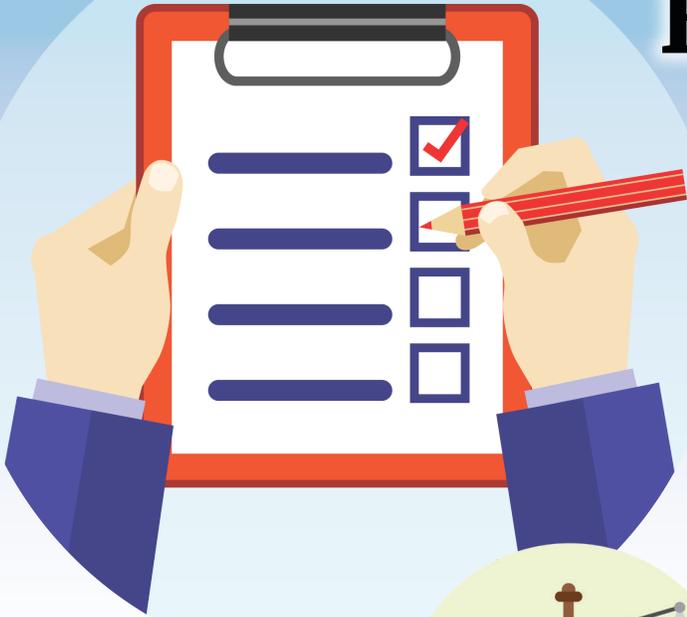


Regional Center *Compliance Reviews*



LINCOLN STONE

PARTNER, STONE, GRZEGOREK & GONZALEZ LLP



SUSAN PILCHER

SENIOR ATTORNEY, STONE, GRZEGOREK & GONZALEZ LLP



ELSIE HUI ARIAS

PARTNER, STONE, GRZEGOREK & GONZALEZ LLP

The USCIS Immigrant Investor Program Office (“IPO”) has commenced its long-anticipated program of regional center “audits,” now designated by IPO as “Compliance Reviews.” This form of oversight is targeted at regional centers and is distinct from the “Site Visit” program that involves unannounced visits to locations of job-creating businesses that have received EB-5 investor capital. IPO has signaled its intention to conduct a Compliance Review of every USCIS-designated regional center. This article provides an overview of the Compliance Review process as experienced by us in a few client matters. Admittedly, our experiences with Compliance Review could be part of a trial phase conducted by IPO prior to its broader launch of a program to review all regional centers, so the process may evolve as is suggested by certain aspects of our experiences to date. Nevertheless, we expect this general information will prove useful to regional centers as they prepare for a Compliance Review and further refine their internal practices to ensure compliance.

The IPO Team

IPO has dedicated a specific team

for Compliance Review. Whereas in IPO’s Site Visit program investigators from the USCIS Fraud Detection and National Security unit are dispatched to the sites of EB-5 job-creating businesses, the “Compliance Division” within IPO administers the Compliance Review program. By all appearances, the Compliance Division is a small team of professionals with training and experience in auditing, forensic accounting, and compliance work. They are knowledgeable and cordial. The overall impression made during our experiences is the members of the Compliance Division are more attuned to eliciting information about organizational processes than say, for example, the facts underlying a particular I-924 application filed by a regional center or a certain I-526 petition filed by an EB-5 investor.

Process Overview

IPO commences the Compliance Review process by issuing a written Notice of Compliance Review (“Notice”). According to this Notice, the information sought in the Compliance Review is “used to assess” the regional center’s “compliance with applicable laws and authorities”, with citations to the EB-5 statutes, regulations and Policy Manual.

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According to the Notice:

A compliance review verifies the information provided by designated regional centers in applications and annual certifications and compliance with applicable laws and authorities to ensure continued eligibility for the regional center designation. The process includes, for example, researching information in government systems, reviewing commercial and public records, and reviewing evidence that accompanies regional center applications and certifications. It also includes obtaining information, on a consensual basis, through compliance review data requests and onsite assessment, as well as the review of such information.

In our experiences with clients having multiple regional centers, the Notice may relate to a single regional center or to more than one regional center owned by the client.

Data Request

The Notice is accompanied by a specific “Data Request” that requires a detailed, written response from the regional center. IPO envisions the response to include a cover letter, written answers to specific questions with attribution of the source of each response, and production of related documents. IPO may require the written response within just 15 days of the date of the Notice, although in our experiences requests for a brief extension for submitting the written response to the Data Request have been readily granted. The process has the “feel” but not necessarily all the formalities of providing responses to interrogatories and a request for production of documents in the discovery process of a civil litigation matter. Meanwhile, questions regarding the Data Request may be directed to a dedicated e-mail address for the Compliance Division.

The Data Request covers four general topical areas. Within each topical area, the Data Request seeks specific information intended to prepare the

Compliance Review team in advance of the Onsite Assessment. The questions seek to verify information provided to USCIS in the regional center’s I-924 and I-924A filings, from inception to the present. The four topic areas are:

(1) Regional Center Organizational Structure: These questions focus on identifying the managing entities and their principals; the roles and responsibilities of management personnel; the structure, ownership, control, and status of all active and inactive new commercial enterprises (“NCE”) and job creating enterprises (“JCE”).

