U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-A-K-

DATE: DEC. 4, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

BENEFIT: REGIONAL CENTER DESIGNATION

The Applicant, a regional center formerly authorized to participate in the EB-5 program, seeks to have its designation reinstated. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (Appropriations Act) section 610, as amended.

The Chief of the Immigrant Investor Program Office (IPO) issued a notice of intent to terminate, and subsequently terminated the Applicant's designation, concluding that it failed to show that it was continuing to serve the purpose of promoting economic growth. The Applicant appealed that decision to this office and we dismissed the appeal, finding that the Chief correctly terminated the Applicant's designation. The Applicant then filed motions to reopen and reconsider this decision with our office. We denied these motions and then, on our own service motion, reopened our denial of these motions.[1]

On motion, the Applicant submits additional evidence and argues that this demonstrates its continued promotion of economic growth and job creation.

Upon *de novo* review, we will deny the motions.

I. LAW

In 1992, Congress enacted the Immigrant Investor Program which set aside visas for foreign investors who invest in a new commercial enterprise associated with a regional center designated by USCIS. To obtain USCIS designation for participation in the Immigrant Investor Program, 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.*

[1] Following our denial of the combined motions, the Applicant filed a complaint in U.S. District Court seeking review of the termination of designation as a regional center by USCIS. Subsequently, the court granted the parties' stipulated motion to stay proceedings to allow the AAO to reopen the matter on service motion and review the prior decisions. 2018).

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, in order to continue to participate in the Immigrant Investor Program it must "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." 8 C.F.R. § 204.6(m)(6)(i)(B). If the regional center does not submit the required information or upon a determination it no longer serves the purposes of promoting economic growth, USCIS will issue a notice of intent to terminate (NOIT) the regional center's designation allowing participation in the immigrant investor program. 8 C.F.R. § 204.6(m)(6)(ii).

II. DETAILED TIMELINE AND PROCEDURAL HISTORY

The Applicant, through its former principal, submitted an application for regional center designation in June 2010. After a series of actions,[2] USCIS approved the application and its accompanying hypothetical project[3] in June 2013. Beginning in 2014, individual immigrant investors began filing petitions based on their investments in the Applicant's new commercial enterprises (NCEs), and both of which planned to pool investor funds and lend them to the job creating entity (JCE), The JCE was to use the funds for the construction and development of a mixed-use facility in downtown .

[2] In January of 2011, USCIS denied the application, but subsequently reopened it two months later. After a notice to the Applicant of our intent to deny the application (NOID) and subsequent request for evidence (RFE), USCIS again denied the application. USCIS once more reopened the application and over the course of 2012, issued three additional RFEs. In 2013, USCIS eventually approved the application, which included a proposal for a hypothetical project called involving the development and on-going operation of a mixed-use property located in Washington.

[3] 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, *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 (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."

On [redacted] 2015, the U.S. Securities and Exchange Commission (SEC) filed a complaint in the U.S. District Court for the Western District of Washington (district court) against the Applicant, several related entities, and the Applicant's principal, [redacted] The complaint alleged the defendants sold securities to finance specific real estate development projects, but that [redacted] misappropriated or diverted millions of dollars in investor funds for other real estate projects or his personal use. In [redacted] of 2015, the district court granted an injunction freezing the assets of the Applicant and its related entities and appointed a receiver tasked with managing them.[4]

On December 24, 2015, the Chief issued a notice of intent to terminate the Applicant's regional center designation after finding that the regional center no longer served the purpose of promoting economic growth as evidenced by the activities detailed in the SEC action and its underlying allegations. Following the Applicant's timely response, the Chief terminated its regional center designation on [redacted] 2016, finding that it was not continuing to promote economic growth due to its lack of credibility, its diversion of investor funds, and the absence of required monitoring and oversight. In April 2016, the Applicant appealed the termination and submitted additional evidence showing new developments regarding the proposed projects. After considering the totality of the record, we dismissed the appeal on November 2, 2016, finding that the Chief correctly determined that the Applicant was not continuing to promote economic growth. In December 2016, the Applicant filed combined motions to reopen and reconsider our appellate decision. In [redacted] 2017, [redacted] pleaded guilty to two federal felonies related to his actions as the principal of the Applicant, conspiracy to commit wire fraud and scheming to conceal information from the federal government, and agreed to pay over $24 million in restitution. We denied the Applicant's motions in June 2017, affirming our prior determination.[5]

In June 2018, we issued a service motion reopening these motions. This is the matter before us. For reasons discussed below, we will again deny these motions and affirm our decision terminating the Applicant's regional center designation.

III. TERMINATION, MOTIONS, and FINALITY

When USCIS determines that an applicant is not promoting economic growth and terminates its designation as a regional center, the applicant may file an appeal. 8 C.F.R. § 204.6(m)(6)(v). Where, as in this case, we uphold a regional center's termination and dismiss the appeal, the applicant may file a motion to reopen or to reconsider our appellate decision; however, such a filing does not stay execution of our prior decision. *See* 8 C.F.R. § 103.5(a)(1)(iv); *see also Pablo v. INS*, 72 F.3d 110, 113 (9th Cir. 1995). Instead, our dismissal of an applicant's appeal constitutes final agency action, ending the approval of the regional center to participate in the EB-5 program.

