



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

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

MATTER OF P-A-S-, LLC

DATE: DEC. 21, 2017

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

APPLICATION: FORM I-924, APPLICATION FOR REGIONAL CENTER UNDER THE
IMMIGRANT INVESTOR PILOT PROGRAM

In 1990, Congress established the EB-5 program¹ to promote economic growth in the United States through foreign investment.² Investors who comply with the program's requirements first receive conditional status, followed by the opportunity for the removal of conditions and permanent resident status.³ Investors may fund their own projects, or invest through a US Citizenship and Immigration Services (USCIS) designated regional center.⁴

USCIS designated the Applicant as a regional center to participate in the program in August of 2011. In August of 2015, the Securities and Exchange Commission (SEC) filed a complaint against the Applicant, its principal, and other related entities in district court. In short, the Applicant's former principal, [REDACTED] diverted investor funds from the project. In light of this derogatory information, the Chief, Immigrant Investor Program Office, terminated the Applicant's designation in November 2016, finding that it no longer served the purpose of promoting economic growth.

The matter is now before us on appeal. The Applicant submits additional documentation, including verification that it has a new owner, and states it will continue to promote economic growth because it has now completed the initial proposed project, creating the requisite jobs, and will pursue other developments in the future. In August 2017, we requested—and the Applicant provided—additional evidence, specifically a Form I-924 amendment application, to reflect the new ownership.

¹ The EB-5 program, as it is commonly called, issues employment-based fifth preference visas.

² See section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5).

³ An immigrant investor files a Form I-526, Immigrant Petition by Alien Entrepreneur, attesting that the investor meets the criteria for conditional resident status, which includes showing that their investment (of either \$500,000 or \$1,000,000, depending on the geographical area) creates at least 10 jobs for qualified U.S. workers. After two years, the investor may file Form I-829, Petition by Entrepreneur to Remove Conditions on Permanent Resident Status, which, if granted, affords the investor full lawful permanent residence in the United States. As part of the petition, the investor must show that their initial investment is still creating the requisite number of qualifying jobs.

⁴ See Section 610(a) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act (the "Judiciary Appropriations Act"), 1993, Pub. L. No. 102-395, 106 Stat. 1828, 1874 (Oct. 6, 1992), as amended.

To determine whether, on balance, the regional center is continuing to promote economic growth, we must weigh the derogatory information (stemming from the diversion of investor funds) against positive indicators (e.g., restructuring the regional center and advancing the development project). Upon *de novo* review, we believe the positive indicia outweigh the negative and we will sustain the appeal.

I. LAW

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

The proposal for a regional center must contain information concerning the kinds of commercial enterprises that will receive capital from investors, the jobs that will be created directly or indirectly as a result of such capital investments, and the other positive economic effects such capital investments will have. *Id.*

Once the regional center is designated, the regulation at 8 C.F.R. § 204.6(m)(6) requires it to “provide USCIS with updated information 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 increased domestic capital investment in the approved geographic area...” If the regional center does not submit the required information or upon a determination it no longer serves the purposes of the program, the regional center’s designation allowing participation in the immigrant investor program will be terminated. *Id.*

II. ANALYSIS

A. Scope of Termination Regulation

The regulation governing regional center terminations speaks to failures to submit required information or to promote economic growth. It does not refer explicitly to the improper use or diversion of funds, or a failure of due diligence on the part of the regional center to oversee the operations of its related new commercial enterprises (NCEs) or job creating entities (JCEs). Nor does it mention fraud or criminal activity on the part of a regional center as grounds for termination. So the first question we must address is whether these kinds of activities are properly within the reach of the termination regulation.

We find evidence of the termination regulation’s breadth in the supplemental information that accompanied the regulation when it was promulgated. In response to a public comment that the proposed termination rule was vague and should contain mention of specific mandated or prohibited

regional center practices, “DHS note[d] 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.” 75 Fed. Reg. 58962, 58980 (Sept. 24, 2010) (emphasis added). It is clear that, from the inception of this rule, DHS contemplated general oversight of the program’s integrity. Moreover, the EB-5 regulations contemplate that, at a bare minimum, the regional center’s activities will be lawful. For example, the regulations define a “commercial enterprise” in part as “any for-profit activity formed for the ongoing conduct of *lawful* business.” 8 C.F.R. § 204.6(e) (emphasis supplied).

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.

