Regional Center Terminations and Impacts on Immigrant Families

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We know from the pleas of immigrant families that not everything is Zen when it comes to regional center (RC) terminations and the feared consequences for their immigration status. When the head of an immigrant family, young parent of two pre-K US born children, cries out "our lives are ruined if we are forced to leave", there's no sense in silence. What policy objective is advanced by dashing the immigrant family's dream, which is legitimately based on having made the required investment in good faith toward creating US jobs? Try to see it the immigrant's way. We take the occasion of recent USCIS announcements to do that.

REGIONAL CENTER TERMINATIONS

Just weeks ago, on May 31, USCIS announced it had posted to its website in the interest of program transparency the notices of terminations of dozens of RCs. We reviewed the posted notices as well as the bounty of RC terminations IIUSA received in Q4 2016 via FOIA efforts. The Immigrant Investor Program Office (IPO) appears to have found the strike zone for terminating RCs and with as many as 859 RCs to pitch to we can be confident IPO will mow through hundreds more. By our count, USCIS has terminated 119 RCs in the 25-year history of the RC program. While only a handful of RCs were terminated from 2008 to 2013, over 94% of RC terminations occurred since 2014. Of the 119 total terminations, USCIS posted 69 termination notices as of June 2017, reflecting most of the notices issued through November 1, 2016.

Although some of the termination notices have been partially redacted, these disclosures provide a window into the underlying reasons for RC terminations under 8 CFR 204.6(m)(6)(ii). The regulation separates the grounds of RC termination into two categories, namely, for failure to file the annual information (Form I-924A) with the required filing fee, or for failure to continue to serve the purpose of promoting economic growth. Based on actual RC experience, however, the latter category is split between RCs with insufficient activity and RCs with "bad actor" problems that typically have attracted SEC or other law enforcement attention. Either way, USCIS concludes the RC "no longer serves the purpose of promoting economic growth."

Approximately 39% (27 in total) of the RCs were terminated for failure to file the I-924A that USCIS now requires annually. This statistic suggests that the requirement of filing the I-924A annually – first imposed in FY2011 -- has helped USCIS to weed out the weaker of the RC species. The I-924A is not difficult to complete and mail to IPO once each year; these RCs have not been paralyzed by yet another government form. Rather, without any scientific basis for our making the observation, we believe based on limited interactions with a few RC principals that these "white flag" RCs have abandoned the EB-5 fight due to overwhelming competitive forces. Note that these RCs failed to file the I-924A despite there being no I-924A filing fee at the time. With the filing fee for the annual I-924A now set at $3,035 as of December 23, 2016, we expect that when IPO dumps the next bucket of RC termination notices to its website we will see the white flag from a growing multitude of RCs.

We estimate that as of June 5, 2017, USCIS had designated 859 RCs. A perfect storm exists for a massive number of white flag RC terminations. First, there are the added costs for maintaining an RC. As indicated the annual RC I-924A filing fee of $3,035 is now in effect. That could be just the start of many new fees, if Congress reforms the EB-5 program as expected. Both draft versions of the Senate reform bill impose an integrity fund fee of $20,000 (or no lower than $10,000 for smaller RCs) annually for each RC, as well as a project-related fee of $17,795 that must be paid prior to filing of any I-526 petition for each project/new commercial enterprise (NCE) sponsored by the RC. Fees of $17,795 already are due for a request for project approval and for any RC amendments (for changes in geography, name, organization structure, etc.). The draft reform legislation also authorizes a fee of $5,000 for 120 day processing of the I-924 NCE/project filing. Then there are numerous additional obligations for RCs, all of which involve substantial administrative costs, including – stiffer obligations to monitor NCEs sponsored by an RC, oversight and certification of compliance with securities laws, added responsibilities and documentation concerning the promoters of a project, RC compliance audits, and project site visits. Of course these added RC costs could be met by fees and revenues generated by attracting EB-5 investors

for worthwhile US projects. But without some other changes to the EB-5 reform package, the substantial visa backlog for EB-5 investors from China and the likely increased minimum investment thresholds (as high as $1.35 million and $1.8 million per the January 13, 2017 Notice of Proposed Rulemaking -- NPRM) will have untold depressive impact on investor demand, making matters only worse for RCs struggling to survive in the current competitive RC environment.