[4] The purpose of appointing a receiver is to recover and protect funds and other assets the defendants have obtained in connection with the fraud and distribute those assets to injured investors if a determination of liability is made. *See* Fast Answers, U.S. Securities and Exchange Commission, https://www.sec.gov/fast-answers/answersrecoverfundshtm.html (last accessed Nov. 9, 2018).

[5] A detailed timeline is attached as Appendix A.

While the AAO may reopen on Service motion at any time, the reopened proceedings do not reset the scope of our review. In reopening a case, we generally look at whether the original decision was factually or legally in error at the time it was issued. *See,* 8 C.F.R. 103.5(a)(2), (3), and (5); *cf. INS v. Abudu*, 485 U.S. 94, 108 (1988) ("[T]he INS [now USCIS] has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive. Granting such motions too freely will permit endless delay . . . by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case.").

As noted above, we dismissed the Applicant's appeal in November 2016, determining that the record before us, viewed in its entirety, failed to establish that the Applicant was continuing to promote economic growth. We found that, as of the time of that decision, the Applicant had not claimed or documented any past actions suggesting it had promoted economic growth since the time of its regional center designation in 2013. Further, while we considered the Applicant's statements and evidence regarding its plans for future promotion of economic growth, we found the record insufficient to show that the projected job growth would more likely than not occur. We noted that the Applicant had not refuted concerns relating to past mismanagement and the alleged diversion of investor funds, nor had it offered any examples of positive effect on the economy to be weighed against such negative factors.

In June 2017, we denied the Applicant's combined motions to reopen and reconsider, affirming our appellate decision. In doing so, we found that the Applicant's motion to reconsider did not demonstrate that our analysis was incorrect based on the record that existed at the time of adjudication. *See* 8 C.F.R. § 103.5(a)(3). Further, we noted that [redacted] actions while principal of the Applicant had resulted in two federal felony convictions.[6] We also considered the new information and evidence presented in the Applicant's motion to reopen regarding its expenditures and the viability of its future activities, but found it insufficient to outweigh the negative considerations in this case and demonstrate that it was continuing to promote economic growth.

We have now reopened the Applicant's motions. In order to continue participating in the EB-5 program, a regional center must satisfy certain reporting requirements and show that it is "continuing to promote economic growth." 8 C.F.R. § 204.6(m)(6). Given these requirements and the finality of our appellate decision described above, in this proceeding we will consider whether the Applicant has documented it was continuing promotion of economic growth prior to and at the time of termination of its designation.

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[6] *See* [redacted] U.S. Department of Justice, The United States Attorney's Office, Western District of Washington, [redacted] 2017, https://www.justice.gov/usao-wdwa/pr[redacted] (last visited Nov. 29, 2018).

IV. RESPONSE TO SERVICE MOTION

As noted above, in June 2018, we reopened the Applicant's prior motions and provided an opportunity to submit a brief and additional evidence. In its August 2018 response, the Applicant presented additional evidence and argues that it continues to promote economic growth and job creation in the metropolitan area. Specifically, it references the construction of the project, the revenue stream it anticipates generating once that the project is operational, and a newly identified project within the Applicant's designated geographic and industry scope.

The Applicant also now submits a copy of an application to amend its regional center designation that it filed with IPO after the AAO reopened the previously denied motions. We note that while the AAO notified the Applicant that a change in ownership would require an amendment filing, the amendment actually filed included plans for a new project. Although the supporting evidence submitted will be addressed below, the amendment itself is not ripe for AAO review. *See* 8 C.F.R. § 103.3(a) (providing for the AAO's appellate review of unfavorable decisions); *see* USCIS Form I-924, Instructions for Application for Regional Center Designation Under the Immigrant Investor Program (ver. 12/23/2016) (describing the filing of an amendment to a previously approved regional center, the different decisions that may follow, and the availability of an appeal if the amendment is denied). As a separate matter that is pending before another USCIS office, we will not make any findings regarding the merits of the amendment or its supporting evidence. *See Louisiana Philharmonic Orchestra v. I.N.S.*, 248 F.3d 1139 n.4 (5th Cir. 2001) (equating the relationship between the original USCIS office and the AAO to the relationship between a district court and a court of appeals).

