U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-K-K-

DATE: JULY 26, 2017

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

PETITION: FORM I-526, IMMIGRANT PETITION BY ALIEN ENTREPRENEUR

The Petitioner seeks classification as an immigrant investor pursuant to the Immigration and Nationality Act (the Act) section 203(b)(5), 8 U.S.C. § 1153(b)(5). This fifth preference (EB-5) classification makes immigrant visas available to foreign nationals who invest the requisite amount of qualifying capital in a new commercial enterprise (NCE) that will benefit the United States economy and create at least 10 full-time positions for qualifying employees. Foreign nationals may invest in a project associated with a United States Citizenship and Immigration Services (USCIS) designated regional center. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, section 610, as amended.

The Chief of the Immigrant Investor Program Office denied the Form I-526, Immigrant Petition by Alien Entrepreneur, concluding that the Petitioner could no longer rely on an investment in a project associated with a since-terminated regional center as a basis for eligibility.

On appeal, the Petitioner submits briefs and supporting evidence consisting of documentation filed in the regional center proceeding.[1] The Petitioner asserts that the regional center should regain its designation. The Petitioner further maintains that the Chief's failure to provide the Petitioner notice of the "intended termination" and termination of the regional center before denial of the Form I-526 violated both Department of Homeland Security (DHS) regulations and constitutional due process.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

A foreign national may be classified as an immigrant investor if he or she invests the requisite amount of qualifying capital in an NCE. With some limitations, it can be any lawful business that engages in for-profit activities. The foreign national must show that the NCE will benefit the United States economy and create at least 10 full-time jobs for qualifying employees.

[1] As acknowledged by the Petitioner in a supplement, we dismissed the regional center's appeal of the termination. At the time the Petitioner filed an addendum, the regional center's motion to reopen and motion to reconsider that decision were before us. We subsequently denied both motions.

An immigrant investor may show that at least 10 qualifying employees have been directly hired by the NCE. Alternatively, an immigrant investor may also invest "within a regional center,"[2] which is an economic unit involved with the promotion of economic growth.[3]

Regional centers apply for designation as such with USCIS, and must file annual supplements to show their continued eligibility for designation. 8 C.F.R. § 204.6(m). In many cases, they identify and work with NCEs, which in turn are associated with a specific project completed by a "job creating entity." A project could be a new office building, mixed-use development project, or other tangible initiative by the business(es) most closely responsible for the qualifying job creation. Regional centers can concentrate the pooling of immigrant (and other) investor funds for qualifying projects that create jobs, and allow an immigrant investor to rely on indirect job creation if supported by reasonable methodologies evidencing it. 8 C.F.R. § 204.6(j)(4)(iii). USCIS may terminate the designation of a regional center that no longer serves the purpose of promoting economic growth. 8 C.F.R. § 204.6(m)(6).

II. PROCEDURAL HISTORY

The Petitioner filed an investor petition based on an investment through the then USCIS-designated regional center (the Regional Center). The petition identified the NCE as (the NCE). The business plan explained that the NCE and another limited partnership would raise $122,000,000 from 244 foreign investors, to be loaned to the job creating entity, (the JCE), for the construction and development of a mixed-use facility in downtown .

The Chief terminated the Regional Center's designation in March 2016, finding that: (1) it was no longer serving the purpose of promoting economic growth through the two commercial enterprises under its sponsorship; (2) it was diverting funds from job creating purposes, and (3) it was not meeting the monitoring and oversight responsibilities set forth in its designation letter. Soon after, the Chief denied the instant petition, concluding that the Petitioner could no longer demonstrate eligibility by relying on an investment through the terminated Regional Center. In November 2016, we dismissed the Regional Center's appeal of the termination. In June 2017, we denied its motion to reopen and motion to reconsider that decision.

III. ANALYSIS

The Petitioner advances three related arguments. First, in the initial appellate brief, the Petitioner maintains that the Chief prematurely denied the investor petition before the adjudication of the Regional Center's appeal. Second, in a supplemental filing, the Petitioner contends that the Regional Center's motion is meritorious because it is promoting economic growth, which should result in it regaining its designation and render the Petitioner's investor petition approvable. Third,

[2] 8 C.F.R. § 204.6(m)(7).
[3] 8 C.F.R. § 204.6(e) (defining "regional center").

the Petitioner asserts that the denial of the petition cannot stand because it was based on derogatory information – specifically, the Regional Center termination and the grounds for that termination – that the Chief did not communicate to the Petitioner prior to denying the petition. The Petitioner maintains that this lack of notice and opportunity to rebut the "intended termination" and termination of the Regional Center prior to the denial violated both DHS regulations and the U.S. Constitution's Due Process Clause. For the reasons below, we will dismiss the appeal.

