



U.S. Citizenship
and Immigration
Services

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PIERRE SD 57501

DATE: MAR. 15, 2017

RECEIPT #: RCW 10 319 10140
I-290C RECEIPT #: AAO 16 040 50002

IN RE: SOUTH DAKOTA REGIONAL CENTER

APPLICATION: REGIONAL CENTER DESIGNATION

ON BEHALF OF APPLICANT:

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Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case. All documents have been returned to the office that originally decided your case. Please direct any further inquiries to that office.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF S-D-R-C-

DATE: MAR. 15, 2017

CERTIFICATION OF IMMIGRANT INVESTOR PROGRAM OFFICE DECISION

BENEFIT: REGIONAL CENTER DESIGNATION

I. INTRODUCTION

In 1990, Congress established the EB-5 program to promote economic growth in the United States through foreign investment.¹ Investors who comply with the program's requirements first receive conditional resident status, followed by the opportunity for the removal of conditions and permanent resident status.² To acquire this benefit, an investor must, among other things, invest a minimum required amount in a new commercial enterprise (NCE) and demonstrate that such investment has resulted in the creation of at least 10 full-time jobs for qualifying U.S. workers.

In 1992, Congress authorized U.S. Citizenship and Immigration Services (USCIS) to designate "regional centers" under the EB-5 program to enhance the program's effectiveness by allowing pooling of investor resources.³ The regional center investment model offers a distinct advantage to EB-5 investors in that they may count jobs indirectly created by their investment towards the job creation requirement, while independent investors must show that they have created 10 jobs directly. As a result, although individual investor projects are still permitted, most EB-5 investments in recent years utilize regional centers. Under the regional center program, numerous individuals typically invest EB-5 funds into a single NCE. The NCE then typically either forms a separate entity, known as the job creating entity (JCE), that actually creates the jobs, or it invests the funds into the JCE in the form of a commercial loan.⁴

¹ See Immigration Act of 1990 (Pub.L. 101-649, 104 Stat. 4978), section 121(b)(5); see also section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5).

² An immigrant investor files a Form I-526, Immigrant Petition by Alien Entrepreneur, attesting that the investor meets the criteria for conditional resident status, which includes showing that their investment (of either \$500,000 or \$1,000,000, depending on the geographical area) creates at least 10 jobs for qualified U.S. workers. After two years, the investor may file Form I-826, Petition by Entrepreneur to Remove Conditions on Permanent Resident Status, which, if granted, affords the investor full lawful permanent residence in the United States. As part of the petition, the investor must show that their initial investment is still creating the requisite number of qualifying jobs.

³ Section 610(a) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act (the "Judiciary Appropriations Act"), 1993, Pub. L. No. 102-395, 106 Stat. 1828, 1874 (Oct. 6, 1992), as amended.

⁴ For example, if the project involved the construction of an office building, the developer could be a JCE.

A regional center must apply for and receive designation from USCIS in order to participate in the EB-5 program. As described in greater detail below, a regional center must also fulfill ongoing requirements to maintain its designation over time, most notable of which is a showing that the center is continuing to promote economic growth. When the regional center fails to submit the annual reporting form (Form I-924A, Supplement to Form I-924), or has indicated on that form that it is inactive or not promoting economic growth, the Chief of USCIS' Immigrant Investor Program Office (the Chief) may issue a notice of intent to terminate (NOIT) the designation. In the matter at hand, the Chief has certified to us the question of whether a regional center's designation may be terminated for reasons beyond a failure to promote economic growth through mere inactivity. We remand the matter for issuance of a new decision consistent with the following.

II. PERTINENT FACTS AND PROCEDURAL HISTORY

This case has a somewhat complex and acronym-laden history, which we try to summarize best as follows: the story begins when the South Dakota International Business Institute (SDIBI) filed an application for regional center designation for SDIBI-Dairy Economic Development Region (SDIBI-DEDR), the precursor name of the Applicant. USCIS granted that application in 2004. Although not strictly a governmental office, the purpose of the SDIBI was to support the South Dakota Department of Tourism and State Development (DTSD) in facilitating and enhancing international trade and investment in the state. To this effect, SDIBI received a portion of its funding from DTSD, which itself was associated with the office of the Governor of South Dakota.

