I Was Afraid Of This Happening:
“No Deference” Regional Centers That Do Not Deliver Desired I-526 Approvals
By Joseph P. Whalen (August 20, 2014)

I. INTRODUCTION

In separate non-precedent administrative decisions dated July 29, 2014, USCIS’ AAO denied two (2) investors among four (4) intending immigrants who were seeking EB-5 visas by investing in the manufacturing and distribution of alcoholic gelatin shots; colloquially known as “Jell-O Shots”. They are affiliated with a Regional Center. These I-526 cases failed to be approved because of reasons relating to both; themselves (source and path of funds) AND; the RC’s intended EB-5 venture. I find that predictable yet disturbing because it was preventable. An I-924 filed as an I-526 Exemplar might have cured the problems.

II. “NO DEFERENCE” REGIONAL CENTERS

What I mean when I refer to a “No Deference” Regional Center (RC) is just what it sounds like. These will be those RC Proposal and I-924 Application decisions involving “No Deferenence” for:

(a) Initial or Amended Designations that were based on:
1. “General” predictions in “general” proposals, and/or
2. Utilizing “hypothetical” projects that don’t pan out;
3. Also in the mix are RC Proposals that had “actual” projects approved but;
4. Any of the above three types of approvals can and often do, later encounter problems with:
   i. Deal structures,
   ii. Organizational and transactional documents, and/or,
   iii. Failing to vet their investors,
   iv. Skipping “Project Due Diligence”,
   v. Lacking the necessary competencies or knowledge, skills, and abilities (KSAs) to run their RC; and/or

(b) Skipped Amendment” Situations that fail because:
1. They go too far geographically and can’t connect cohesively, i.e., the area makes no economic or practical sense;
2. They go too far afield into industries of incompetence;
3. They did not submit an Exemplar or Dummy I-526, i.e., they did not seek Provisional Project Approval, remember that, while an I-924 Application can be perfected after filing, an I-526 Petition cannot; or some may,
4. Offer or accept (from developers) non-Ho-Compliant Plans and/or Unsupported Job Creation Projections.
III. TOO MUCH, TOO SOON

In the recent past couple of years, USCIS has eased up a bit in their rigidity to certain aspects of the licensure or designation of EB-5 Regional Centers. The EB-5 stakeholder community has been generally pleased about that “progress” in this aspect of EB-5 adjudications processing. I believe that some mistakes were made and will continue to be made both inside and outside of the agency. Far too many Regional Centers have been approved and the vast majority of them are not ready to “take their training wheels off” yet! As of this writing, there are 579 USCIS Designated Regional Centers approved.

In their mad rush for cheap EB-5 financing, some RC sponsors, a.k.a., project developers, have been too cheap up front and are now hemorrhaging cash on the back-end, scrambling “not to fail” based on their prior “failure to plan”. Too many RC’s are based on “general proposals” full of “general predictions” and many have failed to identify up front their data and evidence tracking needs and requirements. I fault USCIS for some of the problems outside of the agency. However, don’t get me wrong, there is plenty of blame throughout the EB-5 stakeholder community as well. There are “bad actors” and “incompetents” that I hope get weeded out quickly. More is to follow about the preceding issue, below, in section VI.

IV. EB-5 INITIAL SUPPORT SERVICES ON THE RISE

“Due Diligence & Risk Analysis” firms or working-groups are forming, I know because I am part of one. There are also newer “Broker-Dealers” coming on board who have actually studied EB-5 so that they can make sound judgments and assess projects for EB-5 suitability under FINRA Rule 2111 much better than before. Some are creating EB-5 Boutique Brokerage Firms and including such plans via FINRA Registration. That is another cumbersome process but will serve the needs of investors better and in turn help to improve the U.S. economy. I know this from first-hand experience as well.

There are Business Plan (BP) writers (technical writers) who have gained vast EB-5 knowledge such that, although it may not be their responsibility, many will speak up when a lousy business concept is dumped in their laps. Kudos to them! Better yet is the lucky RC sponsor who hires one. And speaking of support services, it seems that the EB-5 Regional Center industry would collapse tomorrow if the best-of-the-best EB-5 knowledgeable economists walked off the job! RC’s could not survive without EB-5 worthy Economic Impact Analyses (EIAs) and Ho-compliant BPs. Could they?
V. **EB-5 FOLLOW-UP SUPPORT SERVICES ON THE RISE**

As anyone involved in EB-5, and most especially Regional Centers, is aware, the BP and EIA are the key components or basic underlying building blocks for RC projects, I-924 Applications, and I-526 Petitions\(^1\). The I-829 Petition, on the other hand, needs deeper thought. The RC Administration and Oversight component of RC Applications/Proposals as put forth in EB-5 RC Operational Plans or EB-5 RC Business Plans not only need better preparation but also demand much better follow-through. I am pleased to see that there are some EB-5 Support Services leading that charge with cutting edge methods, systems, and don’t forget the knowledgeable people!

I have been, at the very least, *introduced* to a company that can track tons of records from escrow through exit and pay-off on behalf of large numbers of individual EB-5 (and domestic) investors by specific project. They can also track expenditures for later use in I-829 Petitions so that the EB-5 investors can get their “conditions” lifted. The I-829 is a follow-up procedure whereby the many estimates and assumptions that were proffered upfront can later be corroborated. I strongly believe that constant monitoring can help one to anticipate problems so that corrective action can be taken in time to save some hides, if you know what I mean?