A. Timing of the Denial

The Petitioner's initial assertion that the denial was premature is ultimately unavailing. While the Chief could have elected to wait for resolution of the Regional Center's appeal before denying the investor petition, the Petitioner has not shown that there is an affirmative legal requirement to do so. The Petitioner's eligibility for EB-5 classification was premised on an investment through a USCIS-designated regional center and indirect job creation. Once USCIS terminated the designation of the Regional Center associated with this petition, the Petitioner was unable to demonstrate an investment (A) "within a regional center designated by [USCIS]" as required under 8 C.F.R. § 204.6(j); (B) that the NCE was "located within a regional center approved for participation in the Immigrant Investor . . . Program" so as to rely on indirect job creation under 8 C.F.R. § 204.6(j)(4)(iii); or (C) that "his or her qualifying investment is within a regional center approved pursuant to [the applicable regulations]" under 8 C.F.R. § 204.6(m)(7). Indeed, the Petitioner appears to concede ineligibility for EB-5 classification based on the instant petition so long as the Regional Center's designation remains terminated. *See* Petitioner's Supplemental Brief at 3 ("If the AAO reinstates [redacted] designation, the AAO should sustain Petitioner's appeal and order the I-526 petition approved . . . . Alternatively, the AAO should remand the I-526 petition to allow the [Chief] to adjudicate the petition on its merits.")

Moreover, the timing of the Chief's denial of the Petitioner's Form I-526 and the resolution of the Regional Center's appeal does not have an impact on the instant proceeding at this time because we have since dismissed the Regional Center's appeal. (In June 2017, we also denied the Regional Center's motions to reopen and reconsider that decision.) Accordingly, the Petitioner's arguments that the Regional Center continued to administratively challenge its termination, and the Petitioner's requests that adjudication of the Form I-526 and the current appeal be withheld until the Regional Center's appeal and motions had been decided, are now moot.

B. The Regional Center's Promotion of Economic Growth

We decline to address the Petitioner's substantive contention that the Regional Center is promoting economic growth. We have already determined in the separate proceeding that it is not and, accordingly, upheld the termination of the Regional Center's designation.

C. Notice and Opportunity to Respond Before Denial

The Petitioner further maintains that the Chief's failure to notify and provide the Petitioner an opportunity to rebut the "intended termination" and termination of the Regional Center prior to denial of Form I-526 violated both DHS regulations and constitutional due process. Whether conferred on constitutional, statutory, or regulatory grounds, what the Petitioner ultimately seeks is notice and an opportunity to respond. As discussed below, we find no error in the Chief's conduct of those proceedings without individual investor participation in, or notice of, the center's termination prior to denying its associated investors' petitions.

1. Constitutional Due Process

The Petitioner argues that the Constitution's Due Process Clause required USCIS to afford the investor-petitioner notice and a "meaningful opportunity to present evidence or argument in opposition to the regional center's termination."[4] Specifically, the Petitioner states that "[w]here the viability of Petitioner's I-526 turned on USCIS's decision to terminate [redacted] regional center designation, basic Due Process principles required USCIS to provide Petitioner with notice of the intended grounds for denial and an opportunity to contest them."[5] USCIS administers the EB-5 program pursuant to statutory and regulatory authorities, and the Petitioner does not argue that a specific provision of the EB-5 statute or regulations is unconstitutional. To the extent that the Petitioner's due process argument had been grounded in the constitutionality of the EB-5 statute and regulations, we lack jurisdiction to rule on the constitutionality of laws enacted by Congress or of regulations promulgated by DHS. *See, e.g., Matter of Fuentes-Campos*, 21 I&N Dec. 905, 912 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992). Therefore, we will consider the Petitioner's process concerns as they relate to whether USCIS complied with the applicable statute and regulations.