The Applicant additionally submits a declaration from vice president of development and construction for doing business as the , general contractor agreement for the project, revised budget for the project, visual status update, and June photographs of the hotel and apartment components of the project. The Applicant also provides a declaration from its current principal, and a letter of support from , its former receiver.

declaration summarizes the project construction allegedly consistent with the plans in place as of September 2016, when the assumed responsibility for construction. He states that the project has been under full construction pursuant to the general contractor agreement submitted in support of his declaration. He provides a series of photographs showing construction of the apartment floors of the project. indicates that the Applicant had expended funds for a certain amount of work, including excavation, structural engineering work, and architectural design, prior to the receiver assuming control of the project.

declaration details assumption of ownership and control of the Applicant pursuant to the district court's 2016 order and its actions since.[7]

[7] is simultaneously the chief executive officer and manager of and the chief financial officer and

also states that in the first year of operations, slated to begin in early 2019, "the is expected to generate $7,992,834 in net revenue from both the apartment and hotel components." The record lacks corroborative evidence, such as a current market analysis, feasibility study, or other relevant documentation, demonstrating the project is more likely than not to realize this income.[8]

also identifies a new development project, the which he describes as the construction of an 18-storytower with both hotel and residential components to be funded by up to $49.5 million in EB-5 capital to be raised by the Applicant, should its designation be reinstated. He states that and the have been in discussions with the property owner, but provides no evidence demonstrating forward progress in project development. He further cites to a study commissioned by indicating that this project would result in the creation of more than 1,000 jobs, increase investment in the region, and result in annual growth in the regional economy. However, the record lacks a general proposal for this project supporting this analysis. Statements made without supporting documentation are of limited probative value and we do not find descriptions alone to be sufficient to support his assertions. We also note that like focuses on developments that occurred after the termination of the Applicant's regional center designation. He does not address how the Applicant was continuing to promote economic growth at the time of the Chief's termination of the designation or when we rendered our decision on the appeal, which constituted the final agency action. Nor does he contend that our decision at that time was incorrect.

In statement of support he emphasizes that as of October 2015 the physical site of the project had been acquired, architectural and construction plans prepared, and more than $1,000,000 of construction work completed. He then details the restructuring and recovery of funds that we addressed in our denial of the Applicant's motion to reopen. does not offer further information, nor does the Applicant provide other documentation, regarding the pre-termination expenditures to address our findings that, as of the termination of its designation, the Applicant failed to demonstrate it was continuing to promote economic growth.

The Applicant's recent response to our service motion claims progress in the construction of the project, as well as that it contemplates future projects that may potentially result in job creation and increased regional productivity.

However, as we discussed above, this forward progress occurs after the Applicant was no longer approved to participate in the EB-5 program. In other words, these recent developments have transpired nearly two years after our final agency action dismissing the appeal in which we upheld

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president of the government projects division of the

[8] While the Applicant provides a market analysis as part of the copy of the amendment, it was conducted for a different hotel and reflected market conditions as of 2014. We make no findings regarding the merits of this analysis, but note here that market conditions may have changed in such a manner that the revenues anticipated by may no longer be realized by the project. Thus, it may not be sufficient to support statements.

the termination of the Applicant's designation as a regional center.[9] Moreover, the Applicant does not address our previous findings that at the time it was terminated and the appeal dismissed, it had not established it was continuing to serve the purpose of promoting economic growth.

V. PROMOTION OF ECONOMIC GROWH

Regional centers are designated for the promotion of economic growth and must continue to meet the requirements of section 610(a) of the Appropriations Act as amended, and promote economic growth in a manner that does not conflict with requirements for classification under section 203(b)(5) of the Immigration and Nationality Act (INA), removal of conditions on lawful permanent residence under section 216A of the INA, and implementing regulations following their designation. According to section 610(a) of the Appropriations Act, economic growth includes increased export sales, improved regional productivity, job creation, or increased domestic capital investment. *See also* 8 C.F.R. § 204.6(m)(6)(ii) ("USCIS will issue a notice of intent to terminate the designation of a regional center in the program if . . . USCIS determines that the regional center no longer serves the purpose of promoting economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.").

The reasons why a regional center may no longer serve the purpose of promoting economic growth are varied and "extend beyond inactivity on the part of a regional center." 75 FR 58962. For example, depending on the facts, a regional center that takes actions that undermine investors' ability to comply with EB-5 statutory and regulatory requirements such that investors cannot obtain EB-5 classification through investment in the regional center may no longer serve the purpose of promoting economic growth. *See* Section 610(a)-(b) of the Appropriations Act (stating that one purpose of a regional center is to concentrate pooled investment in defined economic zones and accomplishing such pooled investment by setting aside visas for aliens classified under section 203(b)(5) of the INA). Likewise, a regional center that fails to engage in proper monitoring and oversight of the capital investment activities and jobs created or maintained under the sponsorship of the regional center may no longer serve the purpose of promoting economic growth in compliance with the Program and its authorities.

When derogatory information arises—such as evidence of inaction, mismanagement, theft, or fraud by the regional center or related entities—USCIS weighs all relevant factors in the totality of the circumstances to determine whether the regional center is continuing to serve the purpose of promoting economic growth. Such factors may include the seriousness of the derogatory information, the degree of regional center involvement in the activities described in the derogatory information, any resulting damage or risk imposed on investors and the economy, as well as any mitigating, corrective, or restorative actions taken or forthcoming to redress the situation.

[9] We note that the Applicant could have sought new designation as a regional center at any time with the new facts and evidence of the developments and changed economic plans, even before the AAO dismissed the appeal in November 2016.

