Is This the Wave of the Future for Regional Centers?

By Joseph P. Whalen (August 11, 2012)

In a recent Regional Center “Proposal” Designation and Approval Notice (filed on November 22, 2010 — one day prior to the implementation of the form I-924), USCIS approved the “general proposal” and basic “reasonable methodology” but declined to approve a particular project as being “actual” or “shovel-ready”. I found USCIS’ reasoning to be sound and prudent. Pacific Proton Therapy Regional Center, LLC received Designation as a Regional Center on June 28, 2012, for a geographic scope, which includes the four counties of Los Angeles, Orange, Riverside and San Bernardino within the State of California. The approved investment activity and focus based on the business plan and associated economic analysis, which USCIS determined, meets the general requirements for participation in the “Immigrant Investor Pilot Program” in principle, explicitly allows “loans to 3rd party enterprises” in three broad areas.

Those three broad areas are:

1. NAICS 23 Construction
2. NAICS 33 Manufacturing
3. NAICS 62 Healthcare and Social Assistance

USCIS deemed the intended “actual” project insufficient for explicit approval.

“.... USCIS has determined that the business plan presented in the Form I-526 exemplar petition is not Matter of Ho1 compliant due to lack of construction permits and a specific project timeline. Therefore, the regional center proposal approval must be limited to granting the regional center designation without a specific approval of the capital investment project presented in the application for which deference would be given should these same documents be presented in individual Form I-526 petitions.2”

Footnotes from original:

1 Matter of Ho, 22 I&N Dec. 206 (AAO [1998])
2 Guidance on Adjudications Involving the Tenant-Occupancy Methodology, Dated May 8, 2012

The Approval Notice includes a discussion of the significance of USCIS’ acceptance of the “actual project” documentation as an “I-526 Exemplar Petition”. Such documentation must be worthy of deference when later re-submitted as “prima facie evidence” in support of investors’ I-526 petitions. There will be no “wink and nod” on insufficient evidence. If you want an advance vetting that will result in a “provisional approval” of “evidence” then that “evidence” MUST be worthy of the desired and expected deference.

1 Should be Sector 31-33 Manufacturing. If you enter 33 in the NAICS search box at: http://www.census.gov/eos/www/naics/, you get: 331 Primary Metal Manufacturing.
If anything needs correction or clarification or is found to be disqualifying, the “exemplar” provides the time and means to fix it. Just imagine if YOUR REGIONAL CENTER allowed and in fact, encouraged, fifty (50) investors to file insufficient I-526s en masse, and they ALL GET DENIED. At $1,500.00 per I-526 times, 50 I-526s would be a waste of $75,000.00! However, the filing fee for ONE I-924 as an I-526 Exemplar is $6,230.00 divided among those same 50 investors is only $124.60 each. What the hell did they pay that subscription or management fee for anyway if not for something as simple and common sense as this? If you let such a travesty as described above ever happen, then you should expect a lawsuit and expect to lose and expect to cease being a Regional Center.

I recommend filing Project-Specific I-526 Exemplars as I-924 Amendments. It is safer, wiser, and less expensive. Such an Exemplar Amendment also enjoys the luxury of not having to be “approvable when filed” and the “applicant” does not have to be “eligible at time of filing” like a real visa petitioner because it is NOT a real visa petition. The filing date of any I-924 Amendment filed as an I-526 Exemplar is meaningless because it will NOT later transform into, or be used to secure, a “priority date” for visa issuance or adjustment of status purposes. With that said concerning the “filing date NOT being the priority date”, what else should the EB-5 Stakeholder Community ask USCIS to consider in conjunction with the I-526 Exemplar filing? Should we ask USCIS to re-write the regulations such that an I-526 Exemplar “filing date” be an alternative for securing TEA designation for the “specific project”? Lobbying Congress to put pressure on USCIS, or to just do it by legislative amendment and you might get some results. I don’t think it would be a hard sell to Congress. After all, they like to take credit for improving the local (as in Regional) economy of their constituents! If valid TEA designations could be “locked-in” for an entire project, results of individual projects with longer schedules would increase and Congressional Members would increase their bragging rights and improve re-election prospects for having made it happen.

Now, I’ll get back to the discussion of the “Limited (or Provisional) Approval Notice”. In the absence of a Matter of Ho-compliant Business Plan and additional sufficient supporting documentation fully worthy of deference “as-is”, USCIS instructed that the real investor I-526 petitions will need to be supported by much stronger supporting documentation than was presented with this I-924.

“IV. Guidelines for individual Immigrant Investors Visa Petition (Form I-526 Petition)

Each individual immigrant investor Form I-526 Petition, in order to demonstrate that it is associated with the Regional Center, in conjunction with addressing all the requirements for an individual immigrant investor petition, shall also contain as supporting evidence relating to this Regional Center designation, the following:
1. A copy of this letter, the Regional Center approval and designation.

   - A comprehensive detailed business plan with supporting financial, marketing and related data and analysis providing a reasonable basis for projecting creation of indirect and/or induced jobs to be achieved/realized within two years pursuant to 8 CFR 204.6(j)(4)(B) and reasonable methodologies pursuant to 8 CFR 204.6(m)(7)(ii).
   - An economic analysis employing the job creation methodology required in 8 CFR 204.6(j)(4)(iii), based upon the Matter of Ho-compliant business plan that utilizes the reasonable economic methodologies contained in the final Regional Center economic analysis which has been generally approved by USCIS in its regional center designation, which reflects that investment by an individual immigrant investor will create not fewer than ten (10) fulltime employment positions, either directly or indirectly, per immigrant investor.

3. USCIS has reviewed the following organizational documents and has found them to be EB-5 compliant in principle:
   - Private Placement Memorandum  (Draft dated September 2011)
   - Subscription Agreement;   (Draft dated September 2011)
   - Operating Agreement; and  (Draft dated September 2011)
   - Escrow Agreement.   (Draft dated September 2011)

   The regional center may elect to use this organizational documentation for the capital investment opportunities that it chooses to promote.”

Please note that the “organizational documents” are precisely identified by date of actual version or draft that was presented. You can rest assured that each such document that is later submitted with an actual investor’s I-526 will be checked against the earlier version. While it is the simple reality that the precise details will change to suit the actual specific project, USCIS will be on the alert for any shenanigans, i.e. “bait and switched documents”. That particular precaution was made known from the situation that arose in Matter of Izummi, 22 I&N Dec.169 (AAO 1998).

One last point that we should all take notice of is the two-digit NAICS codes. While USCIS has gone on record that they want to see a minimum of four-digit NAICS codes, there is no statute, regulation, or precedent that requires it. The form instructions are incorporated into the controlling regulation as stated at 8 CFR § 103.2(a) (1). That said, the form instructions do not demand a set number of digits! Less precision in this gives greater flexibility but will necessitate an I-526 Exemplar later. I think it is a fair trade. That’s my two-cents, for now.

2 RIMS II was already put forth and tentatively approved BUT a new model may also be substituted because of the lack of precise detail up-front and demand for greater detail in the later stage submissions.