



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF D-L-

DATE: DEC. 5, 2016

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

PETITION: FORM I-526, IMMIGRANT PETITION BY ALIEN ENTREPRENEUR

The Petitioner seeks classification as an immigrant investor based on her financing of a mixed-use development project in [REDACTED] Washington, through a U.S. Citizenship and Immigration Services (USCIS) designated regional center, [REDACTED] (the Regional Center). *See* Immigration and Nationality Act (the Act) section 203(b)(5), 8 U.S.C. § 1153(b)(5). This fifth preference employment based classification makes immigrant visas available to foreign nationals who invest the requisite amount of qualifying capital in a new commercial enterprise that will benefit the United States economy and create at least 10 full-time positions for qualifying employees.

The Chief of the Immigrant Investor Program Office denied the petition, concluding that the Petitioner could no longer rely on an investment in a since-terminated regional center as a basis for her eligibility.

The matter is now before us on appeal. In her appeal, the Petitioner maintains that the Chief erred by denying the petition while the appeal of the Regional Center's termination remained pending. The Petitioner submits a brief and supporting evidence consisting of documentation filed with the Regional Center's appeal.

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

¹ The authority to designate regional centers is based on section 610(c) of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, 106 Stat. 1828 (1992), as amended. The purpose of the regional center framework is to encourage pooled immigrant investment in a range of business and economic development prospects within designated regional centers. This regional center model offers an immigrant investor already-defined investment opportunities.

I. LAW

A. Immigrant Investor Status

A foreign national may be classified as an immigrant investor if he or she invests the requisite amount of qualifying capital in a new commercial enterprise. The commercial enterprise can be any lawful business that engages in for-profit activities. The foreign national must show that his or her investment will benefit the United States economy and create at least 10 full-time jobs for qualifying employees.

Specifically, section 203(b)(5)(A) of the Act provides that a foreign national may seek to enter the United States for the purpose of engaging in a new commercial enterprise:

- (i) in which such alien has invested . . . or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
- (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The implementing regulation at 8 C.F.R. § 204.6(j)(4)(i)(B) requires petitioners to verify the requisite job creation either through documentation confirming such employees have already been hired, or through: "A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired."

An immigrant investor may invest the required funds directly in a new commercial enterprise, and show that at least 10 qualifying employees have been directly hired through that new commercial enterprise as a result. An immigrant investor may also invest via a "regional center," which is an economic unit involved with the promotion of economic growth through "improved regional productivity, job creation, and increased domestic capital investment." See 8 C.F.R. § 204.6(e) (defining "regional center").

Regional centers apply for designation as such with USCIS, and must file annual supplements to show their continued eligibility for designation. 8 C.F.R. § 204.6(m). They identify and work with new commercial enterprises, which in turn are associated with a specific project completed by a "job creating entity." A project could be a new office building, mixed-use development project, or other tangible initiative that results in the qualifying job creation. Regional centers can pool immigrant (and other) investor funds for qualifying projects that create jobs directly or indirectly. 8 C.F.R. § 204.6(j)(4)(iii). A petitioner may rely on indirect job creation to establish eligibility only if investing through a regional center. *Id.*

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An individual seeking classification as an immigrant investor files a Form I-526, Immigrant Petition by Alien Entrepreneur. If USCIS grants the petition and an application to adjust status, the investor receives conditional permanent residence. Approaching the end of a two-year period of conditional status, the investor must request that the conditions be removed by filing a Form I-829, Petition by Entrepreneur to Remove Conditions. If it determines that the investor has met all program requirements, USCIS will remove the conditions and grant (unconditional) lawful permanent resident status.

B. Material Changes

Critically, the investor must maintain his or her eligibility throughout the application process, which is from the time the investor files the petition until he or she receives lawful permanent resident status. Material changes to the investment arrangement require the filing of a new Form I-526 petition.² Specifically, should the initial petition be deficient, or circumstances materially change after filing, the following guidance applies:

A deficient Form I-526 petition may not be cured by subsequent changes to the business plan or factual changes made to address any other deficiency that materially alter the factual basis on which the petition was filed. The only way to perfect material changes under these circumstances is for the immigrant investor to file a new Form I-526 petition to correspond to the changed plans.

