U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-F-R-C-

DATE: MAR. 24, 2017

APPEAL OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

APPLICATION: FORM I-924, APPLICATION FOR REGIONAL CENTER UNDER THE IMMIGRANT INVESTOR PILOT PROGRAM

In 1990 Congress established the EB-5 program[1] to promote economic growth in the United States through foreign investment.[2] Investors who comply with the program's requirements first receive conditional status, followed by the opportunity for the removal of conditions and permanent resident status. Investors may fund their own projects, or invest through a U.S. Citizenship and Immigration Services (USCIS) designated regional center.[3] The Applicant seeks initial designation as a regional center, as well as approval of a proposed actual project with an exemplar.

The Chief of the Immigrant Investor Program Office (Chief) found that the Applicant did not provide sufficient documentation to demonstrate 1) that it qualified for designation as a regional center, or 2) that its proposed exemplar project warrants approval. The Chief cited the unsatisfactory qualifications of proposed regional center employees, as well as unresolved issues regarding the Applicant's job counting and project details.

On appeal, the Applicant submits a brief arguing that the Chief erred in both of his findings. It states that the Chief's decision, particularly regarding the denial of the initial designation, is arbitrary and capricious. It also argues that the unresolved project related issues are not significant enough to warrant denial.

Upon *de novo* review, we will remand the decision for the issuance of a decision consistent with the following.

I. LAW

A. Regional Center Designation

USCIS may designate an entity as a regional center based on a general proposal for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or

[1] The EB-5 program, as it is commonly called, issues employment-based fifth preference visas.
[2] *See* Immigration Act of 1990, section 121(b)(5).
[3] *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (Appropriations Act) § 610, as amended.

increased domestic capital investment. Appropriations Act § 610, as amended. The showing that a regional center will more likely than not promote economic growth may be based on general predictions concerning the kinds of commercial enterprises that will receive capital from immigrant investors, 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 haveon the area. *Id.*

The implementing regulation at 8 C.F.R. § 204.6(m)(3) indicates that an entity that wishes to apply for regional center designation shall submit a proposal that:

> (i) Clearly describes how the regional center focuses on a geographical region of the United States, and how it will promote economic growth through increased export sales, improved regional productivity, job creation, and increased domestic capital investment;
>
> (ii) Provides in verifiable detail how jobs will be created indirectly through increased exports;
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> (iii) Provides a detailed statement regarding the amount and source of capital which has been committed to the regional center, as well as a description of the promotional efforts taken and planned by the sponsors of the regional center;
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> (iv) Contains a detailed prediction[4] regarding the manner in which the regional center will have a positive impact on the regional or national economy in general as reflected by such factors as increased household earnings, greater demand for business services, utilities, maintenance and repair, and construction both within and without the regional center; and
>
> (v) Is supported by economically or statistically valid forecasting tools, including, but not limited to, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and/or multiplier tables.

B. Actual Project with Form I-526 Exemplar

To show that the regional center will promote economic growth, applicants may submit proposals for hypothetical or actual projects. The amount of verifiable detail required depends on the type of project proposed. Actual project proposals require the submission of a *Matter of Ho*[5] compliant

[4] An applicant can submit a general prediction which addresses the prospective impact of the capital investment projects sponsored by the regional center, as indicated in the language of the Appropriations Act, described in the preceding paragraph.

[5] 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998).

business plan.[6] Applicants submitting actual project proposals may also choose to file an exemplar investor petition with additional project documents. If approved, both actual and exemplar projects will be accorded deference in subsequent related filings, barring mistake of law or fact, fraud, or material misrepresentation.[7] In contrast, hypothetical projects do not require *Matter of Ho*-compliant business plans. For approval as a hypothetical project, a regional center must meet a more lenient standard, namely, it must show in verifiable detail how it will positively impact economic growth. If approved, a hypothetical project will not receive deference in future filings.[8]

II. ANALYSIS

The Chief's denial addresses two questions: A) whether the Applicant merits designation as a regional center, and B) whether the Applicant's actual project proposal accompanied by exemplar should be approved. We address each in turn.

A. Regional Center Designation

The sole reason identified by the Chief for denying the Applicant's request for initial regional center designation was that the Applicant did not show how the backgrounds and skills of proposed Operations Manager, and proposed Marketing Director, are related to operating and managing a regional center.[9]

Operations Manager, has a bachelor's degree in business administration from According to the Applicant, he has 15 years of experience in the hospitality and technology industries, and for the past 6 years has managed four hotels. Marketing Director, has a bachelor's degree in business administration from The Applicant states that she has more than 30 years of experience of managerial and marketing experience in the hotel industry.

