

USCIS Increases Oversight of EB-5 Regional Centers

By Stephen Yale-Loehr and Lindsay Schoonmaker*

The number of people obtaining green cards through the employment-based fifth (EB-5) preference category is increasing rapidly. Most EB-5 green cards are filed through "regional centers." These regional centers are designated by the U.S. Citizenship and Immigration Services (USCIS) to attract immigrant investors in specific geographic areas.[1]

As the number of EB-5 immigrant investor applicants ramps up, so too does the number of regional center applications. Likewise, USCIS is stepping up its review of new regional center applications and increasing oversight of existing regional centers to ensure that the EB-5 program grows in a responsible way. For example, in June 2007, Maurice Berez, Chief Adjudications Officer for the USCIS Foreign Trader, Investor & Regional Center Program, sent a letter to the Metropolitan Milwaukee Association of Commerce (MMAC), a regional center in Wisconsin.[2] The letter outlines 17 types of information that approved regional centers must track to keep their regional center designation.

The reporting requirements set forth in the MMAC letter mirror recent regional center decisions, which are growing ever longer and more detailed. In essence the USCIS is exercising greater oversight of regional centers in all aspects of the EB-5 process: (1) in granting or denying regional center status; (2) in maintaining regional center status; and (3) in monitoring compliance through immigrant investors' I-526 and I-829 petitions filed through regional centers.

A summary of 16 EB-5 regional center decisions from 2006 and 2007 shows six approvals for new regional centers, five amendment approvals, and two denials. The USCIS also requested updated information from two regional centers, one of which received two amendment approvals, and the other of which received a notice of intent to revoke its designation as a regional center.

Approvals (Pre-MMAC)

A successful regional center application is comprised of several items, including: (1) a clear delineation of the regional center's geographic scope; (2) the specific industries or economic activities in which investors in the regional center may invest; (3) a detailed economic report showing how investments in each economic activity will create or save 10 direct or indirect jobs per investor; (4) sample corporate documents such as a subscription agreement, operating agreement, and offering memorandum; and (5) a detailed marketing plan and budget.[3] A regional center must also indicate whether it plans to allow investments in targeted employment areas (TEAs) within the regional center. The statute defines a "targeted employment area" as a rural area or an area that has experienced high unemployment of at least 150 percent of the national average.[4] Investments in a TEA can be \$500,000 per investor; otherwise each investor must invest at least \$1,000,000.

Recent USCIS approvals of regional center applications have evolved in their detail. For example, the USCIS designated Whatcom Opportunities Regional Center, Inc. (WORC, Inc.) as a regional center in October 2006 with a two-page approval

notice.[5] This regional center targets assisted living facilities in Whatcom County, Washington. Almost all of Whatcom County is a TEA. Therefore most investments into the regional center can be \$500,000.

In April 2007, the USCIS granted Global Century Development Group I, LP (Global Century) regional center status for Houston's Chinatown district in a three-page approval notice.[6] The regional center targets five specific industries for the regional center's proposed businesses. This designation includes very specific streets and areas, all of which form a contiguous TEA.

In April 2007, the USCIS also approved a regional center application filed by the Pennsylvania Department of Community and Economic Development Regional Center (PDCED).[7] The regional center designation includes eight specific target industries and twenty-three contiguous counties in Western Pennsylvania. However, the USCIS denied PDCED's request to include an additional non-contiguous area in Eastern Pennsylvania. The approval notice was nearly identical to the one issued to Global Century.

Kansas Biofuel Regional Center, LLC received a three-page approval notice in April 2007.[8] This regional center covers twenty-one counties in southwestern Kansas and focuses on ethanol production. It is worth noting that this regional center used RIMS II, a commonly used econometric model, to show ongoing (post-construction) job creation, which is often a trouble area for regional center applicants that create temporary jobs during the creation of the business but cannot prove creation of enough permanent jobs for approval by the USCIS.

These recent approval notices demonstrate that to be successful, a regional center applicant must specify particular industries and contiguous geographic areas. They also need detailed economic reports demonstrating how jobs will be created in each industry sector. A closer look at some recent denials confirms these trends.

Denials

The USCIS denied two regional center applications in November 2006. Both applications had the same problems: no specific industry focus and too large a geographic area.

