U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-R-C-, LLC

DATE: NOV. 17, 2015

APPEAL OF IMMIGRANT INVESTOR PROGRAM DECISION

BENEFIT: REGIONAL CENTER DESIGNATION

The Applicant, a regional center, seeks to maintain its United States Citizenship and Immigration Services (USCIS) designation as an approved regional center under the immigrant investor program. *See* section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act (Appropriations Act), as amended. The Chief, Immigrant Investor Program (IPO), terminated the Applicant's designation; the matter is now before us on appeal. The appeal will be dismissed.

I. THE LAW AND REGULATION

Section 610(a) of the Appropriations Act, as amended, provides in pertinent part:

> 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.

The regulation at 8 C.F.R. § 204.6(m)(6) relating to the termination of regional center status provides, in pertinent part:

> To ensure that regional centers continue to meet the requirements of section 610(a) of the Appropriations Act, a regional center must provide USCIS with updated

information to demonstrate the regional center is continuing to promote economic growth, improved regional productivity, job creation, or increased domestic capital investment in the approved geographic area. Such information must be submitted to USCIS on an annual basis, on a cumulative basis, and/or as otherwise requested by USCIS, using a form designated for this purpose. USCIS will issue a notice of intent to terminate the participation of a regional center in the pilot program if a regional center fails to submit the required information or upon a determination 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.[1]

II. PROCEDURAL HISTORY

On April 29, 2010, USCIS designated the Applicant as a regional center focusing on nine industrial categories in a geographic area of three Kentucky counties and four Ohio counties. In addition, USCIS approved the which consisted of a mixed-use commercial center including a hotel, retail stores, restaurants, residences, and office buildings, as a capital investment project for the Applicant. On June 25, 2013, USCIS approved an amendment request for additional industry categories, including residential and commercial construction and restaurants.

Between January 30, 2012, and December 30, 2013, the Applicant filed Form I-924A, Supplement to Form I-924, each year to comply with the fiscal year filing requirement. On the Form I-924A filed on December 31, 2012, the Applicant indicated that there had been an aggregate capital investment of $5,000,000 for which included a $4,292,295.69 investment in and a $250,000 investment in According to its business plan, would loan money to to develop and operate eight restaurants in the Ohio. On January 13, 2014, USCIS approved Form I-526, Immigrant Petition by Alien Entrepreneur, for nine immigrant investors associated with According to the Form I-924A filed on December 30, 2013, the Applicant made no capital investment in any commercial enterprises or job creating enterprises. In addition, the Applicant filed Form I-924A on March 28, 2014, to reflect a new managing company, and a new principal,

On September 17, 2014, the Chief issued a notice of intent to terminate (NOIT) the Applicant's regional center designation and subsequently terminated it on February 13, 2015, because the Applicant was no longer serving the purpose of promoting economic growth through the two commercial enterprises under its sponsorship, was not meeting the monitoring and oversight responsibilities set forth in its designation letter, and was not accounting for capital investments. On

[1] Pub. L. No. 112-176, 126 Stat. 1325 (Sept. 28, 2012) eliminated "pilot" from section 610(a) of the Appropriations Act. 8 C.F.R. § 204.6(m)(6) has not been updated to reflect the change.

March 18, 2015, the Applicant filed an appeal and submitted additional documentation as well as previously submitted documentation.

On appeal, the Applicant requests an oral argument "to ensure full exploration of the circumstances and arguments and alternatives." The regulation provides that the requesting party must explain in writing why oral argument is necessary. Furthermore, USCIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, the Applicant identified no unique factors or issues of law to be resolved. Further, the written record of proceeding, including the Applicant's brief and additional documentation submitted on appeal, fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

III. ANALYSIS

A. The Applicant's Ownership Change

As a preliminary matter, we first discuss the effect of the Applicant's ownership change relating to meeting the requirements of section 610(a) of the Appropriations Act.[2] On appeal, the Applicant submits a declaration from asserting his history and involvement with the Applicant's prior principal owners, , and the Applicant. According to , his company, owns six buildings in the district in Ohio, and his eventual son-in-law, convinced him that renovating the buildings into restaurants could be achieved through the immigrant investor program. Furthermore, although was formed, with as the sole member, to operate as the borrower of immigrant investor capital by asserts that he was a "passive observer" and "had no real control over the project expenditures." Moreover, states that after he had concerns regarding the expenditures, he sued the to recover funds, and the countersued alleging defaulted loan payments. Both parties entered into a settlement agreement that resulted in with as its sole principal, purchasing the Applicant.