In addition, common sense dictates that USCIS 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 USCIS to designate regional centers to pool immigrant investor funds for the purpose of creating jobs and promoting economic growth. USCIS would ill serve that purpose by turning a blind eye to bad acts within the EB-5 program; we are responsible for ensuring the fundamental integrity of the EB-5 program.

This is not to suggest, however, that a regional center should be subject to termination for any and all actions, whether negligent, reckless, or criminal, made by any of the entities under its authority. If one of a number of NCEs relating to a regional center, for example, is engaged in improperly diverting a small percentage of its investor funds, and the regional center has been exercising proper supervision over the NCE's activities, and takes prompt voluntary corrective action when it learns of the impropriety, termination of the regional center's designation would likely not be warranted. On the other hand, if an NCE is engaging in wide-scale fraud, such that the investors' funds are not used for investment purposes, and the regional center is turning a blind eye to these activities, then termination would be appropriate under those circumstances.

A. Positive Factors

1. Remedial Efforts and Change in Ownership

The record establishes that the court-appointed receiver made significant remedial efforts during his tenure. It contains documentation from the district court and the receiver indicating that was removed as a principal of the Applicant and no longer controls its activity or investor funds. Additionally, the receiver oversaw the transfer of ownership to an EB-5 management company that has overseen other projects, which has now taken control of the Applicant. Further, the record contains district court materials demonstrating that the Applicant is no longer in receivership and that a portion of misappropriated funds has been recovered. We consider this activity, in aggregate, a positive factor to be weighed against negative factors discussed below.

2. Current and Prospective Economic Activity

As noted above, the Petitioner's response to our service motion includes declarations and statements, along with a revised budget for the project, a visual status update, and photographs. The information provided regarding the Applicant's recent and current construction efforts and its contemplation of future projects indicates that it has engaged in economic activity and that it may prospectively do so.

B. Negative Factors

1. Regional Center's Lack of Oversight

USCIS initially designated the Applicant as a regional center with [redacted] as its principal. As discussed, [redacted] pled guilty in [redacted] 2017 to two federal felonies related to his actions while managing the Applicant. He admitted to defrauding immigrant investors, federal regulators, and institutional investors. In [redacted] 2017, he was sentenced to four years in prison for these actions.[10] While not liable for [redacted] criminal actions, the Applicant does bear responsibility for the environment in which they occurred. [redacted] was able to divert tens of millions of dollars of EB-5 investor capital away from their authorized use and submit falsified documents to the government of the United States and financial institutions without any apparent check or notice by the Applicant. The record describes no action voluntarily taken by the Applicant to notify appropriate authorities, audit financial records, or validate claims made on its behalf, prior to the appointment of the receiver.

The court-appointment of a receiver and subsequent transfer of regional center ownership revised the Regional Center's ownership structure—it did not grant the new owners a fresh or different designation nor absolve the Regional Center for the previous principal's past wrongdoings. Even with the change in ownership, USCIS considers the Applicant's performance from the date of its initial designation, rather than the date that [redacted] took ownership of the entity, to determine whether it was continuing to serve the purpose of promoting economic growth and job creation. Accordingly, past wrongdoings remain a negative factor to be weighed in the balance. In addition, we note that the Applicant has not identified any other steps it has implemented to protect investor funds from similar abuses in the future.

2. Continued Promotion of Economic Growth not Supported by Record

As previously noted, USCIS considers the Applicant's performance from the date of its initial designation, rather than the date that [redacted] took ownership of the entity, to determine whether it continues to serve the purpose of promoting economic growth. At the time of our dismissal of its appeal in November 2016, we determined that a number of significant negative factors warranted terminating the Applicant's participation in the EB-5 program. The SEC complaint alleged that the former principal had engaged in fraud and misappropriation of tens of millions of dollars of EB-5 funds; allegations which have proven to be true. The district court had imposed a temporary injunction freezing the Applicant's assets, halting any development that had begun for an unknown period of time. Additionally, the district court appointed a receiver, who initiated efforts to recover some portion of the funds diverted by [redacted] and sought to preserve the value of the

[10] *See* [redacted] U.S. Department of Justice, The United States Attorney's Office, Western District of Washington, [redacted] 2017. https://www.justice.gov/usao-wdwa/pr/[redacted] (last accessed November 8, 2018)

receivership property. At the time of our dismissal, the record reflected that the district court had approved the change in ownership, pursuant to the receiver's efforts to sell the project, but it did not demonstrate that this change had been executed. Additionally, the record held organizational documents and a prospective business plan that the new owners would seek to implement. Most notable, however, was that at that point in time, in November 2016, the record lacked evidence demonstrating that the Applicant had taken actions leading to job creation or other indicators of the promotion of economic growth.

