

Innocent Investors Might Finally Escape EB-5 Hell in Vermont



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Hundreds of innocent EB-5 investors within the Vermont Regional Center (RC) have suffered for a long time, but two government actions might give such investors hope of finally escaping their tragic circumstances in the coming months—or years.

Broadly promising is that after the Investor Program Office (IPO) terminated the Vermont RC in July 2018 for actions having absolutely zero to do with any EB-5 investors themselves, the Administrative Appeals Office (AAO) issued a March 25, 2021 decision vacating the RC termination and remanding the matter back to the IPO with instructions to issue a new decision consistent with the logic of the well-reasoned 2019 *Path America* decision from the Western District of Washington. More on the AAO decision below.

Also important but applicable to only a subset of the Vermont RC investors, the Vermont Department of Financial Regulation issued a cease-and-desist order that essentially compels the successor of two ownership entities of fully completed

EB-5 projects at Vermont's Mount Snow Ski Resort to continue operating within the context of the EB-5 program.

Specifically, in 2019, Vail Resorts Inc. (Vail) acquired the Mount Snow Ski Resort from Peak Resorts Inc., and in late 2021, Vail informed relevant investors that Vail's recently acquired EB-5 entities planned to return all remaining EB-5 funds to the investors in early 2022 and to terminate the EB-5 relationship altogether—irrespective of where such investors were along the path to obtaining conditional green cards or removing conditions on such green cards. The Vermont Department of Financial Regulation intervened, issuing the cease-and-desist order alleging that inherent immigration benefits constituted a substantial portion of value in the EB-5 offering and that Vail would therefore be violating securities laws if its EB-5 entities returned the EB-5 funds prematurely and left the EB-5 investors high and dry with respect to the immigration benefits that the

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predecessor had offered as enticement to invest in the first place.

With respect to the more broadly applicable March 21, 2021 AAO order to vacate and remand IPO's termination of the Vermont RC, affected investors should be substantively optimistic, but procedurally patient. The AAO order theoretically leaves IPO the option of simply alleging new and improved rationale for reaching the same termination outcome as before, but a reasonable reading of the AAO opinion reflects an expectation that IPO will in fact reinstate the Vermont RC. Time will tell, however, whether IPO will even act on the AAO order without first facing a federal mandamus action to compel IPO to do so.

Substantively, the AAO faulted IPO for not considering positive factors or mitigating/corrective action in deciding to terminate the Vermont RC. "To determine whether a regional center serves the purpose of promoting economic growth, the Chief should consider a variety of factors, both positive and negative. Positive factors may include the extent of any job creation, the amount of investment, and the overall economic impact. Negative factors may include inaction, mismanagement, theft, fraud by or otherwise affecting the regional center, any resulting damage, and the risk imposed on investors or the economy. An evaluation of negative factors should take into consideration of any mitigating or corrective actions taken by the regional center."

Moreover, quoting *Path America*: "Just because a regional center failed to promote economic growth for a short period of time while management changed hands does not mean that the regional center has not continued to promote economic growth after that point, when it in fact provided jobs on a successful construction project." The AAO also found "persuasive" the federal court's notion that "USCIS' failure to consider a regional center's remedial efforts 'appears to run contrary to the purposes of the EB-5 program.'"

Given the longevity of the Vermont RC and the diversity of NCEs, JCEs, and projects

within the RC, one might imagine that IPO need not look very deeply to find at least as much evidence of "continuing to promote economic growth" in the Vermont RC as the federal court found in the *Path America* RC.

In addition, in a broader sense, although the underlying circumstances of the Vermont RC and the *Path America* RC are similar in that one or more bad actors were convicted of criminal wrongdoing and that since that wrongdoing both RCs resolved the underlying issues, many other circumstances of the Vermont RC seem more favorable than those in the *Path America* case. Below are a few examples:

Regional Center Problems: Insufficient Oversight vs. Criminality

The feds convicted bad actors at the NCE and JCE levels in both RCs, but the government took no criminal action against the Vermont RC or its principals. In *Path America*, the feds convicted the principal of the RC itself.

Control of NCEs/JCEs: Affiliated vs. Independent

State of Vermont agencies control only the RC itself, not any NCEs or JCEs, but in *Path America*, one person (through entities) apparently controlled everything from RC to NCEs to JCEs. IPO has apparently never even alleged that the Vermont RC or its principals engaged in unlawful activity, but at most had failed to detect quickly enough the criminality of some of its independently operated NCEs and JCEs.

NCE and JCE Problems: Only Some Entities vs. Potentially All Entities

In *Path America*, the affiliation relationship among RC, NCEs, and JCEs made it at least plausible that serious problems extended through all NCEs and JCEs, but in the Vermont RC, the breadth of independent NCE and JCE operators arguably made it much less likely that the criminality and other problems in the Quiros-controlled entities had spread among all NCEs and JCEs. In fact, the March 25, 2021 AAO opinion explicitly mentioned that the successful ongoing Mount Snow and Trapp

Family Lodge projects were "not previously under Mr. Quiros' control." Moreover, even with respect to one of the Quiros-controlled projects (Q Burke Hotel), the Director of the Vermont Department of Financial Regulation publicly stated that the department had thoroughly investigated that project but had found no wrongdoing within the project or offering.

Thus, substantively, the facts underlying the Vermont RC seem to point to a strong case that the Vermont RC continues to promote economic growth despite the temporary criminality-driven problems at some—but not all—NCEs and JCEs.

Unfortunately, such substantive optimism probably does not directly translate to an expectation that the IPO will act quickly to reinstate the Vermont RC. First, despite objective evidence of continuing to promote economic growth seeming more compelling with respect to the Vermont RC than with the *Path America* RC, the fact remains that IPO has not yet reinstated the Vermont RC. Inaction speaks louder than words here.

Also, more broadly speaking, despite the complete shutdown of the overall Regional Center Program for from June 30, 2021 until March 15, 2022 — IPO was adjudicating few EB-5 cases of any kind without first being sued in federal court for mandamus. IPO seems to be milking every pending case as though it were a 50-teated cow, so investors should expect the same with the administrative reinstatement of the Vermont RC even after Congressional reinstatement of the Regional Center Program.

All procedural hope is not lost, though. Once IPO finally reinstates the Vermont RC, affected investors whose I-526 petitions had been denied or revoked because IPO had previously terminated the RC should find it easier to overturn those prior decisions and restart their pursuit of EB-5-based green cards.

Although recent history suggests that IPO is likely to take a long time to do so, affected investors should be confident that IPO will reinstate the Vermont RC eventually. ■