Let us not forget that USCIS is charged with ensuring that Regional Centers continue to live up to their statutory purposes. Through implementing regulations at 8 CFR § 204.6(m)(6), USCIS collects information used to monitor the progress of the increasingly large population of EB-5 Regional Centers, on an annual basis via Form I-924A (the annual information collection supplement). The information collected for the I-829 and I-924A is closely associated with the statutory goals of having the RCs do their best to promote “economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment.” 8 USC § 1153 Note. [Emphasis added.]

Some additional links to items of interest related to this topic:

<table>
<thead>
<tr>
<th>I-829</th>
<th>Petition by Entrepreneur to Remove Conditions</th>
<th>Form Fee: $3,750. (Add $85 biometric fee for a total of $3,835. An additional biometric services fee of $85 must be paid for each conditional resident dependent, listed under Part 3 or Part 4 of Form I-829. See the form instructions for additional details.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>I-924A</td>
<td>Supplement to Form I-924</td>
<td>Form Fee: $0</td>
</tr>
</tbody>
</table>

\(^1\) “Direct Investments” not affiliated with a Regional Center cannot count indirect jobs so, likely will not have any EIA but could have an EIA and/or *market and/or feasibility studies* etc…., if it is complex enough and needs that kind of support or it is an industry standard.
VI. **RC’s ADMINISTRATION & OVERSIGHT PREPAREDNESS**

For its part, USCIS’ AAO declined to address applicants’ challenges to the CSC/IPO RFE portions dealing with the RC administration and oversight requirements. The following is taken from an actual RFE issued on an I-924 Application:

> It appears that you are requesting initial designation as a Regional Center under the Investor Program to include a review of a specific investment project, and/or a review of an exemplar Form I-526 Petition.

**“II. Evidence Requirements for Regional Center Proposals”**

8 CFR 204.6 (m)(3) describes the evidence that must be submitted in support of a Regional Center proposal. After review of your proposal, the following information, evidence and/or clarification is required. Note that in response to this notice, that it is helpful to provide a cover letter that acts as an executive summary, followed by a table of contents with sections that are tabbed at the bottom of the page.

**“2. Regional Center’s Operational Plan (8 CFR 204.6(m)(3)(iii) and 8 CFR 204.6(m)(6))**: 

A Regional Center proposal should have at least two business plans. One for the Regional Center’s Operational Plan and an actual or exemplar business plan for a project in each of the defined target industries in the proposal.

Within the Comprehensive Business Plan (Exhibit [REDACTED]), the application indicates the Regional Center’s marketing and promotional budget of $150,000 has been fully contributed by the Principal ([REDACTED]), as evidenced by copies of “ready-to-draw” cashier’s checks. It is unclear whether or not these funds will also serve to fund the Regional Centers general operations as well. If not, how then will the Regional Center’s general operations be funded initially? Also, since the referenced funding appears to actually be a payment to the Principal (rather than a deposit into the bank) is the money actually available for the purposes stated in the application?

Provide a Regional Center Operational Plan that shows how the Regional Center will identify, assess and evaluate proposed investor projects and activities, and enterprises. In addition, please include a narrative and documentary evidence within the Regional Center plan that addresses the following areas:

2 A “general proposal” based on “general predictions” may be supported by a “hypothetical” BP and a “mock-up” EIA (*for demonstration purposes only*) and get *“No Deference”* RC Approval.

Contact: joseph.whalen774@gmail.com (716) 604-4233 or 768-6506
The amount of funds that have been dedicated to the Regional Center;
The source of such funds;
How the amount is sufficient to sustain the Regional Center; and
The past, current and future promotional activities for the Regional Center, to include a description of the budget for this activity, and the source of the funds that have or will be used for these activities.

A Regional Center must have sufficient capital to operate in the manner outlined in the proposal from sources apart from the immigrant investors’ required capital investment.

3. Administrative Oversight (8 CFR 204.6(m)(6)):

Please provide a statement that fully describes how the Regional Center will oversee the EB-5 capital investment activities in a manner that would allow the Regional Center to be fully responsive to the yearly information collection requirements of the Form I-924A Supplement. ²

As provided in 8 CFR 204.6(m)(6), to ensure that the regional center continues to meet the requirements of section 610(a) of the Appropriations Act, a regional center must provide

² The Form I-924A Supplement and instructions may be accessed at www.uscis.gov

Page 6

USCIS with updated information to demonstrate the regional center is continuing to promote economic growth, improved regional productivity, job creation, and 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. [NAME REDACTED] Regional Center must monitor all investment activities under the sponsorship of the Regional Center and to maintain records in order to provide the information required on the Form I-924A Supplement to Form I-924 (Form I-924A Supplement).

Effective November 23, 2010, the failure to timely file a Form I-924A Supplement for each fiscal year in which the regional center has been designated for participation in the Immigrant Investor Pilot Program will result in the issuance of an intent to terminate the participation of the regional center in the Pilot Program, which may ultimately result in the termination of the designation of the regional center.

Contact: joseph.whalen774@gmail.com (716) 604-4233 or 768-6506
Note: Regional centers that remain designated for participation in the pilot program as of September 30th of a calendar year are required to file Form I-924A Supplement in that year. The I-924A Supplement with the required supporting documentation must be filed on or before December 29\textsuperscript{th} of the same calendar year.

