



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

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

MATTER OF W-F-R-C-

DATE: APR. 2, 2018

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 program<sup>1</sup> to promote economic growth in the United States through foreign investment.<sup>2</sup> 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. Investors may fund their own projects, or invest through a US Citizenship and Immigration Services (USCIS) designated regional center.<sup>3</sup>

In May 2015, USCIS designated the Applicant as a regional center based in part on a proposal for a development project for a multistory building housing both limited and full service restaurants in the city of [REDACTED] California. Four months later, the Applicant submitted an amendment to designate the project as an exemplar.<sup>4</sup> At the same time, another regional center, [REDACTED] filed an amendment request, seeking co-sponsorship of the same project.

In April 2017, the Chief of the Immigrant Investor Program denied the Applicant's amendment application. He determined that the two regional centers were not exercising consistent oversight of the project, that foreign investors' capital was not being made available to the job-creating entity (JCE), that the business plan was not credible, and that the economic analysis did not utilize reasonable methodologies to estimate job creation.

The matter is now before us on appeal. The Applicant provides additional evidence, including, documentation of business activities, project development expenditures, an update to the business plan and economic analysis, and a loan agreement between the NCE's manager and the JCE for provision of additional capital. It affirms its commitment to oversight of the project in concert with

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

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

<sup>3</sup> See Section 610(a) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act (Appropriations Act), 1993, Pub. L. No. 102-395, 106 Stat. 1828, 1874 (Oct. 6, 1992), as amended.

<sup>4</sup> The term exemplar refers to a regional center proposal that includes a sample Form I-526, Immigrant Petition by Alien Entrepreneur, and contains copies of the commercial enterprise's organizational and transactional documents, which USCIS reviews to determine if they comply with established eligibility requirements.

<sup>6</sup> USCIS Policy Manual G.3(B)(3), <https://www.uscis.gov/policymanual>.

its co-sponsor and that it is able to properly report progress to USCIS. It asserts that foreign investors' funds have been placed at risk and made available to the project for the purpose of meaningful business activity. It finally argues that the business plan and economic analysis submitted on appeal resolve the Chief's concerns. The record also includes an updated loan agreement reflecting an increase in the EB-5 capital raise, and evidence of the JCE's ability to repay senior loans without diverting investor capital.<sup>5</sup>

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

## I. LAW

USCIS may designate an entity as a regional center based on a general proposal for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment. Appropriations Act § 610, as amended. The showing that a regional center will more likely than not promote economic growth may be based on general predictions concerning the kinds of commercial enterprises that will receive capital from immigrant 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 on the area. *Id.*

The implementing regulation at 8 C.F.R. § 204.6(m)(3) indicates that an entity that wishes to apply for regional center designation shall submit a proposal that:

- (i) Clearly describes how the regional center focuses on a geographical region of the United States, and how it will promote economic growth through increased export sales, improved regional productivity, job creation, and increased domestic capital investment;
- (ii) Provides in verifiable detail how jobs will be created indirectly through increased exports;
- (iii) Provides a detailed statement regarding the amount and source of capital which has been committed to the regional center, as well as a description of the promotional efforts taken and planned by the sponsors of the regional center;
- (iv) Contains a detailed prediction regarding the manner in which the regional center will have a positive impact on the regional or national economy in general as reflected by such factors as increased household earnings, greater demand for business services, utilities, maintenance and repair, and construction both within and without the regional center; and

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<sup>5</sup> We requested this information in December 2017.

- (v) Is supported by economically or statistically valid forecasting tools, including, but not limited to, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and/or multiplier tables.

To show that the regional center will promote economic growth, applicants may submit proposals for actual or hypothetical projects. The amount of verifiable detail required depends on the type of project proposed. Actual project proposals require the submission of a business plan compliant with *Matter of Ho*, 22 I&N Dec. 206 (Assoc. Comm'r. 1998).<sup>6</sup> Applicants submitting these proposals may also choose to file an exemplar Form I-526, Immigrant Petition by Alien Entrepreneur, with additional project documents. If approved, both the actual project and the exemplar filing will be accorded deference in subsequent related filings, barring mistake of law or fact, fraud, or material misrepresentation.

For approval as a hypothetical project, a regional center must meet a more lenient standard, namely, it must show in verifiable detail how it will positively impact economic growth. Hypothetical projects do not require *Matter of Ho*-compliant business plans. If approved, a hypothetical project will not receive deference in future filings.