Although the actions of the previous owners, as well as the actions of the current owner, are important considerations and will be given weight, the Applicant is ultimately responsible for providing USCIS with updated information to demonstrate that it is continuing to promote economic growth, improved regional productivity, job creation, or increased domestic capital investment in the geographic region. Furthermore, the regulation at 8 C.F.R. § 204.6(m)(6) provides that regional center designation will be terminated if the regional center does not submit the required information or it no longer serves the purpose of promoting economic growth.

[2] We maintain *de novo* review of all questions of fact and law. *See Soltane v. United States Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004).

The Applicant's current principal owner, [redacted] asserts that he neither had knowledge of the [redacted] activities nor of the immigrant investor requirements. The Applicant, however, has not established that [redacted] was a "passive observer" and "had no real control over the project expenditures" during the [redacted] ownership of the Applicant. Although the Applicant submits the complaints and counterclaims between the parties, the submitted settlement agreement indicates that each party denied the claims and counterclaims. The Applicant did not submit any other documentation beyond [redacted] declaration indicating that his role was limited to a passive observer, and he had no involvement in the [redacted] activities.

Page 6 of the "Purchase, Release and Indemnification Agreement" (Purchase Agreement) provides that the buyer shall hold the seller "harmless from and pay any and all losses, costs, damages, claims, obligations, liabilities and expenses . . . ." Accordingly, the new owner assumed all risks in the purchase of the existing regional center, including the possibility of the regional center's termination based on the business activities of the prior owners. In addition, an ownership change does not relieve the regional center from the regulatory requirements of establishing that it has provided updated information and promoted economic growth. Thus, we will evaluate whether the grounds that formed the basis of the Chief's termination of the Applicant's regional center designation were in compliance with the regulation at 8 C.F.R. § 204.6(m)(6), and whether the Applicant has overcome those grounds on appeal.

B. The Promotion of Economic Growth Through [redacted] and [redacted]

The Chief found that the [redacted] was no longer viable as the Applicant indicated that there had been no activity promoting economic growth through the [redacted] On appeal, the Applicant indicates that it has not had any involvement with the [redacted] in the last five years, that no immigrant investor capital was invested into the project, and that it does not intend to promote economic growth through [redacted] Accordingly, we consider the [redacted] to be abandoned, and the Applicant has not and will not promote any economic growth through this project.

Regarding [redacted] the Chief determined that the Applicant's failure to properly account for investor funds did not serve to promote economic growth. First, the Chief found that the Applicant had not assigned expenses to the proper category, including illegitimate hard and soft cost expenses. For example, the record indicated a transfer of $165,475.75 to [redacted] on October 11, 2011, with the memo "Tech Fund" and an expenditure of $8,345.63 at [redacted] with the memo "Office Furniture tech fund" listed as hard costs. In addition, the record included an expenditure of $6,799.16 at an [redacted] on November 14, 2011, with the memo "Tech Fund supplies" listed as a soft cost. The Chief concluded that such expenditures for furniture, fixtures, and equipment typically occur near the end of the construction when the facility is completed and undergoing final outfitting for operations and surmised that these expenses were for the Applicant rather than for [redacted] Furthermore, the Chief pointed out that investment capital was spent to cover the Applicant's expenses, such as organizing and marketing expenses on trips to China.

Moreover, the Chief found that there did not appear to be any active permits associated with , and the Applicant was only able to produce a letter from architects regarding the feasibility of obtaining building permits in the future. In addition, although the Applicant submitted a chart in response to the Chief's NOIT reflecting that $4,034,073 of investment capital was disbursed to by August 2, 2012, the Applicant asserted that waiting for the adjudication of immigrant investor petitions crippled the marketing and development progress. The November 2013 business plan indicated that had the ability to borrow funds from a number of banks in the area if immigrant investor capital was not raised. However, there was no progress reported in the construction and operation of new restaurants consistent with the $5,000,000 investment into