4. Review of Commercial Enterprise’s Organizational Documents

A Regional Center may provide documentation for USCIS to review for EB-5 compliance within a Regional Center proposal, to include:

- Operating Agreements
- Partnership Agreements
- Subscription Agreements
- Escrow Agreements and Instructions (one for capital and one for any service fees)
- An Offering Memorandum, Private Placement Memorandum, or similar investment offering
- Memorandum of Understanding, Interagency Agreement, Contract, Letter of Intent, Advisory Agreement, or similar agreement to be entered into with any other party, agency or organization to engage in activities on behalf of or in the name of the Regional Center
- Organizational Documents, such as Articles of Incorporation, state registration documents, etc.

If a Form I-526 Exemplar is submitted with the Form I-924 application, USCIS will review the commercial enterprise’s organizational documents for program compliance and will give deference in subsequent adjudications to those organizational documents reviewed and approved as compliant with the program’s requirements.

In this case, the applicant submitted the following organizational documents: ………”

Does haste really make waste? It sure seems so to me!

VII. REGIONAL CENTER AS A “WELL-OILED MACHINE” OR NOT!

As alluded to in the \textbf{INTRODUCTION}, the frontline USCIS EB-5 RC Adjudicators have done their best to ensure that RCs will be able to get the job done. This is part of the underlying motivation for the arduous I-924 adjudication process. Unfortunately, things don’t always work out so well in this regard. I have encountered several different scenarios on this aspect of Regional Centers that I wish to share with the readers. Here is a non-exhaustive list:
A. As previously mentioned, AAO has not taken the available opportunity to speak to this issue. Since there is at least some guidance in the I-924 Form Instructions which ARE incorporated into the controlling regulations as per 8 CFR 103.2(a)(1), the issue may be properly addressed. That regulation reads as follows:

“8 CFR § 103.2---Submission and adjudication of benefit requests.

(a) Filing.

(1) Preparation and submission. Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter I to the contrary, and such instructions are incorporated into the regulations requiring its submission. Each benefit request or other document must be filed with fee(s) as required by regulation. Benefit requests which require a person to submit biometric information must also be filed with the biometric service fee in 8 CFR 103.7(b)(1), for each individual who is required to provide biometrics. Filing fees and biometric service fees are non-refundable and, except as otherwise provided in this chapter I, must be paid when the benefit request is filed.”

In an I-924 AAO Dismissal found at: FEB212014_01K1610.pdf, while the underlying denial decision from the California Service Center stated four distinct reasons for the denial, AAO did not address all of them. AAO specifically declined to address the fourth.

“The director denied the application, determining the following:

1. The applicant was not an economic unit on the date it filed the proposal;
2. The proposal failed to sufficiently project job creation through the submission of business plans and an economic impact analysis;
3. The proposal did not explain how the applicant would promote economic growth within the selected geographic area or have a positive impact on the regional or national economy;
4. The record lacked a sufficient promotional and recruitment plan, and evidence that the regional center would perform adequate administrative oversight.” Id. at p. 2

In the analysis section of the dismissal (Section III), AAO painstakingly dissected the CSC Director’s (really an EB-5 RC Adjudicator’s) first three reasons for denial but as for the last one….  

“3. Sufficient Promotional and Recruitment Plan, and Evidence that the Regional Center Would Provide the Required Updates on an Annual Basis

Counsel only briefly addresses the director's concerns about the applicant's promotional plans and ability to provide administrative oversight. With respect to its promotional plans, counsel asserts the applicant will maintain a website for
marketing purposes. Previously, the applicant has also referenced the "rolodex contacts" of its managers. These brief references to a website and the contacts of the managers do not constitute a sufficiently detailed description of the promotional efforts taken and planned by the sponsors of the regional center as required under 8 C.F.R. § 204.6(m)(3)(iii).

Finally, with respect to the director's conclusion that the regional center proposal does not demonstrate that if USCIS approves and designates the applicant as a regional center, the regional center will provide administrative oversight, counsel notes that the applicant has submitted a "pro forma" Form I-924A Supplement and asserts that this submission demonstrates its ability to update USCIS on its activities in the future. The director determined that the proposal was deficient because it did not demonstrate how the regional center would maintain its approval by demonstrating its administration, oversight and monitoring of investment activities under its sponsorship. See 8 C.F.R. § 204.6(m)(6) (requiring that a regional center annually update users with information demonstrating that it continues to promote economic growth, improved regional productivity, job creation, or increased domestic capital investment in the approved geographic area). As the application may not be approved on the other grounds the director identified, the AAO need not determine whether 8 C.F.R. § 204.6(m)(6) imposes evidentiary requirements on an applicant when it applies for designation as a regional center."

I recently wrote an in-depth article about this topic on July 20, 2014, which does the above subject matter more justice. It contains an excerpt from the I-924 form instructions and additional links of interest. Enjoy.

**B. Even the May 30, 2013, EB-5 Adjudications Policy Memo does not go far enough to truly ensure that a Regional Center entity or its principals are up to the task at hand. Memo pages 14-15 tell us this:**

"The level of verifiable detail required for a Form I-924 to be approved and provided deference may vary depending on the nature of the Form I-924 filing. If the Form I-924 projects are “hypothetical” projects,\(^2\) general proposals and general predictions may be sufficient to determine that the proposed regional center will more likely than not promote economic growth, improved regional productivity, job creation, and increased domestic capital investment. Determinations based on hypothetical projects, however, will not receive deference and the actual projects on which the Form I-526 petitions will be based will receive de novo review during the subsequent filing (e.g., an amended Form I-924 application including the actual project details or the first Form I-526 petition filed by an investor under the regional center project). Organizational and transactional documents submitted with a Form I-924 hypothetical project will not be reviewed to determine compliance with program requirements since these documents will receive de novo review in subsequent filings. If an applicant desires review of organizational and transactional documents for program compliance, a Form I-924 application with a Form I-526 exemplar should be submitted.

