

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

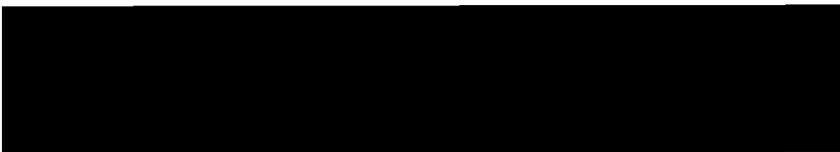
PUBLIC COPY



U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

K1



DATE: DEC 21 2011

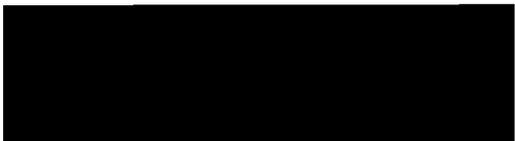
Office: CALIFORNIA SERVICE CENTER

FILE: 

IN RE: Applicant: REGIONAL CENTER OF VICTORVILLE DEVELOPMENT, INC.

APPLICATION: Proposal for Designation as a Regional Center Pursuant to Section 610(c) of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 103-121, 106 Stat. 1874 (1992).

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center (CSC), approved the applicant's proposal for designation as a regional center. Subsequently, the director issued a notice of intent to terminate and ultimately terminated the designation. The applicant filed a motion to reopen and reconsider before the director. After issuing a notice seeking clarification and additional evidence, the director reaffirmed the termination on motion. The matter is now before the Administrative Appeals Office (AAO) on certification. The AAO will affirm the director's decision to terminate the regional center approval.

The applicant was a designated regional center pursuant to section 610(c) of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, 106 Stat. 1874 (1992), as amended by section 116 of Pub. L. No. 105-119, 111 Stat. 2440 (1997); section 402 of Pub. L. No. 106-396, 114 Stat. 1637 (2000) and section 11037 of Pub. L. No. 107-273, 116 Stat. 1758 (2002). Regional centers allow pooled investments through the employment creation visa classification program set forth at section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5). The matter before the AAO is a termination of that designation.

Based on the totality of the evidence available, the AAO will affirm the director's initial basis of termination, reaffirmed by reference in the certified decision dated May 24, 2011. Specifically, the plan now before the AAO is essentially one of job preservation, not job creation. Job preservation is only permissible where the investment is in a troubled business, 8 C.F.R. § 204.6(j)(4)(ii). The applicant has not demonstrated, or even claimed, that the investors will be investing in a troubled business.

I. Procedural History

On June 19, 2009, the director designated the applicant as a regional center pursuant to section 610(c) of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, 106 Stat. 1874 (1992), as amended by section 116 of Pub. L. No. 105-119, 111 Stat. 2440 (1997); section 402 of Pub. L. No. 106-396, 114 Stat. 1637 (2000) and section 11037 of Pub. L. No. 107-273, 116 Stat. 1758 (2002). On May 4, 2010, upon reviewing updated information the applicant provided to U.S. Citizenship and Immigration Services (USCIS), the director issued a notice of intent to terminate the applicant's regional center status pursuant to 8 C.F.R. § 204.6(m)(6). After considering the applicant's response, the director issued a second notice of intent to terminate on August 10, 2010. The director considered the applicant's response to the second notice and terminated the applicant's regional center status on October 20, 2010.

On November 19, 2010, the applicant filed a motion to reopen and reconsider. The director issued a request for additional evidence on December 14, 2010. The director considered the applicant's response and issued a final notice of termination on May 24, 2011. The director certified the final decision to terminate the regional center to the AAO pursuant to 8 C.F.R. § 103.4. A response brief is now part of the record of proceeding.

The final notice of termination the director certified to the AAO on May 24, 2011 affirms the October 20, 2010 notice of termination. The final notice of termination the director certified to the AAO on

May 24, 2011 affirms the October 20, 2010 notice of termination and rejects the analysis submitted on motion.

II. Law

Section 203(b)(5) of Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5), as amended by Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

- (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
- (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

Section 610 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, 106 Stat. 1874 (1992), as amended, provides:

(a) Of the visas otherwise available under section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)), the Secretary of State, together with the Attorney General, shall set aside visas for a pilot program to implement the provisions of such section. Such pilot program shall involve a regional center in the United States, designated by the Attorney General 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.

* * *

(c) In determining compliance with section 203(b)(5)(A)(iii) of the Immigration and Nationality Act, and notwithstanding the requirements of 8 CFR 204.6, the Attorney General shall permit aliens admitted under the pilot program described in this section to establish reasonable methodologies for determining the number of jobs created by the pilot program, including such jobs which are estimated to have been created indirectly

through revenues generated from increased exports, improved regional productivity, job creation, or increased domestic capital investment resulting from the pilot program.

The regulation at 8 C.F.R. § 204.6(m) provides, in pertinent part:

(1) *Scope.* The Immigrant Investor Pilot Program is established solely pursuant to the provisions of section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, and subject to all conditions and restrictions stipulated in that section. Except as provided herein, aliens seeking to obtain immigration benefits under this paragraph continue to be subject to all conditions and restrictions set forth in section 203(b)(5) of the Act and this section.