Joop Bollen was the director of SDIBI at the time the Applicant regional center was created. As director, Mr. Bollen handled the Applicant's initial application for regional center designation, as well as its subsequent operations, which included the organization of several NCEs. Because of the awkward organizational framework of SDIBI and the governmental offices within South Dakota that provided funding and which it served, the parties involved created SDRC, Inc. in 2009. SDRC, Inc. is a private corporation that effectively became the Applicant's management company by agreement between SDRC, Inc. and the SDIBI office. SDRC, Inc. agreed to provide a number of services to SDIBI, including solicitation and vetting of investors, and the production of regular reports on the regional center's various projects. USCIS was duly provided with a copy of the relevant documentation to apprise the agency of the change in management. Around this time, Mr. Bollen left his employment with SDIBI to operate SDRC, Inc. full time.

While these events were taking place, Richard Benda served as the DTSD secretary and, in this capacity, signed the management contract between DTSD and SDRC, Inc. After the administration changed in 2011, Mr. Benda joined SDRC, Inc. as a loan monitor for some of the immigrant investor funds invested through the regional center.⁵

⁵ While admittedly confusing, it is vital to maintain the distinction between SDRC, the regional center the Chief is proposing to terminate and the Applicant in this case, and SDRC, Inc., the management company that ran SDIBI-DEDR/SDRC for a number of years. As recounted below, SDRC, Inc. no longer does so and is not a party in this case. Moreover, around this time, the Applicant changed its name to what it is now, South Dakota Regional Center (SDRC).

In the new administration, DTSD became the Governor's Office of Economic Development (GOED), its current name. In September 2013, GOED terminated the management contract with SDRC, Inc. Although the documentation we have in the record relating to the termination does not reflect its exact reasons, media reports from the time indicate that state officials had been preparing to arrest and indict Mr. Benda for allegedly double-billing the state and misdirecting state money to his own salary.⁶ Further, the NCE for which the monies were intended, Northern Beef Packers, filed for bankruptcy in 2013 and laid off all of its employees.⁷

Mr. Benda committed suicide and was therefore never prosecuted.⁸ Allegations of criminal activity surrounded Mr. Bollen as well, including use of investor funds to purchase artworks from Christie's of London.⁹ Mr. Bollen recently pled guilty to one felony count (out of five) of unauthorized disposal of property related to his handling of the state funds invested in the regional center program.¹⁰

Despite these events, there is also clear evidence of the Applicant's substantial economic activities. Over 1,000 individual investors have invested at least \$500,000 each into 32 NCEs since the Applicant's inception. Moreover, USCIS records reflect that hundreds of these investors have now obtained lawful permanent resident status, meaning that their investments were still supporting at least 10 U.S. jobs (apparently more than 5,000 jobs in all).

As noted above, the Chief issued the Applicant a notice of intent to terminate its regional center designation and the Applicant responded in opposition. The Chief considered the Applicant's arguments but found termination nevertheless appropriate on the ground that the Applicant no longer serves the purpose of promoting economic growth due to evidence that it failed to exercise proper oversight of SDRC, Inc., which resulted in the improper diversion of funds away from job creation and economic growth.¹¹ The Chief then certified to us his proposed termination, specifically whether "the reasons why a regional center may no longer serve the purpose of promoting economic growth are varied and 'extend beyond inactivity on the part of a regional center.'" ¹² On certification,

⁶ See Documents: "Benda arrest was imminent when he died," *Argus Leader* (July 29, 2014), <http://www.argusleader.com/story/davidmontgomery/2014/07/29/jackley-benda-arrest/13313227/>.

⁷ "Northern Beef creditors get final notice to submit claims," *The Daily Republic* (June 30, 2016), <http://www.mitchellrepublic.com/news/state/4065239-northern-beef-creditors-get-final-notice-submit-claims>.

⁸ "Benda's death ruled suicide," *Aberdeen News* (Nov. 22, 2013), http://www.aberdeennews.com/news/beef_plant/benda-s-death-ruled-suicide/article_b1bf5521-8644-541e-88b2-60787b9a4228.html.

⁹ "EB-5: Bollen accused of improperly disposing of \$1.2M," *Argus Leader* (Apr. 1, 2016).

¹⁰ "Ex-head of South Dakota's Visa Program Gets Probation, Fine," ABC News (Feb. 1, 2017), <http://abcnews.go.com/US/wireStory/plea-agreement-reached-south-dakotas-eb-visa-case-45193728>.