Form I-924 applications that are based on actual projects may require more details than a hypothetical project in order to conclude that the proposal contains verifiable details and
is supported by economically or statistically sound forecasting tools. Determinations based on actual projects, however, will be accorded deference [sic] [in] subsequent filings under the project involving the same material facts and issues. While an amended Form I-924 application is not required to perfect a hypothetical project once the actual project details are available, some applicants may choose to file an amended Form I-924 application with a Form I-526 exemplar in order to obtain a favorable determination which will be accorded deference in subsequent related filings, absent material change, fraud, willful misrepresentation, or a legally deficient determination (discussed in more detail below).”

*C * * * *

C. The subject matter of footnote number two (2) in the above excerpt is addressed next, along with additional considerations.

1. **Expected Level of Deference:** As per USCIS Policy, there are different levels of deference based upon what was previously submitted to USCIS in an I-924 Application whether for initial RC Designation or via an Amendment. USCIS has stated most recently its intentions in this regard through the May 30, 2013, EB-5 Adjudications Policy Memo especially in footnotes 2 and 3:

a. **FN2 Describes three levels of approval:**
   i. An “actual project” refers to a specific project proposal that is supported by a *Matter of Ho* compliant business plan.
   ii. A “hypothetical project” refers to a project proposal that is not supported by a *Matter of Ho* compliant business plan.
   iii. The term “exemplar” refers to a sample Form I-526 petition, filed with a Form I-924 actual project proposal, that contains copies of the commercial enterprise’s organizational and transactional documents, which USCIS will review to determine if they are in compliance with established EB-5 eligibility requirements. USCIS disclaimers clearly inform that USCIS is not responsible for reviewing any other legal compliance aspect of the project or any of its business-related documents.

b. **FN3 Discusses “deference” and informs us that:**
   i. In cases where the Form I-924 is filed based on actual projects that do not contain sufficient verifiable detail, the projects may still be approved as hypothetical projects if they contain the requisite general proposals and predictions.
The projects approved as hypotheticals, however, will not receive deference.

ii. In cases where some projects are approvable as actual projects, and others are not approvable or only approvable as hypothetical projects, the approval notice should contain a statement identifying which projects have been approved as actual projects and will be accorded deference and those projects that have been approved as hypothetical projects but will not be accorded deference.

2. What Gets Deference?
   a. Beyond the discussion of deference contained in the footnotes in the May 30, 2013, Memo, it needs to be clearly understood that the above statements are only addressing the EB-5 Project’s Business Plan (BP) and Economic Impact Analysis (EIA), i.e., reasonable methodologies for estimating indirect job creation.
   b. It will become abundantly clear precisely which Project Documents will receive deference because they will be listed in the Official USCIS Designation Letter/I-924 Approval Notice. The list of documents will be a key indicator of the level of deference to be expected. **Higher Deference should sell better in the EB-5 market.**

   a. In business, changes to plans happen as a matter of routine. Some changes are small, others are big. Regardless of size, some are irrelevant and/or benign. Again, regardless of size, some are drastic and/or devastating. Of all of the dichotomies thus far discussed in regard to changes, the one dichotomy that matters most is whether it is **material** or **immaterial** for EB-5 eligibility requirements and determination purposes.
   b. USCIS includes a variety of “Notes” which explain some of the consequences to changes in documents. **NOT** all changes are **FATAL** to deference. Minor changes that do not diminish EB-5 compliance should not be a problem.

D. Another major area of concern in determining whether a Regional Center will be able to become a “well-oiled” machine for administration, oversight, and compliance has to do with attitudes. There are **Arrogant & Obstinate Obfuscators** interfering with
many individuals’ better judgment. As I remarked to someone just the other day, in a totally different context, “It seems that common
courtesy isn’t as common as it used to be”. In the EB-5 context, I need but change one word. “It seems that common sense isn’t as common as it used to be”. I wrote more about this general issue in another article. Please, don’t be afraid to ask the hard questions!

E. Beyond arrogance and obstinacy, we also find plain old dishonesty. I have unfortunately encountered Regional Center principal or sponsor applicants who “talked a good game” but had no intention of following through with any of it. They would hire someone to write-up their grand plan to be meticulous and thorough in performing due diligence and vetting investors etc... However, once they got their USCIS Designation they merely used their Approval Notices as a prop in their sideshow act of peddling lousy or fake “EB-5 Projects” in order to make a fast fortune and skip town, skip the country, or make small expenditures look much bigger and allow a project to “fail” or “die on the vine”.

F. The last scenario I wish to get folks to think about is the “Peter Principle”. That theory, which has proven itself on innumerable occasions, predicts that most folks will rise to their level of incompetence. In the EB-5 Regional Center context, the Peter Principle might not rear its ugly head until an investor approaches their RC to ask for evidence to be submitted with their I-829 Petition to Lift Conditions. At that point it may be too late. Such a situation may lead to USCIS Denial of the I-829, termination of LPR status instead of lifting of conditions, issuance of an NTA, and being ordered removed. Can everybody say “Lawsuit”? More about this topic later in this article.

