See also: https://www.sec.gov/litigation/complaints/2015/comp-pr2015-173.pdf

See also: https://www.sec.gov/litigation/litreleases/2015/lr23326.htm

See the Delaware portion here: https://dockets.justia.com/docket/delaware/dedce/1:2015mc00304/58178

U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

See also: https://www.sec.gov/news/pressrelease/2015-173.html

MATTER OF P-A-K-, LLC

DATE: NOV. 2, 2016

APPEAL OF IMMIGRANT INVESTOR PROGRAM DECISION

BENEFIT: REGIONAL CENTER DESIGNATION

https://cases.justia.com/federal/district-courts/washington/wawdce/2:2015cv01350/219858/427/0.pdf?ts=1474462660

In 1990 Congress established the EB-5 program[1] to promote economic growth in the United States through foreign investment.[2] Investors who comply with the program's requirements first receive conditional status, followed by the opportunity for the removal of conditions and permanent resident status. Investors may funds their own projects, or invest through a US Citizenship and Immigration Services (USCIS) designated regional center.[3]

SEE multiple documents at: https://dockets.justia.com/docket/washington/wawdce/2:2015cv01350/219858

USCIS designated the Applicant as a regional center to participate in the program in August of 2013. In August of 2015, the Securities and Exchange Commission (SEC) filed a complaint against the Applicant, its principal, and other related entities in district court. Based on the SEC action, the Chief, Immigrant Investor Program, terminated the Applicant's designation in March 2016, finding that it no longer served the purpose of promoting economic growth.

The matter is now before us on appeal. The Applicant submits additional evidence and a letter indicating it is under new management. It states it will promote economic growth by pursuing a previously proposed project.

Upon *de novo* review, we will dismiss the appeal.

REVIEWED
By Joseph P. Whalen at 10:49 pm, Dec 05, 2016

I. LAW

In 1992 Congress added the concept of the regional center to the EB-5 program. To obtain USCIS designation, a regional center must provide a general proposal showing how it will concentrate pooled investments in defined economic zones, thereby promoting economic growth. Section 610(a) of the Appropriations Act, as amended. The desired economic growth may be in the form of increased export sales, improved regional productivity, job creation, or increased domestic capital investment. *Id.*

[1] The EB-5 program, as it is commonly called, issues employment-based fifth preference visas.
[2] *See* Immigration Act of 1990 section 121(b)(5).
[3] *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (Appropriations Act) section 610, as amended.

NOT APPROVED

The proposal for a regional center must contain information concerning the kinds of commercial enterprises that will receive capital from investors, 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. *Id.*

Once the regional center is designated, the regulation at 8 C.F.R. § 204.6(m)(6) requires it to "provide USCIS with updated information to demonstrate that the regional center is continuing to promote economic growth, improved regional productivity, job creation, or increased domestic capital investment in the approved geographic area." If the regional center does not submit the required information or upon a determination it no longer serves the purposes of the program, USCIS will issue a notice of intent to terminate (NOIT) the regional center's designation allowing participation in the immigrant investor program. *Id.*

II. ANALYSIS

A. Procedural History

The Applicant, through its principal, [redacted] submitted an application for regional center designation in June of 2010. After a series of actions,[4] USCIS approved the application and its accompanying hypothetical project[5] in June of 2013. Beginning in 2014, individual immigrant investors began filing petitions based on their investments in the Applicant's new commercial enterprises (NCEs), [redacted] and [redacted] both of which planned to pool investor funds and lend them to the job creating entity (JCE), [redacted] The JCE was to use the funds for the construction and development of a mixed-use facility in downtown [redacted]

[4] In January of 2011, USCIS denied the application, but subsequently reopened it two months later. After a notice to the Applicant of our intent to deny the application (NOID) and subsequent request for evidence (RFE), USCIS again denied the application. USCIS once more reopened the application and over the course of 2012, issued three additional RFEs. In 2013, USCIS eventually approved the application, which included a proposal for a hypothetical project called [redacted] involving the development and on-going operation of a mixed-use property located in [redacted] Washington.

