REGIONAL CENTERS BEWARE!
IF YOU HAVE *NOTHING PENDING* THEN YOU HAVE NO CAUSE FOR *MANDAMUS*

By Joseph P. Whalen (Sunday, July 10, 2016)

INTRODUCTION

Mandamus is a Latin term that literally translates as "we order". It is a type of "writ", which itself is a term from English common-law simply meaning a formal written order, and it will be issued by a body with administrative or judicial jurisdiction. A *Writ of Mandamus* is one such order that directs a public agency or governmental body to perform an act required by law when it has neglected or refused to do so.

VIEW FROM THE OUTSIDE

There are various subtleties involved in pleading for a *Writ of Mandamus.* It seems that most people jump to questions concerning the length of time that can be considered reasonable, versus unreasonable. It seems that most people both inside and outside of the public agency or governmental body gravitate almost immediately to discussions and arguments about "average processing times" and "lengthy processing delays". Sometimes a public agency or governmental body can point to legitimate aberrations and anomalies in timeframes directly attributable to the individual case at hand. There might be more physical paperwork, multiple files that must be gathered together, collated, aggregated, assessed, and fully digested before a determination can be made.

VIEW FROM THE INSIDE

On the other side of this equation, the public agency or governmental body is staffed by people. Public agencies or governmental bodies might be short on staff and even if they can find more money in order to hire more people, they have to find and train those people. It will take time to increase staff. In addition, people working in the various public agencies or governmental bodies can suffer from all the foibles and weaknesses as anybody else. Some people are afraid to make the hard and difficult

decisions. Complex and complicated cases are often loaded with so many problems that it is hard to know where to start! In such situations, there may be undue and unreasonable processing delays, such that a fair to strong case can be made for *mandamus*.

IT'S JUST NOT THAT SIMPLE!

It has been my experience that with the mere *existence* of so many complexities, that it can easily lead to confusion. In the ensuing chaos, some critical things seem to become lost or overlooked. Fundamental and underlying questions might fail to be asked. Leading and critical issues might fall to the wayside and thus be considered in the wrong chronological order. This unfortunate mistake results in much wasted time and increased waiting times across the board. In other words, confusion can become the catalyst for a variety of systemic problems that cause excessive delays in adjudication processing.

DECIPHERING THE COMPLEXITIES OF EB-5 REGIONAL CENTER PROJECTS

In the murky world of EB-5 "Projects", normal processing starts out longer; as well as more complex, complicated, and confusing, than they are throughout the majority of immigration legal proceedings. It is at this point in this discussion that I will circle back to the beginning. EB-5 not only has the self-petitioning investors with whom to contend; but also EB-5 Regional Centers, project developers, and various other partners. Each of these players has specific forms to file and processes to follow. While these players are involved in symbiotic relationships, they cannot intrude upon each other's legal proceedings. Until such time that there are changes made to the controlling laws, certain firm limits cannot be crossed. Those limits, however, are murky and under constant assault from all sides.

HURRY UP & WAIT!

When an EB-5 *Regional Center-affiliated* project is structured such that all of the EB-5 funds are tied up in escrow, in most instances, it is because the investors' Forms I-526 are held up in a processing backlog. Generally, the Forms I-526 that are in-process move more quickly if they are filed *en masse* immediately upon "*Provisional Approval of the Project Documentation*" signified by **Approval** of a Form I-924 which was filed as a

Dummy (***Exemplar***) *Investor* ***Petition*** (*I-526*). Ideally, all of the shared documentation associated with that specific project will receive *Deference* during the ensuing I-526 adjudications. If things work out as planned then this would speed up I-526 processing.

With imprudent filing *en masse* of Forms I-526 associated with an EB-5 *Regional Center-affiliated* pooled investment for which there is **no** "*Provisional Approval of the Project Documentation*" there is an exponentially greater risk of processing delays and eventual denial. In those situations when the risk is taken to file Forms I-526, *en masse* while relying only upon the USCIS policy position to allow certain Regional Center related issues to be determined during the adjudication of the **FIRST** such Form I-526, then, **denial *en masse*** is a very real risk. Due to the importance of the **filing date** of a *preference visa petition*, it is not possible to make ***post-filing material changes*** to deficient documentary evidence submitted in support of that petition. So, if the EB-5 funds cannot sit in escrow for an extended period of time, this would not be the approach I would take. Instead, I would prefer to file an I-924 as a *Dummy* I-526 in order to obtain a "*Provisional Approval of the Project Documentation*". This approach gives a Regional Center certain due process rights to assert and an adjudication decision to "*enforce*".