(2) Regional Center Management and Oversight: These questions focus on investor due diligence screening procedures; developer/project due diligence procedures; accounting, oversight and reporting processes in connection with regional center service agreements or public-private partnerships; international marketing materials, marketing strategies, and marketing relationships; materials and reports provided to investors; subscription and administrative fee collection procedures; management fee arrangements; recordkeeping procedures; redeployment procedures; and investment redemption procedures following I-829 petition approval.

(3) Job Creation: These questions seek documentary evidence to verify the data reported on a selected I-924A Annual Report, including investor-specific data to verify reported I-526 and I-829 petition approvals and aggregate EB-5 investment during the reported time period, including account statements verifying the reported figures.

(4) Financial Management: These questions request documentation regarding the flow of funds from EB-5 investors and through to the JCE, for each NCE named in the annual report being audited, including escrow account administration, NCE bank accounts, disbursement of investment funds to each JCE, and verification of use of EB-5 funds.

Onsite Assessment

As explained in the Notice, after the

regional center submits a response to the Data Request, the IPO will contact the regional center’s counsel with proposed dates for the Onsite Assessment, to take place at the regional center’s principal place of business with “all major parties” present, including counsel if desired. During the Onsite Assessment, the regional center is expected to “immediately provide any readily available documentation and information that the review team requests to verify information provided in the [I-924] application(s) or [I-924A] certification(s).” The Onsite Assessment may be conducted over several days, as necessary.

IPO is likely to request that the regional center provide a “walk-through” of its “internal control procedures and accounting processes [utilized in] the administration, monitoring and oversight of EB-5 capital investment activities and the allocation of resulting jobs,” describing them in detail “from start to finish.” Significantly, IPO adds:

Note that an “internal control” is a process for assuring achievement of an organization’s objectives in operational effectiveness and efficiency, reliable financial reporting, and compliance with laws, regulations and policies. A broad concept, an internal control also relates to organizational risk identification and mitigation measures.

This “walk-through” is not necessarily scripted by IPO, and thus, there may be very different approaches adopted by regional centers as they consider how best to present information in the Onsite Assessment. Also, the IPO approach to the Onsite Assessment might be quite fluid, and IPO may have a keen interest in learning more about a particular area of compliance that perhaps was not signaled in the Data Request. IPO, for instance, might delve deeper into the subscription process, how investor files and data are managed, how communications with investors are handled, and how the use of EB-5 capital is tracked.

Prior to the conclusion of the Onsite Assessment, IPO might identify certain additional documentation that it wants copied or transmitted for purposes of

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further review. Ultimately, the regional center should anticipate receiving a “close out” letter relating to the Compliance Review.

Thoughts on Compliance Review and Termination

Notices issued by IPO frame the Compliance Review as verification of information presented in Forms I-924 and I-924A. IPO states the purpose of the review is to “assess [the regional center’s] compliance with applicable laws and authorities requiring designated regional centers to continue to serve the purpose of promoting economic growth.” It is clear from IPO’s use of this language that IPO intends to use adverse findings from a Compliance Review to support a regional center termination process. It is not clear, however, whether the “close out” letter the process envisions, wherein IPO may state “no further action is required at this time”, is one with a certain lifespan: Could a regional center be subjected to more than one Compliance Review within just a few years? Or, in the alternative, would the final step of an unfavorable Compliance Review be the delivery of a Notice of Intent to Terminate the regional center designation? It’s too early to say.

Regional Centers and Robust Compliance Programs

The emphasis placed on review of “internal controls” evidences IPO’s expectation that regional centers will implement a robust compliance program designed to minimize the possibility of misuse and diversion of investor funds as well as unlawful or non-compliant business activity. Common features of effective compliance programs for any organization include:

- Specific compliance standards, policies and procedures
- Demonstrable commitment to compliance at the executive level of the organization
- Criteria for excluding/debarring individuals from

the organization

- Communications and training regarding compliance procedures
- Monitoring and auditing to ensure ongoing compliance
- Consistent internal enforcement of standards
- Procedures for reporting wrongdoing

When considering how these common features get tailored to the EB-5 industry and regional centers in particular, clearly an effective compliance program must involve policies and procedures for exercising due diligence to prevent and detect unlawful conduct such as money laundering and diversion of investor funds as well as to ensure compliance with EB-5 requirements for the use of EB-5 capital and job creation. Just as important is an organizational culture that encourages ethical conduct and a commitment to legal compliance. Actual compliance that is fitted to a particular organization must allow for the fact not all regional centers are alike

-- Some are integrated within large organizations, and others are quite thin in terms of personnel. Some regional centers establish NCEs that operate as a lender and thus conduct substantial due diligence prior to lending, other regional centers are of the regional center-developer type with common ownership for the NCE and JCE, and then other regional centers are “renting” the use of their regional center banner and may have very little or no involvement in the raising and investment of EB-5 capital. Regional center compliance may require very different pathways for these differently-situated regional centers in the new era of Compliance Review. ■