On appeal, the Applicant states that there are two immigrant investor petitions pending with USCIS, that there are two additional investors who are awaiting the outcome of this decision before they file their petitions, and that there are two more investors whose funds have yet to invest into the project. Moreover, the Applicant indicates that eight contracts have been entered into for services related to the project, and a business evaluation was conducted for the properties reflecting a market value of $11,000,000 with a potential market value of $23,200,000 upon completion of the projects. Furthermore, the Applicant states that the expenditures for tech funds were consistent with proper use of immigrant investor capital and were part of the business plan at one point. In addition, the Applicant disagrees with the Chief's determination that furniture, fixtures, and equipment typically occur towards the end of construction projects and that such purchases were for the benefit of the Applicant. Further, the Applicant states that has made progress, such as securing building permits, in the renovation of six properties. The Applicant acknowledges that there were regional center expenditures in the amount of $107,458 that occurred even after the Applicant's change of ownership and "can only promise that no such expenses will be made" again.

The Applicant also indicates that the immigrant investor expenses made for organizing and marketing trips of the regional center should be offset by the personal funds of and his family will provide to the project. Moreover, the Applicant asserts that "can only offer potential remedial solutions [to] include transferring ownership of the buildings to from without paying for the buildings." The Applicant further states that will forego the ownership of these remaining buildings and contribute over $1.1 million dollars in equity into the project" in order to offset any inappropriate regional center expenses.

Although the Applicant submits documentation, both new and previously submitted, such as emails from current immigrant investors and recently obtained building permits and construction contracts, reflecting its desire to continue in the renovation of the buildings, the Applicant has not addressed or overcome all of the grounds of the Chief's decision. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). While the Applicant indicated that it disagreed with the Chief's assessment that furniture, fixtures, and equipment typically occurred near the end of projects, the Applicant did not submit any

documentation showing that the expenses mentioned by the Chief were used for rather than for the regional center. Furthermore, the Applicant indicated that the construction projects were halted because of the length of time it took for immigrant investors' petitions to be approved; however the Applicant did not address business plan reflecting that had the ability to borrow funds from a number of banks in the area if immigrant investor capital was not raised.

Moreover, although the Applicant offers potential remedies, such as using the funds from to repay the missing funds and reimbursement of the misused funds, there is no evidence in the record that the Applicant promoted economic activity at any time after its initial designation. The phrase "is continuing to promote economic growth" requires the Applicant to continuously promote economic activity from its initial designation. *See* 8 C.F.R. § 204.6(m)(6). Furthermore, the purpose of the NOIT is to advise the Applicant of USCIS' determination that the Applicant did not abide by the terms of its regional center designation, including the promotion of economic activity and job creation and the submission of required information, such as Form I-924A. The NOIT is not an opportunity for the Applicant to show that it will begin promoting economic growth or that it will begin promoting economic activity again after it had already ceased for an extended period of time. The Applicant's "stop-and-start" approach is contrary to the regional center's purpose of promoting economic growth. Generally, the promotion of economic activity is a continuous process. Although the Applicant was designated a regional center in 2010, it has not provided any evidence of promoting economic growth as of the date of the Chief's Notice of Termination. An applicant's past achievements or activities are indicative of its future achievements or activities. Considering that the Applicant has not demonstrated that it promoted any economic activity in over four years of designation, including after its sale, the Applicant has not established that it can and will promote economic activity.

Furthermore, the Applicant used immigrant investor funds for other than job creation and still cannot account for the full amount of the $5,000,000 it has already received from investors. Even after the change of ownership, the new owner used immigrant investor funds for the Applicant, such as on trips to promote the Applicant, rather than on job creating projects and thus did not engage in promoting economic growth through the full investment of funds raised through this program. For these reasons, the Applicant has not established that it has continued to promote economic growth through

C. The Promotion of Economic Growth Through Monitoring and Oversight Responsibilities

The Chief determined that the Applicant did not meet the monitoring and oversight responsibilities set forth in its designation letter. Although business plan made a brief reference to investment expenditures included a $150,000 to and a $150,000 payment and other expenditures totaling $24,165.98 to The investments in and were not in business plan or disclosed in any of the Form I-924A filings. Furthermore, the Chief found that several of the Form I-526 petitions included a statement from the who stated that the Applicant "has allocated the investment funds of these seven immigrant investors solely towards job creation activities in the approved restaurant

