UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LIVE IN AMERICA- WASHINGTON D.C./ BALTIMORE REGIONAL CENTER LLC;	
Plaintiff	
v.	**Docket No.:** 16-09505
Jeh JOHNSON, Secretary of the United States Department of Homeland Security; **Leon RODRIGUEZ,** Director, United States Citizenship and Immigration Services; **Nicholas COLUCCI,** Chief, Immigrant Investor Program Office, United States Citizenship and Immigration Services; **UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES**	**Judge:** _____ Agency No: RCW1527253093
Defendants.	

PLAINTIFF'S COMPLAINT
FOR WRIT IN THE NATURE OF MANDAMUS

Plaintiff, by and through its undersigned attorneys, commence this action against the above-named Defendants, and state as follows:

1. This action is brought against the Defendants to compel action on an unreasonable delay in adjudicating Plaintiff's I-924 amendment to an approved regional center application.

2. Plaintiff, Live in America – Washington D.C./Baltimore Regional Center LLC ("the "Regional Center" or "LIAWBRC"), is a U.S. company, previously designated as an approved regional center by the United States Citizenship and Immigration Services (USCIS) for the purposes of facilitating foreign investment under the U.S. EB-5 Program, which allows certain foreign investors to qualify for an immigrant visa based on their investment into a new commercial enterprise in the U.S., provided that their investment results in the creation of at least 10 new jobs for U.S. workers. LIAWBRC has applied for an amendment to its approved regional center designation in order to include a Class A, transit-oriented residential apartment development that is expected to create approximately 938 jobs for U.S. workers, known as Capital Park Tower II project (the "Project"), as a USCIS-approved project. The Regional Center's application for approval has been delayed beyond USCIS' published processing times, to the detriment of the

Regional Center, potential investors, and the Project. The Regional Center and the Project face harm from the ongoing uncertainty about the status of the Project as a result of the USCIS' delay in processing it's regional center application for amendment to its approved regional center designation in order to include the Project. The delay is also harmful to the goals of the EB-5 program, namely promoting domestic job creation through foreign investment into the United States.

PARTIES

3. Plaintiff, Live in America – Washington D.C./Baltimore Regional Center LLC (LIAWBRC) is a Delaware limited liability company with offices at 711 Westchester Avenue, Suite 203, White Plains, NY 10604.

4. Plaintiff LIAWBRC is owned 100 percent by Live in America Financial Services LLC, which is in turn owned 100 percent by The LCP Group L.P. The LCP Group L.P. is owned 91.3 percent by the E. Robert Roskind 2001 Trust for Dina Walsh & Scott C. Roskind and 8.7 percent by Third Lero Corp. Third Lero Corp. is owned 100 percent by E. Robert Roskind.

5. Defendant, Jeh Johnson, is the Secretary of the United States Department of Homeland Security, with responsibility for the administration of applicable laws and statutes governing immigration and naturalization. He is generally charged with enforcement of the Immigration and Nationality Act, and is further authorized to delegate such powers and authority to subordinate employees of the Department of Homeland Security. More specifically, the Secretary, is responsible for the adjudication of applications for regional center designations.

6. Defendant, Leon Rodriguez, is the Director of USCIS, and is responsible for the administration of immigration and naturalization adjudication functions and establishing immigration services policies and priorities. These functions include: adjudication of immigrant visa petitions and applications for adjustment of status; adjudication of naturalization petitions; adjudication of asylum and refugee applications; adjudications performed at the service centers, and all other adjudications performed by USCIS, including applications for designation as a regional center and amendments thereto.

7. Defendant, Nicholas Colluci, is the Chief of the USCIS Immigrant Investor Program Office, which is directly charged with responsibility for processing applications and petitions under the EB-5 program, and specifically applications for new regional center designations and amendments to existing regional center designations.

8. Defendant, U.S. Citizenship and Immigration Services (formerly, the Immigration and Naturalization Service) is an agency of the federal government within the Department of Homeland Security (formerly, within the U.S. Department of Justice) and is responsible for the administration of laws and statutes governing immigration and naturalization.