USCIS Policy Memorandum PM-602-0083, *EB-5 Adjudications Policy* 25 (May 30, 2013).³

II. PROCEDURAL HISTORY AND EVIDENCE OF RECORD

In May 2014, the Petitioner filed her Form I-526 petition based on an investment through the designated Regional Center. The petition identified the new commercial enterprise as [REDACTED] (the NCE). The business plan explained that the NCE and another limited partnership [REDACTED] would raise \$122,000,000 from 244 foreign investors, to be loaned to the job creating entity, [REDACTED] (the JCE) for the construction and development of a mixed-use facility in downtown [REDACTED].

The Chief terminated the Regional Center's designation on March 23, 2016, finding that: (1) it was no longer serving the purpose of promoting economic growth through the two commercial enterprises under its sponsorship; (2) it was diverting funds from job creating purposes, and (3) it was not meeting the monitoring and oversight responsibilities set forth in its designation letter. The Regional Center appealed that termination.

² 8 C.F.R. § 103.2(b)(1); see also *Matter of Izummi*, 22 I&N Dec. 169, 175-76 (Assoc. Comm'r 1998) (USCIS cannot consider materially different facts that come into being only subsequent to the filing of a petition).

³ Found at <https://www.uscis.gov/laws/policy-memoranda>.

On April 19, 2016, the Chief denied the petition, concluding that the Petitioner could no longer continue to rely on an investment through the terminated Regional Center. The Petitioner appealed that decision as premature due to the Regional Center's appeal of the termination.

III. ANALYSIS

On appeal, the Petitioner submits a brief with additional evidence⁴ and argues that the Chief's denial was premature, thus it should be held in abeyance during the pendency of the appeal relating to the Regional Center's termination, preferably until after a judge resolves the Securities and Exchange Commission (SEC) complaint against the Regional Center and related parties.

A. Timing of the Denial

The Petitioner maintains that because the Chief withheld adjudication of the petition while reevaluating the Regional Center's status, he should exercise his discretion to reopen the petition during the pendency of the Regional Center's appeal of its termination. In addition, the Petitioner indicates that because the Regional Center appealed the termination, the Chief's decision was not yet final. If we were to sustain the Regional Center's appeal, the Petitioner argues, then the sole basis of the Chief's denial of the petition would no longer be valid. The Petitioner concludes that fundamental fairness supports the reopening of her petition at least until we adjudicate the Regional Center's appeal, if not until after the resolution of the SEC complaint.

While the Chief could have elected to wait for resolution of the Regional Center's appeal before denying associated investor petitions, the Petitioner has not shown that there is an affirmative requirement to do so. Here, the timing of the two events does not appear to have impacted the instant proceedings. On November 2, 2016, we dismissed the Regional Center's administrative appeal, which constituted final agency action on the Regional Center's termination. That termination preceded our consideration of the instant appeal on the denial of the Petitioner's investor petition. In addition, we have considered all arguments and supplemental evidence subsequently advanced on appeal in the instant case.

B. Impact of Regional Center Termination

The Petitioner has not advanced an explanation as to how she might be eligible for the classification should we dismiss (as we now have) the Regional Center's appeal of its termination. The Petitioner does note that the receiver⁵ in the SEC's case against the Regional Center has solicited and received

⁴ The additional documentation consists of the brief and some documents that the Regional Center filed in support of its appeal.

⁵ 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).

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proposals to continue the [REDACTED] Proceeding without the Regional Center may require material changes to the plan, which, as stated above, would necessitate the filing of a new immigrant investor petition. The Petitioner has not addressed this issue or established that the new proposals do not constitute such a change.

Moreover, while the Petitioner states that the [REDACTED] will continue to promote economic growth without the Regional Center's involvement, promotion of economic growth is a requirement specific to regional centers; it is not an element of investor eligibility. Therefore, the Petitioner's position that the [REDACTED] will continue to promote economic growth does not demonstrate her eligibility for the classification. Regardless, we have already determined in a separate proceeding that the Regional Center is not promoting economic growth. To the extent the Petitioner argues that the Regional Center itself continues to promote economic growth, this constitutes an impermissible collateral challenge to our prior decision in a separate proceeding.

IV. CONCLUSION

The Petitioner in this matter has not demonstrated that she is eligible for the benefit sought without the involvement of the Regional Center. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, she has not met that burden. The Petitioner may file a new Form I-526 based on a new regional center or a new project. If the Petitioner believes that we incorrectly decided this matter, she may file a motion requesting us to reconsider our decision and/or reopen the proceeding based on additional probative evidence demonstrating eligibility, provided that evidence does not constitute a material change to the original filing.

ORDER: The appeal is dismissed.

Cite as *Matter of D-L-*, ID# 37141 (AAO Dec. 5, 2016)