industry." The statement was therefore inconsistent with the other documentation as the Applicant also reported expenditures into "tech funds" rather than only in the restaurant industry. On appeal, the Applicant asserts that the Chief's reference of a payment to for $150,000 "came back into the project," and that while it appeared that investments into technology companies totaled $250,000, the net of the investments was $150,000. Moreover, the Applicant indicates that the Chief's reference to the $24,165.98 payment to was erroneously labeled by the Applicant and should have been labeled as a $19,765.97 expenditure for the creation of website. Furthermore, the Applicant asserts that expenditures on technology companies became appropriate with USCIS Policy Memorandum PM-602-0083, *EB-5 Adjudications Policy* (May 30, 2013), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB5%20Adjudications%20PM%20%28Approved%20as%20final%205-30-13%29.pdf, which provides that formal amendments to the regional center designation are not required when a regional center changes its industries of focus, its geographical boundaries, its business plans, or its economic methodologies. *Id.* at 23.

The issue here, however, is not whether the Applicant was permitted to make investments in technology companies. Rather, the issue is the Applicant's submission of inaccurate and inconsistent information. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. The Applicant submitted a statement, dated March 7, 2012, accompanying several Forms I-526 reflecting that the immigrant investor funds would be used for the acquisition and renovation of buildings to house restaurants, along with the associated tenant improvements and incentives in the restaurant industry. In the November 2013 business plan, there was a reference to an investment in and in response to the NOIT, the record reflected that there were additional investments using immigrant investment capital in and A review of the Forms I-924A that were submitted by the Applicant does not reflect that the Applicant ever disclosed investments in and in the required end of the year filings. Although USCIS Policy Memorandum PM-602-0083 no longer requires a regional center to file Form I-924A each time there is a change in its operation, the policy memorandum did not cease the requirement of filing Form I-924A at the end of each year with true and correct information. Part 4 of Form I-924A requires the signature of the applicant attesting that the supplemental form and the evidence are all true and correct. In addition, the Applicant's statement that was submitted with the immigrant investors' Forms I-526 that their capital would be invested in the restaurant was inaccurate as funds were also used in technology companies.

Moreover, the Chief found that the purchase of the Applicant by from the was funded by immigrant investor capital based on the proceeds of the sale of a property by Specifically, the Applicant submitted an expenditure chart in response to the NOIT reflecting that purchased the located at for $1,500,000 on December 21, 2011, using immigrant investor capital. then sold the the sale coinciding with a deposit of $425,006.88 on January 24, 2014, into account. On the same date, $300,000 was transferred from to who purchased the Applicant for $300,000. Prior to the

$425,006.88 deposit, account balance was $54,798.78 indicating that purchase of the Applicant for $300,000 was derived from immigrant investor capital.

On appeal, the Applicant states that the Chief's determination that used immigrant investor funds to purchase the Applicant "is demonstrably wrong." The Applicant indicates that it was always part of the business plan for to purchase properties from , and the Applicant submits on appeal a warranty deed for the property showing the transfer from to on September 27, 2013. The Applicant further asserts that when the proceeds of the came into the project, received $300,000 for the purchase of the property. The applicant also submits credit union statement showing a $300,000 deposit on January 24, 2014, and an outgoing wire transaction of $300,000 on the same date.

The Applicant's explanation and documentation do not resolve the Chief's concerns with this issue. Although the Chief indicated that the was located at the Applicant discusses and submits the warranty deed for the property located at The Applicant has not demonstrated how the property relates to the sale of the located at Furthermore, the credit union statement coincides with the Chief's finding that the deposit into account, the deposit into account, and the wire transfer from account all happened on January 24, 2014, indicating that immigrant investor funds, which were originally used to purchase the , were later used to purchase the Applicant. Accordingly, the Applicant has not established that immigrant investor funds were not used by to purchase the Applicant.

In addition, the Chief found that the financial records reflected disbursements made to individual principals of the Applicant, such as the transfer of $222,475.75 from to in October 2011, that did not relate to the business plan for the creation of jobs. On appeal, the Applicant asserts that was at the mercy of the in terms of expenditures of project funds, and some of the transfers were a result of the signatory authority. As discussed above, the Applicant has not established that was a passive observer and had no control over project expenses. Regardless, as the Applicant used immigrant investor capital other than for the purpose of promoting economic activity, the Applicant has not demonstrated that it had properly monitored the capital and expenditures.

