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For biofuels, immigration pays

Program giving visas for investment funnels money to Kansas ethanol plants.

By John Green - The Hutchinson News - jgreen@hutchnews.com

A little known U.S. immigration program has helped quietly infuse millions of Asian dollars into development of the ethanol industry in western Kansas over the past five years.

The industry's recent struggles, however, coupled with the economic crisis, has dozens of those investors now facing both the potential loss of their substantial investments and the reason they invested in the first place - a chance to become permanent U.S. residents.

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An attorney for the California law firm directing the investments into southwest Kansas says several proposed plants - including ones in Ulysses, Dodge City and now Hiawatha - will be built.

But the clock for investors is ticking.

That became clear late last year when the law firm forced foreclosure of the delayed Dodge City plant in an effort to recover its money or to take over the development.

And though the federal government approved the development of biofuels in Kansas as a specific allowable program, an official with a company that conducts "due diligence" for investors warns it's particularly risky.

The program

Under the federal Immigration and Nationality Act, some 10,000 immigrant visas a year are available to people seeking permanent U.S. resident status or "green cards" on the basis of helping create new U.S. jobs through investment.

In 2002, the program also called EB-5 was restructured to encourage more participation. Now, 3,000 of the annual visas require only a \$500,000 investment, rather than the previous minimum of \$1 million; they count indirect jobs created in the region; and they don't require the investor be engaged in the business.

A crucial stipulation, however, is that a minimum 10 jobs - whether direct or indirect - must be created for each \$500,000 invested within two years.

The U.S. Citizenship and Immigration Service has designated a number of "regional centers" that qualify for such investments. The centers, now numbering 40, have purposes as diverse as building schools to supporting cruise lines. They range from wineries and shopping centers in California to spa developments in Arkansas and performing arts in Florida.

The Los Angeles law firm of Lee & Kent was approved in 2007 for two regional investment centers: the Kansas Bio-Fuel Regional Center, covering 21 counties in southwest Kansas, and Southwest Biofuels Regional Center, encompassing 40 counties in Texas and nine in Oklahoma.

Both target construction of fuel-grade ethanol plants.

A good start

For two Kansas ethanol projects that have been operating - the Bonanza Bioenergy ethanol plant in Garden City, which began operating in September 2007, and the Arkalon Energy plant near Liberal, which came on line in January 2008 - nine EB-5 investors contributed \$4.5 million, said law firm partner Thomas Kent.

Conestoga Energy Partners built and manages both. Justin Lee, the other partner of Lee & Kent, is a Conestoga board member.

Both projects, Kent said, predated creation and approval of the regional center program. The firm first began working with Kansas developers in 2005.

"Originally, it was one company, but it ultimately had to be split into two plants because of the small producer tax credit," Kent said. "To preserve the credit, the plant had to be under 60-million-gallon production. Investors shared the same number of units per plant."

After its early success, the firm continued to invest in other projects and began to develop its own through a separate "alternative energy" company the partners created.

All those, however, now appear to be stalled.

"There are EB-5 investors in multiple projects in southwest Kansas," Kent said. "All are in different stages of development. The recession has impacted credit markets and made it very difficult for projects to get funding. As the credit markets open or alternative sources of capital are found, those projects will be completed."

"From an equity standpoint, those projects are ready to be completed," he said. "From the debt side, the credit markets aren't there... Even if we have the equity, we can't get loans unless we use other sources, private sources of money."

In the works?

After getting regional center approval, the partners formed Nexsun Corp. Lee is chairman, and Kent is vice president and general counsel. Nexsun Corp., in turn, formed Nexsun Energy, which created the subsidiary Nexsun Ethanol, a limited liability company registered in Kansas.

Nexsun Ethanol announced in early 2007 it was developing separate ethanol and biodiesel plants on neighboring parcels 2 miles west of Ulysses in Grant County. The size of the ethanol plant has ranged in various reports from 40 million to 48 million gallons per year. Officials targeted the biodiesel plant for production of 30 million gallons per year.

Lee stated in May 2008 that the ethanol plant should create 54 direct permanent jobs and up to 942 indirect jobs, and generate an estimated \$180 million in annual revenues.

Ground was broken for the \$100 million project in September 2007. Since then, contractors have installed temporary underground utilities, a fire suppression system with at least 20 fire hydrants and a rail line, and a substantial amount of grading and site work are done. So far, Kent said, more than \$7 million has been spent on the site.

Because of the credit crunch, however, work has been halted for months.

In March of this year, Nexsun officials gave Grant County a \$50,000 check to purchase the land for the plant. Ulysses City Administrator Daron Cq Hall said Nexsun indicated at that time it was putting the ethanol plant on hold, but it would complete a smaller biodiesel plant by the end of the year, capable of producing 3 to 5 million gallons annually.

"They've set up a side business on Main Street, which they said will do several things," Hall said. "They have an herbal supply company that will fill orders on site."

It was unclear how many will be employed there.

In April, Industrial Info Resources of Sugar Land, Texas, also reported on its Web site that Nexsun had put the ethanol plant on hold.

Kent, however, said Wednesday that plans are to go forward with construction on the ethanol and biodiesel plants this year.

"The business plan includes both," he said. "They are being built by different companies. One has nothing to do with the other except that they'll be situated next to each other. Both are proceeding, but they've been temporarily delayed because we had to make arrangements for alternate sources of financing. We're still working on it. Our hope is to have the biodiesel project up and running before the end of the year. The only thing we need to do (on the ethanol plant) is start pouring concrete and to finish the plant."

Meanwhile...

Nexsun Corp. announced June 4 that it wants to build a 3-million- to 5-million-gallon biodiesel plant in Hiawatha, in the far northeast corner of Kansas and outside the Kansas Bio-Fuel Regional Center area.