## II. ANALYSIS

The Chief granted the Applicant's initial designation as a regional center in [REDACTED] 2015, noting that USCIS had reviewed and deemed compliant the project's May 2014 business plan and economic analysis. This business plan called for 32 foreign investors to contribute \$16,000,000<sup>7</sup> in pooled funds to the NCE, [REDACTED] which would loan the funds to [REDACTED], the JCE, for the purpose of "renovating, constructing, developing, and directly managing and operating a 69,380 square foot high-end entertainment center with restaurant and retail components." The total project cost was \$24.4 million, with the remaining capital coming from a \$4.2 million loan from [REDACTED] Bank, a \$3.5 million bridge loan from [REDACTED] and developer equity. This filing included a supplement to the Confidential Private Offering Memorandum, and a second amendment to the Partnership Agreement that added the Applicant as a co-sponsor and removed [REDACTED] as the compliance partner of the NCE. It also contained the loan agreement between the NCE and the JCE, the bank and development loans, and the closing statement for the property showing that the JCE purchased the project property for \$7,760,375.75.

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<sup>6</sup> A *Matter of Ho* compliant business plan must include the following components: (1) a description of the business; (2) business structure and objectives; (3) a marketing plan with target market analysis; (4) personnel experience; (5) competitive analysis; (6) required licenses and permits; (7) a staffing timetable for hiring; (8) job descriptions; and (9) budget and financial projections. Additionally, the overriding requirement of *Matter of Ho* is that the business plan must be credible.

<sup>7</sup> The Applicant indicates that the NCE is located in a targeted employment area, and that the requisite amount of qualifying capital is downwardly adjusted from \$1,000,000 to \$500,000. See 8 C.F.R. § 204.6(f)(2).

After review of the initial submission, the Chief issued a notice of intent to deny in which he determined that there would not be sufficient funding to construct the project if investors' funds capital was fully deployed to repay the bridge loan, as indicated in the filing's cover letter. He also requested clarification of each regional center's oversight responsibilities, the NCE's and JCE's entity formation documents, and the purchase documents for the project's property. In response to this notice, the Applicant supplied a June 2015 sponsorship agreement between the JCE, NCE, and the Applicant, a sponsorship agreement between the NCE, JCE and [REDACTED] and a 2017 business plan and economic analysis prepared by [REDACTED]. It also submitted a compliance agreement between [REDACTED] and the Applicant, a market study, and a newly amended Confidential Private Offering Memorandum increasing the number of potential units to 40. Additionally, it added a proposal from a new architect and an estimate of construction costs. This supplement increased the total project costs to \$26,612,555, necessitating the increase to 40 investors to fund a \$20 million loan from the NCE to the JCE. As evidence of potential increased funding, the Applicant also provided a letter from [REDACTED] the owner of the NCE's general partner, in which he committed an additional \$2,329,555, and provided a bank certificate of personal deposit as evidence of his ability to pay that amount.

While the Applicant's request for initial designation was pending, several investors in the project filed Forms I-526, Immigrant Petitions by Alien Entrepreneur, through the sponsorship of [REDACTED] a separate regional center. USCIS records show that seven of these petitions were approved. Once the Applicant received its regional center designation, it filed an amendment request based upon an exemplar proposal for the same project. The request sought the Chief's review to determine the program compliance of the initial Confidential Private Offering Memorandum and supplement, the subscription agreement, the Limited Partnership Agreement and amendment, the escrow agreement, the loan agreement, and the promissory note. In September 2015, the instant amendment request was filed and USCIS records show that Applicant-sponsored investors began filing Form I-526 petitions. In November 2016, the Chief approved one of those petitions, prior to denying the Applicant's request to amend its designation in April 2017.

#### A. Regional Center Compliance

In his decision denying the exemplar, the Chief noted concerns with the Applicant's ability to accurately "administer and exercise [its] oversight and reporting responsibility." He cites to 8 C.F.R. § 204.6(m)(6), which lists the requirements for the continued participation in the EB-5 program, including the submission of information showing the promotion of economic growth annually or upon request. The Chief did not cite to any regulation defining the evidence required for a regional center to demonstrate ability to comply with these requirements at the time it files a request for an initial or amended designation.