¹¹ The Chief also proposed terminating the Applicant's designation based on its failure to submit all the required documentation necessary for continued designation during several years of its operation. We do not find it necessary to reach that issue given our decision on the question of promotion of economic growth and resultant disposition of the case. The Chief, however, should reconsider his finding that the Applicant failed to submit all required documentation relating to its activities in years past in light of the Applicant's arguments on certification. In the remanded proceedings, the Applicant may submit any additional evidence that may have become available in this respect.

¹² Under 8 C.F.R. § 103.4(a)(1), designated USCIS officials can designate an "initial," non-final decision to this office if

the Applicant provides an additional statement and further evidence in support of its continued designation.

III. LAW

When they established it in 1992, Congress described the regional center program as follows: “Such . . . program shall involve a regional center in the United States for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.”¹³

Accordingly, to receive USCIS designation, a regional center must show, among other things, how it will promote economic growth, how jobs will be created, and the amounts and sources of capital. Once a regional center has been designated, DHS regulations provide instruction for maintaining that designation and the consequences for failure to do so:

Continued participation requirements for regional centers.

(i) Regional centers approved for participation in the program must:

(A) Continue to meet the requirements of section 610(a) of the Appropriations Act.

(B) Provide USCIS with updated information annually, and/or as otherwise requested by USCIS, to demonstrate that the regional center is continuing to promote economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment in the approved geographic area, using a form designated for this purpose; and

(C) Pay the fee provided by 8 CFR 103.7(b)(1)(i)(XX).

(ii) USCIS will issue a notice of intent to terminate the designation of a regional center in the program if:

(A) A regional center fails to submit the information required in paragraph (m)(6)(i)(B) of this section, or pay the associated fee; or

(B) USCIS determines 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.* . . .

8 C.F.R. § 204.6(m)(6) (emphasis added).¹⁴

it involves an unusually complex or novel issue of law or fact.

¹³ Section 610(a), The Judiciary Appropriations Act, *supra*.

¹⁴ The regulation at 8 C.F.R. § 204.6(m)(6) was revised to its current form, as written above, on October 24, 2016. *See* 81 Fed. Reg. 73,292 (Oct. 24, 2016). Not relevant to the instant case, the revisions relate to fee payment and withdrawal from the regional center program. The above-highlighted standard for termination remains unchanged from the old to new rule.

IV. ANALYSIS

A. Analytical Framework

To date, most regional center terminations have been based on failure to promote economic growth by virtue of insufficient activity (or by a failure to comply with annual reporting requirements). In this case, the Chief has certified to us the question of whether the reasons why a regional center may no longer serve the purpose of economic growth are varied and can extend beyond its inactivity to potentially include diversions of investors' funds from job growth activities or a lack of proper oversight. The Chief describes possible scenarios in which a regional center's actions undermine its immigrant investors' ability to meet the requirements for EB-5 classification (due to a lack of sufficient job growth, for example), or cases in which a regional center fails to properly oversee or monitor the capital investment activities of its related entities, jeopardizing those investments. In response to the notice of certification, the Applicant does not dispute that investor funds may have been used improperly, but lays all responsibility for such actions with SDRC, Inc., noting that its management contract with that company has been terminated and new control measures have been put into place to ensure proper oversight and compliance moving forward. The Applicant also points to evidence of its active NCEs that continue to create jobs and promote economic growth.

The regulation governing regional center terminations reproduced above speaks to failures to submit required information or to promote economic growth. It does not refer explicitly to the improper use or diversion of funds, or a failure of due diligence on the part of the regional center to oversee the operations of its related NCEs or JCEs. Nor does it mention fraud or criminal activity on the part of a regional center as grounds for termination. So the first question we must address is whether these kinds of activities are properly within the reach of the termination regulation.

We find evidence of the termination regulation's breadth in the supplemental information that accompanied the regulation when it was promulgated. In response to a public comment that the proposed termination rule was vague and should contain mention of specific mandated or prohibited regional center practices, "DHS note[d] that the regulation at 8 CFR 204.6(m)(6) already provides a means to terminate a regional center if the regional center *'no longer serves the purpose'* of the program. DHS believes that the potential reasons for the termination of a regional center *extend beyond inactivity* on the part of a regional center." 75 Fed. Reg. 58962, 58980 (Sept. 24, 2010) (emphasis added). It is clear that, from the inception of this rule, DHS contemplated general oversight of the program's integrity. Moreover, the EB-5 regulations contemplate that, at a bare minimum, the regional center's activities will be lawful. For example, the regulations define a "commercial enterprise" in part as "any for-profit activity formed for the ongoing conduct of *lawful* business." 8 C.F.R. § 204.6(e) (emphasis supplied).

