U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-N-

DATE: JULY 28, 2017

MOTION ON ADMINISTRATIVE APPEALS 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. We dismissed a subsequent appeal.

The Petitioner now files combined motions to reopen and to reconsider our previous decision. On motion, the Petitioner submits a brief and supporting evidence consisting of documentation filed in the regional center proceeding. 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 review, we will deny the motions.

I. LAW

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). The regulation at 8 C.F.R. § 103.5(a)(2) does not define what constitutes a "new" fact, nor does it mirror the Board of Immigration Appeals' (the Board) definition of "new" at 8 C.F.R. § 1003.23(b)(3) (stating that a motion to reopen will not be granted unless the evidence "was not available and could not have been discovered or presented at the former hearing"). Unlike the Board regulation, we do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, we interpret "new facts" to mean facts that are relevant to

the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of USCIS or DHS policy.

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.

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,"[1] which is an economic unit involved with the promotion of economic growth.[2]

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

[1] 8 C.F.R. § 204.6(m)(7).
[2] 8 C.F.R. § 204.6(e) (defining "regional center").

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 and then dismissed this investor's appeal. In our appellate decision on the petition, we found that the Chief did not err in denying the investors' petitions before final agency action on the Regional Center termination or by not reopening them during the pendency of the Regional Center's appeal. We then found that the termination of the Regional Center precluded the Petitioner from demonstrating eligibility without an impermissible material change. Finally, we rejected the Petitioner's attempt to advance a collateral challenge to the separate Regional Center proceeding. In June 2017, we denied the Regional Center's motion to reopen and motion to reconsider our decision on its appeal.

III. ANALYSIS

The Petitioner advances three related arguments. First, the Petitioner acknowledges that we correctly withheld adjudication of the appeal until after dismissing the Regional Center's appeal, but maintains that the motion constitutes a new circumstance that supports reopening of the Form I-526. Second, 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 affiliated investor petitions approvable. Third, the Petitioner asserts that the denial of the petition cannot stand because it was based on derogatory information, specifically, the Regional Center 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 participate in the *Regional Center's* termination proceeding or to at least receive notice of the termination prior to the denial violated both DHS regulations and the U.S. Constitution's Due Process Clause. For the reasons below, we will deny the motions.

A. Timing of the Denial

Cognizant of petitioner-investors' dependence on an approved regional center to pursue EB-5 immigration benefits, we reserved our review of the Petitioner's appeal on the denial of the petition until after the conclusion of the Regional Center's appeal. Similarly, we withheld adjudication of the current motions until completing additional administrative proceedings, specifically, the Regional Center's motions that followed our final agency action on its appeal. Accordingly, as we have now denied the motions that the Regional Center filed, they are not new facts that warrant reopening the instant proceeding.

B. Notice and Opportunity to Participate in the Regional Center Proceedings

We previously declined to address the Petitioner's substantive contention that the Regional Center is promoting economic growth. We have already determined in a separate proceeding that it is not and, accordingly, upheld the termination of the Regional Center's designation. The Petitioner's motion to reconsider relies on several legal authorities for the proposition that investors should be permitted to participate in a regional center proceedings.

Specifically, the Petitioner 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 the 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 or our rejection of a collateral challenge on appeal.

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."[3] 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." 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 its 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). In *Mantena*, the court was actually engaged in an act of statutory construction, not constitutional analysis. The Court of Appeals for the Second Circuit construed the portability provision in section 106(c)(1) of the American Competitiveness in

[3] Petitioner's Motion Brief at 7. 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.

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 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.[4] 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 investors-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.

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[4] In like manner, the Petitioner cites *Kurapati v. USCIS*, 767 F.3d 1185 (11th Cir. 2014). That case 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.

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 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.[5] 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

[5] 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.

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.

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. Accordingly, the legal authorities the Petitioner cites on motion do not demonstrate that our prior decision was in error.

IV. CONCLUSION

An immigrant investor seeking an EB-5 visa through a regional center "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 that the legal authorities the Petitioner cites relating to due process demonstrate that our prior decision dismissing the appeal after taking the same action on the

Regional Center's appeal was in error. There being no regional center at this time to support the Petitioner's investment, the Petitioner has not offered new facts that warrant reopening.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of J-N-*, ID# 413212 (AAO July 28, 2017)