[5] A "hypothetical project" proposal is one not supported by a comprehensive business plan, as opposed to an "actual project" proposal that is supported by a detailed plan. USCIS Policy Memorandum PM-602-0083 (Policy Memo), *EB-5 Adjudications Policy* 14 n.2 (May 30, 2013), https://www.uscis.gov/laws/policy-memoranda. In *Matter of Ho*, 22 I&N Dec. 206 (Assoc. Comm'r 1998), we held a "comprehensive business plan" is one that is "sufficiently detailed to permit the Service to draw reasonable inferences about the job-creation potential." We stated that "at a minimum, the plan should include a description of the business, its products and/or services, and its objectives." We described specific details that should be part of a comprehensive plan, e.g., a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a description of the target market and prospective customers of the new commercial enterprise, and the marketing strategies of the business. We found that "[m]ost importantly, the business plan must be credible."

On [redacted] 2015, the Securities and Exchange Commission (SEC) filed a complaint in the U.S. District Court for the [redacted] of Washington ("district court") against the Applicant, several related entities, and the Applicant's principal, [redacted] The complaint alleges they sold securities to finance specific real estate development projects, but that [redacted] misappropriated or diverted millions of dollars in investor funds for other real estate projects or his personal use. In October of 2015, the court granted an injunction freezing the assets of the Applicant and its related entities and appointed a receiver[6] tasked with managing them.

On December 24, 2015, the Chief issued a NOIT the Applicant's regional center designation based on the SEC action and its underlying allegations. Following the Applicant's timely response, the Chief terminated its regional center designation on March 23, 2016, finding that it is not continuing to promote economic growth due to its lack of credibility, its diversion of investor funds, and the absence of required monitoring and oversight.

On appeal, the Applicant provides documentation from the district court and the receiver indicating that [redacted] no longer controls the Applicant or related investor funds. Instead, an EB-5 management company that has overseen other successful projects will permanently take over control of the Applicant. The receiver indicates that the involved parties intend to "continue pursuit of the original USCIS-approved business plan as closely as possible."[7]

B. The Promotion of Economic Growth

The regulation at 8 C.F.R. § 204.6(e) defines a regional center as "any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." Once designated, the regional center must regularly provide updated information to demonstrate that it is continuing to promote economic growth. 8 C.F.R. § 204.6(m)(6). If USCIS determines that a designated regional center no longer serves the purpose of promoting economic growth, it will issue a NOIT. *Id.*

[6] Receivership is one method the SEC uses to help investors recover funds in a fraud case involving a violation of the federal securities laws. *See* Fast Answers, U.S. Securities and Exchange Commission, http://www.sec.gov/answers/recoverfunds.htm (last accessed Aug. 23, 2016).

[7] The only USCIS approved business plan was a hypothetical project submitted with the Applicant's application for initial designation. The receiver has made clear, however, that the Applicant will pursue a different project (discussed in more detail below), which was submitted to USCIS as an exemplar amendment, but ultimately denied due to the Applicant's termination.

The Chief found the Applicant is not continuing to promote economic growth and concluded that the district court proceedings, including the order for receivership, cast considerable doubt on the credibility of the Applicant's operations.[8] He cited the SEC complaint, which alleges that misused investor funds on several occasions in order to personally benefit. The complaint indicates improperly transferred investor funds between projects, purchased a personal residence with investor funds, and spent investor funds at gambling establishments around the country. The termination notes that, although the allegations have not been proven true in a court of law, the Applicant does not refute the actions described in the SEC complaint or the Chief's NOIT.

Indications of past mismanagement reflect negatively on a regional center's ability to promote economic growth. When derogatory information arises (such as evidence of inaction, mismanagement, theft, or fraud by the regional center or related entities), we weigh all relevant factors in the totality of the circumstances to determine whether the regional center is continuing to serve the purpose of promoting economic growth. Such factors may include the seriousness of the derogatory information, the degree of regional center involvement in the activities described in the derogatory information, any resulting damage or risk imposed on investors and the economy, as well as any mitigating, corrective, or restorative actions taken or forthcoming to redress the situation.

We share the concerns of the Chief and the SEC in ensuring that the alleged acts, if true, do not occur again. In assessing whether an applicant is continuing to promote economic growth, however, we must consider past actions as part of a totality of the circumstances analysis. Blatant diversions of investor funds do not indicate the promotion of economic growth. There may, however, be other factors present that *do* indicate the promotion of economic growth. It is the balancing of both the negative and positive considerations that must form the basis of a determination regarding whether termination of a regional center's designation is appropriate.

