not prematurely file with insufficient evidence in the form of underdeveloped plans for creating the required new jobs. When the *Katigbak* concept was applied to Izummi's petition, the terminology changed slightly and became a prohibition against making a "material change" to certain documents that had been submitted as evidence *at time of filing* the petition. This concept was expressed in the holding as:

> "(3) A petitioner may not make material changes to his petition in an effort to make a deficient petition conform to Service [*now* USCIS] requirements."

USCIS has since backed away from an "absolute" material change prohibition for an individual investor's business and job creation activities, but that *leeway* is applied to

[8] EB-2 "*members of the* **professions** holding advanced degrees" or EB-3 "**professionals**".

a protracted process lasting several years. This "prohibition" correctly only narrowly applies to the initial filing in that process, namely the I-526 only.

The immigrant investor, however, begins the ***EB-5 process*** long before filing the I-526 visa petition. The investor either begins investing and creates the required jobs; or comes up with a plan to do so prior to filing the I-526 preference visa petition. This is where the "prohibition" comes into play. If a self-petitioner files a sub-standard I-526, supported by *unrealistic* or just plain *lousy* plans presented in the accompanying evidence, then he or she cannot be rewarded with a priority date to which he or she is not entitled. To allow such a self-petitioner to retain an early priority date while making significant or "material" changes to the *prima facie* evidence, would be extremely unfair to the other investors who got their evidence in good order before filing an I-526 petition.

Form I-924 Is Not A Visa Petition; It's An Application!

Form I-924, on the other hand, is **not** a visa petition at all. It is an '*application for a designation*' as an EB-5 Regional Center, and for USCIS' '*permission to participate*' in the EB-5 Regional Center Program. In other words, the I-924 is a '*license application'*. I do not know about you, but I had to pass both a *written test* and a *road test* in order to get my driver's license. Many folks need multiple attempts to pass either or both parts of the test, therefore, it is what can be eventually demonstrated that matters in the *licensing process*. Why not for the I-924, also?

The mere fact that *Matter of Izummi* is one of the four EB-5 Precedents does not automatically make its "material change" prohibition applicable to everything related to EB-5. In particular, over several years from filing an I-526 petition to the I-829 petition, it is *unrealistic* to expect **no** changes, even some of a material nature, in the normal course of "doing business". The prohibition truly applies to the "hypertechnical" requirements found in complex business documents to prevent fraudulent "bait and switch" tactics.

That's My Two-Cents, For Now!

/s/ Joseph P. Whalen

Sunday, June 26, 2016

CITATION	OUTCOME, HOLDING, EXCERPT(S), COMMENTS	LINK & FILENAME
***Matter of A-C-R-C-, LLC*, ID# 16195 (AAO Apr. 28, 2016)**	**I-924 Application** **REMANDED** **For Further Proceedings**	APR282016_01K1610.pdf
This non-precedent predates AAO's implementation of citation strings with name and identification number. It would be necessary to include the ***filename*** *and* ***a copy of the decision*** *for easy reference for the adjudicator IF citing to this AAO decision.*	**I-924 Application** **APPEAL DISMISSED** **Held** *The regulation at 8 C.F.R. § 204.6 (m) (3) requires the regional center applicant to submit a detailed proposal* ***for the regional center*** *rather than a general or hypothetical proposal.* **Synopsis** *The Chief, Immigrant Investor Program Office (IPO), denied the application for Regional Center Designation, determining that the applicant did not submit a business plan (or Operational Plan) for the regional center or provide any evidence of the regional center's administrative oversight.* **My Interpretations** *The legal entity, that applies for Regional Center Designation must include an Operational Plan for the Regional Center itself, apart from, and beyond, any Matter of Ho-compliant Business Plan for the investment vehicle.*	JUL092015_01K1610.pdf

	Such plan must describe in sufficient detail how the Regional Center will fulfill its administrative and oversight responsibilities related to project management, securities, anti-money laundering, OFAC licenses, etc., as well as its obligations to its EB-5 investors. *The Operational Plan is an opportunity to demonstrate the applicant's **K**nowledge, **S**kills, and **A**bilities (**KSA**s) necessary to the successful day-to-day operation of the Regional Center as a distinct business unto itself, even if the Regional Center exists within a larger organization.*	
***Matter of K-R-C-, LLC*, ID# 14127 (AAO Nov. 17, 2015)** ***See my article at*:** "*REGIONAL CENTER DESIGNATION CANNOT BE SOLD OR TRANSFERRED BUT THE UNDERLYING BUSINESS CAN*" posted here and here.	**REGIONAL CENTER TERMINATION UPHELD** **Held** *Any ownership changes in the business that obtained regional center designation does not relieve the **Regional Center** from any regulatory requirements; and a new owner assumes all risks in the purchase of the existing regional center entity, including the possibility of the regional center's termination based on the business activities of the prior business entity's owner(s).*	**NOV172015_01K2610.pdf**

	Synopsis *On February 13, 2015, the Chief, Immigrant Investor Program (IPO), terminated the Regional Center's designation. USCIS had designated Midwest EB-5 Regional Center, LLC (also known as Kentucky Regional Center or KRC) as a regional center on April 29, 2010.* *Initially, USCIS approved a proposal that focused on nine industrial categories in a geographic area of three Kentucky counties and four Ohio counties. On June 25, 2013, USCIS approved an amendment request for additional industry categories. The intended kinds of commercial enterprises stated in the proposals included consisted of a mixed-use commercial center including a hotel, retail stores, restaurants, residences, and office buildings; and residential and commercial construction and restaurants.* *USCIS Terminated regional center designation because it was not meeting the monitoring and oversight responsibilities set forth in its designation letter, and was not accounting for capital investments.*	