Continued Participation Requirements for Regional Centers

By Joseph P. Whalen (Monday, April 3, 2017)

The latest update to EB-5 regulations was once again attached to the required bi-annual fee rule. It is a slight improvement over its predecessor but could have been better if **§ 204.6(m)(6)(ii)** was expanded to include other causes for termination, *for clarity*. There have been enough instances of incompetence, non-compliance with *other* agencies'[1] rules, fraud, certain forms of criminality, or dubious activities; to warrant listing more *sample* reasons for Regional Center termination. Here is the *current* rule regarding RC termination.

(cont'd)

8 C.F.R. § 204.6 Petitions for employment creation aliens.

(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 [of 1993], 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.

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(6) ***Continued participation requirements for regional centers.***

(i) Regional centers approved for participation in the program must:

(A) Continue to meet the requirements of section 610(a) of the Appropriations Act.

(B) Provide USCIS with updated information annually, and/or as otherwise requested by USCIS, to demonstrate that the regional center is *continuing to promote economic growth*, including increased export sales, improved regional productivity, job creation, ~~and~~ [or] increased domestic capital investment in the approved geographic area, using a form designated for this purpose; and

(C) Pay the fee provided by 8 CFR 103.7(b)(1)(i)(XX).

(ii) USCIS will issue a notice of intent to terminate the designation of a regional center in the program if:

(A) A regional center fails to submit the information required in paragraph (m)(6)(i)(B) of this section, or pay the associated fee; or

(B) USCIS determines 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.

(iii) A notice of intent to terminate the designation of a regional center will be sent to the regional center and set forth the reasons for termination.

(iv) The regional center will be provided 30 days from receipt of the notice of intent to terminate to rebut the ground or grounds stated in the notice of intent to terminate.

(v) USCIS will notify the regional center of the final decision. If USCIS determines that the regional center's participation in the program should be terminated, USCIS will state the reasons for termination. The regional center may appeal the final termination decision in accordance with 8 CFR 103.3.

(vi) A regional center may elect to *withdraw* from the program and request a termination of the regional center designation. The regional center must **notify USCIS** of such election **in** the form of **a letter** *or as otherwise requested by USCIS*. USCIS will notify the regional center of its decision regarding the withdrawal request in writing.

1 SEC, FINRA, OFAC, or FinCEN, as examples.

While USCIS maintains that the *supplementary information* included with the 2010, *Fee Schedule* Final Rule, when the Forms I-924 and I-924A were initially adopted, sufficiently allows for the inclusion of additional reasons for termination; some clarification wouldn't hurt. Undoubtedly, the most egregious cases of EB-5 fraud involve money issues, *including, but not limited to*: misappropriation, misuse, or misdirection of funds, embezzlement, and the use of unsourced or "dirty "money, as well as outright theft. Still others have engaged in various *other* forms of criminality, unethical behaviors that only border on criminal, and let's not forget good old fashioned gross incompetence. The worst of the aforementioned "bad acts" have garnered the most attention by making national headlines. Several cases involving the misappropriation of funds have been the result of various motives and *modus operandi*.

There have been standard *Ponzi* schemes, and multi-layered transactions in attempts to hide the <u>*source*</u> and/or <u>*use*</u> of funds, excessive fees, fake companies charging fake fees with no actual work performed—often "consulting fees" to oneself or family members, and double-dealing of various sorts. All of the aforementioned are only some of the methods used by the *bad actors* involved. *Price gouging* such as the various "fee" scams mentioned above, might rear its *ugly head* in many forms. For example, sometimes one piece of property is sold to a series of closely held shell companies, one after another, after another before it is finally sold to the EB-5 project developer. With each sale, the price went up thus artificially increasing the price regardless of the actual fair market value. A few Regional Center principals have simply *'robbed Peter to pay Paul'* in order to bolster other NCEs, JCEs, from other RC-affiliated projects (or phases), covering operating expenses of the Regional Center, and/or associated entities that were failing, even at businesses completely outside of the reaches of the EB-5 investments.

Some folks may agree with me when I say that I think the worst problems have been in those situations that show a complete disregard for law and order. Those 'situations' include such disgraceful behavior as using the EB-5 capital to buy mansions, exclusive country club memberships, and vacations to exotic locations, expensive cars, yachts, ivy-league tuition, and numerous other luxury items—all the while believing there's nothing that can be done to stop them. These *bad actors* take advantage of the hopes and dreams of people in search of a better life for themselves and their families. These crooks mistakenly believe that their foreign victims have no recourse after being cheated, but *that* is not true.

Let's take a look at some of the '*supplementary information'* from the 2010, FR Notice where the I-924 and I-924A were introduced, along with an associated regulatory change, and a clarification about the Program.