On appeal, the Applicant states that the regulations do not identify certain qualifications needed to operate a regional center. It notes that the Chief does not specify functions or duties that

[6] A *Matter of Ho* business plan must include the following components: (1) a description of the business; (2) business structure and objectives; (3) a marketing plan with target market analysis; (4) personnel experience; (5) competitive analysis; (6) required licenses and permits; (7) a staffing timetable for hiring; (8) job descriptions; and (9) budget and financial projections. Additionally, the overriding requirement of *Matter of Ho* is that the business plan must be credible.

[7] USCIS Policy Memorandum PM-602-0083 (2013 Policy Memo), *EB-5 Adjudications Policy* 14 n.2 (May 30, 2013), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20(Approved%20as%20final%205-30-13).pdf.

[8] *Id.* at 14 n.3.

[9] The denial cites 8 C.F.R. § 204.6(m)(6), the regulation related to the "Continued participation requirements for regional centers," whereas we are concerned here with the regulation at 8 C.F.R. § 204.6(m)(3), related to "Requirements for regional centers." Although evidence tending to show that a regional center would not be able to meet continued participation requirements could be relevant for a determination regarding its initial designation, the Chief does not articulate any basis for such an assumption related to continuing participation requirements in this case.

and [redacted] are unsuitable to accomplish. Lastly, it points to the provided list of various specialists it plans to employ for tasks that require professional expertise.

Although the Applicant provided information on the backgrounds of [redacted] or [redacted] the Chief did not discuss the qualifications cited or otherwise explain his conclusion. More importantly, the Chief did not indicate why his conclusion regarding the backgrounds of [redacted] or [redacted] means that the Applicant does not merit designation as a regional center. In particular, the Chief did not identify deficiencies related to the legal requirements for designation as a regional center, such as funding regional center operations, promotional efforts, or job creation.[10] *See* 8 C.F.R. § 204.6(m)(3).

We will withdraw this portion of the Chief's decision and remand for an analysis of the Applicant's request for initial designation that addresses whether the evidence provided meets the regulatory requirements for designation.

B. Actual Project with Form I-526 Exemplar

Accompanying its initial designation request, the Applicant submitted an actual project proposal with a Form I-526 exemplar. The business plan and economic analysis provided indicate that the project involves lending investor funds to finance the purchase and renovation of [redacted] located in [redacted] California. Improvements would increase the 263-unit hotel to 290 rooms, and upgrade the quality of amenities throughout.

1. Bridge Financing

As detailed in the 2013 Policy Memo, EB-5 funding may be used to replace bridge financing in certain situations:

> Generally, the replacement of bridge financing with EB-5 investor capital should have been contemplated prior to acquiring the original non-EB-5 financing. However, even if the EB-5 financing was not contemplated prior to acquiring the temporary financing, as long as the financing to be replaced was contemplated as short-term temporary financing which would be subsequently replaced, the infusion of EB-5 financing could still result in the creation of, and credit for, new jobs.[11]

[10] We address deficiencies the Chief did raise related to the exemplar project submitted by the Applicant in the next section. As noted below, we agree with the Chief that such deficiencies mean the project was not approvable as an exemplar project. However, importantly, the Chief does not cite these issues as reasons for denying the Applicant's designation request. We note that initial designations are often granted with a hypothetical project's level of detail regarding job creation.

[11] 2013 Policy Memo 15-16 (May 30, 2013).

In this case, the job creating entity (JCE) and developer, purchased the in 2012 for $16.5 million. In the initial submission received in March 2013, the Applicant estimated total project costs of approximately $35.4 million, which included the $16.5 million for the property acquisition. It indicated that EB-5 funds would cover approximately $32 million of the total cost. The Director found that the use of EB-5 funds to repay the $16.5 million was not an acceptable use of EB-5 funds, as it did not meet the requirements for permissible bridge financing.