Rather, he referred to the Form I-924 instructions, which stated:

The application should be supported by a statement from the principal of the Regional Center that explains the methodologies that the Regional Center will use to track the

infusion of each EB-5 alien investor's capital into the job creating enterprise, and to allocate the jobs created through the EB-5 investments in the job creating enterprise to each associated EB-5 alien investor.<sup>8</sup>

The Chief interpreted these instructions as requiring a clear agreement and understanding between the entities regarding responsibility for compliance duties, and then proceeded to conduct a review of the Form I-924A, Annual Certification of Regional Center, submitted by both the Applicant and [REDACTED] for consistency and accuracy.<sup>9</sup> Based on discrepancies in the reporting by the two regional centers, he determined the Applicant had "not met the evidentiary burden that the two Regional Centers will administer and execute their oversight and reporting responsibilities, accurately or adequately."

The reporting requirement in the regulations relates to the filing of the Form I-924A, annually or upon request; they do not contain additional reporting requirements for regional centers co-sponsoring the same new commercial enterprise or project. Neither the regulations nor the form instructions predicate the adjudication of an amendment to a regional center's designation upon a demonstration of consistency or accuracy in its own Form I-924A filings or in relation to those of another regional center. Rather, when filing a Form I-924, a regional center should provide an explanation of how it will monitor capital investment activities into projects under its sponsorship and the allocation of resulting jobs.<sup>10</sup> Consistent with the form instructions, when more than one regional center sponsors the same project, the explanation should account for capital coming from, and jobs being allocated to, investors through each of the regional centers.

The record contained the Applicant's oversight and reporting agreement with [REDACTED] and with the JCE. Under its terms, each regional center will maintain an accurate, up-to-date list of the foreign investors and periodically cross check each other's list to ensure accuracy. Additionally, they will regularly audit and conduct on-site visits of the project and review documentation from the NCE and JCE to ensure compliance with EB-5 program requirements. The record also included the sponsorship agreement between the Applicant and the NCE, in which the Applicant explicitly agreed to sponsor no more than three investors for this project. Thus, the record contained sufficient detail to explain how the management and oversight functions of the project would be shared by, and investors allocated amongst, the two regional centers.

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<sup>8</sup> This language is excerpted from the March 18, 2015, version of the form instructions. The current version of the form instructions (dated December 23, 2016) contains different language, which reads:

**Item Number 40. Administration, Oversight, and Management Functions.** Confirm that you have submitted a plan that demonstrates that there are (or will be) sufficient management, oversight and administrative functions in place to monitor all capital investment activities and the allocation of the resulting jobs created or maintained under the regional center's sponsorship.

<sup>9</sup> Regional centers submit the Form I-924A annually to report their efforts to promote economic growth in accordance with 8 C.F.R. § 204.6(m)(6)(B).

<sup>10</sup> See 8 C.F.R. § 103.2(a)(1) (requiring all forms be submitted and executed in accordance with its form instructions and incorporating those instructions into the regulation)

B. JCE Identity and Business Activities

The Chief determined that the Applicant had not established that investor funds were placed at risk for the purpose of generating a return because the full amount of this capital had not been placed with the entity most closely responsible for job creation. *See Matter of Izummi*, 22 I&N Dec. 169, 179 (Assoc. Comm'r 1998). He concluded that foreign investors' funds had not been made available to the business most closely responsible for job creation. Rather, he argued, "it had [sic] been provided to [redacted] (the Borrower)." He continues on, asserting that the Applicant had not provided a financing agreement between [redacted] and [redacted] (the JCE)."

In this statement, he erroneously identified the JCE as [redacted] which is the name of the project, not an entity. The record before the Chief demonstrated consistently, through all versions of the business plan and offering documents, that the JCE is [redacted]. Additional evidence, such as the loan agreements, show that the NCE will transfer the EB-5 capital it receives to [redacted] to pursue the development described in the business plan.<sup>11</sup> The Applicant has overcome the concerns raised by the Chief regarding the identity of the JCE and whether it had received the full amount of EB-5 capital to be used for job creation purposes.

After incorrectly identifying the JCE, the Chief then concluded that the loan agreement between the NCE and [redacted] stipulating that the JCE use foreign investor capital for project development, did not establish that investor funds were placed at risk "...because preponderance of the evidence is that [redacted] has not spent the EB-5 funds to develop the Project, even though it has had the funds for more than two years." However, the record shows that the JCE is undertaking actual business activity in pursuit of the NCE's business plan, and thus that the capital is placed at risk for generating a return on capital, in accordance with 8 C.F.R. § 204.6(j)(2).