In addition to this contextual evidence in the regulations, common sense dictates that DHS cannot be compelled to maintain a malfeasant entity in the EB-5 program indefinitely and regardless of how egregious its acts may be. It would be absurd to suggest, for example, that USCIS could not terminate a regional center's designation due to clear evidence of widespread criminal activity

simply because there is some evidence of economic growth. Congress authorized DHS to designate regional centers to pool immigrant investor funds for the purpose of creating jobs and promoting economic growth. DHS would ill-serve that purpose by turning a blind eye to bad acts within the EB-5 program. We retain authority to ensure the integrity of the EB-5 program. Accordingly, we construe the regional center termination rule to encompass more than mere inactivity.

Indeed, the Applicant does not argue otherwise. Instead, the Applicant disclaims responsibility for any improper actions of its prior contractor and affirms that proper oversight mechanisms are now in place. The Applicant claims it should not be held accountable for the bad actions of SDRC, Inc. in determining whether to terminate its designation. We disagree. The Applicant cannot immunize or absolve itself of responsibility for its management company's wrongdoing simply by the fact that it contracted out its operations to that company. The implications of such a framework are plainly inconsistent with proper USCIS oversight of the EB-5 program.

This is not to suggest, however, that a regional center should be subject to termination for any and all actions, whether negligent, reckless, or criminal, made by any of the entities under its authority. If one of a number of NCEs relating to a regional center, for example, is engaged in improperly diverting a small percentage of its investor funds, and the regional center has been exercising proper supervision over the NCE's activities, and takes prompt corrective action when it learns of the impropriety, termination of the regional center's designation would likely not be warranted. On the other hand, if an NCE is engaging in wide scale fraud, such that the investors' funds are not used for investment purposes, and the regional center is turning a blind eye to these activities, then termination would seem appropriate under those circumstances.

In sum, we must balance all the equities on a case-by-case basis to determine whether a regional center is continuing to promote economic growth. Where both positive and negative indications of the promotion of economic growth exist, we look at all relevant documentation to reach a conclusion regarding whether, on balance, the regional center is continuing to promote economic growth. Positive factors include job creation, capital investment, and other signs of positive economic impact. Negative factors include mismanagement, theft, or fraud by the regional center or related entities. Each case will therefore be assessed on its own merits. In doing so, we consider the factors' relative weight as determined by surrounding circumstances. *See Matter of Sotelo-Sotelo*, 23 I&N Dec. 201, 203 (BIA 2001) ("In any balancing test, various factors, whether positive or negative, are accorded more weight than others according to the specific facts of the individual case.").

B. Positive and Negative Factors in this Case

1. Positive Factors

In his proposed decision, the Chief acknowledged that “several projects associated with the Regional Center were successful, as evidenced by the numerous I-829 approvals [reflecting the creation of at least ten full time jobs per investor].” As mentioned above, USCIS records reflect that the agency has credited the Applicant with thousands of new jobs, many as recently as last year. While the past approvals of these immigrant investor petitions do not necessarily mean that a regional center will continue to promote economic growth, they do reflect rather robust job creation and economic growth to date. We cannot tell from the Chief’s decision what weight, if any, this positive factor received.

Perhaps the primary document with which to review a regional center’s economic activities is the Form I-924A, the regional center annual reporting form designed “to demonstrate the regional center is continuing to promote economic growth . . . in its designated geographic area.” The Form I-924A requests information such as the amount of EB-5 capital investment, the amount of job creation, and the number of Forms I-526 and Forms I-829 approved, denied, and revoked. In the termination decision, the Chief did not address the information the Applicant reported in recent years on these forms.

Finally, we note that the Applicant has taken several steps to mitigate improper activity that took place under SDRC, Inc.’s administration. Its contract with the company was terminated relatively shortly after the new South Dakota gubernatorial administration took office (and presumably became aware of the issues with the regional center). The Applicant has been actively trying to secure documents from SDRC, Inc. that it says it needs for compliance with the regulatory reporting requirements. It has created a framework for its monitoring and due diligence going forward.