JURISDICTION

9. Jurisdiction in this case is proper under 28 U.S.C. §§1331 and 1361, 5 U.S.C. §701 *et. seq.*, and 28 U.S.C. §2201 *et. seq.* Relief is requested pursuant to said statutes. Specifically, this Court has jurisdiction over this action pursuant to 28 U.S.C. §1331, which provides that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States," and under 28 U.S.C. §1361, which provides the district court with "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Plaintiff." Further, the Declaratory Judgment Act, 28 U.S.C. §2201, provides that: "[i]n a case of actual controversy within its jurisdiction… any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Review is also warranted and relief sought under the Administrative Procedure Act 5 U.S.C. §701 *et seq.*, § 702, §706(1) and §555(b).

VENUE

10. Venue properly lies within the Southern District of New York pursuant to 28 U.S.C. §1391(e), in that this is an action against officers and agencies of the United States in their official capacities, brought in the District where a Defendant in the action resides. Further, Plaintiff, LIAWBRC, is a resident of White Plains, New York, within the geographic territory of the Southern District of New York.

EAJA FEES

11. In connection with the claim for attorneys' fees and costs, under the Equal Access to Justice Act 28 U.S.C. §2412, Plaintiff seeks to recover costs and attorneys' fees incurred in bringing this action. Plaintiff has retained the law firm of Klasko Immigration Law Partners, LLP to represent them in this action. Plaintiff is obligated to pay reasonable attorneys' fees and costs incurred in the prosecution of this cause.

EXHAUSTION OF REMEDIES

12. Plaintiff has exhausted its administrative remedies. Plaintiff has made inquiries with Defendants concerning the status of its application, all to no avail. No other administrative remedy is available to Plaintiff.

BACKGROUND ON THE EB-5 PROGRAM

13. In 1990, Congress amended the Immigration and Nationality Act of 1965, allocating, inter alia, 10,000 immigrant visas per year to foreign nationals seeking Lawful Permanent Resident ("LPR") status on the basis of their capital investments in the United States. *See generally* the Immigration Act of 1990, Pub. L. No. 101-649, § 121(b)(5), 104 Stat. 4978

(1990) (codified at 8 U.S.C. § 1153(b)(5)). Pursuant to the so-called "Immigrant Investor Program," foreign nationals may be eligible for an employment-based, fifth preference ("EB-5") immigrant visa if they have invested, or are actively in the process of investing, $1,000,000 (or $500,000 in a high unemployment or rural area) in a qualifying New Commercial Enterprise ("NCE"), and such investment results in the creation of at least 10 jobs for U.S. Workers. *See* 8 U.S.C. § 1153(b)(5)(A)-(D); *see also* 8 C.F.R § 204.6(a)-(j). The EB-5 regulations further provide that, in order to qualify as an "investment" in the EB-5 Program, foreign nationals must actually place their capital "at risk" for the purpose of generating a return, and that the mere intent to invest is not sufficient. *See* 8 C.F.R. § 204.6(j)(2). The purpose of this program was to promote foreign direct investment into, and job creation within, the U.S.

14. In 1993, Congress created the Immigrant Investor Pilot Program ("Pilot Program") through the enactment of various provisions of section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act. *See* Pub. L. No. 102-395, § 601, 106 Stat. 1828, 1874 (1992). The Pilot Program allows foreign investors who invest in NCEs affiliated with USCIS designated regional centers to meet the 10-jobs-per investor by counting indirect jobs - i.e. jobs that are created outside of the NCE. Further, in addition to not being restricted to only counting employees of the NCE, investors under the Pilot Program are allowed to use any valid statistical forecasting model to demonstrate job creation. *See* § 601(a)-(c) of Pub. L. No. 102-395; *see also* 8 C.F.R. § 204.6(e), (j)(4)(iii), (m)(7)(ii). The intent of these reforms was, again, to incentivize and promote foreign investment into, and job creation within, the U.S.