The Chief noted in his decision, and the Applicant acknowledged on appeal, that USCIS representatives conducting a site visit did not view any construction activities. However, the Applicant clarified that the visiting officer met with [redacted] the NCE's manager, who explained that the JCE was in the final stages of receiving permits after revising the structure design and had taken some activity on the interior of the building. The Applicant asserts that [redacted] also provided the USCIS representative with copies of these building permits after the site visit. On appeal, the Applicant claims that building demolition has occurred, and it provides building permits for demolition, a proposal from [redacted] for interior and exterior destruction as well as architectural and structural construction as corroborative evidence. It also provides a bid from [redacted] and copies of approximately \$800,000 in checks paid to entities such as [redacted] and the engineering firm [redacted]. As part of its response to our request

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<sup>11</sup> The NCE amended its plan, increasing the number of investors from 32 to 40, and the amount to be loaned from \$16 million to \$20 million. While not addressed by the Chief in his decision, in response to our RFE the Applicant has provided an updated loan agreement demonstrating that the full amount of the EB-5 funds capital obtained from the NCE would be lent to the JCE.

for evidence, it includes records from local government demonstrating its continued undertaking of business activity, such as the fire department's approval of the building plan, inspection records, and fee receipts. Thus, the Applicant demonstrates that its project has undertaken meaningful business activity and placed the EB-5 capital at risk.

#### D. Business Plan

A business plan must be submitted to establish, prospectively, that a new commercial enterprise will create the minimum required number of jobs. *Matter of Ho*, 22 I&N Dec. at 213, identifies the components that should be found in a business plan, but indicates the overriding concern is its credibility. The Chief noted several concerns about the credibility of the 2017 business plan. First, he questioned the credibility of the JCE's projected revenues in full- and limited-service restaurants because they did not "consider the existing "market surplus" status." The business plan paraphrases an independent market analysis showing that sales in full- and limited- service restaurants exceed the amount that consumers in the area spend in those businesses near the project's location in ██████████ County.<sup>12</sup> The projected job creation depends, in part, upon the estimated revenues from the full- and limited-service restaurant categories. Therefore, overestimated revenue projections could result in overstated employment creation estimates.

Contrary to the Chief's statement that the business plan did not consider the market surplus status, the 2017 business plan explains that "negative value represents a surplus of retail sales, a market where customers are drawn in from outside the trade area." The plan further clarifies that "the area has significant draw beyond their own residents." It then states that "the negative value is actually good news for the projects." The record contains data within the business plan from an independent market analysis that supports the Applicant's interpretation. This profile shows that consumers living near the project have a higher propensity to spend money dining out when compared against the United States population as a whole, and that there is a strong consumer base for the services provided. The record also contains independent data showing increased sales and revenues for full- and limited service restaurants, indicative of increasing demand for both. The evidence in the record, considered as a whole, supports the credibility of the business plan's market analysis and revenue projections.

Second, the Chief questioned the credibility of the business plan by noting that the business plan's staffing requirements for full- and limited-service restaurants greatly exceeded the number of these restaurant's direct hires predicted by the economic model. These staffing requirements called for more than 2,700 full time employees, which would be impractical in the project's space as described. On appeal, the Applicant acknowledges that the business plan incorrectly summed the employees per

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<sup>12</sup> While not explicitly stated in the Chief's decision, the following framework provides context for his conclusion. When supply exceeds demand, the market for those services will adjust and prices for those services will decline, which may result in lower revenues. Conversely, when demand exceeds supply, consumers may pay more for services and providers may realize increased revenues, all else being equal. The Chief's concern appears to be that the revenue projections may be overstated because a surplus exists and its potential impact on revenues was not considered.

quarter, overinflating the number, however the Applicant provides new staffing requirements that project 253 direct employees at the project, a reasonable amount for the total square footage of 68,375. We note that the erroneous staffing requirements identified by the Chief were not part of the project's job creation estimates, and thus did not significantly detract from the credibility of the business plan.

Third, the Chief questioned the credibility of the business plan by examining its financial viability to determine whether there would be sufficient funding for project development. He first noted concerns with the JCE's ability to repay the [REDACTED] Bank loan without using foreign investor capital, leaving insufficient funds remaining for project development. The record included a funding commitment from [REDACTED] to be used for the development of the project, as well as evidence of his ability to pay this commitment from the overseas bank in which these funds were held. However, the Chief expressed his belief that use of these funds violated the requirement that capital be placed at risk and that the project must demonstrate it will carry out meaningful business activities. Here, he appears to conflate concerns over the project's financial viability with the requirement that a foreign investor's capital must be placed at risk for this purpose.<sup>13</sup> Funds provided from sources other than EB-5 investors are not subject to the requirements of 8 C.F.R. § 204.6(j)(2), even if the record did not demonstrate that the JCE has engaged in meaningful business activity.