As the 2013 Policy Memo indicates, bridge financing will be allowed in two situations. The first instance is when the replacement of bridge financing with EB-5 investor capital was contemplated prior to acquiring the bridge financing. In this case, the was purchased prior to the submission of the instant application. The Applicant has not provided information regarding the financing used for the purchase, and does not indicate that EB-5 funds were contemplated to replace that financing. The second allowable bridge financing situation is one in which, although EB-5 funds may not have been contemplated, the bridge financing was nevertheless seen as short term and soon to be replaced. Again, the Applicant has not provided information regarding the financing used to purchase the property, and does not indicate it was intended to be short term and replaced. The record is generally silent regarding the financing used and any intentions regarding payment. The Applicant has not shown that EB-5 capital was contemplated, or that the financing was otherwise intended to be replaced shortly thereafter.

Because the Applicant has not demonstrated that either of the conditions identified in the 2013 Policy Memo exists, we cannot conclude that the use of $16.5 million in EB-5 funds for the purchased property constitutes permissible bridge financing. As a result, the Applicant has not demonstrated that the use of $16.5 million in EB-5 funds to pay for the purchase of is an acceptable use of investor money.

2. New Jobs

To satisfy program requirements, the Applicant must demonstrate that any jobs for which it claims credit are new. The January 22, 2013, economic impact analysis submitted by the Applicant estimates that a total of 721.7 total jobs will be created. Of these, 525.7 jobs will result from hotel operations, as calculated based on the hotel's square footage.

The Applicant indicates that the hotel had not been in operation for a year at the time the JCE purchased it in December 2012. However, the evidence submitted does not support that statement. On the contrary, documentation provided shows that existing hotel staff was released because of the JCE's purchase of the building. The record contains a letter from the hotel's former owner to the local employee union with the subject "Pending Escrow Sale and Hotel Closure." The letter is dated September 27, 2012, and states in relevant part:

> [P]lease consider this letter as written notification of an established escrow account to sell the Real Property and Hotel Business . . . . The estimated closing date of escrow is November 30, 2012.
>
> Please be advised that due to the current condition of the hotel equipment and the expected hotel sale, we are forced to close the hotel operations effective October 31, 2012. The following Union Positions will be temporarily eliminated until the hotel is re-opened:
>
> 1. Hotel and Casino Housekeeping Room Attendants
> 2. Front Desk Agents
> 3. Hotel Housemen
>
> The housekeeping duties for the Casino will now be handled by the Maintenance Department. We anticipate the re-opening of the hotel operations by the 2nd quarter of 2013.

This letter implies that the hotel was operational and had employees up until the sale of the property to the JCE. We note that the Applicant has not otherwise provided evidence of the claimed closure. As a result, the Applicant has not shown that any primary or secondary jobs associated with the hotel's operations should be considered new.

The economic impact on analysis also estimates that 13.7 jobs will be created through lease revenue. The business plan revised February 2014 includes leases for the operation of the casino, as well as space rented by a local church. The JCE signed a 10-year lease with the property's previous owner for the casino space. The casino has operated continuously since the sale of the property, but the Applicant states that, because casino jobs are estimated based on the new lease, the jobs should be considered new. Regardless of whether a new methodology for estimating jobs is used, if the jobs existed previously, they cannot be counted toward EB-5 job creation requirements. The same principle applies in this case to jobs derived from a pre-existing lease with a local church that regularly rents space at [redacted] As the rents from the church lease existed previously, any jobs resulting from lease revenue are not new and cannot be counted towards job creation.

Because of these issues with the Applicant's method for counting job creation, we find that the Applicant has not demonstrated that 539.4 of the 721.7 claimed jobs are more likely than not new. As a result, it has not provided a credible *Matter of Ho* compliant business plan, and the Chief appropriately denied the proposed "actual project."

The Chief's Notice of Intent to Deny the application issued January 7, 2016, states: "If USCIS determines that the actual project does not comply with 8 CFR [§] 204.6(j) and Matter of Ho, but complies with the lesser standard for a hypothetical project, the Form I-924 Application may be approved without specifically identifying the project in the Form I-924 approval letter." In this case,

however, the Chief did not address whether the Applicant's proposed project meets the more lenient "hypothetical project" standard. On remand, the Chief should analyze whether the evidence in the record meets the requirements for a hypothetical project.

III. CONCLUSION

The Chief should discuss under existing legal authority, the merits of the Applicant's request for regional center designation. While we agree that the Chief properly denied the Applicant's proposal as an actual project, the Chief should consider whether the proposal is sufficient to meet the requirements of a hypothetical project.

ORDER: The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision, which, if adverse, shall be certified to us for review.

Cite as *Matter of A-F-R-C-*, ID# 142806 (AAO Mar. 24, 2017)