Approximately 49% (34 in total) of the RCs were terminated for "failure to promote economic growth" due to inactivity, a conclusion that IPO reached based on information submitted in the RC I-924A filings over a 3 year period that indicated no EB-5 project sponsorships and no EB-5 investors. Of the 34 RCs that received a Notice of Intent to Terminate (NOIT) from IPO for this reason, 23 essentially flew the white flag, by not responding at all, requesting a withdrawal of their RC designation, or requesting an extension that was denied. Only 11 of the 34 RCs challenged the NOIT with a substantive response and claimed to be promoting economic growth. Most of the responses attempted to demonstrate progress in pursuing the sponsorship of an EB-5 project. Responses included evidence of:

- Continuous interactions with brokers and borrowers in a seven-year effort to find a project for EB-5 investors
- Lack of traditional construction financing due to recession
- Potential joint venture projects, and three failed past attempts to sponsor suitable projects
- Five project agreements "nearing execution"
- Potential investor interest and architectural planning
- PowerPoint presentation of the RC's plans, which USCIS called less substantive than what it expects for a hypothetical project
- A statement that a change of RC ownership justified additional time to select and sponsor a suitable project
- A statement that the RC was limited in the potential projects it could sponsor due to its one-county geographic designation
- Contentions that the numerous mini-extensions of the RC program did not permit reasonable assessment of business risks
- Arguments that developers of large-scale real estate projects in economically advantaged areas had monopolized the EB-5 investor market leaving prospects dim for RCs not promoting such projects

On the one hand, these challenged RC terminations reveal that IPO appears to have found the threshold for a minimum amount of RC activity that it requires for an RC to stave off RC termination. On the other hand, note that the grounds for RC termination also are a topic addressed in the Advanced Notice of Proposed Rulemaking (ANPRM) DHS published January 11, 2017, indicating the agency is keen on settling the legal bases for RC termination in scenarios where the RC seems to be making genuine efforts but is not getting traction with actual EB-5 projects and investors. Until the legal bases for RC termination are well settled, substantial arguments may be available to RCs desiring to challenge IPO on its interpretation of "continuing to promote economic growth". In a recent non-precedent decision by the Administrative Appeals Office (AAO), for example, the appeal of a decision to terminate a RC for inactivity was upheld and the AAO remanded the case to IPO to further consider the totality of circumstances. (AAO, Matter of [name redacted], March 15, 2017) The AAO directed IPO on remand to apply a balancing test, weighing all the positive and negative factors relevant to promotion of economic growth.

The remaining 8 terminations (12% of the total) we reviewed were of active RCs. USCIS terminated these RCs as the result of a "bad actor", mismanagement, or other RC problems. Note that the published RC terminations at the USCIS website typically do not present a comprehensive picture of the underlying facts, as the final termination notices generally refer back to the "reasons stated earlier" in the NOIT which typically is not published. The FOIA production to IIUSA, however, does yield a few more details about RC terminations for El Monte RC, Mamtek RC, Victorville RC, and Lake Buena Vista RC (all of which were featured in the RCBJ article by R. Loughran, Q4 2013, pages 20-22), Intercontinental Trust RC of Chicago (covered in the RCBJ article by R. Loughran, Q2 2014, page 42), and the RC terminations of USA Now RC and Path America RC. (See also the RCBJ article by R. Divine, Q1 2015, page 18-19, for a general description of the RC termination process.) These articles can be found in their respective editions of the RCBJ at www.iiusa.org/magazine.

These RC terminations often but not always accompany SEC or other law enforcement activity, and depending on the circumstances, the continuing RC designation can be heavily litigated alongside or after the enforcement actions. One current example illustrates the heightened coordination of federal agencies in taking down a RC alleged to be directed by bad actors. In April 2017, IPO issued a 31 page NOIT emphasizing the common ownership of the RC, NCE and project entities, and thus the RC culpability for project delays, gaps in funding, and diversion of EB-5 funds among various projects to the possible detriment of immigrant investors who must connect their EB-5 capital investment to job creation. In June 2017, SEC filed a securities fraud lawsuit against the RC and its principal owner, and attached the NOIT as an exhibit to the complaint seeking injunctive relief, freeze on assets, appointment of a Receiver, disgorgement, and penalties. https://www.sec.gov/litigation/litreleases/2017/lr23866.htm

IMPACTS ON IMMIGRANT FAMILIES

All available data signal that RC terminations

are on the rise, and their frequency is likely to accelerate for the foreseeable future. Sensational RC flops seed readable news and a business narrative for the purveyors of compliance products and services. Given that IPO terminations of "active" RCs are for bad acts or mismanagement, the likelihood is strong that coincident with these RC terminations immigrant families may be victimized by diversion of funds, poor business performance and the like. The financial loss is real for these immigrant families. What's the sense in imposing further punishment by closing the door to their immigration dreams?