Pinnacle Enterprises, Inc. requested the whole state of California as its designated area.[9] The petition did not include evidence of TEAs, and there were no specific business plans outlined or industries targeted. Although the application mentioned construction as one possibility, there was no evidence that the job creation would be more than temporary employment. Therefore, this center did not prove enough jobs would be created through investment in it. Additionally, the USCIS decision stated that not all of the investor money was going to be at risk, as there was no evidence submitted with the petition that money existed in the center without investor support. Therefore, investor money would necessarily be used to support the regional center itself, rather than to fund the investor businesses and job creation. Also noted was the lack of subscription agreements, other legal documents, or evidence that marketing was already in progress to show that the center already existed and could exist without the investors' money. Overall, the petition was too vague.

The USCIS denied a regional center application filed by Ricodan, LLC for almost identical reasons.[10] Ricodan proposed construction projects in rural areas of King, Kitsap, Pierce, and Thurston counties in Washington state. The company did not present any evidence that the company already existed, had funding separate from the investors, or that it had a marketing plan in place. Ricodan also failed to provide documentation that all of the investors' money would be completely at risk. No evidence was included delineating rural or high unemployment areas, of creating permanent jobs, or documentation of how the investors' non-cash investments' market value would be determined. Additionally, the application lacked a valid forecasting tool to show the positive economic impact that projects in the regional center would have.

As evidenced by these two denials, the USCIS needs convincing evidence that a regional center is a true, existing business that will allow investors to put all of their money into very specific industries and geographic areas to create permanent jobs.

Pre-MMAC Amendment Approvals

Amendment approvals to existing regional centers also need to be specific. For example, in December 2006, the South Dakota International Business Institute, Dairy Economic Development Region (SDIBI/DEDR) received an amendment approval to expand their regional center to include meat processing and packing operations, cattle, pork, and other animal feedlots, and to eliminate the numeric threshold on herd size.[11] The USCIS approved these three very specific changes.

The City of New Orleans Regional Center received approval for an amendment in February 2007 to restart that regional center's activities after Hurricane Katrina.[12] The amended approval allows the regional center to engage in nine specific economic activities, largely focused on rebuilding New Orleans. The USCIS also extended the area covered by the regional center to include all of the Parish of Orleans, Louisiana. Another stipulation of the amendment is that the entity NobleReach-NOLA, LLC will act as an agent of the City of New Orleans to manage the regional center.

In March 2007 the California Consortium for Agriculture Export Regional Center (CCAEC) received an amendment approval to add a ninth area of business/industry to their existing business models.[13] The amendment allows investments in California Manufacturing and Engineering Company, a "troubled business," which manufactures and develops aerial work platforms and telescopic handlers for the construction industry.

In April 2007, the California Military Bases Export LLC Regional Center (CMB) received an amendment approval to improve infrastructure and funding methods.[14] In the amendment petition, CMB included a revised business plan, economic impact analysis, sample agreements, and a business model for both domestic and immigrant investors. The USCIS approved the regional center for six former military bases in California, with the amended criteria being that investor money could be put directly into improvement of infrastructure in the designated area by way of direct investment into both state and local government economic development authorities and private companies in the area.

Each of these amendment approvals is to the point and for very specific changes to the original regional center designation.

MMAC Letter – June 2007

As noted above, on June 12, 2007 the USCIS wrote the MMAC to elaborate on the administrative duties each EB-5 regional center must carry out. The USCIS also sent the same letter to all other approved regional centers. The MMAC letter sets forth 17 types of information each regional center must submit to the USCIS each federal fiscal year. Some of the information is simple recordkeeping data such as the name, birth date, alien registration number, nationality, city and state of residence for each immigrant investor. The regional center must also document its management activities, investor screening processes, and investment supervision. If the regional center has not attracted any investors recently, it must explain why and submit a plan for attracting investors. Regional centers must also notify the USCIS if they have made any changes concerning their structure, operation, or administration that require an amendment of their approval notice. Regional centers must also calculate the total money invested through the regional center for each fiscal year, as well as the total money invested into specific categories of business activities and the determination of how much money came from U.S. versus immigrant investors. The regional center must also list the total number of jobs created and/or preserved, as well as the names and locations of each company that received immigrant investors' money. Finally, the regional center should indicate the number of I-526 and I-829 petitions approved that fiscal year.

Approvals and Amendment Approvals (Post-MMAC)

Two approvals after the MMAC letter show the rising complexity of regional center designation and compliance. Southwest Biofuels Regional Center, LLC (SBRC) received regional center designation in June 2007 for a contiguous 49-county area in northwest Texas and western Oklahoma.[15] Like the Kansas regional center, SRBC focuses on ethanol facilities. The USCIS approval notice was six pages long. It included the 17 MMAC criteria and recommendations about extensive record keeping for new direct jobs and preserved jobs to verify employment creation at the I-829 stage.

