



U.S. Citizenship
and Immigration
Services

November 23, 2016

Robert Divine

Re: Path America SnoCo LLC– **Designation Terminated**

1800 Republic Centre

633 Chestnut Street

Chattanooga TN 37450

Notice of Termination

This letter shall serve as notification that U.S. Citizenship and Immigration Services (“USCIS”) has terminated the designation of Path America SnoCo LLC (the “Regional Center”) as a regional center under the Immigrant Investor Program (the “Program”) pursuant to Title 8 of the Code of Federal Regulations (“8 CFR”) section 204.6(m)(6).

The regulation at 8 CFR § 204.6(m)(6) provides:

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.

Procedural History

On August 8, 2011, USCIS designated and authorized the Regional Center's participation in the Program.¹ On November 20, 2015, USCIS issued a Notice of Intent to Terminate ("NOIT") to the Regional Center which afforded the Regional Center 30 days from receipt of the NOIT to offer evidence in opposition to the grounds alleged in the NOIT. On December 29, 2015, USCIS received a response to the NOIT (the "First NOIT Response"). USCIS subsequently received two supplemental filings to the NOIT, the first dated May 19, 2016, and the second dated July 27, 2016 (together, the "Supplemental NOIT Responses" and together with the First NOIT Response, the "NOIT Response"). None of the responses sufficiently address the grounds alleged in the NOIT. Accordingly, USCIS has determined that the Regional Center's participation in the Program should be terminated. Through this Notice of Termination, USCIS hereby terminates the Regional Center's participation in the Program.

Reasons for Termination

USCIS has determined that the Regional Center no longer serves the purpose of promoting economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment as required by 8 CFR § 204.6(m)(6).

Failure to Continue to Serve the Purpose of Promoting Economic Growth

Regional centers are designated for the promotion of economic growth and must continue to meet the requirements of section 610(a) of the Appropriations Act following designation. *See, e.g.*, 8 C.F.R. § 204.6(m)(6). According to section 610(a) of the Appropriations Act, economic growth includes increased export sales, improved regional productivity, job creation, or increased domestic capital investment. *See also* 8 C.F.R. § 204.6(m)(6) ("USCIS will issue a notice of intent to terminate . . . 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 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." 75 FR 58962. For example, depending on the facts, a regional center that takes actions that undermine investors' ability to comply with EB-5 statutory and regulatory requirements such that investors cannot obtain EB-5 classification through investment in the regional center may no longer serve the purpose of promoting economic growth. *See* Section 610(a)-(b) of the Appropriations Act (stating that one purpose of a regional center is

¹ The Regional Center, through its owner and manager at the time, Lobsang Dargey, submitted an application for regional center designation in June of 2010. A request for evidence (RFE) was issued in November 2010 and the applicant for regional center designation was denied in April 2011. The case was reopened in May 2011 and eventually USCIS approved the application and its accompanying hypothetical projects in August 2011.

to concentrate pooled investment in defined economic zones and accomplishing such pooled investment by setting aside visas for aliens classified under INA 203(b)(5)). Likewise, a regional center that fails to engage in proper monitoring and oversight of the capital investment activities and jobs created or maintained under the sponsorship of the regional center may no longer serve the purpose of promoting economic growth in compliance with the Program and its authorities. As detailed in the NOIT, on August 24, 2015, the United States Securities and Exchange Commission (the “SEC”) brought a civil action against the Regional Center, related EB-5 entities,² and Lobsang Dargey, among other named defendants (collectively referred to herein as “Defendants”). The evidence cited in the NOIT includes reference to the SEC’s allegations that the management of the Regional Center, including Mr. Dargey, may have engaged in improper or illegal behavior. The NOIT also details the District Court’s orders restraining the Regional Center and related EB-5 entities, from issuing, offering or selling any securities, as well as a series of orders which freeze the assets of the Regional Center, the new commercial enterprise (the “NCE”), and the related escrow accounts.

When derogatory information arises (such as evidence of inaction, mismanagement, theft, or fraud by the regional center or related entities), USCIS weighs all relevant factors in the totality of the circumstances to determine whether the regional center is continuing to serve the purpose of promoting economic growth. Such factors may include the seriousness of the derogatory information, the degree of regional center involvement in the activities described in the derogatory information, any resulting damage or risk imposed on investors and the economy, as well as any mitigating, corrective, or restorative actions taken or forthcoming to redress the situation.