On appeal, the Applicant provides a loan agreement between [REDACTED] and the JCE for \$3,000,000. Furthermore, the Applicant has provided documentation of four years of consistent loan payments to [REDACTED] Bank, as well as a statement from [REDACTED] Bank indicating that it may extend this commercial loan subject to project completion, preleasing status, and updated financial statements. This suffices to establish that these additional funds are available to the JCE, resolving the Chief's concern that EB-5 funds would be pulled away from development to repay other debt obligations.

Lastly, the Chief opined that it was unlikely that the NCE would raise the total amount of required foreign investor capital, as the regional centers were unlikely to secure 40 investors. He does not cite to any evidence in the record to support his contention, nor do the regulations require that the Applicant demonstrate this ability. Therefore, the Chief's opinion does not detract from the credibility of the business plan.

#### E. Reasonable Economic Methodology

Under 8 C.F.R. § 204.6(m)(7)(ii), regional centers may use indirect job creation, as demonstrated by reasonable economic methodologies, to satisfy the EB-5 program's job creation requirement. Here, the Applicant uses the Regional Input-Output Modeling System (RIMS II), developed by the Bureau of Economic Analysis of the U.S. Department of Commerce which estimates the increase in number of jobs, by industry, resulting from an increase of \$1,000,000 spent in or generated by that industry. In this case, the Applicant uses expenditures on construction, architecture and engineering design

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<sup>13</sup> See *Matter of Ho*, 22 I&N Dec. at 210.

and working capital, as well as projected revenues as inputs. In its original filing, the Applicant claimed that it would create 532 jobs—278 from revenues and 254 from expenditures.

Of the jobs created from expenditures, the economic analysis indicated that 54 of those derived from working capital, which represents an unallocated reserve fund. The Chief asserted that working capital was an asset, not an expenditure and therefore could not be used as an input into an economic model that estimates job creation based on an increase in spending. On appeal, the Applicant provides an update to the 2017 economic analysis which explains that while the uses of working capital are not predetermined, the project developer has identified several potential uses for these funds, including purchase of equipment, insurance, and hiring and training of staff. Using the estimated expenditures in each of these industries, the Applicant provides an updated job creation projection that reduces jobs attributed to working capital to 36. As it has now identified the uses of working capital, and has generated job estimates based on using expenditures into the appropriate industries, we are satisfied that the Applicant's job estimates were reached using reasonable economic methodologies.

The Chief also questioned the increase in jobs from revenue. He first noted that between the original business plan, and the updated 2017 business plan, project costs increased 10 percent. He attributed 5 percent of this increase to inflation, without reference to any corroborating evidence. The Chief then applied this estimate of inflation to the job estimates in the 2014 economic analysis, and concluded that operations-related jobs increased by 13, not 37. He therefore found the estimated number of jobs generated by operating revenue to be unreasonable.

On appeal, the Applicant notes that the Chief's assertion is "one of the most confusing aspects of the Denial." In the update to the 2017 economic analysis, it asserts that the Chief erred in attributing part of the increase in project costs to 5 percent inflation. First, it notes that, according to the Bureau of Economic Analysis, inflation measured at 2.5 percent during the relevant time period, contradicting the Chief's estimate. This analysis also explains that the increase in project costs resulted both from a redesign of the project, and from the inclusion in the project budget of a line item for furnishings and equipment. The analysis then goes on to explain that the Chief incorrectly applied his 5 percent inflation to the original jobs estimate, and also ignored significant methodological changes between the original and current economic analysis, such as the inclusion of new breakouts of jobs attributed specifically to full- and limited-service restaurant revenues. We find that this analysis persuasively addresses the Chief's concerns, and that the job estimates deriving from operational revenues are reasonable. The Applicant demonstrates that it will create a total of 517 jobs, which is more than sufficient to allocate ten jobs for each of the 40 anticipated investors.

### III. CONCLUSION

The Applicant has established its ability to report annually on its progress. It further has shown that the foreign capital raised by the NCE is fully available to the JCE, and that the JCE is using the capital to carry out meaningful business activities. Finally, it demonstrates that the business plan is

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credible, and that job creation estimates were generated using reasonable economic methodologies. Accordingly, it has established eligibility for the benefit sought.

**ORDER:** The appeal is sustained.

Cite as *Matter of W-F-R-C-*, ID# 748693 (AAO Apr. 2, 2018)