Member Perspective:

Urgent Action Required for Previously Approved Regional Centers

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This blog addresses two decisions that must be made prior to December 29, 2022 by regional centers approved and in good standing as of the effective date of the EB-5 Reform and Integrity Act ("RIA") that do not intend to sponsor any new projects or any new investors

- Should such regional centers file Form I-956 to amend their regional center designations; and
- Should they file Form I-956G (annual statement)?

By way of background, after the passage of the RIA, USCIS took the position that every previously approved regional center was terminated and had to file a new form (I-956) in order to apply for re-designation. In a case which I co-counseled (EB5 Capital, et al vs. US Department of Homeland Security, et al), we obtained a nationwide preliminary injunction against USCIS' action based on the Judge's conclusion that the regional center terminations "were almost certainly legal error." Subsequent to the nationwide preliminary injunction and before a final decision in the case, the parties reached a Settlement Agreement accepted by the Court on September 1, 2022 ("Settlement Agreement"), which is legally binding on USCIS.

The Settlement Agreement provides that Previously Approved Regional Centers must file for an amendment of their already-existing regional center designations in order to confirm compliance with the RIA if they intend to sponsor new projects and new investors under the RIA. The Settlement Agreement is clear that "Previously Approved Regional Centers sponsoring new projects or new investors under the Integrity Act will comply with all the requirements of the Integrity Act." Further, "if a Previously Approved Regional Center fails to file a Form I-956 application or amendment by December 29, 2022, it may no longer engage in any activities under the Integrity Act, including sponsoring I-526E visa petitions or the development of new projects." This author believes that the language of the Settlement Agreement is very clear that

only regional centers that intend to sponsor new projects and new investors must file Form I-956 to retain their regional center designations.

The Settlement Agreement also makes clear that grandfathered investors (investors who filed I-526 petitions prior to the RIA) should not be prejudiced by the choice of a regional center not to file Form I-956 and not to do further business under the RIA:

"USCIS will continue to process and adjudicate I-526…petitions from investors filed prior to the Integrity Act…, even if the regional center with which their project was approved does not file a Form I-956 application or amendment by December 29, 2022. The failure of a Previously Approved Regional Center to file a Form I-956 application or amendment will not, standing alone, be a basis for USCIS to deny a petition described by the preceding sentence."

Since the date of the Settlement Agreement, representatives of the Plaintiffs (including myself) have attempted to get USCIS to confirm that regional centers that do not file Form I-956 because they will not sponsor any new projects or investors, but wish to continue in existence in order to meet their obligations to grandfathered investors, will not be subject to termination. Unfortunately, as of the date of this blog (a mere 3 weeks from December 29, 2022), USCIS has not confirmed this, and rather, has taken the position that such regional centers may be subject to termination. (For clarity, USCIS has not stated that it will commence termination proceedings; just that it believes that it has the authority to do so and may choose to do so).

This could have serious consequences. In addition to a regional center being terminated without legal authority, USCIS takes the position (with which the author does not agree) that a termination of a regional center is a material change that can result in the denial of a pending or approved I-526 petition for any investors in projects sponsored by the regional center who are not yet conditional permanent residents.

USCIS takes the position that such grandfathered investors who would potentially be subject to denial could avail themselves of the "good faith investor" provisions of the RIA (INA 203(b)(5)(m)). However, this so-called relief would not help many or most grandfathered investors since it is impractical in many cases to find a regional center that wants to assume sponsorship of a project that has already been completed and for which no new investor money will be forthcoming.

It is the opinion of this author that Previously Approved Regional Centers that do not choose to sponsor new projects or new investors under the RIA are not legally required to file Form I-956 both under the law and the Settlement Agreement; and should not legally be subject to termination for failure to file Form I-956. Further, grandfathered investors should not legally be prejudiced by the failure of such a regional center to file Form I-956.

Nevertheless, given USCIS' position on this issue, such regional centers must make a critical decision by December 29, 2022. A regional center may choose not to file Form I-956 (a) because

it is not legally required; (b) because of the substantial fees ($17,795 filing fee for the Form I-956 and $10,000 to $20,000 annual fee imposed under the RIA); and (c) because it is not willing or able to comply with all of the provisions of the RIA. In the event of USCIS filing a Notice of Intent to Terminate, this author believes that there would be a significant chance of successful rebuttal of the NOIT either administratively or in federal court.

Alternatively, regional centers may opt to file Form I-956 for at least 3 reasons:

1. The regional center desires to avoid any possibility of termination;
2. The regional center wants to prevent any possible negative consequences to its sponsored investors; and
3. The regional center wants to be designated under the RIA because there may be interest on the part of developers or other regional centers to purchase the regional center. (For reasons to be discussed in a separate blog, there is presently an unprecedented demand to buy and sell regional centers).

Finally, regional centers choosing not to file Form I-956 have a separate issue to deal with. Should they file an annual statement on Form I-956G? Although Form I-956G in its present form is not applicable to such regional centers (among other things, it references projects that filed Form I-956F, which would not include winding down regional centers), this author believes that it may be prudent for such regional centers to file Form I-956G because the filing of an annual statement has always been required and because the failure to file an annual statement could be a separate basis for termination. Since the I-924A is no longer in existence, and the I-956G is the only annual statement form being accepted, filing such form may be a prudent course of action for many of such regional centers.

Because of the importance of the choices to be made and the consequences to both the regional center and its investors, regional centers should immediately seek the advice of experienced EB-5 counsel prior to making these choices.