USCIS has considered all evidence in the record including evidence provided in response to the NOIT “for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence,” in determining whether the Regional Center’s continued participation is justified under the regulations by a preponderance of the evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). For the reasons set forth below, USCIS has determined by a preponderance of the evidence that the Regional Center no longer serves the purpose of promoting economic growth in compliance with the Program.

1. Factors Impacting the Regional Center’s Ability to Serve the Purpose of Promoting Economic Growth

A. Allegations of Improper or Illegal Behavior of the Regional Center

In response to the NOIT, the Regional Center did not provide any evidence in opposition to the allegation of improper or illegal behavior of the Regional Center. Nor did the NOIT Response provide sufficient evidence to demonstrate how the Regional Center would be able to continue to serve the purpose of promoting economic growth in compliance with the Program as contemplated by its initial designation in

² Including Path America Farmer’s Market, LP, the new commercial enterprise associated with the Regional Center.

light of the asset freeze, the preliminary injunction prohibiting the issuing, offering or selling of any securities, and the appointment of a court-ordered receiver (the “Receiver”).³

The cover letter from the attorney of record that accompanied the First NOIT Response (the “Attorney Cover Letter”) neither refutes nor denies any allegations about past misdeeds of the Regional Center or its management, including Mr. Dargey; rather, the letter asserts that “it is not likely that there will be further problems or additional harm because the alleged perpetrator is no longer in control . . .” This is further confirmed in the Supplemental NOIT Responses, including in the first supplemental NOIT response dated May 17, 2016 where the Receiver notes “I am developing a plan for both restoring funds diverted to other projects and replacing other funds for the Project.” From these additional references acknowledging the need for remedial measures to address diversion of funds it appears that the Regional Center does not contest the allegation of Mr. Dargey’s improper or illegal behavior. Nor does the Regional Center appear to contest the serious allegation that EB-5 funds were misappropriated from the sole project sponsored by the Regional Center.

As noted previously, a regional center that takes actions that undermine investors’ ability to comply with EB-5 statutory and regulatory requirements or fails to engage in due diligence, monitoring and oversight of the EB-5 capital investment activities and jobs created or maintained under its sponsorship may no longer serve the purpose of promoting economic growth. Based on a preponderance of the evidence in the record related to the allegations of improper or illegal behavior, USCIS has determined that the Regional Center, through its previous management has failed to serve the purpose of promoting economic growth.

B. Lack of Future Projects

In addition, the NOIT Response states that the Regional Center does not intend to sponsor any additional projects. Therefore, the Regional Center is not likely to promote economic growth in the future. Specifically, the Attorney Cover Letter indicated that “[i]t is not likely that the Regional Center will sponsor any additional projects.”

In his recovery plan filed with the court on January 20, 2016, the Receiver stated that he had “completed much of his analysis of the business and financial activities” of the Regional Center and related entities but did not include any indication of future projects for the Regional Center or any future plans for the

³ According to a court order dated October 22, 2015, Michael A. Grassmuck was named the court-appointed Receiver for Path America LLC; Path America SnoCo LLC; Path America Farmer's Market, LP; Path America KingCo LLC; Path America Tower LP; Path Tower Seattle, LP; Potala Tower Seattle, LLC; Potala Shoreline, LLC and Potala Kirkland, LLC. On July 15, 2016, the court granted a Motion to Modify Receivership Order, which placed Dargey Development, LLC; Dargey Enterprises, LLC; Path Farmer's Market, LLC; and Dargey Holdings, LLC into the receivership.

promotion of economic growth.⁴ Nor do the updates provided in the Supplemental NOIT Responses indicate that there are any additional projects being contemplated.

Furthermore, the Regional Center is currently prohibited from soliciting EB-5 funds or engaging in the core purpose of a regional center, *concentrating pooled investments from immigrant investors* for the purpose of job creation. The NOIT Response argues that both the Receiver and the Court have indicated their commitment to complete the project as it was described to USCIS, and that the Receiver is negotiating with lenders for a loan to replace the misappropriated funds. Therefore, the NOIT Response argues that the Receiver is likely to be able to finish the current project, thereby promoting economic growth. However, while the Regional Center under control of the court-appointed Receiver might be permitted to complete real estate projects, sell assets, and seek additional outside financing in connection with the current project, the Regional Center and its related EB-5 entities remain barred from attracting and concentrating any new capital from immigrant investors for the purpose of job creation. Accordingly, it appears that the Regional Center is currently unable to promote economic growth with EB-5 funds in the future.