In its combined motions to reopen and reconsider, the Applicant submitted documentation establishing that the change in ownership had been executed. It focused on the prospect of economic growth under its new management, submitting additional documentation of its proposed plans and financing. It also sought to distance itself from the misdeeds of its former principal, asserting that his excision from the company and prohibition from further involvement made his actions "irrelevant" to determining whether the Applicant was continuing to promote economic growth. Although it provided an updated economic impact report analyzing the prospective job creation from completion of the entire project, it did not establish which, if any, of the job creation had occurred prior to our dismissal of its appeal and the termination of its participation in the EB-5 program and whether it had made any expenditures that resulted in increased export sales, increased regional productivity or in generating increased domestic investment.

In its response to our service motion, the Applicant again focuses on actions taken since its management change. In his statement, reiterates claims about expenditures made prior to the appointment of the receiver. However, the evidence in the record does not substantiate these claims. For example, he claims the general contractor on the project recognized payments of approximately $9,910,000 prior to the cessation of work. He provides the Applicant's initial budget for the project, which reflects a variance in the total bid cost, but does not submit probative evidence supporting his assertion that the NCE paid almost $10,000,000 to the general contractor, such as invoices or records of payments. The record also fails to establish that any expenditures made prior to the appointment of the receiver have resulted in economic growth. For example, a significant portion of the funds claimed to be expended went to the purchase of land, an activity that does not result in eligible job creation and one whose impact on economic growth is prospective and subjective.[11]

Between its approval in June 2013 and the appointment of a receiver and freezing of assets in 2015, the Applicant reported no job creation or approved immigrant investor petitions on its Forms I-924A, Supplement to Form I-924.[12] While these forms indicate that the Applicant collected

[11] *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/Talking-Points-EB-5-Interactive-Series-Expenses-6-4-15.pdf (last accessed November 14, 2018).

[12] The Form I-924A, renamed the Annual Certification of Regional Center since December 23, 2016, is the form designated for regional centers to provide USCIS with updated information to demonstrate that it is continuing to promote economic growth.

EB-5 capital during the same period, the fraudulent activities of during this period call into question the amount, if any, of these funds that were used in the promotion of economic growth. In December 2015, the receiver submitted a revised Form I-924A for fiscal year 2014, reflecting amounts of capital contributed to the two NCEs that differed from what had previously been reported. The Forms I-924A submitted by the receiver for fiscal years 2014 and 2015 identify no job creation.

When viewed in its entirety, it is clear that the Applicant has not continuously engaged in activities that promoted economic growth throughout its history. After receiving its designation, the Applicant took minimal action to promote economic growth prior to the start of the SEC litigation in 2015. Between the asset freeze, receivership, and eventual sale of the project in September 2016, the record does not indicate any appreciable economic growth activity prior to our dismissal of the Applicant's appeal. The strongest evidence of activity promoting economic growth relates to the time period between the dismissal of the appeal in November 2016 and our service motion in June 2018. This activity, however, occurred after the final agency action terminating the Applicant's participation in the program and is, therefore, not probative that the Applicant was engaged in activities that served the purpose of promoting economic growth throughout the relevant timeframe.

For the reasons listed above, we cannot conclude that the Applicant has continuously promoted economic growth from the date of its original designation until our dismissal of the appeal upholding the termination. The lack of activity by the Applicant during the period of its participation in the EB-5 program is a significant negative factor.

3. Harm to Investors

Investor eligibility is highly relevant to the purposes of promoting economic growth. A regional center exists, in large part, to pool EB-5 capital so that immigrant investors may demonstrate eligibility for immigrant visa classification through indirect job creation. While our November 2016 decision noted that a regional center's designation is not "contingent" on investors' status, we explained that the fact that its actions imperiled the investors' ability to petition for lawful status is relevant to the overall balancing test and the weight assigned to past misdeeds. In the instant case, the diversion of funds by its former principal, and the resulting organizational restructuring precipitated by his actions, will necessarily render any immigrant investor who has invested in the project ineligible for such classification. Funds provided by investors associated with the Regional center were not properly at risk and were not used for purposes consistent with the 2014 business plan presented to USCIS. A petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

a. Diversion of Investor Funds

For an immigrant investor, the EB-5 program involves making an at-risk investment of capital into a new commercial enterprise which results in the creation of jobs. *See* 8 C.F.R. § 204.6(j). In

situations where the new commercial enterprise is not the job-creating entity, *Matter of Izummi*, as well as USCIS policy, require that, in order for EB-5 capital to be considered properly at-risk, "the full amount of money must be made available to business(es) most closely responsible for creating the jobs upon which EB-5 eligibility is based." *Matter of Izummi*, 22 I&N Dec. 169, 179 (Assoc. Comm'r 1998). As noted in the USCIS Policy Manual, "the payment of administrative fees, management fees, attorney's fees, finders' fees, syndication fees, and other types of expenses or costs by the new commercial enterprise that erode the amount of capital made available to the job-creating entity do not count toward the minimum required investment amount." USCIS Memorandum, "EB-5 Adjudications Policy", PM-602-0083, *supra*, p. 16; and 6 USCIS Policy Manual G.2(A)(2), https://www.uscis.gov/policymanual.