Where positive and negative indicators exist, both must be considered to determine whether, on balance, the regional center is continuing to promote economic growth. Positive indicators include the extent of any job creation, the amount of investment, and the overall economic impact. Negative indicators include inaction, mismanagement, theft, or fraud by the regional center or related entities, any resulting damage, and the risk imposed to investors or the economy by continued designation. Where there are negative factors, we consider mitigating or corrective actions taken by the regional center. The requirement that a regional center demonstrate it is continuing to promote economic growth implies that we must consider whether these factors existed in the past, as well as the likelihood of their presence in the future. For example, we will consider both the job creation already facilitated by the Applicant, as well as the projected future ones. 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.”).

B. Procedural History

The Applicant, through its former principal, [REDACTED] submitted an application for regional center designation in June of 2010. After a series of actions,⁵ USCIS approved the application and its

⁵ In April of 2011, USCIS denied the application, but subsequently reopened and approved it four months later. The final proposal included a proposal for hypothetical projects for apartments, an indoor year-round farmers market, and a hotel.

accompanying hypothetical project⁶ in August of 2011. Beginning in 2012, individual immigrant investors began filing Forms I-526, Immigrant Petition by Alien Entrepreneur, based on their investments in the Applicant's NCE, [REDACTED] which planned to pool investor funds and lend them to the JCEs, [REDACTED] and [REDACTED]. The JCEs were to use the funds for the construction and development of a five-story luxury apartment building with a farmer's market on the ground floor and a [REDACTED] hotel. In 2016, approved investors began filing Forms I-829, Petition by Entrepreneur to Remove Conditions on Permanent Resident Status.

In August 2015, the SEC filed a complaint in the U.S. District Court for the Western District of Washington (district court) against the Applicant, several of its related entities, and the Applicant's former principal, [REDACTED]. The complaint alleges that the defendants sold securities to finance specific real estate development projects, but that [REDACTED] then misappropriated or diverted millions of dollars in investor funds for other projects or his personal use. In October 2015, the district court granted an injunction freezing the assets of the Applicant and related entities and appointed [REDACTED] to be the receiver⁷ tasked with managing them.

In November 2015, the Chief issued a notice of intent to terminate (NOIT) the Applicant's designation as a regional center based on the SEC action and its underlying allegations. Following the Applicant's timely response, the Chief terminated its regional center designation in November 2016, finding that it was not continuing to promote economic growth due to the diversion of investor funds and the absence of required monitoring and oversight.

On appeal, the Applicant provides documentation from the district court and the receiver indicating that [REDACTED] is not now a principal of the Applicant and no longer controls its activity or investor funds. In fact, [REDACTED] pled guilty to two felony counts and was sentenced to four years imprisonment.⁸ An EB-5 management company that has overseen other successful projects, [REDACTED] has now taken control of the Applicant. At the time of termination in November 2016,

⁶ A "hypothetical project" proposal is one not supported by a comprehensive business plan, as opposed to an "actual project" proposal that is supported by a detailed plan. USCIS Policy Memorandum PM-602-0083 (Policy Memo), *EB-5 Adjudications Policy* 14 n.2 (May 30, 2013), <https://www.uscis.gov/laws/policy-memoranda>. In *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998), we held a "comprehensive business plan" is one that is "sufficiently detailed to permit the Service to draw reasonable inferences about the job-creation potential." We stated that "at a minimum, the plan should include a description of the business, its products and/or services, and its objectives." We described specific details that should be part of a comprehensive plan, e.g., a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a description of the target market and prospective customers of the new commercial enterprise, and the marketing strategies of the business. We found that "[m]ost importantly, the business plan must be credible."

⁷ 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 Nov. 21, 2017).

⁸ Department of Justice Press release, "Developer Sentenced to 4 Years in Prison for Defrauding Investors seeking Permanent Residency under Federal Immigration Program," <https://www.justice.gov/> [REDACTED] (last accessed Nov. 21, 2017).

the apartments were leasing, the hotel was operational, and hundreds of jobs had been created. The only portion of the business plan that remained incomplete was the farmer's market on the ground floor of the apartment building.

