U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-C-R-C-

DATE: AUG. 15, 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[1] 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 U.S. Citizenship and Immigration Services (USCIS) designated regional center.[4]

In June 2013, USCIS designated the Applicant, as a regional center to participate in the program. The Applicant submitted an amendment in September 2015, seeking to amend its designation and requesting approval of a proposed project as an exemplar.[5]

The Chief of the Immigrant Investor Program Office denied the application, concluding the full amount of the EB-5 investment capital will not be placed at risk for the purpose of job creation, and the business plan and economic analysis do not demonstrate the requisite number of jobs will be created. The Chief further found the Applicant made impermissible material changes to the 2015 filing.

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[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.

[5] The term exemplar refers to a regional center proposal that includes a sample Form I-526 and contains copies of the commercial enterprise's organizational and transactional documents, which USCIS reviews to determine if they comply with established eligibility requirements.

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

On appeal, the Applicant asserts the Chief misinterpreted the relevant statute, regulations, and precedent decisions; the submitted revisions are acceptable changes; and the record demonstrates eligibility for the benefit sought.[6]

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,

[6] We issued a notice of intent to dismiss (NOID) in July 2018 regarding the partnership agreement and role of In August 2017, president, was found to have violated the The NOID response clarified that while the unsigned draft 2015 partnership agreement included with the original application listed and as the NCE's co-general partners, the NCE subsequently determined that would not serve in this capacity, and further, and have never had any ownership or management role with the NCE. In addition, the 2016 executed partnership agreement reflected as the NCE's sole general partner, and demonstrated its authority to amend the partnership agreement in 2017, in accordance with the new hospital project location.

utilities, maintenance and repair, and construction both within and without the regional center; and

(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).[7] 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

USCIS initially designated the Applicant as a regional center in 2013. In 2015, the Applicant filed a Form I-924, Application for under the Immigrant Investor Pilot Program, seeking to amend its designation and requesting approval of an exemplar project. The application filed in 2015 indicates the new commercial enterprise (NCE), would pool $25,000,000 of immigrant investor funds to loan to to finance the development and construction of a hospital facility in Texas. an entity established by the city of and the original Borrower of the EB-5 funds, would provide $45,367,000 in funding, with additional assistance totaling approximately $8,500,000, for the $78,871,000 hospital project. The city of would own and operate the hospital upon the project's completion.

In August 2017, the Chief issued a notice of intent to deny (NOID) identifying deficiencies related to the original 2015 business plan and economic report. Specifically, he noted that local media in Texas reported that the city of withdrew support of the project. In response to the Chief's

[7] 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.

NOID, the Applicant confirmed the city of decided not to pursue its involvement with the hospital project. The city of Texas, located approximately two miles from agreed to "tak[e] over the to construct a hospital facility in The Applicant submitted a revised 2017 business plan that indicated the NCE will instead loan the $73,155,000 in funding for the $98,155,000 hospital project to a different entity, , the "Borrower," will in turn loan the funds to , the or job creating entity (JCE), pursuant to a tri-party loan agreement between the NCE, the Borrower, and the JCE. The Borrower will issue "senior bonds," use the bond proceeds to extend a loan to the JCE, and the JCE will use these proceeds and EB-5 loan funds to "develop, construct, equip, and operate" a hospital facility in Texas.

In addition to the revised business plan, the NOID response included various new documents that demonstrated the project changes, such as the revised economic impact report, amended partnership agreement, business formation documents for the new Borrower and JCE, and draft loan agreement. The Chief denied the application finding that the full amount of the EB-5 investment capital would not be placed at risk for the purpose of job creation, and that the revised business plan and economic model did not rely on acceptable inputs to support its job creation estimates. He further found that changes made to the business plan and associated organizational and transactional documents represented impermissible material changes.