The USCIS also designated the entire state of Alabama as a regional center in June 2007.[16] The Alabama Center for Foreign Investment (ACFI) focuses on five types of economic activities: (1) heavy and light manufacturing, agriculture; (2) high technology, construction; (3) hospitality, resort, and service industries; (4) schools, healthcare facilities, and infrastructure; and (5) cruise line support services. The ACFI approval notice is almost identical to the SBRC approval notice, including a warning about keeping extensive records about job creation and/or preservation to submit at the I-829 stage.

In August 2007, the PDCED requested an amendment to its designation from April 2007, requesting that one of its target industries be given more latitude in its scope so that the tourism-related business of entertainment/film production be allowed to film "on-site" in areas that are not necessarily part of the contiguous geographical boundaries set for the regional center in Western Pennsylvania.[17] The USCIS approved this amendment, giving latitude for the film industry to work "on-site" anywhere in Pennsylvania.

These post-MMAC approvals and amendments show that the USCIS is focusing more and more on job creation, especially at the I-829 stage. Even though I-526 petitions

filed through regional centers contain detailed forecasts of expected job creation or preservation, the USCIS wants concrete proof at the I-829 stage. This emphasis is understandable, since many EB-5 petitions succeed at the I-526 stage but fail two years later at the I-829 stage. USCIS statistics indicate that of the 476 I-526 petitions that were adjudicated in FY 2006, only 28% were denied, whereas of the 216 I-829 petitions that were decided that year, 50% were denied.[18] The USCIS is understandably concerned that immigrant investors' money must actually create or save the necessary number of jobs required by the statute. Telling regional centers in advance that they should keep detailed job records is one way to assure both the agency and investors that this statutory requirement will be met.

Requests for Updates: Two Interesting Case Studies

Two other interesting cases involve requests for updates from the USCIS.

The Hawaii Department of Business, Economic Development and Tourism (DBEDT) originally received designation as a regional center in 1995. The USCIS sent a letter in 2006 to DBEDT, requesting information on how the regional center was actually operating.[19] Based on DBEDT's response, the USCIS determined that the Hawaii regional center did not have enough oversight over its investors, did not provide details on their investors, and did not show enough job creation. Furthermore, their website was misleading and there were no separate funds set aside to administer the regional center without dipping into the investors' money. In April 2007, the USCIS sent a notice of intent to revoke the Hawaii center's designation. This proposed revocation illustrates that the USCIS is reviewing approved regional centers more carefully than it has in the past. DBEDT is now in the process of selecting an outside entity to administer the regional center for it.

The Vermont Agency of Commerce and Community Development Regional Center (VACCD) also is an interesting case study, as it had one amendment approval before the MMAC letter and one that coincided with the MMAC letter. The USCIS initially approved VACCD as a regional center for the entire state of Vermont in 1997. In 2006, the USCIS sent a letter requesting an update on the center. VACCD responded with a new business plan showing a broadening of investment areas, including resort expansion for a specific resort, Jay Peak, plus a plan to deal with troubled business issues.[20] The USCIS approved this amendment in March 2007 (pre-MMAC).

In June 2007, the USCIS approved another amendment for VACCD to add a project at Sugarbush ski resort.[21] Although broadening the scope of the March 2007 amendment, the June 2007 amendment was still industry-specific. This amendment approval was sent in conjunction with the MMAC letter, including the 17 MMAC recordkeeping criteria as well as the I-829 recommendation information.

Conclusion

The MMAC letter and the most recent approval notices indicate that the USCIS has evolved in its approach to EB-5 regional centers. In the beginning, when there were few EB-5 immigrant investors and only a handful of active regional centers, USCIS oversight was minimal. As the EB-5 program has grown and more regional centers are approved, the agency has intensified its oversight. Regional centers must now keep specific and thorough records and report to the USCIS on an annual basis. Failure to comply with reporting requirements may result in a regional center losing

its designation. Furthermore, investors could have trouble getting the conditions removed from their green cards. In the long run, such oversight is important to keep the EB-5 program growing responsibly.

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[1] A list of designated EB-5 regional centers is printed as an appendix to Stephen Yale-Loehr & Carolyn S. Lee, *EB-5 Immigrant Investors*, in AILA Immigration & Nationality Law Handbook 109 (2007-08 ed.). The list is also available at <http://www.millermayer.com/resources/immigrant/eb52.html> (last visited Oct. 21, 2007). See also <http://www.iiusa.org> (last visited Oct. 29, 2007). A list of active regional centers is available at <http://www.millermayer.com/new/stateregionalcenters.html> (last visited Mar. 6, 2008).