VIII. THE PROOF IS IN THE PUDDING—CORROBORATION

For the sake of argument or as they say in legalese, assuming arguendo that an EB-5 investment has been a success, the investor is still left with the task of proving it. IF an EB-5 investor goes it alone or even with partners (EB-5 Direct Investment) but in either case, not affiliated with a Regional Center, THEN that individual investor must show no fewer than ten (10) permanent full-time EB-5 direct qualifying work-authorized employees, as defined under EB-5 law, during the course of the adjudication of their I-829 Petition. Only a Regional Center Affiliated investor may utilize EB-5 indirect employees as determined through reasonable methodologies, i.e., an economic impact analysis (EIA).

In order to demonstrate the creation or existence of a true “EB-5 direct” employee, as defined, specific evidence is listed in the implementing regulations and that evidence is expected to be included in the alien’s I-829 package. In the
case of a Regional Center Affiliated investor who claims “EB-5 indirect” employees, the evidence will be more variable, indeed evidence may be highly variable and fluid, i.e., unpredictable to an uncertain degree.

However, a Regional Center’s indirect jobs were previously projected via an economic impact analysis (EIA). That EIA was based a comprehensive business plan (BP) (at least I hope it was). The USCIS-reviewed and accepted BP and EIA will have set a stage full of facts, factors, assumptions, and presumptions. At the I-829 stage, it is hoped that the evidence bears out that the predictions can be demonstrated to have come to fruition or are on the cusp of being realized. If the reality does support a finding of successful job creation, then an I-829 may be denied, status terminated, an NTA issued, and an Immigration Judge (IJ) can order removal. That Removal Order can be appealed to the BIA. If the BIA upholds the order then a Petition for Review can be filed in the Circuit Court of Appeals with jurisdiction. Wow! The less often that happens, the better. Avoidance of bad situations is a good thing and some stern adjudication is warranted early on in order to prevent that unpleasant situation from occurring in the first place. On the flipside is the tendency for some adjudicators to become a bit too rigid, also a situation to be avoided whenever possible.

IX. ON THE BRIGHT SIDE—I-829 CERTIFICATIONS TO AAO

When that awful scenario of I-829 denial and NTA issuance, described above, does happen; there are some things that you have to keep in mind. First of all, Congress writes the statutes; the executive branch is tasked with enforcing those statutes. In so enforcing the statutes, the executive branch agencies generally write implementing regulations to help guide their “customers” as well as their adjudicators. That being the case, the executive agency is sometimes given a rather “free-hand” or “carte blanche” to simply control virtually the whole of a program via regulations when Congress has been inadvertently vague, or when it has expressly “dumped” the responsibility in an agency’s lap. Other times, an agency is extremely constricted by Congress in the “artfully awkward wording” used in a statute. Awkwardness usually happens when someone had to be appeased in order to get the bulk of a worthy bill passed.

With the above information fresh in your mind, please also remember that an I-829 has no administrative appeal option. When an I-829 is denied, USCIS is supposed to terminate lawful permanent resident status and issue an NTA; Notice To Appear in Removal Proceedings. However, USCIS also has “prosecutorial discretion” as to how it will enforce the laws within its purview. IF an EB-5 investor fails to create sufficient qualifying jobs through investment the first time around; THEN USCIS may be willing to allow him or her to start over. If an EB-5 investor changes direction during the course of their first attempt to create jobs through an investment; USCIS will no longer automatically deny the
request to lift conditions based **solely due to that change** in the business plan. This relatively new and definitely enlightened approach is seen in some fairly recent AAO reviews of I-526s and some I-829s on appeal, motion, or certification. More is to follow on that subject further below in a discussion of at least eight similarly situated EB-5 investors in the Atlantic Regional Center for Foreign Investment (ARCFI) and at least one investor through Philadelphia Industrial Development Corporation (PIDC) Regional Center.

Let’s get back to discussing a basic problem with the current USCIS I-829 adjudication framework. Legacy INS (former Immigration and Naturalization Service) was a Law Enforcement Agency (LEA) first and foremost. Many within that LEA viewed the benefits adjudication functions as a low priority burden and as an opportunity to block the “unworthy” from ever reaching the United States. That “Culture of NO!” lingered for far too long but it is almost gone from the vast majority of people employed by USCIS which is now a Customer Service Oriented Benefits Determination Agency. Unfortunately, many of the old INS regulations linger on at USCIS. While progress has been made, the EB-5 regulations need a serious overhaul. We have been told that the EB-5 regulations are under review as are those of the AAO. Many of us stakeholders have submitted suggestions on various aspects of those EB-5 and AAO regulations in regard to specific changes that we would like to see. I did my part and urge anyone reading this to put their suggestions in writing and send them to USCIS. OK, I’ll get off my soapbox now and back to this exciting topic in EB-5 adjudications.