15. Regional center investment projects typically use an economic model, such as the RIMS II Input/Output model, a U.S. government created model, for predicting the job creation resulting from EB-5 investment into a given project. Input/Output models are based on multipliers derived from vast amounts of government data. For every unit of input, the multiplier is applied to derive a number of units of output. For instance, most common in the EB-5 program is the use of construction expenditures as an input. For every $1,000,000 of construction expenditures, *X* number of jobs are created (the multiplier varies by region, but typically there are 10-12 jobs per $1,000,000 of construction expenditures). The ability to count indirect jobs and use an economic model allows EB-5 funds to be used for types of development projects that would not ordinarily qualify under the non-regional center program due to the requirement of counting only employees of the NCE. Another result of the Pilot Program is that regional centers can aggregate investments from a large number of EB-5 investors in order to finance larger scale projects.

16. In order to become an LPR through both the standard and regional center-model program, a foreign national must initially file with USCIS a Form I-526, Immigrant Petition by Alien Entrepreneur, which, if approved, makes the foreign national eligible to receive an employment-based, fifth preference immigrant visa, *see generally* 8 U.S.C. § 1153(b)(5). Upon approval of his I-526 Petition, the foreign national must file a Form I-485, Application to Adjust Status (if he is located in the United States), or a Form DS-230, Application for Immigrant Visa and Alien Registration (if he is located outside the United States). *See generally* 8 U.S.C. § 1201 (provisions relating to the issuance of entry

documents); 8 U.S.C. § 1255 (provisions relating to adjustment of status). Upon adjustment of status or admission on an EB-5 immigrant visa, the foreign national is granted two-years of conditional permanent resident status, provided that the foreign national is not otherwise ineligible for admission into the United States. *See generally* 8 U.S.C. § 1182 (provisions relating to excludable aliens). Finally, at the conclusion of the two-year conditional period, the foreign national must file a Form I-829, Petition to Remove the Conditions on his or her LPR status. If the foreign national has fulfilled the EB-5 requirements - i.e. has invested, maintained the investment at risk, and the investment has resulted in the creation of at least 10 jobs for U.S workers - then the conditions will be removed and the foreign national will be an unconditional LPR. *See generally* 8 U.S.C. § 1186b (provisions relating to conditional permanent resident status for certain alien entrepreneurs, spouses, and children).

FACTUAL ALLEGATIONS

17. Plaintiff, LIAWBRC, received regional center designation from the agency on April 3, 2014.

18. On September 29, 2015, Plaintiff, LIAWBRC, filed an I-924 application in order to amend its regional center designation with Defendant USCIS (receipt number RCW1527253093). This application has been pending approximately 14 months.

19. This application sought to amend LIAWBRC's designation as a regional center in order to include the Project, sponsored by the LIAWBRC through LCP CPTII LLC (the "Company"), a New Commercial Enterprise, as an approved regional center project.

20. The Project involves the development of a transit-oriented residential apartment development known as Capitol Park Tower II. The Project is planned as 333 affordable and market-rate apartment units in an 8-story elevator-served structure. The building will have underground garage parking as well as a central, open-air courtyard and rooftop pool, with units averaging 679 square feet. The unit mix will include approximately 36 studios, 192 one bedroom apartments, 99 two bedroom apartments, and 6 three bedroom apartments, all with contemporary floor plans and upscale finishes. The total cost of the Project is approximately $116,725,623. The Company is seeking EB-5 funds from immigrant investors in order to partially finance the development of the Project.

21. That application for amendment of regional center designation included, among other things, a project business plan, economic impact report demonstrating that the Project will create 938 jobs for U.S. workers, offering documents for potential investors, and other supporting documents.

22. To date, nine investors have made a $500,000 capital contribution (the "Capital Contribution") to the Company, executed subscription documents to become a member of the Company, and filed I-526 petitions with USCIS.

