

# Terminations of EB-5 Regional Centers

By Robert F. Loughran

## *Introduction*

The Immigrant Investor Program (“Program”) can be a “win-win” for developers, who get access to low-interest capital, and also for the foreign investor who may be principally seeking the non-monetary “return” of Lawful Permanent Residence in the United States. However, due to the potentially distorting mix of immigration regulations, there can be situations where the needs of the developer and the needs of the foreign investor do not completely align.

For example, in order to be eligible to file an I-526 petition, the foreign national’s investment must be “at-risk” in the commercial sense. This requirement of risk means there is no guarantee that the applicant will recover the investment made to the commercial enterprise. Added to the investor’s commercial risk requirement are numerous other risks connected with investments. It may turn out that a high percentage of commercial enterprises, perhaps a majority, will experience some, or total, loss of investment capital due to poor planning, inexperienced management, outright fraud, or generally unfavorable economic conditions.

EB-5 regional centers designated by USCIS have fueled meteoric growth of the Program.<sup>1</sup> Investment in or with a designated EB-5 regional center facilitates proof of the required job creation.<sup>2</sup> But one of the risks of the Program is the continuing compliance of the EB-5 regional center. Pursuant to regulatory authority, USCIS may terminate regional center status for non-compliance with Program requirements.<sup>3</sup> The EB-5 investor who is banking on the liberalized proof for indirect job creation to establish initial eligibility will be denied by USCIS if the EB-5 regional center is terminated.<sup>4</sup> Similarly, a conditional permanent resident may be unable to remove the conditions on permanent residence if the EB-5 regional center has been terminated.<sup>5</sup>

Those who use the EB-5 regional center as a means of raising capital, as well as the EB-5 investors, should be aware of the threats to continuing regional center viability. The possibility

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<sup>1</sup> Singer, Audrey, and Camille Galdes. “Improving the EB-5 Investor Visa Program: International Financing for U.S. Regional Economic Development.” The Brookings Institution, 05 Feb. 2014.

<sup>2</sup> 8 CFR 204.6(j).

<sup>3</sup> 8 CFR 204.6(m)(6).

<sup>4</sup> 8 CFR 204.6(m)(7).

<sup>5</sup> 8 CFR 204.6(m)(9).

of EB-5 regional center termination affects the representations and disclosures that must be made in the course of raising EB-5 capital, and also informs the EB-5 investor's evaluation of this aspect of immigration risk. Experience in the Program suggests that EB-5 investors and regional center-connected developers should expect a relationship of no less than five years. The national economic picture, industry performance and even family relationships can evolve dramatically in half a decade. Typically regional centers are defined by their approved geographic scope, industry sectors, and specific projects. Formal amendments must be approved by USCIS in many circumstances, meaning some EB-5 regional centers may lack the adaptability needed to maintain the compliance of investments in changing projects. Given the uncertainties and the substantial interests at stake, expectations, rights and legal recourses should be spelled out and memorialized in contract.

### ***Authority for Termination of USCIS Designation***

USCIS has terminated EB-5 regional centers numerous times in the past three years. In many of the cases there is the specter of inconsistent representations and even possible fraud. The usual stated reason for these terminations was failure to promote economic growth. By regulatory authority,<sup>6</sup> USCIS may terminate a regional center's designation for various reasons, including:

1. The regional center fails to submit required information; or
2. The regional center no longer promotes economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.

Effective November 23, 2010, EB-5 regional centers must file Form I-924A annually, and the failure to file a Form I-924A may be cause for termination.<sup>7</sup> If the regional center is issued a Notice of Intent to Terminate (NOIT), then the regional center must be provided 30 days to respond to the NOIT.<sup>8</sup> Furthermore, if the USCIS ultimately terminates the regional center's participation in the Program, it must notify the regional center of the reasons for termination and right to appeal.

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<sup>6</sup> 8 CFR 204.6(m)(6).

<sup>7</sup> <http://www.uscis.gov/i-924a>.

<sup>8</sup> 8 CFR 204.6(m)(6).

### ***Summary of Rationale for Termination of Regional Center's Designation***

In review of recent regional center termination cases, the rationale for the terminations has been as follows:

1. USCIS may terminate a regional center's designation for lack of job creation.
2. USCIS may terminate a regional center's designation for failure to promote economic growth. In this regard, USCIS may question:
  - a. How many investors have used the regional center in the last few years?
  - b. Has the regional center or the principals of the regional center filed for bankruptcy or otherwise manifested economic weakness?
  - c. Are the representations made in previous filings borne out as factual?
3. USCIS may terminate a regional center's designation if it fails to demonstrate that its projects will create jobs in verifiable detail based upon a business plan and economic analysis that employs reasonable methodologies for estimating jobs.
4. USCIS will terminate a regional center's designation where it no longer promotes economic growth in the sense that the regional center's projects are no longer viable and the regional center entity is no longer overseeing the projects and investments that were outlined in the original request for regional center designation.
5. USCIS may terminate a regional center's designation where its activities violate and demonstrate a significant disregard for the immigration laws of the United States.