Anyway, INS interpreted the statutory provisions as harshly as it could when writing the EB-5 regulations. That is a major reason why there is no administrative appeal process through AAO. Instead, USCIS uses a general provision in order to certify some I-829 Denials to AAO before terminating status and issuing an NTA. **IF** the agency were to routinely send the majority of I-829 Denials to AAO on certification, especially when multiple investors are involved in a single project whether affiliated with a Regional Center or as Direct Investments, **THEN** an increase to the I-829 filing fee would be eminently justified. An I-829 certification is just like a free appeal which has the added advantage of NOT being a final agency action and thus prevents the effectuation of the denial decision while the case remains pending with AAO but more importantly, it keeps the case from being amenable to District Court Review under the APA. In other words, status is not immediately terminated and an NTA is not immediately issued and the petitioner cannot file in U.S. District Court until the fat lady sings (until AAO issues a decision). **IF** the denial is affirmed **THEN** an NTA might eventually be issued. **IF** the terminated LPR offers to depart, **THEN** other mechanisms are available to allow a period to wind up affairs before departing abroad.
I have previously written about my suggestions for utilizing the I-924 to allow for the filing of an Exemplar I-829 in advance of allowing the investors to file en masse. I urge this as a matter of routine, at least in large projects. I especially urge USCIS to consider the option when there has been a change to the project such that doubts linger as to the materiality of those changes and what might or might not be the net result of the changed or “resultant EB-5 project”. I envision a materially changed project which is put forth at the I-829 stage as being supported by a “Hindsight Report” that covers all the major points normally covered in the Matter of Ho compliant BP plus an updated EIA to address the indirect job creation which should be based on much more accurate information of actual expenditures and on the ground base-level job creation.

X. **ARCFI Remands Based on May 30, 2013. EB-5 Adjudications Policy Memo**

The Atlanta Regional Center for Foreign Investment (ARCFI) submitted an I-924 Amendment Application to cover a new and different type of project but USCIS took so long to get to it that it apparently became necessary to proceed before obtaining a long overdue adjudication decision in that matter. It also lead to a group of EB-5 investors taking the risk and filing their I-526 petitions for an ARCFI project before USCIS ruled on the I-924 for the RC’s expansion on their “product line” of investments. However, on May 30, 2013, USCIS issued a long overdue EB-5 Adjudications Policy Memo which negated the need for any I-924 to be filed for this type of expansion in RC scope. In that the sole reason for denying at least eight I-526 petitions was the shift in investment project type outside of the previously approved RC investment scope, AAO invoked the May 30, 2013, change in USCIS policy and remanded the group of I-526 petitions. In addition, as of February 2013, the I-924 Amendment Application was approved. The final outcome of these eight cases is unknown to me at this time but, I suspect that they were eventually approved provided that the individual petitioners had sufficient evidence of the source and path of funds for their EB-5 investment capital.

Here are hyperlinks to the AAO Remands for the ARCFI investor cases. Enjoy!

- [JUL152013_01B7203.pdf](#)
- [JUL232013_01B7203.pdf](#)
- [JUL232013_02B7203.pdf](#)
- [JUL232013_03B7203.pdf](#)
- [JUL232013_04B7203.pdf](#)
- [JUL232013_05B7203.pdf](#)
- [JUL232013_06B7203.pdf](#)
- [JUL232013_07B7203.pdf](#)
XI. **PIDC Remand Based On Kyu Seock Lee, et al. v. USCIS, 10-1243-DOC (C.D. Cal.) (ECF No. 124) Settlement Agreement**

Here are some excerpts from the PIDC-affiliated I-829 Certification Remand. Was this a follow up to the Tommy D’s and Butcher & Singer case (4/23/10)? It sure looks a lot like the same situation. *It's only a guess.*

"**DISCUSSION:** The Director, California Service Center, denied the Form I-829, Petition by Entrepreneur to Remove Conditions. The director subsequently reaffirmed the denial on motion and certified the new decision to the Administrative Appeals Office (AAO) pursuant to the regulation at 8 C.F.R. § 103.4. The AAO affirmed the director’s decision on certification. The matter is now before the AAO on motion. Pursuant to a settlement agreement in *Kyu Seock Lee, et al. v. USCIS, 10-1423-DOC (C.D. Cal.),* the AAO will withdraw its prior decision and remand the petition to the California Service Center for adjudication of the Form I-829 under the terms of the settlement agreement." At 2.

".................................The petitioner was granted conditional lawful permanent resident status as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5), based on his investment through PIDC. The petitioner now seeks to remove conditions on his lawful permanent resident status pursuant to section 216A of the Act, 8 U.S.C. § 1186b.

"The director initially determined that the petitioner had made a material change in his investment and failed to demonstrate that he had sustained the investment proposed in the initial, approved Form I-526 petition. On motion, counsel submitted a brief and additional evidence. The director, or corrected the finding that the petitioner had made material changes but reaffirmed the initial finding that the petitioner had not sustained the original investment in the employment-creating business. The director also determined that the petitioner had not established that the new investment was in a targeted employment area. Accordingly, the director found that the petitioner did not establish that he continued to qualify for a reduced investment amount of $500,000. 8 C.F.R. § 204.6(f)(2). Finally, the director determined that the petitioner had not established that the new investment project had generated sufficient employment to qualify all of the investors in this project for removal of conditions.

The director certified her decision to the AAO pursuant to 8 C.F.R. § 103.4(a)(5). Counsel submitted a brief and additional evidence. [NAME REDACTED] Manager of [REDACTED] prepared the brief and asserts that the AAO made factual errors and inappropriately applied the law. With respect to location of the new investment project, a restaurant named [NAME REDACTED] the regional center acknowledges that the previous submissions mislabeled its location. The petitioner submits a corrected map reflecting that the project location at [LOCATION INFORMATION REDACTED] was at a targeted employment area. On March 7, 2011, the AAO issued a request for additional evidence. PIDC filed a responsive reply.