Here, as per the SEC complaint, the Applicant's former principal had:

> [M]isappropriated approximately $17.6 million. For example, Defendant misappropriated approximately $2.5 million of investor funds to purchase a residence in Washington. Further, made cash withdrawals of investor funds totaling approximately $350,000, including more than $200,000 withdrawn at 14 different casinos in Washington, Nevada, California, and British Columbia, Canada. Defendants have also misappropriated approximately $14.7 million of investor funds for use in real estate projects under control through relief defendants and which are unrelated to the projects for which the funds were raised.

The Department of Justice Press Release issued on the occasion of criminal sentencing noted that the Applicant's former principal admitted to using funds in ways that conflict with EB-5 program requirements.

> This included approximately $11.5 million of investor funds that secretly used to pay unauthorized sales expenses, including sales commissions to Asian brokers. The money also went for lavish meals, expensive gifts, and cash withdrawals at casinos, and the purchase of a $1.4 million home for a business associate. withdrew over $10 million in investor funds from the project as developer fees to fund his lavish lifestyle, including his purchase of a $2.5 million home in [13]

This diversion of EB-5 funds away from job-creating purposes irreparably harmed the immigrant investors associated with the Applicant. Because each immigrant investor must establish that his or her investment of capital resulted in the creation of jobs in order to establish eligibility, replacement of the value of the EB-5 capital initially invested does not equate to recovery of each investor's own

[13] *See* U.S. Department of Justice, The United States Attorney's Office, Western District of Washington, 2017. https://www.justice.gov/usao-wdwa/pr/ (last accessed November 8, 2018)

capital. It further appears that the manner in which some misappropriated funds were used, such as in casinos, may preclude recovery altogether.

Here, despite the receiver's best efforts, even where misappropriated funds could be recouped, it is unclear that such funds recovered from any recipient of misappropriated capital would satisfy the capital at-risk requirement. *See Izummi*, 22 I&N Dec. at 179; *see also* 8 C.F.R. § 204.6 (j)(2) (requiring that each investor establish that he or she has placed the required amount of capital at risk for the purpose of generating a return). The diversion of funds by [redacted] while in control of the Applicant confused, if not completely disrupted, the path of funds between the investors and any job creation. The record does not establish that the recovery of a portion of the value of these funds by the receiver represents the return of the original capital attributed to investors, or if these recovered funds were commingled with other funding sources. Thus, even if the Applicant were reaffirmed and allowed to participate again in the EB-5 program, the complications arising from the diversion perpetrated by [redacted] would still leave the immigrant investors associated with it at a significant probability that they would be unable to establish their eligibility for the immigration benefits sought.

Furthermore, due to the diversion of funds occurring so early in the progress of the project, immigrant investors could not attempt to use eventual expenditures made in furtherance of the business plan to establish eligibility. The Applicant has not demonstrated that any investor capital had been expended on job creating activities prior to the diversion of funds by [redacted] Although the value of these funds may have later been replaced, the record does not establish that the investors' own funds were used in subsequent expenditures or were otherwise available to the job-creating entity. Similarly, investors could not rely on income generated by project operations to ameliorate the harm. Therefore, the actions of [redacted] and the Applicant directly interfered with the ability of those investors to demonstrate that their capital was placed and remained at-risk and in furtherance of job creation, in accordance with 8 C.F.R. § 204.6(j).

b. Potential Material Changes Affecting Eligibility

The Applicant contends that its actions post-termination of its participation in the EB-5 program have resulted in significant job creation. In the response to our service motion, it asserts that "[b]etween 2016 and mid-July 2018, more than 3,100 new jobs for U.S. workers have been created through construction on the [redacted] Project – nearly double the job-creation needed to support the 157 EB-5 investors who reaffirmed their commitment to the project and remain fully invested."

Even if the Applicant had provided sufficient documentation to support this claim, it is unclear that any of the immigrant investors associated with the Applicant could benefit from this job creation. Each must demonstrate that their qualifying investment is within a regional center approved to participate in the EB-5 program. 8 C.F.R. § 204.6(m)(7). Here, the record does not establish that any job creation occurred prior to the November 2016 final agency action upholding the earlier termination of the Applicant's participation in the program. Furthermore, it is unclear that this alleged job creation resulted from the same business plan the immigrant investors relied on when

they filed their petitions.

C. Application of the Balancing Test

As we have stated previously in the dismissal of the appeal and the denial of the Applicant's motions, the question of whether to terminate a regional center's status is not limited solely to its prospects for future economic growth at the time of termination. Rather, we take into account a variety of factors, both positive and negative, that encompass past, present, and likely future actions. Our prior determinations that the Applicant no longer served the purpose of continuing to promote economic growth were based upon a review of the historical activities of the regional center as an entity, and analysis of its attempts to promote economic growth, as well as future potential promotion of economic growth. In this decision, we again consider both positive and negative factors in reaching the conclusion that, on balance, the Applicant has failed to show continued promotion of economic growth in compliance with program requirements.