On appeal, the Applicant does not allege any past actions that suggest it promoted economic growth. The Applicant received its regional center designation in June of 2013. Its application for initial designation included a proposal for a hypothetical project. In 2015, the Applicant filed two amendments, each containing an exemplar project. Neither was adjudicated prior to the Applicant's termination, and both were thereafter denied because of the termination. A total of 178 investors have filed Forms I-526 based on investment in one of the Applicant's two NCEs. All of these petitions have since been denied due to the Applicant's termination. Although the Applicant collected investor capital, it does not state that these funds were then used for job creation activity

[8] The Chief has not identified an evidentiary submission of the Applicant that lacks credibility. Rather, he concludes that, due to problems with the handling of previous projects, as well as concerns regarding the viability of future projects, the Applicant lacks the "credibility" to promote economic growth. Such phrasing confusingly applies a term of evidentiary evaluation to the crucial legal question at issue. If, due to prior mismanagement, the ability of a regional center to effectively oversee future plans is called into question, this should be explicitly analyzed as part of the assessment.

and the promotion of growth. As noted above, the SEC complaint alleges specific diversions of significant amounts by the regional center principal. Although the veracity of these claims is not addressed, we note the absence of any specific indication that the funds collected were otherwise used to promote growth. For example, the Applicant does not indicate what portion of investor funds, if any, were deployed for project completion.

Future plans for the promotion of economic growth are also relevant to the determination of whether a regional center is "continuing to promote economic growth." In the termination, the Chief noted that the district court has frozen the assets of the Applicant and its related entities and that receivership itself is a temporary court-imposed mechanism. On appeal, the Applicant emphasizes that there have been further developments regarding the Applicant and its investors since the termination. Before analyzing the developments themselves, however, we step back to consider the context in which they have materialized. In this case, the Applicant's current plans come from its receiver, an officer of the district court in the aforementioned SEC proceeding[9] who was appointed in order to effectuate the purposes of the federal securities laws. *See SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1105 (2d. Cir. 1972). Given the circumstances surrounding an appointment, it is unlikely that mere plans issued by a receiver will demonstrate that a regional center is continuing to serve the purpose of promoting economic growth.

In this case, the district court issued an order on [redacted] 2016, approving a proposal for a restructuring transaction for the [redacted] project, a mixed use commercial development. The recommended and approved plan is based on the proposal submitted by previous equity partner [redacted] and the new equity partner [redacted] The order provides that 100% ownership interest in the Applicant is transferred to [redacted] which in turn indicates that all management of the project will be turned over to [redacted] a company that has run several successful EB-5 projects in the past.

According to the receiver, the parties will "continue pursuit of the original USCIS-approved business plan as closely as possible." The record does not indicate that USCIS has ever approved an actual[10] or exemplar[11] level project submitted by the Applicant. Although the Applicant's designation was initially approved based on the submission of a hypothetical project, the project evaluated in that context a) was approved only as a hypothetical, and b) is significantly different from the business

[9] Investor Bulletin: 10 Things to Know About Receivers, U.S. Securities and Exchange Commission, Aug. 27, 2015, https://www.sec.gov/oiea/investor-alerts-bulletins/ib_receivers.html (last visited Oct. 28, 2016).

[10] As stated in the 2013 EB-5 adjudication policy memorandum, "[a]n 'actual project' refers to a specific project proposal that is supported by a *Matter of Ho* compliant business plan." USCIS Policy Memorandum PM-602-0083, *EB-5 Adjudications Policy* 3 n.2 (May 30, 2013), https://www.uscis.gov/laws/policy-memoranda.

[11] "The term 'exemplar' refers to a sample Form I-526 petition, filed with a Form I-924 actual project proposal that contains copies of the commercial enterprise's organizational and transactional documents, which USCIS will review to determine if they are in compliance with established EB-5 eligibility requirements." *Id.* at n.3.

NOT APPROVED

plan now associated with the filed Forms I-526.[12] This is relevant in that USCIS has never evaluated the proposed plan and determined that, even if completed exactly as initially proposed, it would satisfy program requirements.