A. Capital at Risk

The Chief determined, in part, that the Applicant had not established that the full amount of investor funds would be placed at risk for the purpose of job creation because a portion of the EB-5 capital would be placed in a reserve fund. According to pages 19-20 of the 2017 business plan, $5,599,360 of the EB-5 funds are allocated to a "Working Capital Reserve," which "relates to the Working Capital Fund" and "includes uses such as (a) costs of the Project, (b) the costs of needed repairs to the Project, (c) the costs of capital improvements to the Project, (d) potential judgments against the Project, or (e) amounts due on any indebtedness of the Project (i.e. financing costs of the Project)." In support of his denial, the Chief pointed to *Matter of Izummi's* finding that "Reserve funds that are not made available for purposes of job creation cannot be considered capital placed at risk for the purpose of generating a return on the capital being placed at risk."[8]

On appeal, the Applicant asserts that the funding structure does not violate *Izummi*, and the full amount of the EB-5 funds would be made available for job creation purposes. It contends that, in contrast to *Izummi*, the NCE would not reserve any EB-5 capital for its own expenditures, rather the Working Capital Fund is an account owned by the JCE and administered under the submitted Master Trust Indenture. The Applicant further states that the JCE expects to use the Working Capital Fund for its operations by the second year (as detailed on page 20 of the 2017 business plan) and therefore, the EB-5 capital will "expressly be made available for the purposes of job creation, namely, the business and operations of the Project which is creating jobs."

[8] *See Matter of Izummi,* 22 I&N Dec. 169, 179 (Assoc. Comm'r 1998).

We disagree with the Chief's determination. The instant case is distinguishable from *Izummi,* wherein the operative documents required the creation of reserve funds in order to satisfy the NCE's potential future debts and obligations, and return a portion of the investors' EB-5 capital in compliance with a sell option. In our precedent decision, we explained that "the general partner would be obligated to deposit sufficient portions of the initial [investment] into the reserve funds such that the deposits and their earnings . . . would enable the Partnership to fulfill its own obligations to buy back Partnership interests . . . any leftover money would be used for other Partnership obligations, and whatever was left thereafter would then be used for business activities." *Id.* The instant case does not create reserve funds to facilitate any capital repayment to investors. Rather, the record shows the JCE anticipates using these funds for its operations by the second year, and accordingly, has demonstrated that the full amount of the EB-5 capital would be made available for job creation purposes.

In addition, the Chief found that the $5,001,937 in EB-5 capital allocated to a "Capitalized Interest Fund (Taxable)" to pay interest on certain bonds, would not be placed at risk for the purpose of job creation because these funds would go to the bond holders and not the job creating activity. He determined that this provision would violate *Izummi* because the full amount of EB-5 capital would not be made available to the business(es) most responsible for creating jobs.

On appeal, the Applicant asserts that the Chief incorrectly interpreted *Izummi* and misapplied its findings. The Applicant explains that the Master Trust Indenture establishes the rules governing the use of EB-5 funds. It requires these funds to be deposited into the JCE's accounts, and demonstrates that the entity most closely responsible for job creation controls and directs the EB-5 capital. The record supports the Applicant's contention that the JCE would receive the investors' funds from the NCE.

We agree that the Chief erred in his application of *Izummi*'s requirement that the full amount of money be made available to businesses most closely responsible for creating the employment upon which the petition is based. In that decision, we held that 8 C.F.R. § 204.6(j)(2), which requires an immigrant investor to demonstrate that he or she has placed the required amount of capital at risk, restricts the NCE's ability to divert investor funds for purposes other than job creation. *Id.* at 178-179 (discussing the deduction of $30,000 in operating fees from investor capital by the new commercial enterprise in that case). *Izummi* sought to prevent NCEs and their subsidiaries from siphoning EB-5 capital away from job creation, but it placed no limitations on how the entity most closely responsible for job creation used the funds.[9] Additionally, we note the Chief has historically found the use of EB-5 funds to purchase land to be permissible, even though the acquisition of real estate is not recognized as a job-creating activity in and of itself.[10] Thus, in the instant case, the

[9] *Id.* at 179. ("The Service does not wish to encourage the creation of layer upon layer of "holding companies" or "parent companies," with each business taking its cut and the ultimate employer seeing very little of the aliens' money.")
[10] *See Talking Points from EB-5 Interactive Series: Expenses that are Includable (or Excludable) for Job Creation* (June 4, 2015). https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/

JCE's use of EB-5 capital on business activities supported by the credible business plan, even where a portion of those expenditures do not directly result in job creation, does not violate *Izummi*.