We find that the negative factors in this record carry significant weight. As outlined above and in our previous decisions, this case involves criminal misdeeds by the regional center's former principal – all of which went unchecked by the Applicant – including the defrauding of immigrant investors, federal regulators, and institutional investors. Although the Applicant emphasizes its remedial measures and later progress on the Tower project, a regional center cannot absolve itself of responsibility for a principal's crimes or other misdeeds simply by removing that principal.

In balancing the Applicant's mismanagement and its subsequent remedial measures, we find that the past mismanagement of the Applicant weighs more heavily than the assertion that such mismanagement may not occur in the future. While taking remedial action is a positive factor, we note that the change in ownership was externally imposed by court order when the district court appointed [redacted] as the receiver. The benefits of his actions are tempered in part by the fact that his involvement was forced upon the Applicant by the injunctions against [redacted] rather than an independent management decision made by the Applicant itself. The management and oversight function is critical to ensure that the Applicant is promoting economic growth in compliance with the program. In this case, the subsequent transfer of ownership to the [redacted] with its familiarity with the EB-5 program and experience developing successful projects under the program, reflects positively on the Applicant, but it occurred only weeks before the termination of its participation in the program. Therefore, on balance, considering both the past actions as well as the new change in management, USCIS has determined that since initial designation, there has been a net negative in the Applicant's management and oversight of its projects.

Importantly, we must further consider that, in this instance, the principal's actions and the Applicant's lack of oversight have resulted in real and direct harm to the immigrant investors' eligibility to comply with EB-5 program requirements notwithstanding the Applicant's remedial measures. Specifically, the diversion of investor funds may have undermined the investors' status irrespective of the Applicant's designation as a regional center. With respect to weighing the Applicant's progress on the Tower project against the above misdeeds and harm to investors, as we

noted in our June 2017 decision denying the motions, "that some projects may be or become viable does not outweigh the scope and seriousness of the prior fraud and mismanagement by the Applicant's former principal."

Moreover, the Applicant's assertions and evidence regarding this recent progress do not address or negate its prior failure to engage in the promotion of economic growth. We find that the lack of activity by the Applicant during the period of its participation in the EB-5 program weighs much more heavily than any prospective or realized activity taken after that time. For all of the above reasons, we find that the negative factors outweigh the positive factors in the record. The Applicant has not established that it was serving the regional center program's purpose.

D. Pending Amendment to Regional Center Designation

With respect to the requested amendment of the Applicant's regional center designation, we again note that this filing included a new project that was beyond the scope of our request for an amendment to be filed in the event of new ownership. We also note that the amendment has not yet been adjudicated by IPO, as it must await our decision on this motion first, and is therefore not ripe for our review. However, to the extent that the Applicant's response to our service motion includes copies of the supporting documentation relating to its amendment, we note that this evidence would not alter our above findings. The Applicant has provided documents for a transformed project as evidence of its future potential to promote economic growth. However, the fact that these plans are substantially different from those submitted previously calls into question how they relate to the Applicant's efforts to promote economic growth prior to termination, and are thus of very limited probative value and weight to the question of whether the Applicant continued to promote economic growth at the time the decision to terminate the regional center was made. Likewise, the introduction of a new hypothetical project is too speculative and prospective to overcome the Applicant's history of inactivity and mismanagement.

Furthermore, we note that despite the avowed efforts of the receiver and the Applicant's new management to prevent further harm to investors, the new project documents appear to present a dramatically different project than that originally submitted by the investors with their petitions. We decline to reach this issue in the present matter, but the introduction of new organizational documents, a new business plan, and a new economic analysis may constitute a material change.[14]

[14] Consistent with *Matter of Izummi* and the Policy Manual, material changes to a Form I-526 made after filing may result in the investor's ineligibility if the investor has not obtained conditional permanent resident status and such petition may be denied. *See Izummi*, 22 I&N Dec. at 176; *see also* 6 USCIS Policy Manual, *supra*, at G.4(C). If the Applicant made material changes to the business plan, organizational documents, and economic analysis originally submitted to and approved by USCIS, the Applicant could have jeopardized the eligibility of the immigrant investors associated with the projects under the Applicant's sponsorship. As such, it appears that the Applicant may have taken further actions that could harm its investors.

VI. CONCLUSION

USCIS has considered all evidence in the record, including that provided in response to our service motion to reopen, "for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence," in determining whether reinstatement of the Regional Center's designation is justified and/or whether the earlier final agency decision to terminate was the correct outcome. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). For the reasons set forth above, USCIS has determined by a preponderance of the evidence that the Applicant has not overcome the grounds alleged by the Chief in his notice of termination, and thus upholds the Chief's finding that it no longer serves the purpose of continuing to promote economic growth in compliance with the program. We note that this determination does not prevent the Applicant from filing a new Form I-924 to demonstrate its eligibility for designation as a regional center.

ORDER: The motions are denied.