Even so, an assessment of the project, which the receiver plans on pursuing, does not reveal that the projected job growth will more likely than not occur. The Form I-924 amendment submitted for the project contains a business plan and economic analysis indicating that the total cost of the project was expected to be $188.39 million. According to the Master Agreement, the sources of funds for the completion of the project will be as follows:

- Construction Loan: $100,000,000
- Equity: $50,000,000
- Equity: $10,000,000
- EB-5 Investors: up to $83,000,000

If obtained, these combined funds would adequately cover the new estimated project costs. The documentation provided, however, raises specific concerns regarding the ability of the Applicant to acquire the funds from the sources listed.

The Applicant plans to rely on up to $83,000,000 in EB-5 funds. Although this is the theoretical amount of investment available to the project, the Applicant has not shown that this amount is, in fact, available. The SEC complaint alleges that the Applicant, through misappropriated approximately $17.6 million in investor funds, $14.7 of which was transferred to other EB-5 projects. The receiver states that "[c]onstruction funding will also be supplemented by recoveries of cash previously diverted to other entities currently under receivership and my direct control." However, the Applicant has not submitted evidence to demonstrate that recovery of these funds will be possible: it does not provide an accounting of current assets held by these entities or the amounts these entities owe to other creditors.

The amount of EB-5 investor funds available may be further reduced as a result of investors' choice to opt out of continued participation in the restructured project. The Notice to Investors filed with the district court on 2016, states:

---

[12] In July and August of 2015, the Applicant submitted I-924 amendments containing exemplar applications for two projects: the project and the project. At the time of the Applicant's termination, these amendments had not yet been adjudicated. As a result of the termination of the Applicant's designation, the Chief denied the amendments. USCIS records show that it received a total of 178 Forms I-526 in which investors planned to loan funds to the project. The Chief denied these Forms I-526 following the Applicant's termination. No Forms I-526 have been filed in conjunction with the project.

> The Approved Restructuring is contingent upon confirmation that at least 80% (the "Required EB-5 Threshold") of EB-5 investors "OPT-IN" to the transaction. If the Required EB-5 Threshold is not met, and will not be obligated to proceed with the Approved Restructuring, although they will be allowed to do so, if they choose to waive the threshold requirement.

Even if 80% of investors opt in, or and decide to waive the requirement, those opting out will receive $250,000 immediately and have a claim against the receivership estate for the remainder of their investment, further reducing the amount of EB-5 funds available.

The receiver also indicates that up to $100,000,000 in project funding will come from a construction loan. The Applicant does not, however, provide documentation to show that such funds are available. In conjunction with the project exemplar, the Applicant included a letter dated February 13, 2014, from indicating that it would be interested in pursuing a loan of up to 25% of the total project budget, or $47,000,000. The record does not contain post-receivership evidence from a lender indicating it would be willing to loan the larger sum of $100,000,000. The lack of evidence regarding such a large portion of anticipated funds raises doubts as to the likelihood that the project will be possible.

Even if the Applicant were able to acquire the necessary funds to facilitate the project's completion, however, we cannot ignore that the Applicant has not, to this point, used the funds entrusted to it for the promotion of economic growth. To maintain designation, a regional center must continuously work toward this purpose. We allow for flexibility and understand the vagaries of the business world, particularly with large real estate construction ventures. In this case, however, unrefuted allegations of overtly misappropriated funds are not countered by any examples of the Applicant's positive effect on the economy.[13] We note the receiver's intention to facilitate the project in the future. But where some job creation occurs in spite of a regional center's actions, as opposed to because of its guidance and oversight, the regional center has not continued to serve its purpose of promoting economic growth.

In this case, we find that the Applicant has not promoted economic growth in the past and is unlikely to do so in the future. We therefore conclude that it has not demonstrated it is continuing to promote economic growth, as required by the regulations to maintain regional center designation.

III. CONCLUSION

In sum, we conclude that the termination of the Applicant's regional center designation was proper. We note the arguments and additional evidence submitted on appeal, but after considering the

[13] Examples of positive impact on the economy would not negate past bad actions. Rather, the presence of both positive and negative factors would mean both must weighted and considered.

totality of the evidence submitted, agree with the Chief that the Applicant "no longer serves the purpose of promoting economic growth." 8 C.F.R. § 204.6(m)(6).

It is the Applicant's burden to establish eligibility for the immigration benefit sought: its continued regional center designation. Section 291 of the Act. Here, it does not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of P-A-K-, LLC*, ID# 24035 (AAO Nov. 2, 2016)