2. Statutory Process

To bolster the constitutional due process argument, the Petitioner relies on a recent case affording a beneficiary standing to participate in proceedings to revoke its employer-petitioner's petition. *Mantena v. Johnson*, 809 F.3d 721, 734 (2d Cir. 2015). It is important to note, however, that, in *Mantena*, the court was actually engaged in an act of statutory construction, not constitutional analysis. In that case, the Court of Appeals for the Second Circuit construed the portability provision in section 106(c)(1) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC-21) (enacted at section 204(j) of the Act, 8 U.S.C. § 1154(j)). That provision allows a beneficiary of a valid Form I-140, Immigrant Petition for Alien Worker, whose adjustment of status application has been pending for more than 180 days, to change jobs or employers without a separate labor certification or Form I-140 petition. The court found that Congress established "portability" to

[4] Petitioner's Supplemental Brief at 4. The Petitioner relies on *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) for the proposition that the Constitution requires an opportunity to be heard in a meaningful time and manner.
[5] Petitioner's Supplemental Brief at 4.

afford beneficiaries new flexibilities during processing delays and no longer require them to remain tethered to the original petitioning employer. *Mantena*, 809 F.3d at 734. In so doing, the court reasoned, Congress placed these beneficiaries in the AC-21 statute's "zone of interests," giving them standing to sue in federal court. The court ultimately remanded the case for a determination of whether the beneficiary – or the subsequent employer – was the proper party to be allowed to participate in revocation proceedings relating to the original employer's petition.

Mantena is inapposite.[6] In the AC-21 context, the statute's focus, as confirmed by the legislative history, concerned the difficulties employee beneficiaries endured in the face of processing delays relating to their adjustment applications. As a result, these beneficiaries plainly fall within the statute's zone of interests because Congress created the statutory language expressly for their benefit. Here, in contrast, we do not perceive a congressional intent to directly benefit the investor-petitioners; rather, the focus of the legislation is on the promotion of economic growth. Section 610(a) of the 1992 Appropriations Act, which established the regional center pilot program, provides in pertinent part:

> [The EB-5] program shall involve a regional center in the United States, designated by the Secretary of Homeland Security on the basis of a general proposal, for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment. A regional center shall have jurisdiction over a limited geographic area, which shall be described in the proposal and consistent with the purpose of concentrating pooled investment in defined economic zones. The establishment of a regional center may be based on general predictions, contained in the proposal, concerning the kinds of commercial enterprises that will receive capital from aliens, the jobs that will be created directly or indirectly as a result of such capital investments, and the other positive economic effects such capital investments will have.

The statutory text does not exhibit any sign that Congress was concerned with individual investors in the context of creating the regional center framework. The statute simply states that DHS may designate regional centers and makes only passing reference to the ("alien") investors as a source of capital in a program to concentrate pooled investment in specific geographic areas of the United

[6] In like manner, the Petitioner cites *Kurapati v. USCIS*, 767 F.3d 1185 (11th Cir. 2014), a case that also concerns beneficiaries' ability to port under the AC-21 statute and is likewise inapposite to the EB-5 context here. Lastly, the Petitioner cites *Ilyabaev v. Kane*, 847 F. Supp. 2d 1168, 1177-78 (D. Ariz. 2012) (finding that a porting beneficiary was entitled to notice of and an opportunity to rebut derogatory information under the applicable regulations about his qualifying experience in the context of the adjudication of his application for adjustment of status). While *Ilyabaev* is also distinguishable because it relates to AC-21 cases, the facts help illustrate why the AC-21 and EB-5 contexts are distinct and warrant different outcomes with respect to others' participation in proceedings. In *Ilyabaev*, the derogatory information related specifically to that beneficiary (namely, his qualifying experience). In this EB-5 context, the individual investor possesses no unique evidence relating to the regional center's ability to continue promoting economic growth. Regional center designations and terminations do not turn on issues pertaining to one or more of the pooled investors.

States. It is true that Congress incentivized this pooled investment model by allowing immigrant investors to use indirect jobs in satisfying the job creation requirement as opposed to the direct jobs initially required.[7] But the clear purpose of the regional center program was the promotion of economic growth in specified economic zones in the United States. And, both the direct and indirect jobs had to benefit United States citizens or noncitizens lawfully present in the United States. Accordingly, we do not conclude that Congress intended to directly benefit *potential* immigrant investor-petitioners when it created the regional center program as it specifically did in the context of AC-21 with beneficiaries of *approved* I-140 immigrant petitions. It therefore follows that the statutory scheme does not require us to construe either it or the related DHS regulations to afford investors an opportunity to participate in regional center proceedings.