On July 8, 2013, the District Court for the Central District of California approved a settlement agreement in *Kyu Seock Lee, et al. v. USCIS, 10-1423-DOC (C.D. Cal.) (ECF No. 124).* Petitioner appears to fall within the terms of the approved settlement agreement, and, on that basis, the AAO is reopening this matter and remanding the petition to the California Service Center for the purpose of adjudicating the petition under the terms of the settlement agreement.

In light of the settlement agreement, the AAO will reopen and withdraw its prior decision. The petition will be remanded for a new adjudication.

**ORDER:** The petition is remanded to the director, California Service Center, for the issuance of a new decision." at 2-3.

**NOTE:** It is uncertain which case number is correct (1423 or 1243); I have not looked in PACER for the Central District of California in order to check. [If anyone wants to send it, I'd be grateful.]

Above found at: [AUG072013_01B7203.pdf](#)

Contact: joseph.whalen774@gmail.com (716) 604-4233 or 768-6506  Page 15
XII. ADJUDICATION METHODOLOGY BASICS: A REFRESHER

Whether you are the practitioner assembling an application or petition package, or an adjudicator reviewing that package, there are some common themes to focus your attention upon. There is a process involved in any decision-making endeavor. It is a progressive mental exercise that normally follows a common course. That course starts with identifying **POSSIBILITIES**. The question then becomes one of **PLAUSIBILITY** among those possibilities. Next we consider the **PROBABILITY** of success. Lastly, we seek to determine if a certain premise is fully supported as **CREDIBLE**. When taking these progressive steps in our thought process, it is done through an evaluation of **evidence** from which we attempt to draw **REASONABLE inferences** to justify a **CONCLUSION** one way or the other. The ultimate conclusion for the USCIS Adjudicator will be to either Approve or Deny a particular Benefit Request.

With regard to an I-924 or I-526 Approval; these should be understood as always being **Provisional** in nature. That is because even when deference is accorded, IF significant changes are made THEN de novo review will be done in a future proceeding. Also, there are different levels of deference accorded from the I-924 stage to the I-526 stage. IF an I-924 or I-526 is Denied, THEN an AAO Appeal is available. When that is the case, the Courts usually will expect exhausted of administrative appeals before it will entertain a **Petition for Review**. The I-829 follows a different course to administrative exhaustion. That petition may be renewed in Removal Proceedings if denied by USCIS and an NTA is issued. The final administrative step to exhaustion runs through the BIA rather than the AAO. The I-829 will also bypass the District Court and end up in the Circuit Court of Appeals instead.

The Denial of an I-829 is quite often **certified** to AAO before being issued as a final agency action. The I-829 has no administrative appeal so one might incorrectly assume that a **Petition for Review** may be filed immediately. While there is no “appeal” there is still an option for a Motion to Reopen and/or Reconsider but it is not mandatory to exhaust a mere optional administrative challenge. Often in the case of an I-829, USCIS will initiate these undesirable case decisions with a Notice of Intent to Deny (NOID). More NOIDs are probably issued for I-526 Petitions but for an I-526 there is also the potential for an initial Approval that can be revoked later on. Revocation often happens when fraud or material misrepresentation is detected later. A Notice Of Intent to Revoke (NOIR) is issued 1st with only 15 days to respond, or plus 3 days when mailed, for a total of 18 days to respond. IF a response is not submitted or is simply unsuccessful, then a Final Notice of Revocation should be send along with an NTA in many cases. The one action that might be taken to Court is a writ of ___________

---

3 It may take some time to get to a final decision as RFE’s are common in EB-5 and certification of decisions to AAO is becoming more common.
emandamus to request that the Court order DHS or USCIS to “take action” but usually simply leads to the issuance of an NTA and the initiation of Removal Proceedings.

XIII. MORE ABOUT “NO DEFERENCE” REGIONAL CENTERS

Let me start off this last section by saying that SOME of these No Deference RCs will be OK. I truly believe that there will be a percentage, size as yet indeterminate, of these No Def RCs that are being run by folks who have done it before and done it successfully. These will likely be situations, as mentioned above, that involve “replicating” a model that has already worked within an internal system that has also already proven successful. In these cases, seasoned veterans of EB-5 deals will simply be expanding operations but in an area too distant to simply annex geography to an existing RC. This is likely a very smart move that saves time, energy, and money.

In that we are starting to see that some of the newbie RCs that rushed to obtain USCIS Designation are allowing their EB-5 investors to file I-526s, those folks are finding out the hard way where their KSAs fall short. It seems that some have fallen short on choosing EB-5 suitable and worthy projects. Some have a problem writing a Matter of Ho compliant BP. Still others seem ill-equipped to produce an EIA that truly demonstrates reasonable methodologies for job creation projections that utilize verifiable detail. Lastly, we also will see those who cannot properly structure an EB-5 compliant deal that hits the highlights while avoiding the lowlifes, oops; I guess that should be lowlights. My bad! Or is it? You decide because as time marches on, we can all look over our shoulders with perfect 20/20 hindsight!