23. None of the I-526 petitions filed by investors in the Company have been approved by USCIS as of November 30, 2016.

Seems overly complex >>>>>>

24. Pursuant to Plaintiff's existing escrow agreement for investors in the Company, Capital Contributions are held in the Company's escrow account (the "Escrow Account") until at least $10,000,000 in Capital Contributions has been deposited in the Escrow Account (the "Initial Release Condition"), at which time the Capital Contributions are relased to the account of the Company. After the Initial Release Condition has been satisfied, an amount equal to twenty percent (20%) of each subsequent investor's Capital Contribution, $100,000, is placed by the Company in a refund subaccount until the earlier to occur of the following: (x) USCIS has approved the I-526 petition of any one investor or (y) USCIS has approved the I-924 application (receipt number RCW1527253093), associated with the Project, after which the Company will maintain $500,000 or $1,000,000 in the refund subaccount, with such amount depending on the final aggregate amount of Captial Contributions received by the Company. If the Company receives less than $15,000,000 in Capital Contributions, the refund subaccount shall be reduced to $500,000, and if the Company received $15,000,000 or greater in Capital Contributions, the refund subaccount shall be reduced to $1,000,000. The final amounts in the refund subaccount will be reduced in increments of $500,000 as each of the last one or two investors' I-526 petitions are approved.

25. Pursuant to the offering documents for the Company provided to Defendant USCIS, upon denial of the I-526 petition of an investor in the Company, the Company is required to use commercially reasonable efforts to return such investor's Capital Contribution.

26. Based on data published by USCIS, the historical denial rates for I-526 petitions vary from approximately 10 percent to approximately 30 percent. An I-526 petition can be denied due to issues relating to the eligibility of an investor, or issues relating to the EB-5 investment project. On information and belief, USCIS does not track whether denials are based on project based reasons or investor specific reasons.

27. If USCIS finds that an EB-5 project does not meet the requirements of the EB-5 program, USCIS will deny all investor I-526 petitions for investors in that particular project, irrespective of whether the investor would be otherwise eligible. Thus, a project denial results in the denial of 100 percent of investor petitions for a project, as opposed to the historical 10-30 percent denial rate for individual investors.

28. On information and belief, a significant portion of the 10-30 percent denial rate for I-526 petitions results from circumstances where USCIS denies all investors in a single project because it deems the project to be ineligible, and denials based on investor specific factors (background checks, inability to prove the lawful source and path of the investor's funds, etc.) account for only a portion of the 10-30 percent denial rate.

29. Once a project has been approved by USCIS, either through the adjudication of an I-924 application or the adjudication of an investor's I-526 petition, it is typically easier for the project sponsors to locate foreign investors because the immigration risks of the particular

investment have been substantially reduced, because under normal circumstances, USCIS will not revisit the approval of the project when adjudicating future I-526 petitions.

30. Once USCIS approves a project, either through the adjudication of an I-924 application or the adjudication of an investor I-526 petition, the project developers are reasonably assured that they will not have to refund 100 percent of the EB-5 investment funds, and in practice, will most likely be faced with an investor denial rate that is less than the historical denial rate, and also will likely be able to replace most or all of any denied investors with new ones. As such, a project approval provides a measure of confidence that the developer will be able to continue to utilize the vast majority of the EB-5 funds throughout the investment term.

31. On the other hand, a project denial causes a developer to make alternate plans to obtain financing. The earlier in the process a developer knows that it will have to find other funding or refund EB-5 funds already expended in the project, the easier it is for the developer to make contingency plans. Additionally, the longer the project progresses without a decision, the more EB-5 money is spent, and therefore not available for immediate refund to investors when a decision is rendered.

32. Put simply, LIAWBRC faces extreme uncertainty with regards to funding for the Project as there is no certainty that USCIS will approve or accept the Project documents and, therefore, the Company must be prepared at all times to refund all investors' Capital Contributions, which hinders the progress of the Project.