TWO POTENTIAL PATHS TO FOLLOW

The way I see things, the above-described filing scenarios will leave a Regional Center in either of two vastly different positions. When there has been **no I-924** involved in a particular project, then the Regional Center has **no cause** upon which to base a *Petition for Writ of Mandamus*. While the Regional Center is most definitely an interested party, and it can pay the legal fees, and it can file an *Amicus Brief*; that is where its involvement must end. In this scenario, the Regional Center has ***nothing pending***, and it has **no Provisional Approval** *for which to seek enforcement*.

If, however, **a *project-specific* Form I-924** ***remains pending too long*** then a Regional Center has **good cause** upon which to base a *Petition for Writ of Mandamus*. In the alternative, **if a *project-specific* Form I-924** has resulted in a "*Provisional Approval of the Project*", **then** there is *a basis upon which to seek enforcement*. A request for enforcement would, *I imagine*, be a novel approach but I believe it would work.

The reader might wonder how to present a case for *enforcement* and; that is a good question. I suggest prefacing the request by pointing the court to the pertinent

portions of the May 30, 2013, EB-5 Adjudications Policy Memo that describe *the issues to which deference is due* during the subsequent adjudications of project-related Forms I-526. In addition, I would point the Judge towards § 610(d) of the Appropriations Act of 1993, *as amended*[1]. To wit, the Secretary has discretionary authority to process Regional Center affiliated visa petitions out of the traditional first-in, first-out (FIFO) order. Taking this into account, it might be worth the effort to also make a request for an Order under the *Declaratory Judgments Act*, on this aspect of the case. *See* the ***"Declaratory Judgments Act"***, codified as **28 U.S. Code Chapter 151 - DECLARATORY JUDGMENTS**; **28 U.S.C. § 2201 - Creation of remedy** and **§ 2202 - Further relief**.

WHY GET A "*PROVISIONAL APPROVAL*" FOR A PROJECT'S DOCUMENTATION?

The whole idea behind the concept of the ***advance vetting*** of all of the project related shared documentation, was to streamline the EB-5 process. This is accomplished through the filing of an I-924 Amendment Application for an *I-526 Exemplar*. AAO has explained this process thus:

> "An exemplar is a common investment structure and job-creation activity promoted by a regional center to attract immigrant investors for the **purpose** of concentrating pooled investment and promoting economic growth. Some applicants may choose to file 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. USCIS Policy Memorandum PM-602-0083, *supra,* at 15".

Matter of P-C-F-R-C- LLC, ID# 14717 (AAO June 22, 2016), n. 4, p. 3

I have previously advocated for Regional Center projects to be treated in such a way as to centralize processing as much as possible. If all of the complex hypertechnical matters can be addressed and settled collectively, then the investors' cases can focus on their individual issues relating to their lawful funds. The only other major concerns would be the individual self-petitioner's eligibility for visa approval. Does the alien have any fraud marriages or frivolous asylum claims in their past, or was there a failure to

[1] "(d) In processing petitions under section 204(a)(1)(H) of the Immigration and Nationality Act (8 U.S.C. 1154(a)(1)(H)) for classification under section 203(b)(5) of such Act (8 U.S.C. 1153(b)(5)), the Secretary of Homeland Security may give priority to petitions filed by aliens seeking admission under **the program** described in this section. Notwithstanding section 203(e) of such Act (8 U.S.C. 1153(e)), immigrant visas made available under such section 203(b)(5) may be issued to such aliens in an order that takes into account any priority accorded under the preceding sentence."

follow through with voluntary departure? Lastly, if there is some insurmountable ground of inadmissibility involved, don't waste any time fooling around with this stuff!