The instructions for the Form I-924, page 1, state that a regional center "must file an amendment to [s]eek approval for any changes to the regional center's name, ownership, or organization structure." As of August 2017, [REDACTED] had not filed a Form I-924 seeking an amendment recognizing it as the new owner of the Applicant. Thus, we requested that the Applicant file that form, which it has now done. The submission relies heavily on the completion of the apartments and continued progress towards opening the farmer's market, supported by an updated business plan and the 2016 Economic Impact analysis, but also includes an Operational Plan describing a potential new project. According to the 2017 Master Agreement whereby [REDACTED] took over the Applicant, the new owner committed "immediately available funds as needed to complete and operate the Project consistent" with the business plan.

C. The Promotion of Economic Growth

1. Negative Factors

The Chief found the Applicant is not continuing to promote economic growth because of [REDACTED] diversion of investor funds, as well as the SEC action against the Applicant. The SEC complaint alleges that [REDACTED] used regional center funds on several occasions to personally benefit in ways unrelated to the projects for which investors gave funds. Specifically, the complaint indicates [REDACTED] transferred investor funds to the accounts of other projects, used investor funds to purchase a personal residence, and withdrew investor funds at gambling establishments around the country.⁹ According to the Department of Justice's press release regarding [REDACTED] guilty pleas, he used approximately \$21.5 million for disallowed expenses and failed to contribute \$32.5 million as pledged.¹⁰

Concomitant with the diversion of funds, the Chief found that the Applicant lacked sufficient institutional safeguards to effectively monitor and oversee its own operations. The district court's orders freezing the Applicant's assets and appointing a receiver to assume control of its operations caused further uncertainty about its ability to conduct basic business functions and operations. Indications of past mismanagement reflect negatively on a regional center's ability to promote economic growth and create jobs.

⁹ According to the SEC complaint, he diverted over \$11 million from the NCE in this matter and another one associated with the [REDACTED] project. Exhibit 9 to the SEC Complaint, which the Applicant submitted in response to the NOIT, shows considerable funds diverted from an [REDACTED] account ending in [REDACTED] the [REDACTED] escrow account.

¹⁰ "Developer Sentenced to 4 Years in Prison for Defrauding Investors seeking Permanent Residency under Federal Immigration Program," <https://www.justice.gov/> [REDACTED] (last accessed Nov. 21, 2017).

Further, the Chief determined that the Applicant was unlikely to promote economic growth in the future, as the district court had enjoined it from soliciting additional EB-5 funds. In its NOIT response, the Applicant indicated that it did not intend to pursue any future projects. Without future plans, the Chief reasoned, the Applicant did not establish a way to overcome its historical misdeeds.

Finally, in light of the SEC action, the Applicant permitted a small number of investors with funds still in escrow to “opt-out” and recoup a portion of their invested funds. While such an option may ameliorate the negative impact on investors,¹¹ it can also diminish the funds the NCE has available for the project.

2. Positive Factors

Along with these negative factors, there are also several positive factors. First, in May 2017, the district court approved a proposal to restructure the NCE, declared its assets free and clear, and lifted the freeze of its financial accounts. The next month, [REDACTED] a company that has sponsored several completed EB-5 projects in the past, executed a Master Agreement to assume ownership and control over the Applicant and the NCE.

Second, despite the diversion of funds, the Applicant had already made significant progress on the project and continued to do so during the SEC proceeding. According to a letter from [REDACTED] (the receiver) in response to the NOIT, the project was already 90 percent complete at that time and was generating positive cash flow. The record contains the occupancy rates for the apartments and statements of operations regarding the income from the apartments and the hotel. He also confirmed his commitment to resolving issues for the farmer’s market, the one remaining element of the proposal. Notably, in the September 2015 opposition to one of the defendant’s motions, the SEC advised the district court that [REDACTED] fraud had seriously jeopardized a separate project, but expressed no such concern about the project in this matter.

Third, the Applicant’s receiver took steps to recover the diverted funds and secure new funding sources to complete the project. According to the September 2015 SEC opposition to the defendant’s motion, the NCE used over \$5 million to purchase land and recovered \$3 million from a different project to which the funds had been diverted. On appeal, the Applicant notes that [REDACTED] had recovered \$270,000 from one related entity and had taken steps to recover another \$1.3 million.

Fourth, in his declaration to the district court, [REDACTED] affirms that the apartments and hotel have generated \$1,169,495 in cash. As noted above, the record also contains statements of operations for these entities supporting that assertion. Not only does this information reveal that the

¹¹ We use ameliorate here in the context of the investors’ ability to receive some of their diverted funds back. An option to recover funds remaining in escrow, however, could impact the ability of those individuals to receive favorable adjudication of their petitions. Specifically, a request to opt out indicates that portion of their investment is not at risk as required. 8 C.F.R. § 204.6(j)(2); *Matter of Izummi*, 22 I&N Dec. 169, 184 (Assoc. Comm’r 1998).

project is operational, the funds generated have also served to help mitigate some of the diversion of funds.