2. Negative Factors

As an initial matter, we note that it is well established that the full amount of the immigrant investor’s money must be made available “to the business(es) most closely responsible for creating the employment upon which the petition is based.” *Matter of Izummi*, 22 I&N Dec. 169, 179 (Assoc. Comm’r. 1998). Here, the record indicates that funds were improperly diverted during the time the Applicant contracted with SDRC, Inc. to run its operations.¹⁵ In addition to the evidence of Mr. Bollen’s recent felony conviction for unauthorized disposal of property, for example, the Chief listed in his notice of intent to terminate the Applicant’s designation three instances of alleged impropriety:

¹⁵ We note that is not clear from the record if investor funds were diverted as opposed to solely funds relating to the State of South Dakota. The Chief in his notice of certification mentions that endangering investors’ immigration benefits through diversion of their funds could be grounds for termination for failure to promote economic growth. In light of this fact, the Chief should consider whether the evidence shows that only state funds were improperly diverted, and if so, whether this should be taken into account in the balancing of the equities.

(1) a diversion of funds into an offshore account held by a Cyprus-based holding company of Russian railway companies; (2) use of investor funds for regional center expenses, such as legal or agent fees and other expenses not dedicated to job creation; and (3) the purchase of a special-purpose lending company incorporated in the British Virgin Islands.

The Applicant does not deny that these transactions took place. In fact, in response to the NOIT, Mr. Bollen submitted a statement defending the purchase of the offshore lending company as more cost effective than reimbursing funds the company loaned to some of the Applicant's operations. Instead, the Applicant asserts SDRC, Inc. alone is responsible for these actions. The Chief rejected that argument, as have we. The improper diversion of funds, as well as any failure of the Applicant to exercise proper oversight over SDRC, Inc., are negative factors to be properly weighed in the balance of equities.

C. Remand

While noting both positive and negative factors, the Chief's decision does not balance them in determining whether to terminate. Instead, his decision seems to assume that the evidence of diversion of funds alone warrants termination of the Applicant's designation, notwithstanding any countervailing equities. This is not the case; as we state above, a weighing of the equities is required to determine if a regional center is continuing to promote economic growth. We will accordingly remand the record to the Chief to reconsider his decision and balance all the evidence of the positive and negative factors in this case to determine whether termination is warranted.¹⁶

Before concluding, we note that the Applicant raises another argument in opposition to the Chief's proposed termination, i.e., that the issue of any failure to put its investors' monies to proper use should be adjudicated in the context of the investors' individual petitions, not in a decision to terminate the regional center's designation. The Applicant claims considering this question in the termination context would punish investors for SDRC, Inc.'s mismanagement and would run counter to the purpose of the EB-5 program, as it could have a chilling effect on state and local entities' use of the program.

USCIS can consider and address issues of diverted funds when adjudicating investors' individual petitions, but we do not agree that these issues belong there and nowhere else. The actions of a regional center, or its associated entities, are clearly relevant to an examination of the center's continued promotion of economic growth. Bad acts are not within the exclusive purview of one proceeding or the other.

¹⁶ We also note that it appears most of the diverted funds were eventually returned to the Applicant's operations. "A court affidavit said most of the money was repaid to the account, but a state investigator said in the document that a nearly \$167,000 transfer didn't appear to have been refunded." "Joop Bollen pleads guilty to one felony count in EB-5 case," *Argus Leader* (Feb. 1, 2017), <http://www.argusleader.com/story/news/crime/2017/02/01/joop-bollen-pleads-guilty-one-felony-count-eb-5-case/97338546/>. If it is true that most of the funds were eventually returned, it could be another, albeit modest, mitigating factor.

That said, we appreciate the unfortunate position of individual investors who may find their petitions jeopardized in some manner by actions or inactions of the regional center under which they made their investments. They may have causes of action against the regional center or those responsible for its operations, particularly if their funds have been subjected to fraudulent misappropriation. The investors may still be eligible for immigration benefits in some manner not at issue here, perhaps by making a new qualifying investment in another new commercial enterprise, whether through another regional center or directly. But the question of whether a regional center merits continued designation is not contingent on its investors and their immigration statuses, but whether or not the center's activities continue to serve the EB-5 program's purpose of creating U.S. jobs and promoting economic growth.

V. CONCLUSION

Evidence of a regional center's improper or unlawful activities is relevant to the question of whether that center is continuing to promote economic growth, but derogatory evidence must be weighed against countervailing equities on a case-by-case basis. This case contains evidence of the diversion of funds away from job-creating activities, as well as evidence of substantial economic activity that created thousands of jobs. USCIS must consider all relevant factors in determining whether the Applicant's regional center designation should be terminated or maintained.

ORDER: The Chief's decision is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of S-D-R-C-*, ID# 13768 (AAO Mar. 15, 2017)