Among the lessons learned: If USCIS terminates the regional center authority, EB-5 investors could be stranded if their immigration cases are in progress. There also exists the possibility that cases previously approved could be reopened and denied if it is determined that previous approvals were based on false statements.

Below, thanks to a FOIA production obtained at the request of the IIUSA,<sup>9</sup> each of the recent regional center termination decisions is summarized.

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<sup>9</sup> Association to Invest in the USA, [www.iiusa.org](http://www.iiusa.org).

### ***Victorville Regional Center***

In the case of the Regional Center of Victorville Development, Inc. (Victorville RC), USCIS had approved Victorville RC in June 2009, however, USCIS then terminated Victorville RC on October 10, 2010. After Victorville RC filed a motion, and responded to a subsequent request for evidence, USCIS issued a Final Notice of Termination on May 24, 2011. The Administrative Appeals Office affirmed the decision on December 21, 2011.<sup>10</sup>

The stated rationale of USCIS for terminating the Victorville RC was the regional center failed to promote economic growth through job creation. According to the decision adjudicated by the Administrative Appeals Office, the Victorville RC sought to invest EB-5 capital only *after* the jobs in question had already been created. According to the record, Victorville RC undertook an Industrial Waste Water Treatment Facility project (IWWTF) that involved bridge financing. Due to the structure of the bridge financing, the IWWTF began hiring employees and construction of the project reached 90% completion before the investors had contributed and invested their EB-5 capital. Therefore, Victorville RC, according to the USCIS, was improperly claiming immigrant investor job creation credit for jobs that existed before EB-5 capital was invested into the project.

### ***El Monte Regional Center***

The El Monte Regional Center (El Monte RC) had been approved in June 2008 by USCIS. Three years later in 2011, USCIS issued notices for terminating El Monte RC. After an unsuccessful motion, the Administrative Appeals Office affirmed the decision to terminate the regional center on July 23, 2012. El Monte RC was terminated because USCIS determined that the regional center could not promote economic growth.<sup>11</sup>

El Monte RC submitted annual reports in 2009 and 2010. In the 2009 annual report, El Monte RC identified a single investor, and in the 2010 report, it identified a second investor. In its notice of July 11, 2011, USCIS cited the following factors:

1. El Monte RC had recruited only 2 investors;
2. El Monte RC had insufficient financial resources to deliver on its representations as evidenced by its bankruptcy proceedings; and,

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<sup>10</sup> *Matter of Regional Center of Victorville Development, Inc.*, RCW1-3 1910251, Dec. 21, 2011.

<sup>11</sup> *Matter of El Monte Regional Center*, RCW 1031910138, July 23, 2012.

3. El Monte RC did not have title to the property it purported to own.

### ***Lake Buena Vista Regional Center***

The Lake Buena Vista Regional Center (LBV RC) was initially approved by USCIS in September 2008. Thereafter, LBV RC obtained several approvals of amendments to the regional center designation. Nonetheless, USCIS issued a notice to terminate LBV RC in December 2011, conducted an interview in March 2012, and finally terminated LBV RC in a notice dated July 23, 2012.<sup>12</sup>

According to USCIS, it terminated LBV RC for failure to establish continuing eligibility and compliance with program requirements of promoting economic growth. In particular, USCIS indicated that a statistically valid job creation analysis had not been submitted. The analysis was plagued by errors in data sources and methodologies. Also, for instance, the market competitor analysis indicated significant excess capacity in accommodation services, jeopardizing the ability of LBV RC to meet the requisite EB-5 job creation requirements based on a claim of increase in visitor spending. USCIS concluded that LBV RC failed to demonstrate its projects would create jobs in verifiable detail, based upon a business plan and economic analysis that employed reasonable methodologies for estimating job creation through EB-5 capital investment.