> "Another commenter mentioned the proposed amendment to 8 CFR 204.6(m)(6), which would provide for an annual reporting requirement for Regional Centers in connection with the USCIS authority to terminate a regional center's designation. The commenter suggested that the language *"no longer serves the purpose of promoting economic growth,"* was **vague**, and in need of more specifics regarding practices that are either prohibited or required in order for the regional center to continue to ''serve the purpose of promoting economic growth.'' The commenter recommended that USCIS adopt a rule to ensure ongoing regional center compliance, such as termination proceedings if a regional center does not file a single Immigrant Petition by Alien Entrepreneur within a fiscal year.
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> DHS notes that the regulation at 8 CFR 204.6(m)(6) already provides a means to terminate a regional center if the regional center ''no longer serves the purpose'' of the program. DHS believes that the **potential reasons** for the termination of a regional center **extend beyond inactivity** on the part of a regional center. This regulation currently provides for a process of notice and rebuttal. The amended regulatory language leaves this process intact. Regional centers have been and will be provided with ample opportunity to overcome the reasons for termination of the regional center under this process. DHS is exploring means by which information regarding termination proceedings may be shared, and will consider making this information available in the annual disclosure report. DHS is making no changes in the final rule as a result of this comment."

75 FR 58962, 58980 (Friday, September 24, 2010).

> "In addition to establishing the fee, DHS is clarifying the related regulations that provide for the annual regional center review related to the Form I–924A. In addition, a change is proposed to accommodate regional centers that seek to **withdraw** their designation. Proposed 8 CFR 204.6(m)(6)(vi). USCIS has received requests recently from regional centers seeking to **withdraw** their designation and discontinue their participation in the program. We currently have no procedure for this request and instead must proceed with the formal termination process of issuing a Notice of Intent to Terminate followed by a termination notice. Providing a **withdrawal procedure** will simplify the ability to terminate a regional center when the entity seeks to **withdraw** its designation. In conjunction with the fee, DHS wants to ensure that the requirements for continued participation for regional centers and the procedures to follow to meet the requirements are clear. Proposed 8 CFR 204.6(m)(6)."

81 FR 26904, 26912 (Wednesday, May 4, 2016).

8 CFR 204.6(m)(6)(vi) informs us that ***'[a] regional center may elect to withdraw from the program … and … must notify USCIS … in the form of a letter or as otherwise requested by USCIS. …"***. It is that last part that makes me think that USCIS **might** create a simple withdrawal form. Then again, that might be too simple, convenient, and easy for a government bureaucracy. We'll just have to wait and see how that issue is eventually resolved. Moving right along, as the commenter correctly noted back in 2010, there **is**

ambiguity in the phrase "*no longer serves the purpose of promoting economic growth*". That **phrase was adapted**, with slight changes, **from** portions of Pub. L. 102–395, § 610(a). This public law is the statutory source for the Regional Center Program which is **not** part of the INA, but is codified alongside it as a note under 8 U.S.C. § 1153, entitled: *Immigration Program*. This "Program" goes above and beyond that portion of the INA which authorizes and defines the EB-5 "Employment Creation" visa. The visa is a permanent immigrant visa category while the Regional Center is not—it is set to sunset (again) on April 28, 2017. Please lobby your Congressional Representatives in the House and Senate to act favorably to at least extend it again, to at least the end of the fiscal year. Anyway, § 610(a) reads in full as follows:

> "(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 Secretary of Homeland Security, shall set aside visas for a program to implement the provisions of such section. Such program shall involve a regional center in the United States, designated by the Secretary of Homeland Security on the basis of *a general proposal, for the* ***promotion of economic growth***, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment. A regional center shall have jurisdiction over a limited geographic area, which shall be described in the proposal and consistent with the ***purpose*** *of concentrating pooled investment in defined economic zones*. The establishment of a regional center may be based on *general predictions*, contained in the proposal, *concerning* the kinds of commercial enterprises that will receive capital from aliens, 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*.

Please note the emphasized words and phrases above and observe that § 610(c) adds to the mix with additional language as follows:

> (c) In determining compliance with section 203(b)(5)(A)(iii)[(ii)] of the Immigration and Nationality Act [8 U.S.C. 1153(b)(5)(A)(iii)[(ii)]], and notwithstanding the requirements of 8 CFR 204.6, the Secretary of Homeland Security shall permit aliens admitted under the program described in this section to establish reasonable methodologies for determining the number of *jobs* ***created*** by the 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 program.

Again, please note the ***emphasized*** words. Represented among them are "active", "positive", and "forward-looking" concepts in specific words in § 610(a) which are later used as measures for results, presented in the past tense in § 610(c). Specifically, the words to watch include: ***created, generated, increased, improved***, and ***productivity***. Collectively, they support the agency's inclusion of the *purposely* ***inexact*** phrase "*no longer serves the purpose of promoting economic growth*" in the regulation. Those few words speak volumes,

and in light of the supplementary information within the *Federal Register* publication of that regulation, one can **infer**, as did AAO, that this key phrase is meant to be *broad* and *open to interpretation*. And so it encompasses and applies to, so much more than mere "inactivity".

The following excerpts show AAO's current view on the scope of activities, or lack thereof, which support or refute termination of a Regional Center. I suggest that this interpretation is not new. Instead, it is a return to pre-I-924 standard operating procedures. Prior to the introduction of the form and imposition of a fee, USCIS demanded more of RC principals, but did so 'informally' because there was formal mechanism in place.