Anyway, when push finally comes to shove, I think that we might see a few RC Terminations in the near future. It is for that reason that I feel it to be worthwhile to review RC Termination Proceedings. However the situation arises whereby USCIS gets wind of problems there are regulations already in place for this proceeding. Before getting into the mechanics, let’s try to think of ways that USCIS might take that closer look that leads to Termination Proceedings. The easiest way will be the receipt of substandard I-526 filings that demonstrate any of the issues listed in the previous paragraph or any combination of them. There could be a “whistleblower” whether an unhappy EB-5 investor or perhaps a domestic investor or partner. The FTC has an online system to file complaints and there is a working relationship between FTC and USCIS to “report scams”. The SEC keeps its eyes wide open for problems with advertising and offering of securities. FINRA might receive a complaint about someone acting as a broker-dealer of securities without proper registration. The list goes on and on. Whatever the means for USCIS to find out, the regulations (which also need an update) are found at 8 CFR § 204.6(m)(6) and (9).
When USCIS decides to take action, the Regional Center will first be issued a “Notice Of Intent To Terminate” (NITT or NOIT). The accused RC will be afforded 30 days from date of receipt to respond and may offer evidence and argument in rebuttal to any and all allegations against it. The point that I have been has to do with a Termination for Cause, as it were. Any incompetence or shenanigans would be covered under that part of the regulation invoking that part of the statute which demands that the RC continues to “...promote economic growth, improved regional productivity, job creation, or increased domestic capital investment in the approved geographic area.” I don’t think that anyone could argue that fraud, corruption, bribery, theft, or plain old-fashioned gross incompetence helps to promote any of the goals of the EB-5 Regional Center Program or any part of the overall Immigrant Investor Program. A second type of termination exists under the implementing regulation. I think it might best be described as Termination for Technical Violation, i.e., failure to timely file the annual reporting Form I-924A, which all by itself should prompt USCIS to issue an NITT.

The regulations themselves explain it pretty well without very much elaboration required, so here they are:

(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.

(9) Effect of termination of approval of regional center to participate in the Immigrant Investor Pilot Program. Upon termination of approval of a regional center to participate in the Immigrant Investor Pilot Program, the director shall send a formal written notice to any alien within the regional center who has been granted lawful permanent residence on a conditional basis under the Pilot Program, and who has not yet removed the conditional basis of such lawful permanent residence, of the termination of the alien's permanent resident status, unless the alien can establish continued eligibility for alien entrepreneur classification under section 203(b)(5) of the Act.
XIV.  ABOUT THE AUTHOR

Joseph P. Whalen, Independent EB-5 Consultant, Advocate, Trainer & Advisor
238 Ontario Street | No. 6 | Buffalo, NY 14207
Phone: (716) 604-4233 (cell) or (716) 768-6506 (home)
E-mail: joseph.whalen774@gmail.com
web http://www.slideshare.net/BigJoe5 or http://eb5info.com/eb5-advisors/34-silver-surfer

DISCLAIMER: Work is performed by a non-attorney independent business consultant and de facto paralegal. It is the client’s responsibility to have any and all non-attorney work products checked by an attorney. I provide highly-individualized training based on consultation with my clients. I serve Regional Center Principals and their counsel, potential EB-5 investors, immigration attorneys, and project developers. I am not an attorney myself although I have trained numerous attorneys and INS/USCIS adjudicators in complex issues within immigration and nationality law when I was an adjudicator there for many years. I do not prepare forms, write business plans, or create economic analyses. I do review them for clients prior to submission and suggest corrections and/or modifications to run by your attorney and investment advisor.

NOTE: I have over a decade of experience as an adjudicator for INS and USCIS and direct EB-5 Regional Center Adjudications experience having been instrumental in reviving, greatly enhancing, and expanding the EB-5 Regional Center Program for USCIS.

NAICS Code: 611430 Professional and Management Development Training

2012 NAICS Definition

611430 Professional and Management Development Training

This industry comprises establishments primarily engaged in offering an array of short duration courses and seminars for management and professional development. Training for career development may be provided directly to individuals or through employers' training programs; and courses may be customized or modified to meet the special needs of customers. Instruction may be provided in diverse settings, such as the establishment's or client's training facilities, educational institutions, the workplace, or the home, and through diverse means, such as correspondence, television, the Internet, or other electronic and distance-learning methods. The training provided by these establishments may include the use of simulators and simulation methods.
ENDNOTES

i Acronyms used in this article:

AAO      Administrative Appeals Office within USCIS
APA      Administrative Procedures Act [5 USC]
ARCFI    Atlantic Regional Center for Foreign Investment
BIA      Board of Immigration Appeals
BP       Business Plan
CFR      Code of Federal Regulations
DHS      Department of Homeland Security
EB-5     Employment-Based, Fifth Preference Immigrant Visa Classification
EIA      Economic Impact Analysis
FINRA    Financial Industry Regulatory Authority
FTC      Federal Trade Commission
KSAs     Knowledge, Skills, and Abilities (Competencies)
NITT     Notice of Intent To Terminate (a Regional Center)*
NOID     Notice Of Intent to Deny
NOIR     Notice Of Intent to Revoke
NOIT     Notice of Intent To Terminate (a Regional Center)*
NTA      Notice To Appear (formerly OSC: Order to Show Cause)
PIDC     Philadelphia Industrial Development Corporation (PIDC) Regional Center
RC       Regional Center
RFE      Request For Evidence
SEC      Securities and Exchange Commission
USC      United States Code
USCIS    U.S. Citizenship and Immigration Services