* * *

6) *Termination of participation of regional centers.* To ensure that regional centers continue to meet the requirements of section 610(a) of the Appropriations Act, a regional center must provide USCIS with updated information to demonstrate the regional center is continuing to promote economic growth, improved regional productivity, job creation, or increased domestic capital investment in the approved geographic area. Such information must be submitted to USCIS on an annual basis, on a cumulative basis, and/or as otherwise requested by USCIS, using a form designated for this purpose. USCIS will issue a notice of intent to terminate the participation of a regional center in the pilot program if a regional center fails to submit the required information or upon **a determination that the regional center no longer serves the purpose of promoting economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.** The notice of intent to terminate shall be made upon notice to the regional center and shall set forth the reasons for termination. The regional center must be provided 30 days from receipt of the notice of intent to terminate to offer evidence in opposition to the ground or grounds alleged in the notice of intent to terminate. If USCIS determines that the regional center's participation in the Pilot Program should be terminated, USCIS shall notify the regional center of the decision and of the reasons for termination. As provided in 8 CFR 103.3, the regional center may appeal the decision to USCIS within 30 days after the service of notice. (Bold emphasis added.)

Thus, the authority to terminate the designation of a regional center applies to situations where the regional center no longer serves the purpose of promoting economic growth, including job creation.

The regulation at 8 C.F.R. § 204.6(j)(4)(ii) states:

Troubled business. To show that a new commercial enterprise which has been established through a capital investment in a troubled business meets the statutory employment creation requirement, the petition must be accompanied by evidence that

the number of existing employees is being or will be maintained at no less than the pre-investment level for a period of at least two years. Photocopies of tax records, Forms I-9, or other relevant documents for the qualifying employees and a comprehensive business plan shall be submitted in support of the petition.

The regulation at 8 C.F.R. § 204.6(e) defines a troubled business as follows:

[A] business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty per cent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

III. Facts

As stated above the applicant filed the proposal for designation as a regional center on January 15, 2009. The initial proposal was to use EB-5 investor funds for "a series of bridge loans to the Southern California Logistics Airport Authority ('SCLAA') from Limited Partnerships ('LP')." The projects proposed included:

- Key rail spur
- Industrial waste water treatment plant
- Electrical power generation facility
- Military Base demolition and associated street and utility installation.

The applicant submitted a January 13, 2009 Offering Memorandum indicating that the qualifying investment would be a loan to SCLAA. The SCLAA loans would mature in five years and be subordinate to bonds. The SCLAA would repay these loans with (1) "tax increment revenues," (2) revenue generated from activities at the location, (3) bonds, notes and other indebtedness, (4) unrestricted grants and loans (5) SCLAA profits and (6) "other funds of the SCLAA, however derived."

On June 19, 2009, the director approved the applicant's proposal.

On January 19, 2010, the regional center advised that it had earmarked \$25 million for the IWWTF. The applicant stated:

The Wastewater Treatment Facility is currently under construction and is expected to be completed by spring 2010. It is being constructed to meet the requirements of the Dr[.] Pepper Snapple Company and their contracted bottle manufacturing company, Plastipak. In December 2009, Dr[.] Pepper Snapple began their hiring process. The

±850,000 square foot beverage manufacturing and distribution facility is anticipated to be completed and operational by March 2010 and expect to employ 210 people. Plastipak is expected to be operational by February 2010 and expects to employ 70 people.

The applicant's June 20, 2010 response to the May 4, 2010 notice of intent to terminate stated that the IWWTF was 90 percent complete and would be fully complete by October 1, 2010. The applicant further stated that Dr. Pepper Snapple Group (DPSG) and Plastipak were already hiring employees.

Finally, the applicant conceded that the other projects that formed the basis of the regional center approval were on hold, although it asserted the projects were not defunct.

The applicant's September 2, 2010 response acknowledged that IWWTF was the only project it was pursuing. Specifically, the applicant stated:

The following are the projects *that should no longer be a part of the Victorville Regional Center* approved designation as a regional center:

1. SCLA Airport Electrical Generation Project (referred to as b.1 of the Notice),
2. Intermodal Rail Improvements (referred to as b.2 on Page 7 of the Notice);
and
3. SCLA Infrastructure Improvement Project (referred to as b.2 on Page 7 of the Notice.). (Emphasis added.)

The applicant responded to concerns about timelines by stating: "project-finance projects, such as this one, typically require three or more stages of financing; the EB-5 funds are a critical part of this project's funding life-cycle, and each phase is critical to job creation. Indeed, job creation will not occur unless the entire project is funded throughout." The applicant asserted that USCIS approved the concept of bridge loans when it approved the regional center application. The applicant continued that USCIS has no authority to link expenditure of alien investor funds to the construction phase only, but that the applicant could have done so had the director not terminated the regional center's status. The applicant claimed that it would have reached its \$25 million goal but for the fact that the director terminated the regional center, and it would have focused funds differently if the focus had been a condition of the original approval. The applicant acknowledged that the IWWTF was "constructed with non-EB-5 funds," but asserts that existing job creation is in jeopardy if the applicant's ability to refinance is in question. While the regulations do allow alien investors to rely on job preservation, they may only do so if the investment is in a troubled business. 8 C.F.R. § 204.6(j)(4)(ii). The applicant, however, has never asserted that the alien investors will be investing in a troubled business.