3. Regulatory Process

The Petitioner next maintains that the provisions at 8 C.F.R. § 103.2(b)(16)(i) require the Chief to provide notice of, and an opportunity to rebut, "derogatory information . . . of which the [petitioner] is unaware." The Petitioner asserts that USCIS' termination of the Regional Center's designation and the grounds underlying such termination constituted derogatory information and thus required advance notification to the Petitioner.

Even if the termination of a regional center, in a separate proceeding, could constitute derogatory information for (b)(16) purposes in the context of this (or any) Petitioner's visa petition adjudication, the Chief's failure to notify is harmless error because the Petitioner has not established how the Chief's failure prejudiced the Petitioner. *See Matter of Hernandez*, 21 I&N Dec. 224, 226 (BIA 1996) (stating that "the violation of a regulatory requirement invalidates a proceeding only where the regulation provides a benefit to the alien and the violation prejudiced the interest of the alien which was to be protected by the regulation").

To understand why, it is useful to distinguish between regional centers and new commercial enterprises (NCEs). Investor-petitioners do not invest in regional centers and have no ownership interest in them. Instead, investor-petitioners purchase an interest in an NCE. Where the NCE is affiliated with a regional center, the investor-petitioners typically pay administrative fees as part of the subscription process in return for the benefits of being associated with a regional center. That is largely the extent of an immigrant investor's role or involvement in the administration of a regional center. It is difficult to conceive how an individual investor would have meaningful, non-duplicative information to contribute to a proceeding related to the continued viability of a regional center, the entity clearly in the best position to defend its designation.

[7] The legislative history confirms this focus. *See* S. Rep. No. 102-331 (1992), stating:

> The Committee intends that in implementing this provision, the Immigration and Naturalization Service [now USCIS] will allow immigrants participating in the pilot program to credit not only those jobs which they create directly, but also those which may be created indirectly such as through contract, subcontract, or export revenues benefiting the general economy.

Reflecting this practical distinction between regional centers and individual investors, the specific regulations governing regional center designations and terminations prescribe processes that are wholly independent of individual investors. *See* 8 C.F.R. § 204.6(m)(3)-(6). These designation regulations make no mention of individual investors. In fact, as noted above, a regional center's designation typically occurs before individual investors are even solicited, let alone identified and brought on board. Even at a stage when individual investors may be known, the termination regulation requires USCIS to notify the *regional center* of its intent to terminate, and subsequent decision to terminate, that center's designation. 8 C.F.R. § 204.6(m)(6). Accordingly, the EB-5 regulations did not require the Chief to notify the Petitioner of the regional center's "intended termination."

Only *after* USCIS has terminated a regional center do the regulations require USCIS to provide formal written notice to investors who have obtained conditional permanent residence through that regional center, but have not yet had those conditions removed, informing them that their conditional status will terminate unless the investors can establish continuing eligibility. 8 C.F.R. § 204.6(m)(9). While the Petitioner in this matter had not already received conditional permanent resident status, such that subparagraph (m)(9) even applies, it remains that no EB-5 regulation requires notice to individual investors at any stage of their immigration process prior to the termination of a regional center.

Finally, even if the Chief should have notified the Petitioner of the termination of the regional center's designation, the Petitioner has had the opportunity to speak to that termination on appeal to this office. Furthermore, the Petitioner has offered no concrete evidence of prejudice or harm resulting from the Chief's lack of notice and, for the reasons set forth above, we would not expect that any would be forthcoming. While we are aware of the unfortunate circumstances that surround the immigrant investor investing through a regional center whose designation is terminated during the course of that individual's EB-5 immigration process, neither the law nor the regulations at present contemplate any relief that USCIS is able to provide.

IV. CONCLUSION

An immigrant investor seeking an EB-5 visa through the Immigrant Investor Program "must demonstrate that his or her qualifying investment is within a regional center approved [by USCIS] and that such investment will create jobs . . . ." 8 C.F.R. § 204.6(m)(7). Here, USCIS terminated the Regional Center's designation, and we are not persuaded by the Petitioner's reasons for revisiting that termination decision in the context of this individual investor petition. There being no regional center at this time associated with the petition, we conclude that the Petitioner has not demonstrated eligibility for the immigrant investor classification.

ORDER: The appeal is dismissed.

Cite as *Matter of H-K-K-*, ID# 387245 (AAO July 26, 2017)