The January 2017 NPRM includes a provision for priority date retention for EB-5 investors in NCEs sponsored by terminated RCs, if the investor holds an approved I-526 petition. This provision, if made law, would keep the investor's place in the visa queue based on the original I-526 petition filing date, notwithstanding RC termination. Granted, this form of relief is tangible for those holding an approved I-526 petition, but it rates as only a slight benefit because (i) it presumes the EB-5 investor must file a new I-526 petition and wait the approximate 20 months it presently takes for USCIS to adjudicate I-526 petitions with no guarantee USCIS would approve the second I-526 petition, and (ii) it provides no relief for EB-5 investors with a pending I-526 petition who are stranded by RC termination.

Separately, just weeks ago on June 14, 2017, USCIS announced it had updated the EB-5 sections of the Policy Manual (PM Update), allowing just two weeks for public comment. Included within the PM Update is a disappointing section indicating that for EB-5 investors who do not yet have conditional permanent residence (non-CLPR), RC termination is a material change that requires the EB-5 investor's I-526 petition to be denied, or the approved I-526 petition to be revoked. Although the PM Update confirms that the EB-5 investor who already has conditional permanent residence would not suffer from RC termination, it memorializes as current policy the dreadful result of petition denial or revocation for non-CLPRs. The same harsh outcome for immigrant families has followed on the heels of actual RC terminations even in circumstances where there is evidence they are victims with clean hands.

Whether it is via the NPRM or the PM Update, or both, USCIS aims to do far too little for immigrant families who would be harmed by RC termination. Instead of these gestures benefiting a limited group of EB-5 investors in a narrow way, USCIS should promulgate a rule and/or adopt as policy a far more robust set of proposals that would provide an immigration safety net for immigrant families. An immigration safety net is warranted given that (i) immigrant families acting in good faith already have done what the law requires of them – to place at least the minimum level of capital at complete risk of loss, and (ii) the immigration safety net merely allows the immigrant families acting in good faith to cure the problem of RC termination.

The only existing law that references RC termination and impact on EB-5 investors is a 25-year old regulation concerning "effect of" RC termination, 8 CFR 204.6(m)(9), that speaks of the agency sending a notice to the EB-5 investor who has not yet obtained removal of conditions on permanent residence status. It reads:

> **Effect of termination of approval of regional center to participate in the Immigrant Investor Pilot Program.** Upon termination of approval of a regional center to participate in the Immigrant Investor Pilot Program, the director shall send a formal written notice to any alien within the regional center who has been granted lawful permanent residence on a conditional basis under the Pilot Program, and who has not yet removed the conditional basis of such lawful permanent residence, of the termination of the alien's permanent resident status, unless the alien can establish continued eligibility for alien entrepreneur classification under section 203(b)(5) of the Act. (italics added)

By its very terms ("…can establish continued eligibility…") this regulation requires providing notice to the EB-5 investor who in turn may act to cure the adverse effects of RC termination. It certainly does not prohibit the agency from establishing policy that clarifies the opportunity for an immigrant family to cure the fact of RC termination.

In arriving at the harsh outcome it does – i.e., a determination that RC termination standing alone is "material change" that always carries with it the need to start over and file a new I-526 petition -- the PM Update cites the regulation at 8 CFR 204.6(m)(7). That regulation, however, requires only that an EB-5 investor who is using the indirect job creation concept afforded by the RC program file a petition that identifies a designated RC. Notably, the cited regulation is not about material change; it does not require USCIS to revoke or deny an existing I-526 petition.

An exhaustive discussion of the USCIS policies surrounding material change is beyond the scope of this article, and just a few comments are offered here. However, it may be enough to observe that in the very same PM Update, on account of lengthy processing times and visa backlogs, USCIS found reason to protect from the harsh consequences of a material change determination those non-CLPR investors who are redeploying their capital into a new project not described in the I-526 petition. Experience and this sensible, flexible part of the PM Update show that material change is a malleable concept formed to suit ever-changing policy objectives.

"Materiality" according to USCIS writings, and the Kungys v. United States case the agency cites, is determined by the elements of eligibility for the immigration benefit, and the central question is whether new facts make the petitioner ineligible for the desired benefit. Unlike, for example, in the case of a family-based first preference petition where a subsequent marriage would render the beneficiary categorical-

ly ineligible for the visa classification, RC termination does not render the I-526 petitioner categorically ineligible for the EB-5 investor classification because continued eligibility for EB-5 classification does not necessarily turn on continued association with a particular RC.