### ***Mamtek Regional Center***

USCIS had approved Mamtek Regional Center (Mamtek RC) in August 2011. Mamtek RC involved a planned sucralose manufacturing facility in Moberly, Missouri. But within just 3 months of regional center approval, USCIS issued a notice of intent to terminate. USCIS finally terminated Mamtek RC on April 11, 2012. In this case, USCIS had determined upon review of individual investor I-526 petitions filed by Mamtek investors that the proposed capital investment project was not viable.<sup>13</sup>

Mamtek RC was a single member LLC with Mamtek, U.S., Inc. as its owner according to the initial business plan. USCIS later discovered that Mamtek RC was no longer overseeing the projects and investments that Mamtek RC had outlined in its original request for regional center

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<sup>12</sup> *Matter of Lake Buena Vista Regional Center*, September 5, 2013.

<sup>13</sup> *Matter of Mamtek Regional Center*, RCW 1105950169, April 11, 2012.

designation. Instead, Mamtek RC was controlled by a new company and supervised by the City of Moberly. Therefore, the USCIS determined that the Mamtek RC could no longer claim credit for the estimated job creation related to the future projects.

In its decision, the USCIS noted that the existence of bankruptcy proceedings against Mamtek U.S., Inc. did not preclude the USCIS from exercising its power to ensure that Mamtek RC had fulfilled its statutory and regulatory obligations as a regional center. USCIS terminated the approval of the Mamtek RC because it determined that the regional center no longer served the purpose of promoting economic growth. Since then, a lengthy parade of legal proceedings has ensued, including an enforcement action by the State of Missouri.<sup>14</sup>

### ***Intercontinental Regional Trust Center of Chicago***

The Intercontinental Regional Trust Center of Chicago (Chicago RTC) was established on August 16, 2010 and was approved by USCIS on June 9, 2011. On November 20, 2013, USCIS issued a Notice of Final Termination to Chicago RTC in which its designation as an EB-5 approved regional center was terminated. USCIS made the determination that Chicago RTC had “engaged in activities in violation of and evidencing a significant disregard for the immigration laws of the United States.”<sup>15</sup>

Chicago RTC, along with its affiliate, A Chicago Convention Center, LLC (ACCC) sought investors to finance and build the “World’s First Zero Carbon emission Platinum LEED Certified” hotel and conference center in the Chicago area. However, on February 6, 2013, the Securities and Exchange Commission (SEC) filed a complaint against Chicago RTC, ACCC, and Anshoo Sethi, the creator and managing member of both entities.<sup>16</sup> The SEC claimed that, since November 2011, Chicago RTC fraudulently sold over \$147,000,000 in securities and collected an additional \$41,400 per investor in administrative fees. As the scheme targeted over 250 investors, these administrative fees amounted to \$11,000,000, which Sethi claimed would be refunded to the investors if the EB-5 visa applications were denied. However, over 90% of the \$11,000,000 was either spent or funneled into Sethi’s personal bank account in Hong Kong. The SEC further alleged that Chicago RTC falsely demonstrated adequate financing to USCIS

<sup>14</sup> See e.g, <http://www.sos.mo.gov/securities/orders/AP-13-10.pdf>

<sup>15</sup> *United States Securities and Exchange Commission v. A Chicago Convention Center, LLC, Anshoo Sethi, and Intercontinental Regional Center Trust of Chicago, LLC*. United States District Court for the Northern District of Illinois Eastern Division. 13-CV-982.

<sup>16</sup> *Id.*

through fraudulent letters from the Qatar Investment Authority and Hyatt Hotels, overvaluing the real estate it owned and falsely stating that it had obtained all necessary permits and approvals to construct the hotel.

In its November 20, 2013, Notice of Final Termination, USCIS determined that: (1) Chicago RTC had “engaged in activities in violation of and evidencing a significant disregard for the immigration laws of the United States;” and (2) Chicago RTC was “unable to demonstrate that it is continuing to promote economic growth, improved regional productivity, job creation, or increased domestic capital investment in the approved geographic area.”<sup>17</sup>

### ***Effect of Regional Center Termination on EB-5 Investors***

When USCIS terminates the regional center upon which EB-5 investors with pending immigration cases have based their cases, the immigration impact on and procedural remedies available to the EB-5 investors vary depending on the stage of the case in which the investor finds himself at the time of regional center termination.

#### **Pending I-526 Immigrant Petition**

If the regional center’s approval is terminated while an investor’s I-526, Petition by Alien Entrepreneur is pending, the I-526 petition is likely to be denied. The regulations are clear that an EB-5 investor who seeks the benefit of indirect job creation must demonstrate that there is a regional center connected with the EB-5 investment.<sup>18</sup> Although an investor may have been eligible at the time of filing due to the existence of the regional center, the petitioner must continue to be eligible for classification at the time of actual adjudication of the petition.<sup>19</sup>

If, after filing the I-526 petition, the investor becomes eligible under a materially different set of facts or circumstances, the investor must file a new I-526 petition.<sup>20</sup> For example, if a petitioner files a Form I-526 petition purporting to be associated with a particular project within the scope of an approved regional center but, subsequent to filing, it is determined

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<sup>17</sup> *Id.* (The SEC successfully froze assets, coordinated substantial refund payments to the EB-5 investors, and achieved a settlement with the defendants that included substantial penalties and injunctions.)