33. In addition, it is more difficult for LIAWBRC to find investors for the Project while the Project is not approved. While waiting for Project approval, LIAWBRC will commit resources and time to finding investors for the Project, and may not be able to focus on other opportunities. If the Project is approved, there is an obvious benefit. If the Project is denied, it allows LIAWBRC to plan on how to allocate its resources and plan for other opportunities.

34. Plaintiff has made inquiries with Defendant USCIS about the status of its application, but has received only form responses from USCIS, with no meaningful or case specific information.

35. The EB-5 program is an economic development program intended by Congress to promote job creation and regional economic growth through foreign direct investment into the U.S.

36. The regional center Pilot Program (now Immigrant Investor Program) was enacted by Congress to meet the goals of the program by allowing USCIS designated regional centers to help pool foreign direct investments under the program to further facilitate economic development and job creation on a regional level.

37. Plaintiff has sponsored the Project in order to facilitate foreign direct investment, job creation, and economic growth in the greater Washington D.C./Baltimore area, in

furtherance of the goals of the EB-5 program, but cannot proceed with confidence in the absence of a decision concerning the acceptability of the Project's documents.

38. Plaintiff has invested substantial time, effort and money into seeking amendment of its designation as a regional center.

39. According to 8 U.S.C. §1571(b), "[i]t is the sense of Congress that the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application, except that a petition for a nonimmigrant visa under section 1184(c) of this title should be processed not later than 30 days after the filing of the petition."

40. According to information published by Defendant USCIS, as of July 31, 2016, the average processing time for an I-924 petition was approximately 11 months.

41. Since at least 2012, USCIS has stated publicly and regularly at stakeholder meetings and calls that its goal for adjudications is 6 months or less for I-924 applications.

42. USCIS is primarily a fee supported, and not an appropriations supported agency.

43. On information and belief, USCIS, through DHS, is permitted to set filing fees for the applications and petitions it adjudicates, including the I-924 application.

44. On information and belief, the Immigrant Investor Program Office has the authority to hire personnel at rates outside of the normal GS scale in order to attract candidates with the specialized business and economic knowledge and experience that is relevant to EB-5 adjudications.

45. On information and belief, USCIS, through DHS, has the ability to set fees at a level necessary to ensure sufficient resources to hire enough staff to process EB-5 applications and petitions in a timely manner.

46. The filing fee for an I-924 application is currently $6,230. On information and belief, it is the single most expensive filing fee charged by USCIS for any application or petition.

47. Plaintiff has followed all filing procedures, has submitted a complete application to USCIS, and has paid the required filing fee.

48. On information and belief, Plaintiff is, and has been since the time of filing, eligible to have its respective application approved.

CLAIMS

49. Defendants' refusal to act in this case is, as a matter of law, arbitrary and not in accordance with the law. Defendants willfully, and unreasonably, have delayed in and have refused

to, adjudicate Plaintiff's application for amending its regional center designation, thereby depriving it of the peace of mind and ability to plan business activities to which it is entitled.

50. Plaintiff has fully complied with all applicable laws, regulations and procedures, and have provided Defendants with all information and documents required or requested in conjunction with its application.

51. Defendants' delay in processing Plaintiff LIAWBRC's application is unreasonable and unjustified.

52. USCIS has the ability to generate fee income and allocate sufficient resources to meet its own case processing goals and the time frame specified by Congress for the adjudication of immigrant benefits, but Defendants continue to unreasonably fail to do so.

53. Regardless of resources, Defendants' failure to adjudicate Plaintiff's application and petition within normal processing times is unreasonable.

54. The EB-5 program was intended by Congress to stimulate job creation in the U.S., and USCIS' failure to adjudicate EB-5 petitions within the time frame specified by Congress and the goals stated by the agency itself frustrates the goals of the program, and makes the delay in the adjudication of Plaintiff's application even more unreasonable.

55. USCIS has offered no reason for the delay, and has not indicated a time frame in which a response can be expected, and has only provided automated form responses to inquiries, all of which undermine confidence in its intent to adjudicate the application and petitions within a reasonable time absent court intervention.