Further, the Chief found that in the second Form I-924A the Applicant indicated $5,000,000 in immigrant investor capital through yet the Applicant stated that $4,292,295.69 was invested in and $250,000 was invested in totaling $4,542,295.69 leaving an unaccounted amount of $457,704.31. Although the Applicant submitted a chart from the regarding loans that were loaned to or paid on behalf of , the Chief stated that he had concerns with the figures, and that the reported transactions of $4,819,362.76 still left a shortfall of $180,637.24. In addition, the Chief concluded that although the Applicant submitted documentation reflecting $4,034,073.18 of immigrant investor capital deposited into account, it did not account for the $250,000 investment that was reported on Form I-924A and mentioned in the business plan. Furthermore, the $4,034,073.18 immigrant investor capital that was deposited into account was not consistent with the $4,292,295.69 reported in the filing of the second Form I-924A.

On appeal, the Applicant states that it cannot vouch for the contents of the Form I-924A filings and "can only offer speculative explanations." The Applicant also indicates that its response to the Chief's NOIT contained some inadvertent mislabeling such as the payment/investment assertion discussed above. Further, the Applicant acknowledges that out of the previously reported $4,034,073.18 that was transferred to account, $752,453.72 was improperly used. This amount included: $266,475.75 in payments to the $448,057.08 in regional center expenses; and $37,920.17 in regional center marketing trips. Regarding the unaccounted $965,926.82, the Applicant indicates that $44,238.79 appears to be legitimate project expenses, such as computer purchases. The Applicant also asserts $667,635.92 in non-investor funds that have come into the project includes: $243,531.92 in contributions by and his family; $85,000 for sewer work improvements performed by the buyer on all project buildings as part of the sale of the $62,000 for loan proceeds guaranteed by and $277,104 for the sale of . Further, the Applicant indicates that equity contribution of $1,100,000 and the addition of $667.635.92 in non-investor funds would offset the $1,674.141.75 of improper and/or unaccounted immigrant investor capital.

Again, the Applicant is unable to account for the full amount of the $5,000,000 immigrant investor capital. In addition, the Applicant does not submit any documentation to support any of its explanations beyond the previously submitted expenditure chart for Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Further, page 4 of the Purchase Agreement reflects that "[t]he financial statements and documents and tax returns provided to Buyer by Seller and the are true, correct, accurate and complete in all material respects." Notwithstanding, the record reflects that the Applicant misused immigrant investor funds and cannot account for other funds. Although the Applicant has proposed that will reimburse the Applicant for the missing funds, the Applicant only submits a loan billing statement reflecting that secured a loan in the amount of $1,052,424.34 as of February 11, 2015. There is no evidence, such as the transfer of funds from to the Applicant, showing that actually reimbursed the Applicant. The Applicant also has not submitted any documentation supporting its assertions regarding the reimbursement of $667,635.92 in non-investor funds. Regardless, the Applicant's misuse of and unaccounted for immigrant investor capital has not promoted economic activity, and therefore has not complied with its monitoring and oversight responsibilities.

D. The Submission of Required Information to USCIS

The Chief also found that the Applicant did not comply with the end of the fiscal year filing requirements because it did not submit all of the required information to USCIS on Form I-924A. The Chief determined that although the Applicant reported $5,000,000 in immigrant investor capital through including a $4,292,295.69 investment in the chart only reflected $4,034,073 in immigrant investor capital directly transferred to In addition, the Chief

indicated that even if he was to accept the accounting in the chart totaling $4,819,362.76, the Applicant has not accounted for the full amount of $5,000,000 of immigrant investor capital. Therefore, the Applicant's second Form I-924A was inaccurate and omitted required information.
On appeal, the Applicant asserts that was not the owner when the second Form I-924A was filed and cannot vouch for the previous owners but can only offer potential remedial measures. As discussed above, the Applicant submitted inaccurate information and omitted information that was required pursuant to the filing instructions for Form I-924A and has yet to account for the missing immigrant investment capital. The regulation at 8 C.F.R. § 103.2(a)(1) provides that every benefit request must be executed and filed in accordance with the form instructions. Accordingly, the Applicant did not submit the required information to USCIS.

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. It is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, the Applicant has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of K-R-C-, LLC*, ID# 14127 (AAO Nov. 17, 2015)