> "… The Chief considered the Applicant's arguments but found termination nevertheless appropriate on the ground that the Applicant *no longer serves the purpose of promoting economic growth* due to evidence that it failed to exercise proper oversight of SDRC, Inc., which resulted in the improper diversion of funds away from job creation and economic growth. The Chief then certified to us his proposed termination, specifically whether "the **reasons** why a regional center may no longer serve the purpose of promoting economic growth **are varied and 'extend beyond inactivity** on the part of a regional center.'" **At p. 3**
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> "In addition to this contextual evidence in the regulations, common sense dictates that DHS cannot be compelled to maintain a malfeasant entity in the EB-5 program indefinitely and regardless of how egregious its acts may be. ***It would be absurd to suggest***, for example, ***that USCIS could not terminate a regional center's designation due to clear evidence of widespread criminal activity simply because there is some evidence of economic growth.*** Congress authorized DHS to designate regional centers to pool immigrant investor funds for the purpose of creating jobs and promoting economic growth. ***DHS would ill-serve that purpose by turning a blind eye to bad acts within the EB-5 program.*** We retain authority to ensure the integrity of the EB-5 program. Accordingly, we construe the regional center termination rule to encompass more than mere inactivity." **At pp. 5-6 (*Emphases* added.)**
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> "In sum, we must balance all the equities on a case-by-case basis to determine whether a regional center is continuing to promote economic growth. Where both positive and negative indications of the promotion of economic growth exist, we look at all relevant documentation to reach a conclusion regarding whether, on balance, the regional center is continuing to promote economic growth. Positive factors include job creation, capital investment, and other signs of positive economic impact. Negative factors include mismanagement, theft, or fraud by the regional center or related entities. Each case will therefore be assessed on its own merits. In doing so, we consider the factors' relative weight as determined by surrounding circumstances. *See Matter of Sotelo-Sotelo*, 23 I&N Dec. 201, 203 (BIA 2001) ("In any balancing test, various factors, whether positive or negative, are accorded more weight than others according to the specific facts of the individual case.")." **At p. 6** (Emphasis added.)

See *Matter of S-D-R-C-*, ID# 13768 (AAO Mar. 15, 2017)[2] for additional discussion of the concepts in these excerpts, and more. There have been significant developments in the

2 https://www.uscis.gov/sites/default/files/err/K2%20-%20Regional%20Center%20Termination/Decisions_Issued_in_2017/MAR152017_01K2610.pdf

assessment methodology to be employed when determining the question of *continued participation* in the Regional Center Program. While the following points are drawn from *Matter of S-D-R-*, they are not recognized as "Official Holdings". These are only my suggestions as *the* important points of interest for further study and exploration.

1. Evidence of a Regional Center's improper or unlawful activities is relevant to the question of whether that center is *continuing to promote economic growth*, but derogatory evidence must be weighed against countervailing equities on a *case-by-case* basis.

2. The question of whether a Regional Center merits continued designation is not contingent on its EB-5 foreign national investors and their immigration statuses, but whether or not the Regional Center's activities continue to serve the EB-5 Regional Center Program's purposes of creating U.S. jobs and promoting regional economic growth.

3. Where a case contains evidence of the diversion of funds away from job-creating activities, as well as evidence of substantial economic activity that created thousands of jobs, then USCIS must consider these, and all relevant factors, in determining whether the Applicant's Regional Center designation should be terminated or maintained.

4. Each case will therefore be assessed on its own merits. In doing so, one must consider each factors' relative weight as determined by surrounding circumstances. "*In any balancing test, various factors, whether positive or negative, are accorded more weight than others according to the specific facts of the individual case*." *Matter of Sotelo-Sotelo*, 23 I&N Dec. 201, 203 (BIA 2001)[3], *followed*.

5. More serious misconduct necessarily weighs more heavily against an exercise of discretion than do less serious bad acts or derogatory information. Therefore, an Applicant may need to present "additional offsetting favorable evidence" to counterbalance an egregious adverse factor such as serious criminal activity. *Matter of Marin*, 16 I&N Dec. 581, 585 (BIA 1978)[4], *followed*.

6. No Applicant can immunize or absolve itself of *responsibility for* its company's wrongdoing simply by the fact that it contracted out its operations to another company.

Continued participation in the *EB-5 Immigrant Investor Program* and maintenance of USCIS-Designation as a Regional Center, are not automatic. USCIS-Designation is not guaranteed to continue through only minimal efforts at compliance. Annual I-924A *filing* alone, is insufficient for maintenance of USCIS-Designation, just as *inactivity* alone, *may* be insufficient for Regional Center Termination. A Regional Center needs to be productive or explain its efforts be so, and towards *serving the purpose of promoting economic growth*.

That's My-Two Cents, For Now!

3 https://www.justice.gov/eoir/vll/intdec/vol23/3460.pdf
4 https://www.justice.gov/eoir/vll/intdec/vol16/2666.pdf