56. Plaintiff has been greatly damaged by the failure of Defendants to act in accordance with their duties under the law and adjudicate their application.

    a. Plaintiff, LIAWBRC, has been harmed by its inability to seek investors for the Project, as there is no certainty with regards to whether or not the Project documents will be approved.

    b. Plaintiff, LIAWBRC, has been harmed by the inability to make business decisions and plans for the future, because it does not know whether it will have to return all Capital Contributions to its investors.

57. The harm suffered by Plaintiff is ongoing, and can be resolved only through the adjudication of its application.

58. Plaintiff has a statutory right to the adjudication of its application and petition pursuant to the Immigration and Nationality Act and governing regulations at 8 C.F.R. § 204.6.

59. Defendants are required by their own regulations to adjudicate and issue a written decision on Plaintiff's application. *See* 8 C.F.R. § 204.6(k), (m)(5).

60. Plaintiff's payment of fees and Defendants' acceptance of those fees for processing Plaintiff's application represents a *quid pro quo* whereby Defendants are accepting a fee in exchange for providing a service - namely the processing and adjudication of Plaintiff's application.

61. In the process of adjudicating an I-924 application, on information and belief, Defendants are required to complete certain security checks. However, on information and belief, none of these should cause a significant delay in adjudication as LIAWBRC has already received designation as a regional center. Further, as LIAWBRC is a U.S. company, and not a foreign national seeking to immigrate to the U.S., it is unclear what, if any, security checks are conducted in the course of processing an I-924 application.

62. According to a report published by one of Defendants' agencies, the FBI name check is concluded within one month for 94 percent of applicants, and within six months for 99 percent of applicants. However, according to a recent USCIS press release, the backlog of FBI name checks has been eliminated, and there remain NO cases in which an FBI name check has been pending for more than six months. All other security checks performed in conjunction with Defendants' adjudication of an application or petition generally take less than a month to complete, and some take as little as a day or two. *See* Office of the Inspector General, "A Review of U.S. Citizenship and Immigration Service's Alien Security Checks," November, 2005; USCIS Fact Sheet "Immigration Security Checks - How and Why the Process Works," April 25, 2006. What security checks are performed on the principals of a regional center is not publicly available information, and it is not certain whether Defendants conduct any checks at all. In either case, security checks should not be a cause of delay.

63. Defendant USCIS is an administrative agency subject to 5 U.S.C. § 555(b), which provides "[w]ith due regard for the convenience and necessity of the parties or their representatives and **within a reasonable time**, each agency **shall** proceed to conclude a matter presented to it." (*Emphasis added*).

64. Completing security checks and adjudicating I-924 applications are purely routine and ministerial duties performed on a daily basis by Defendants.

65. Except under very specific provisions of law that are not applicable here, Defendants lack the legal authority or discretion to abstain from processing applications or petitions for immigration benefits or completing security checks.

66. Thus the completion of security checks and adjudication of I-924 applications are clearly subject to the requirements of 5 U.S.C. § 555(b), and Defendants have a legal duty to complete them within a reasonable time.

67. Because Defendants have a purely ministerial duty under the law to adjudicate Plaintiff's application within a reasonable time, and have utterly failed, or refused, to do so, a Writ of

Mandamus is proper to compel Defendants to perform their duty to adjudicate Plaintiff's application and petitions to avoid further harm to Plaintiff.

68. For the same reasons, relief under the A.P.A. is warranted.

PRAYER FOR RELIEF

69. WHEREFORE, in view of the arguments and authority noted herein, Plaintiff respectfully prays that the Defendants be cited to appear herein and that, upon due consideration, the Court enter an order:

a. granting Plaintiff a Writ of Mandamus and/or an order under the A.P.A. requiring Defendants to adjudicate its I-924 application within 30 days;
b. awarding Plaintiff reasonable attorney's fees; and
c. granting such other relief at law and in equity as justice may require.
d. It is further requested that the Court retain jurisdiction over this matter to ensure Defendants' compliance with this Court's order.

Respectfully submitted,

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