B. Job Creation

The Chief determined that the revised business plan and economic analysis failed to demonstrate that the requisite number of jobs will be created using reasonable economic methodologies. He found that the economic model used inputs that are not job creating activities: $5,599,360 of the EB-5 funds allocated to a "Working Capital Reserve" and $5,001,937 in EB-5 capital allocated to a "Capitalized Interest Fund (Taxable)." He concludes that the application cannot be approved because only part of the EB-5 funds would be used in job creating activity, though he does not cite to any statute, regulation, or case law to support his conclusion. The Chief further contends, without explanation, that the record lacks sufficient verifiable details to support the job creation inputs.

According to 8 C.F.R. § 204.6(m)(7)(ii), immigrant investors associated with a regional center may use reasonable methodologies to show that they will satisfy the employment creation requirements of the EB-5 program through indirect job creation. Such methodologies may include multiplier tables, feasibility studies, market analyses, and other economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment. *Id.* The regulation does not restrict deployment of EB-5 funds solely into specific job-creating activities.

The Applicant's revised economic analysis uses the Regional Input-Output Modeling System (RIMS II) to project job creation derived from hard and soft construction costs and revenue from operation of the hospital, and demonstrates that it will create a sufficient number of jobs to satisfy the employment creation requirement of the project's 50 immigrant investors. [11] A review of the record shows significant documentation supporting these hard and soft construction costs, including a report provided by a major international construction and project development company. Moreover, the Applicant provided a detailed feasibility study to support the operational revenues used as inputs into the RIMS II model.

The Applicant has demonstrated that the revised business plan and economic analysis use acceptable inputs to support its job creation estimates.

C. Material Change

The Chief found that changes made to the business plan and associated organizational and transactional documents represented impermissible material changes.[12] As the revised business plan

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Talking-Points-EB-5-Interactive-Series-Expenses-6-4-15.pdf

[11] RIMS II was developed by the Bureau of Economic Analysis of the U.S. Department of Commerce, and estimates the growth in number of jobs, by industry, resulting from an increase of $1,000,000 spent in or generated by that industry.

[12] A change in fact is material if the changed circumstances would have a natural tendency to influence or are predictably capable of affecting the decision. *See Kungys v. United States.* 485 U.S. 759, 770-72 (1988).

and associated new hospital project documents presented a set of facts that were not established at the time the application was filed, the Chief determined it could not be approved based on these new documents.

We agree with the Applicant's assertion on appeal that the Chief erred in its material change determination. The Applicant explains that while the location, the Borrower, and the JCE differ from the initial filing, these changes are permissible because the hospital project is substantively similar to the management structure, construction and development entities, and economic analysis in the original 2015 business plan's proposed project in and moreover, these changes were not an attempt to remedy a deficient petition.

To support his material change determination, the Chief cites *Izummi's* finding that "A petitioner may not make material changes to his petition in an effort to make his deficient petition conform to the Service requirements."[13] The instant case is inapposite to *Izummi*, where the petitioner amended its partnership agreement after the petition's denial, clearly in an effort to remedy its deficiencies. Here, the new JCE was created in May 2017, prior to the Chief's August 2017 NOID, in response to evolving business needs; specifically, the city of decision to participate in the Applicant's hospital project after the city of withdrawal.

Further, the Chief concluded that the instant application could not be approved because the immigrant investors who had already filed petitions associated with this NCE would be ineligible because the new JCE did not exist at the time of their filing. However, the Chief erred in basing his decision, in part, upon the adjudication of associated Form I-526 petitions. The Form I-924 eligibility requirements are independent of future eligibility determinations for associated investor petitions.[14]

In addition, the Chief's denial points to the USCIS Policy Manual in support of its argument that the application cannot be approved with a different set of facts than those presented in the original 2015 filing. We note that the referenced Policy Manual section does not support the Chief's assertion because it specifically addresses changes made to petitions[15] rather than applications, such as the Form I-924. Moreover, *Matter of Katigbak*, which forms the underlying legal foundation for the Policy Manual guidance, explicitly applies to visa petition proceedings, not applications filed by regional centers.[16]

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[13] *See Matter of Izummi,* 22 I&N Dec. 169, 179 (Assoc. Comm'r 1998).