<sup>18</sup> 8 C.F.R. 204.6(m)(7).

<sup>19</sup> 8 C.F.R. § 103.2(b)(1).

<sup>20</sup> *See, e.g., Matter of Izummi*, 22 I. & N. Dec. 169, 176 (AAO 1998).

that the proceeds of the investment will be directed to a job-creating entity in an entirely different project, that petition should not be approved according to USCIS policy.<sup>21</sup>

However, the result may be different if the project is unchanged but switches its affiliation to a different regional center while investor I-526 petitions are pending. The prospect of termination of a regional center could motivate developers of a fundamentally approvable project affiliated with a failing regional center, to seek a replacement regional center so that CIS may approve an on-going affiliation with a properly functioning regional center, approve the continuing viability of the project and approve pending investor I-526 petitions and petitions to be filed. Without such an affiliation, indirect employment may not be credited to investors, likely rendering I-526 petitions unapprovable.

The investor who has filed an I-526 petition should be permitted to establish continuing eligibility for approval, albeit the project is in a regional center different from the affiliated regional center at the time of filing of the I-526 petition. This outcome presumes that the substituted regional center is approved at the time of the project's affiliation through the time the I-526 petition is adjudicated. The principal place of business of the project must be located within the boundaries of the substituted regional center, and the substituted regional center likely will be required to have claimed the NAICS codes relevant to the project's business sectors prior to the project's affiliation. Under these circumstances it appears that indirect employment may continue to be credited to investors. Since there are no changes in the project's business model, arguably, there is no material change in the facts of the filed I-526 petition that would require its withdrawal or the filing of a new I-526 petition after its affiliation with the substituted regional center.

Proactive notice to USCIS of the change of regional center affiliation at the soonest opportunity may serve several purposes. In the notice, the investor may explain that the substitution of regional centers is not a "material change" and that the investor does not anticipate a new I-526 petition filing. The notice will also underscore the forthrightness of the investor and the project. It will link the business plan and other relevant facts of any previously approved I-526 petitions with the unaltered business plan and the same relevant facts in pending petitions filed before and after the affiliation with the substituted regional center. Assisting

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<sup>21</sup> See USCIS Policy Memorandum, "EB-5 Adjudications Policy" (May 30, 2013).



USCIS to understand the matter and avoiding a USCIS claim of surprise at the time of adjudication may prevent the issuance of a Request for Evidence or a Notice of Intent to Deny.

#### After Approval of the Immigrant Petition

A key benefit of an authorized regional center is to permit the indirect employment created by projects affiliated with the regional center to be credited to the job totals that investors must establish as participants in the EB-5 program. If the affiliated regional center ceases business or loses its USCIS authorization, the ability of an investor to rely upon indirect employment will end. Investor applications for conditional lawful permanent residence, pending or to be filed, can be denied and the conditional residence of investors who do not have approved I-829 petitions can be revoked unless the investor establishes on-going eligibility as an EB-5 investor.<sup>22</sup> In all likelihood, adherence to a project's original, approved business plan will not stave off this outcome because the indirect employment upon which the investor relied to meet the job creation requirement is no longer creditable to the investor even though the jobs were created, and there is little chance that direct employment, if any, created by implementing the approved business plan, will be sufficient to meet the investor's minimum job creation threshold. A change in the business plan so that it will create sufficient direct jobs to replace the newly unqualified indirect jobs might be a solution to the problem caused by loss of affiliation with an authorized regional center, but such a change may be difficult to accomplish, will likely be deemed a material change necessitating a new I-526 petition.

If a development project doing business with a failing or terminated regional center changes its affiliation to an approved regional center, the outcome for investors may be favorable. In its latest EB-5 Policy Memorandum, USCIS said that if there had been a material change in the project's business plan or a material change in the facts upon which the I-526 was approved, the investor's I-526 petition may be revoked and the investor's application for conditional residence may be denied.<sup>23</sup>

Affiliating with a different regional center does not mean there is any change in the project's business plan or the facts supporting I-526 approval. Until conditions are removed, an investor must show that requisite jobs have been created or are more likely than not to be created

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<sup>22</sup> 8 C.F.R. 204.6(m)(9).