The city is providing six acres for the project, said City Administrator Lynne Ladner, with an option for more land. It also extended tax abatements to the company based on the number of people it eventually employs. The city's agreement requires construction to start within 12 months.

Local officials were advised the plant would employ at least eight people at a beginning wage of \$10 per hour, and that local contractors would be used to build the plant.

"Nexsun is the developer of that project and there is EB-5 money involved in it," Kent confirmed last week.

Dodge City plan

EB-5 investments were also tied up in the proposed Boot Hill Biofuels plant in Dodge City, being developed by Dodge City resident Gary Harshberger.

Conestoga Energy Partners is identified as the development's management company and its vote in Liberal was listed as Boot Hill's mailing address. With the right to appoint two board members, Conestoga had a majority vote on the board.

For its investment in the Dodge project under its regional center designation, the California firm created Biofuel Venture I LLC, or BVI.

Last December, BVI filed suit against Boot Hill and Harshberger for failing to progress on the plant, forcing the company into bankruptcy court.

According to documents filed in the suit, Nexsun Energy, through BVI, raised \$2.5 million for the Boot Hill project, of which it lent Boot Hill \$750,000. When Boot Hill failed to progress on the plant, Kent, on behalf of BVI, sent a demand letter in June 2008 seeking its money back to invest in another project.

By August 2008, Nexsun officials, aware of a November 2008 deadline under EB-5 to create at least 10 jobs, approached the Boot Hill board about BVI taking ownership of the Boot Hill name and its federal tax ID number.

Records show Harshberger registered Boot Hill Biofuels No. 2 in September, with Marc Kliever, the registered agent for Nexsun Ethanol, as its registered agent also.

On Nov. 13, according to bankruptcy case records and filings with the Kansas Secretary of State's office, Kent formed a company called BH Reddwerks LLC, with a resident agent listed in Ulysses. Ten jobs at Boot Hill 2 were then created and the employees leased to BH Reddwerks "to provide employment services," according to court documents. BVI then loaned \$1.25 million to BH Reddwerks.

The Boot Hill board, however, balked at a proposed settlement plan that would give BVI majority ownership of the proposed plant. That resulted in BVI seeking the bankruptcy filing Dec. 1. The suit was filed as Chapter 7 liquidation, but Boot Hill officials were able to convert it to Chapter 11 reorganization.

Under a settlement agreement that was approved by U.S. Bankruptcy Court Judge Robert Nugent on April 30, BVI did obtain sole ownership of the Boot Hill name, tax number and its limited equity, and Boot Hill's share in BH Reddwerks, in exchange for paying \$110,000 in legal fees.

Boot Hill 2 was dissolved, but Boot Hill and BH Reddwerks remain registered Kansas companies.

Still in the plans

The majority of investors in the original Boot Hill, meanwhile - called "Slot Note Holders" because their investments were used to "slot" construction of the Dodge ethanol plant on contractor ICM's construction schedule - had their more than \$4 million in investments and debt shifted to a new company called Prairie Land Renewable Resources LLC, said attorney David Jones of Amarillo, Texas.

Under the agreement, the 11 slot note holders received pro-rated shares of 75 percent of membership interests and 100 percent of voting rights of the new company. Equity shareholders in Boot Hill received the remaining 25 percent membership interest, but no voting rights.

BVI remains a slot note holder for its \$750,000 investment.

Attempts by The News last week to reach Harshberger and officials with Conestoga Energy were unsuccessful and their attorney referred questions back to them.

Though the Southwest Biofuels Regional Center was formed in June 2007, only one proposed ethanol plant has been announced within that region.

Borger BioFuels LLP, a proposed 100-million-gallon plant in Dalhart, Texas, was scheduled for a December 2006 groundbreaking. An air permit was issued for the plant last November, state records show, but other details on its progress were unavailable and officials at the company did not return calls to The News.

Kent said his firm has raised \$10 million to \$15 million for projects in Texas and Oklahoma, but he declined to identify what other projects are in the works. He said investments in Kansas "are somewhere close to \$30 million," most from investors in South Korea and China. He didn't have an exact number of investors.

Other concerns

"If the project fails? It's always a gamble," said Karen Caco of International Immigration Services, which helps investors through the process. "It's unfortunate for businesses everywhere around the world. But that's why it's important to research the different regional centers. You hope they manage it, so you get your money back and you get to stay."

Which is one reason Michael Gibson, managing director for USAdvisors, a company in Florida that conducts "due diligence investigations" for prospective foreign investors and is affiliated with International Immigration Services, advises against going with the biofuel projects.

"We try to answer two questions," Gibson said. "Will it create the required jobs in two years and will it be viable in five years' time? With biofuels, I don't think you can say it would. There are so many problems to deal with, in construction and permitting. There are a lot of problems with that. And then there's the commercial question. Do you think there's a market for ethanol when gas is at \$4.26 per gallon? I don't."

Gibson also raised concerns about the company itself.

Two years ago, his company visited every approved regional center to "do due diligence" and create a portfolio for investors. Lee & Kent was the only company unwilling to meet with him, Gibson said, even after he showed up outside their LA offices.

"We've been trying for two years to engage them," he said. "The message I want your readers to take away is that this is a good program in 22 states. It has brought in billions of dollars in investments to projects that would never have obtained investment in the first place. But there are bad operations out there."

Kent said he'd never heard of Gibson or USAdvisors and didn't know what Gibson was talking about. He suggested the firm may have been unwilling to speak with someone because they wouldn't sign a nondisclosure agreement.

"Our programs are under regular review by Immigration Services," Kent said. "We have to submit regular reports regarding our progress."

"We are looking for private-source funding, hedge funds overseas, until credit reopens," Kent said. "But when the economy turns around, things will change."

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