[14] *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) and I-924, Application For Regional Center Designation Under the Immigrant Investor Program, https://www.uscis.gov/i-924.

[15] If, at the time of adjudication, the investor is asserting eligibility under a materially different set of facts that did not exist when she filed the petition, the investor must file a new petition.
6 USCIS Policy Manual G.4(C).

[16] A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The relevant Policy Manual guidance for regional center amendment applications and the Form I-924 instructions recognize the evolving business realities that are reflected in regional center amendments and limit the types of changes that require an amendment submission. The Policy Manual specifies that a regional center is "not required" to submit amendments when it changes its business plan or economic methodologies. Rather, it "may" find it advantageous to seek USCIS approval of such changes before they are adjudicated in individual immigrant investor petitions.[17] Similarly, while the Form I-924 instructions state a regional center "must" file an amendment for certain changes, such as a change in the regional center's name and geographic area, it "may" file an amendment to notify USCIS of changes to "name, organizational structure or administration, capital investment instruments, or offering memoranda (including changes in the economic analysis and underlying business plan used to estimate job creation) for a previously added [NCE] associated with the regional center."[18]

Here, the Applicant moved the job creation location two miles from the original site, and substituted a new JCE in response to evolving business realities, namely the first town's withdrawal from the hospital project. The Applicant did not change the NCE and maintained identical or substantively similar elements of its original 2015 business plan and economic analysis, such as the management structure, construction and development entities, operational revenue projections, final demand

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[17] To improve processing efficiencies and predictability in subsequent filings, many regional centers may seek to amend the Form I-924 approval to reflect changes in economic analysis and job creation estimates. Such amendments, however, are not required in order for individual investors to proceed with filing the immigrant petitions . . . Formal amendments to an approved regional center's designation are not required when a regional center changes its industries of focus, business plans, or economic methodologies; however, a regional center may find it advantageous to seek USCIS approval of such changes before they are adjudicated in individual immigrant investor petitions. 6 USCIS Policy Manual G.4(D).

[18] The form instructions for the version of the instant application, dated March 18, 2015, contained the following language:

This form is used to:

1. Apply to U.S. Citizenship and Immigration Services (USCIS) to request designation of an entity to be a regional center in the Immigrant Investor Pilot Program.

2. Request approval of an amendment to a previously approved regional center. An amended regional center designation request may include requests for determinations relating to any or all of the reasons for filing an amendment request noted below.
   A. An amendment request may be filed to seek approval of changes to the Regional Center's:
      1. Geographic area;
      2. Organizational structure or administration;
      3. Capital Investment projects, to include changes in the economic analysis and underlying business plan used to estimate job creation for previously approved investment opportunities and industrial clusters;
      4. Affiliated commercial enterprise's organization structure and/or capital investment instruments or offering memoranda.
   B. An amendment may also be filed to seek a preliminary determination of EB-5 compliance for documentation provided as an exemplar Form I-526, Immigrant Petition by Alien Entrepreneur, prior to the filing of Form I-526 petitions by individual alien entrepreneurs with USCIS.

multipliers, and hard construction costs used for the job creation estimates. In accordance with the Policy Manual guidance and Form I-924 instructions, which only require amendments for specific, limited changes, we do not find the revised business plan and associated project documents constitute impermissible changes to the 2015 application, and as such, should be considered as part of the application's overall eligibility determination.

III. CONCLUSION

The Applicant has demonstrated that the foreign capital raised by the NCE would be placed at risk for the purpose of job creation and would be fully available to the JCE. It has further shown that the revised business plan and economic model use acceptable inputs to support its job creation estimates. Finally, it demonstrates that the record does not contain impermissible material changes. Accordingly, it has established eligibility for the benefit sought.

ORDER: The appeal is sustained.

Cite as *Matter of A-C-R-C-*, ID# 1204547 (AAO Aug. 15, 2018)