<sup>23</sup> See USCIS Policy Memorandum, "EB-5 Adjudications Policy" (May 30, 2013).

in a reasonable time.<sup>24</sup> The loss of the capacity to claim indirect employment that is needed to meet job creation requirements may be cured by affiliation of the project with a substituted regional center. The underlying assumption in support of the I-526 petition, that investors would be permitted to rely on indirect employment creation, remains intact and investors continue the ability to create required employment<sup>25</sup> When there have been no other changes in the project's business plan. This outcome presumes that the new regional center was approved prior to the project's affiliation and retained its authorization until the I-829 was adjudicated. The principal place of business of the project must be within the boundaries of the substituted regional center, and the substituted regional center likely will be required to have claimed the NAICS codes relevant to the project's business sectors prior to the project's affiliation.

Should the loss of affiliation with the original, authorized regional center happen after an investor has obtained conditional lawful permanent residence, the investor could proceed to file for the removal of conditions on his residence if the project affiliates with a substituted regional center. Inasmuch as there is no change in the project's business plan and investors may continue to rely upon indirect employment to meet employment creation requirements, Under existing guidance and procedures USCIS should not revoke prior EB-5 benefits and require the filing of a new I-526. The same prerequisites would apply regarding the location of the principal place of business of the project within the boundaries of the regional center and the pre-existing claim to needed NAICS codes in support of the project's business activities.

Applicants and petitioners must satisfy the requirement that they are eligible for a benefit when it is sought and continue to be eligible for the benefit until the application or petition is adjudicated. Investors should continue to meet this requirement if their investment project substitutes affiliation with a qualified regional center for the affiliation with a regional center that lost its authority to sponsor EB-5 projects.<sup>26</sup>

#### Options After a USCIS Denial

If USCIS denies the I-829 petition and provides written notice, a Notice to Appear may be issued to initiate removal proceedings.<sup>27</sup> The denial notice will advise that the conditional resident's status, and that of any spouse and children, is terminated and that the investor must

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<sup>24</sup> 8 C.F.R. 216.6(a)(4)(iv).

<sup>25</sup> *Id.*

<sup>26</sup> 8 C.F.R. 103.2(b)(1).

<sup>27</sup> 8 C.F.R. 216.6(d)(2).

surrender to the field office any previously-issued permanent resident card.<sup>28</sup> An employment authorization document can be secured by the investor while the case remains in proceedings.

Under the federal immigration regulations, no appeal is available for the denial. However, the regulations do provide for *de novo* review of the decision before an immigration judge under much the same guidelines as when a marriage-based removal of conditional status is denied by USCIS. During the proceedings, the burden will be on the Government to prove by a preponderance of the evidence that the facts and information in the petition are not true and/or that the petition was properly denied.

It has been the author's experience that due to the heretofore scarcity of EB-5 removal of conditions cases, the vast majority of trial attorneys and judges are completely unfamiliar with the EB-5 category and the resultant issues to be proven. With the shifting of the burden to the government, there can be high risk/high reward strategies when investment funds or options are exhausted and reinvestment in a new project is no longer possible.

### ***Conclusion***

Owners and developers should be aware of the legal authority to terminate regional centers and should adjust their practices to document ongoing regional center viability. Not only can careful planning reduce economic loss and litigation for potential investors, it may give developers the opportunity to adjust their practices so as to structure and operate their current or future regional centers successfully. Specific and applicable lessons can be learned from previous regional center failures.

Developers and other industry stakeholders can learn much from the terminations of Regional Centers. In particular:

1. The financial projections need to make sense, independent of the immigration issues;
2. The financial arrangements, identification of all fees and all parties and agents participating and receiving fees should be disclosed and memorialized;
3. Developers cannot sit on a Regional Center designation. They must attract investors, and begin activity, or the approval can be revoked;
4. USCIS can gather contradictory or negative financial information from a variety of public, private and intra-agency sources, which may trigger revocation;

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<sup>28</sup> AFM 25.2(e)(7)(B)

5. The experience and track record of the managers of the regional center and the developers of the projects are relevant to the long term success of the investments;
6. The economic projections need to be realistic, and perhaps conservative to survive the 5-10 years that a developer could be dependent on USCIS review and approval;
7. Merely because a project's business plan supports significant job creation estimates, does not mean developers and investors should rely on the most optimistic projections. Developers should solicit fewer investors than optimistic projections support.
8. Do unto others as you would have them do unto you;
9. Be prepared to document exhaustively every aspect of the regional center and its projects;  
and,
10. Do not skimp on professional guidance because every investor is a potential litigant.