Fifth, the development occurred and continues in accordance with the original business plan. The 2013 Business Plan that supported the approved Forms I-526¹² projected costs of \$58,757,600 and the following sources: \$2.5 million in [REDACTED] equity; \$3 million from [REDACTED] \$40 million in EB-5 investor capital; and approximately \$13 million in construction debt. In a supplemental filing to the appeal, the Applicant maintains that the apartments alone required \$40 million in construction costs and are now 90 percent occupied. It concludes that the project has already created 800 jobs and that [REDACTED] efforts have allowed the Applicant to continue promoting economic growth through the farmer's market portion at a cost of \$4.9 million. The Form I-829 materials accompanying the NOIT response also include a declaration from [REDACTED] shareholder and principal of [REDACTED] a company retained by [REDACTED] to provide forensic accounting for the receivership. [REDACTED] confirms that the actual costs were \$58,079,530, very close to the amount in the 2013 plan.

Sixth and finally, the Applicant's Operational Plan accompanying the Form I-924 Amendment details the new owner's operational past projects through different regional centers, its marketing plan, and [REDACTED] extensive development experience. The plan also lists a future "sample project" for residences that will rely on \$12 million from 24 investors.¹³

3. Balancing Test

We find that the positive indicia here outweigh the negative and, thus, conclude that the Applicant continues to promote economic growth and warrants preservation of its regional center designation. The derogatory factors here are substantial: the Applicant's then-principal, [REDACTED], diverted some \$4 million in investors' funds; the Applicant lacked sufficient safeguards to prevent or detect this malfeasance; and the SEC and DHS, as well as the federal court, invested significant resources to remediate. Despite these strong headwinds, the Applicant put in place a new management team; 90 percent of investors' funds remained available, some diverted funds were recovered, and additional funds were secured; the Applicant built and opened an apartment building and hotel; and it has demonstrated progress towards completion of the farmer's market on the ground floor of the apartment building. The 2016 Economic Impact analysis confirms that the near-completed project has already resulted in hundreds of jobs created and impacted regional and national output (sales), labor income, and household earnings.¹⁴ Finally, the new regional center management company has committed its own financial resources to the Applicant.

¹² A copy of that plan is part of the Applicant's response to the NOIT, in addition to copies of the other documents supporting the pending Forms I-829.

¹³ The Applicant does not characterize the project as a hypothetical and we will not address whether the proposal, which does not include a general market analysis or time line, meets all of the requirements for one.

¹⁴ By comparison, we recently upheld the termination of another regional center led by [REDACTED]. There, he diverted proportionally more of the investors' funds and the comparatively new management has only recently begun the process of renewing the project after its time in receivership.

We find that the Applicant has demonstrated it is more likely than not to promote economic growth in the future, and we conclude that, on balance, preservation of the Applicant's regional center designation is warranted.

III. CONCLUSION

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. This case contains evidence of the diversion of funds away from job-creating activities, as well as evidence of substantial economic activity that created hundreds of jobs. Here, the near completion of the project as proposed and the existence of a new owner committed to promoting future economic growth in the aggregate warrant maintenance of the regional center.

To be clear, strong indicia of economic growth does not compel us to maintain a regional center's designation. As explored above, our authority under 8 C.F.R. § 204.6(m)(6) to consider the appropriateness of terminating a regional center includes DHS' responsibility to ensure the integrity of the EB-5 program. Investors, regional centers, and USCIS officers all contribute to the success of this job creation program. The program's success is most often described in terms of jobs created, dollars invested, and projects completed. But the program's success also depends upon DHS' effective oversight to maintain integrity. When balancing the equities in a termination proceeding, we are mindful of this broader oversight function. There may be cases where, to maintain program integrity, the nature or degree of bad acts cannot be ameliorated or counter-balanced by positive factors of job creation and economic growth. For the foregoing reasons, this is not such a case.

We return the matter to the Chief for all necessary actions and notices consistent with this decision.

ORDER: The appeal is sustained.

Cite as *Matter of P-A-S-, LLC*, ID# 513109 (AAO Dec. 21, 2017)