[2] Letter to Metropolitan Milwaukee Association of Commerce from Maurice R. Berez, Chief Adjudications Officer, Foreign Trader, Investor & Regional Center Program, U.S. Citizenship and Immigration Services (June 12, 2007), at <http://aila.org/Content/default.aspx?docid=22658> (AILA Doc. No. 07061360) (last visited Oct. 29, 2007).

[3] See 8 C.F.R. § 204.6(m)(3).

[4] INA § 203(b)(5)(B)(ii), 8 U.S.C. § 1153(b)(5)(B)(ii).

[5] Letter to Bellingham Whatcom Economic Development Council from Steve Bucher, Acting Chief of Service Center Operations, U.S. Citizenship and Immigration Services (Oct. 13, 2006).

[6] Letter to Global Century Development Group I, LP from Christina Poulos, Acting Chief, Service Center Operations, U.S. Citizenship and Immigration Services (Apr. 18, 2007).

[7] Letter concerning the Pennsylvania Department of Community and Economic Development Regional Center from Christina Poulos, Acting Chief, Service Center Operations, U.S. Citizenship and Immigration Services (Apr. 13, 2007).

[8] Letter to Kansas Biofuel Regional Center, LLC from Christina Poulos, Acting Chief, Service Center Operations, U.S. Citizenship and Immigration Services (Apr. 17, 2007).

- [9] Letter to Pinnacle Enterprises, Inc. from Paul E. Novak, Jr., Acting Chief for Service Center Operations, U.S. Citizenship and Immigration Services (Nov. 17, 2006).
- [10] Letter to Ricodan, LLC from Paul E. Novak, Jr., Acting Chief for Service Center Operations, U.S. Citizenship and Immigration Services (Nov. 17, 2006).
- [11] Letter to South Dakota International Business Institute from Paul E. Novak, Jr., Acting Chief for Service Center Operations, U.S. Citizenship and Immigration Services (Dec. 12, 2006).
- [12] Letter concerning the City of New Orleans Regional Center, Post-Katrina Amendment from Gerard Heinauer, Acting Chief, Service Center Operations, U.S. Citizenship and Immigration Services (Feb. 16, 2007).
- [13] Letter concerning the California Consortium for Agriculture Export (CCAEE) Amendment from John M. Allen, Acting Chief, Service Center Operations, U.S. Citizenship and Immigration Services (Mar. 19, 2007).
- [14] Letter concerning California Military Bases Export LLC Regional Center (CMB) Amendment from Christina Poulos, Acting Chief, Service Center Operations, U.S. Citizenship and Immigration Services (Apr. 18, 2007).
- [15] Letter to Southwest Biofuels Regional Center, LLC from John M. Allen, Acting Chief, Service Center Operations, U.S. Citizenship and Immigration Services (June 21, 2007), *at* <http://www.aila.org/Content/default.aspx?docid=22736> (AILA Doc. No. 07062660) (last visited Oct. 29, 2007).
- [16] Letter to Alabama Center for Foreign Investment, LLC from John M. Allen, Acting Chief, Service Center Operations, U.S. Citizenship and Immigration Services (June 11, 2007), *at* <http://www.aila.org/Content/default.aspx?docid=22656> (AILA Doc. No. 07061266) (last visited Oct. 29, 2007).
- [17] Letter concerning the Pennsylvania Department of Community and Economic Development Regional Center Amendment from John M. Allen, Acting Chief, Service Center Operations, U.S. Citizenship and Immigration Services (Aug. 3, 2007).
- [18] USCIS EB-5 Data 2006-2007, *at* <http://aila.org/content/fileviewer.aspx?docid=22384&linkid=161360> (last viewed Oct. 29, 2007).
- [19] Notice of Intent to Terminate the Designation of Hawaii's Department of Business, Economic Development & Tourism (DBEDT) as a Regional Center under the Immigrant Investor Pilot Program from Christina Poulos, Acting Chief, Service Center Operations, U.S. Citizenship and Immigration Services (Apr. 4, 2007).
- [20] Letter concerning the Vermont Agency of Commerce and Development (VACCD) Regional Center Amendment from John M. Allen, Acting Chief, Service Center Operations, U.S. Citizenship and Immigration Services (Mar. 19, 2007).

[21] Letter concerning the Vermont Agency of Commerce and Development (VACCD) Regional Center Amendment from John M. Allen, Acting Chief, Service Center Operations, U.S. Citizenship and Immigration Services (June 11, 2007), *at* <http://www.aila.org/Content/default.aspx?docid=22653> (AILA Doc. No. 07061263) (last visited Oct. 29, 2007).

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