On certification, counsel states:

The [director's] unlawful and arbitrary termination of the Regional Center designation has resulted in the City facing painful financial penalties due to certain contractual obligations – obligations that were *only* undertaken in reliance on the [director's] original approval of [the applicant] as a regional center. (Emphasis in original.)

As an example, counsel asserts that the applicant concluded negotiations with DPSG and Plastipak after the director approved the regional center proposal. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). An August 18, 2010 letter from [redacted] contradicts counsel's assertion. Specifically, [redacted] states that in August 2008, before the applicant had even filed the regional center proposal, Victorville finalized negotiations with DPSG and signed a contract.

Counsel further asserts that upon “the loss of funding from the EB-5 program,” Victorville engaged in “stop-gap funding measures to keep the project moving forward and meeting its obligations.” The Victorville Water District, however, advanced a loan in July 2009, less than a month after the director approved the regional center proposal and before the director issued any notice of intent to terminate the regional center designation.

In addition, counsel asserts that, unlike corporate financing, Victorville used the common “Project Finance Method” for financing, which relies on different sources of financing during different stages.

Counsel explains:

The highest level of project risk is during initial construction; and accordingly it is common to see short-term loans used to finance initial construction, which the borrower will need to replace with other kinds of financing. Completion or near-completion of construction is an appropriate time for the borrower to move from Phase I to Phase II of a project by refinancing the project – as the risk profile will have changed substantially.

According to counsel, the IWWTF project required bridge financing in the second, third and even fourth stages of financing that are typical with large infrastructure projects. Counsel concedes that the original proposal anticipated the use of alien investor funds for the construction of the project. Counsel continues:

The fact that the funds provided in the initial construction loan have been expended and the facility is at or near completion *from a construction perspective* does not alter the critical importance of post-construction funding sources, and therefore the

critical connection between the EB-5 funds and the job creation that ultimately results *when the project is producing revenues.* (Emphasis in original.)

According to counsel, job creation is linked to successful financing, development and operation of the project. Otherwise, the project becomes a ghost plant. Once again counsel does not claim that the alien investors will be investing in a troubled business such that they can rely on job preservation. *Cf.* 8 C.F.R. § 204.6(j)(4)(ii).

Counsel then notes that the definition of “capital” at 8 C.F.R. § 204.6(e) refers to the investors’ contributions and does not bind the project investment process. Counsel asserts that 8 C.F.R. § 204.6(m) does not bar financing and that there are no precedents that do so. Thus, counsel concludes that by requiring financing before jobs are created, the director is prohibiting a common project financing method.

Counsel is correct that the definition of “capital” does not preclude the new commercial enterprise from financing regional center projects. Similarly, no precedent prohibits the concept of financing by the new commercial enterprise. Counsel is confusing the requirement to make a capital investment with the job creation requirements. At issue is whether the alien investors can be credited with job creation when, in actuality, they are merely preserving jobs.

III. Analysis

USCIS may terminate the regional center’s designation upon a determination that the regional center no longer serves the purpose of promoting economic growth. 8 C.F.R. § 204.6(m)(6). The issue to be resolved by the AAO in the instant case is whether the applicant continues to serve the purpose of promoting economic growth including through job creation.

The regional center must be terminated because the applicant is seeking to invest capital only after the jobs in question have already been created. DPSG and Plastipak began hiring in December 2009. As of June 2010, the IWWTF was 90 percent complete. Regardless of the stage of financing the investors propose to provide, it remains that the jobs for which the applicant wishes to receive credit already exist. Notably, the record does not show that the applicant made a commitment to provide later-stage financing at the outset of the project. Instead, the applicant appears to have decided to commit capital toward later-stage financing only after the initial stages of the project that created the jobs in question were already complete.

The applicant’s argument that the IWWTF will be a ghost plant if it does not obtain bridge financing is inherently an argument that touches on *preservation* of jobs, not *creation* of jobs. The regulation at 8 C.F.R. § 205.6(j)(4)(ii) allows investors to be credited with preserved jobs, but only for investments in a troubled business. The applicant has never claimed or documented that the alien investors will be investing in a troubled business. As such, they may not rely on job preservation arguments to establish eligibility for benefits under the EB-5 visa program.

Finally, the director did not err in terminating the applicant's regional center designation without further analyzing the projects other than the IWWTF as the applicant had expressly requested that those projects no longer be considered part of the regional center on September 2, 2010.

The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not sustained that burden. Accordingly, the decision of the director terminating the regional center will be affirmed.

ORDER: The director's May 24, 2011 decision is affirmed; the regional center designation is terminated.