The existing legal framework does not marry the EB-5 investor to a particular RC. Rather, the regulation for I-526 petition filing requires the EB-5 investor using indirect job creation methodology to indicate the association with a RC, but there is no requirement the EB-5 investor have any legal relationship with the RC entity, own or invest in the RC, oversee the RC, or have any responsibility for management or monitoring. On the other hand, the obligations of a RC are defined and limited to include promotion of the RC geographic area for investment, and reporting data to USCIS (collectively, Reporting Duties). In practice – and we are not commenting here about all RCs -- USCIS currently allows RCs to operate with a highly peripheral and passive role at least in the case of the "affiliation only" model, which may not involve the RC directly in any promotional activity, NCE management, or project oversight, but instead by design is a user-friendly platform for NCEs/projects to link to the benefits of the RC program. Right or wrong, existing USCIS practice allows RCs to exist substantially detached from investors and their immigration eligibility, not to mention from coordinated economic development of a region of the country. The flip side of that coin is that the EB-5 investor's association with a particular RC is not essential. The legal relationship between the typical immigrant investor and RC is not required and is non-existent unless the RC itself is also the NCE manager. The investor typically has no control, leverage or power to affect the actions of the RC. By comparison, the law requires the EB-5 investor to have a contractual relationship as an equity investor in the NCE and the law further requires that the EB-5 investor's capital be infused into the project entity as described in a comprehensive business plan. The EB-5 investor thus is cemented to the NCE and project entity described in the I-526 petition, but is only loosely connected with the RC in terms of what the law requires. With respect to the relationship between RC and EB-5 investor, the law requires the RC to do nothing more than confer the indirect job creation benefit on the EB-5 investor, and otherwise the RC owes Reporting Duties.

In cases of RC termination, investors typically have clean hands and are victims of the actions or inaction of the RC and its principals. Moreover, RC termination, considered alone, does not impair, threaten or compromise any of the salutary outcomes of investor actions – a substantial investment is made in the U.S. economy and specifically into the NCE, and expenditures of capital by the NCE are creating economic benefits and job creation throughout the U.S. economy. In the circumstances it is manifestly unjust to deny and revoke investor petitions based on RC termination.

In considering the form of new legislation, regulation or policy that would enable good faith investors to cure RC termination, we see a foundation in the draft reform legislation that is circulating among legislative staff in the Senate. Provision is made for the non-CLPR EB-5 investor who is an owner of an NCE that acts to associate with another RC ("regardless of approved geographic boundaries") within 180 days of RC termination. The non-CLPR investor may proceed to obtain CLPR status and then remove conditions, without filing a new I-526 petition. The same draft reform legislation provides further protection for immigrant families where there has been SEC or other law enforcement action alleging fraud, specifically authorizing USCIS to hold EB-5 petitions in abeyance during the pendency of SEC and law enforcement action, and authorizing US district courts to enter orders extending deadlines and preventing age-outs of children. Stakeholders from all corners who claim to be concerned with integrity and fairness should be prioritizing these legislative efforts that would provide at least some measure of protection for immigrant families.

The fact remains USCIS is withholding an important form of protection for immigrant families who have acted in good faith. Right now, without new legislation, USCIS is at liberty to add to its new EB-5 regulations or its further PM Updates an immigration safety net by proclaiming the following:

- RC termination, alone, is not material change
- upon RC termination (after administrative appeal is final)v, IPO must send a notice to affected EB-5 investors allowing for 84 days to respond by indicating an intent to cure by way of association with a replacement RC that undertakes the Reporting Duties, and thereafter, must send another request to affected EB-5 investors providing for an additional 84 days to respond with evidence of the perfected cure
- in cases where meeting the required job creation requirement is jeopardized due to diversion of EB-5 capital to unauthorized uses, any recovered funds from insurance, litigation, or enforcement actions that are subsequently deployed for job creation may be the basis for crediting additional jobs to the EB-5 investors' benefit
- diversion of funds and fraudulent activities will be cause for extending the timeframes IPO uses to measure job creation
- consequent amendment of the NCE business plan is not a material change

Cure of RC termination by involving a replacement RC that undertakes Reporting Duties is a sensible solution that provides the desired immigration safety net for immigrant families. USCIS should act decisively with regulations and/or policy to protect immigrant families.

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