Cite as *Matter of P-A-K-*, ID# 1784790 (AAO Dec. 4, 2018)

Appendix A

Detailed Timeline

June 28, 2010	Applicant requests initial designation.	
June 06, 2013	USCIS grants Applicant's initial designation.	
December 31, 2013	USCIS receives the Applicant's Form I-924A for fiscal year 2013.	
February 2014	Investors begin to file I-526s associated with and NCEs	178 immigrant investors filed their petitions through the Applicant between February 2014 and August 2015.
December 23, 2014	USCIS receives the Applicant's Form I-924A for fiscal year 2014.	
2015		SEC files a complaint in the U.S. District Court for the Western District of Washington against the Applicant, several related entities, and its former principal.
2015		The district court grants an injunction freezing the Applicant and related entities' assets and placing it in receivership.
December 24, 2015	USCIS notifies the Applicant of its intent to terminate its regional center designation.	
December 29, 2015	USCIS receives the Applicant's Form I-924A for fiscal year 2015 and an amended Form I-924A for fiscal year 2014.	
January 28, 2016	USCIS receives the	

[15] This is not a comprehensive list of all evidence submitted at each moment in the timeline. All evidence has been considered in this decision.

	Applicant's response to the NOIT.	
[redacted] 2016	USCIS terminates the Applicant's regional center designation.	
April 25, 2016	Applicant files appeal of USCIS' termination with the AAO.	• Receiver's Recovery Plan • Receiver's Motion for Authority to Market and Sell Receivership Assets, Establish Sales Procedures and Engage Broker • Receiver's Reply to Defendants' Opposition to Receiver's Motion for Authority to Market and Sell Receivership Assets, Establish Sales Procedures and Engage Broker • Receiver's Reply to Non-Party Investors' Support of the Receiver's Motion for Authority to Market and Sell Receivership Assets, Establish Sales Procedures and Engage Broker • District court Order Granting in Part and Denying in Part the Receiver's Motion for Authority to Market and Sell Receivership Assets, Establish Sales Procedures and Engage Broker • Declaration of [redacted] Executive Director of the [redacted] discussing [redacted] project restructuring proposal; Supporting attachments A-H • Signed Purchase and Sale Agreement from [redacted] Affidavit of [redacted] CEO of [redacted] • Signed Letter of Intent from [redacted]
June 06, 2016	Applicant files supplement to its appeal of USCIS' termination with AAO.	• Receiver's Memorandum and Recommendation for Disposition of [redacted] Related Assets • Receiver's Supplemental Memorandum for Disposition of

		Related Assets • District court Order Approving Receiver's Recommendation • Letter from President of the confirming has been designated by to assume control of Applicant • Declaration of owner of and Exhibits A-F
July 29, 2016	Applicant files second supplement to its appeal of USCIS' termination with AAO.	• Receiver's Motion for Final Approval of Related Assets and Exhibits • Receiver's Declaration in Support of Motion for Final Approval of Disposition of Related Assets and Exhibits ▪ Exhibit A Notice to Investors ▪ Exhibit B Master Agreement (with Exhibits A through N) ▪ Exhibit C Proposed Order Amending Order Appointing Receiver • Proposed Order Granting Final Approval of Disposition of Related Assets • Order Granting Final Approval of Disposition of Related Assets • Order Granting Motion to Modify Receivership Order • Letters from Receiver, of and of regarding arrangements for alternative regional center
November 02, 2016	AAO issues decision upholding the termination of the Applicant's regional center designation.	Final Agency Decision Terminating Regional Center

December 02, 2016	Applicant files motions to reopen and reconsider AAO's dismissal of its appeal.	• Declaration of [redacted] and supporting Exhibits 1-15[16] • Declaration of [redacted] and supporting Exhibits 1-4 Executed Versions of: • Closing Agreement • Termination Agreement • Liability Releases • Limited Liability Company Membership Transfer and Assignment Agreement & Executed Amended and Restated Limited Liability Company Agreement • [redacted] First Amended and Restated Limited Partnership Agreement • [redacted] First Amended and Restated Limited Partnership Agreement • Amended and Restated Loan Agreement Between [redacted] and the [redacted] NCEs • Promissory Note Between [redacted] and [redacted] • Promissory Note Between [redacted] and [redacted] • Notice to EB-5 Investors re: Opt In/Out (less exhibits) • Updated Economic Impact Report dated November 30, 2016
[redacted] 2017	[redacted] pleads guilty to conspiracy to commit wire fraud and scheming to conceal information from the United States	
June 09, 2017	AAO issues denial of	

[16] These exhibits included the Third Amended and Restated Limited Liability Company Operating Agreement of [redacted] an executed Development Agreement, and the executed Master Agreement, less exhibits, and First Amendment to Master Agreement, among other materials, all of which were reviewed.

	Applicant's motions to reopen and reconsider.	
June 21, 2018	AAO issues service motion to reopen its prior denial of the Applicant's motions.	
August 10, 2018	Applicant provides additional evidence in response to AAO's service motion to reopen.	• Declaration of • Declaration of and supporting Exhibits 1-5 • Letter of Support from • Copy of amendment filed with Immigrant Investor Program Office on August 10, 2018