Furthermore, even if the Receiver is able to complete the sole Regional Center project, any job creation would be in spite of the Regional Center's alleged prior misdeeds, as opposed to because of its positive guidance and oversight. The remedial actions of a receiver are not completely curative of a regional center's past problems, in part because receiverships are by their nature temporary and in place to marshal and preserve assets rather than for the purpose of promoting economic growth in compliance with the Program.⁵

Since insufficient evidence was provided in opposition to the grounds alleged in the NOIT, USCIS has determined by a preponderance of the evidence that the Regional Center has not served the purpose of promoting economic growth in compliance with the Program in the past and is unlikely to do so in the future.

2. Diversion of EB-5 funds

The NOIT asserted that EB-5 funds were used for purposes that were inconsistent with the business plans submitted to USCIS by the Regional Center and in furtherance of job creation. Specifically, based on the allegations set forth in the SEC's complaint and the court's findings in the order granting the motion for preliminary injunction and denying the motion to modify the temporary restraining order, it appears that

⁴ *SEC vs. Path America LLC, et al. Receiver Michael A. Grassmueck's Recovery Plan*, Civil Action No. 2:15-cv-01350, (W.D. Wash. filed Jan. 20, 2016).

⁵ As an officer of the district court, the Receiver was appointed in order to effectuate the purposes of the federal securities laws rather than for the purpose of promoting economic growth. *See SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1105 (2d. Cir. 1972); *See also* Investor Bulletin: 10 Things to Know About Receivers, U.S. Securities and Exchange Commission, Aug. 27, 2015, https://www.sec.gov/oiea/investor-alerts-bulletins/ib_receivers.html (last visited Oct. 28, 2016).

EB-5 funds were diverted and used for purposes unrelated to the business activities of the job creating entity.⁶

In response to the NOIT, the Regional Center did not provide any evidence in opposition to the allegation of diversion of EB-5 funds. Rather, the evidence provided in the NOIT Response as well as publicly available information indicate that the Regional Center concedes that EB-5 funds were diverted from job creating purposes, and therefore support USCIS' determination that the Regional Center does not serve the purpose of promoting economic growth.

The Attorney Cover Letter indicated:

The receiver is currently reviewing its options **to seek to restore the diverted funds** . . . (Emphasis Added)

Further, the Receiver's website states:

Among these issues identified by the Receiver which adversely impact the prospects for approval of any applications are **the fact that funds were dissipated from the Farmer's Market project** and the Potala Tower project.⁷ (Emphasis Added)

The diversion of EB-5 investment funds away from job creating activities is contrary to the intent of the Program as it undermined investors' ability to comply with EB-5 statutory and regulatory requirements and jeopardized their eligibility for EB-5 classification. It also indicates that the Regional Center failed to engage in proper monitoring and oversight of the capital investment activities under the sponsorship of the Regional Center. The Regional Center's alleged involvement in activity that resulted in serious risk to its investors' immigration petitions reflects negatively on the Regional Center's ability to promote economic growth in compliance with the Program.

The fact that the Receiver has attempted to recover the misappropriated funds and to secure additional funding to replace the misappropriated EB-5 capital is considered a positive factor; however it does not absolve the Regional Center of misdeeds that undermined economic growth and necessitated such remedial efforts in the first place. Similarly, an individual petitioner's ability or inability to overcome the misdeeds of the Regional Center does not diminish the severity of the Regional Center's alleged role in diverting EB-5 investments funds.

⁶ *SEC vs. Path America LLC, et al.* Complaint. Civil Action No. 2:15-cv-01350, (W.D. Wash. filed Aug. 24, 2015) (Alleging that "Defendants engaged in the scheme to defraud through the misappropriation of investor funds knowingly or recklessly."). *SEC vs. Path America, LLC, et al.* Order Granting Motion for Preliminary Injunction and Denying Motion to Modify the Temporary Restraining Order. Civil Action No. 2:15-cv-01350, (W.D. Wash. filed Oct. 6, 2015).

⁷ See "Update to Investors as of December 18, 2015" available at <http://www.grassmueckgroup.com/pathamerica-status.php> (accessed on February 25, 2015)

After reviewing the evidence in the record, including all that was submitted in response to the NOIT, it appears that the Regional Center, through Mr. Dargey, used EB-5 funds for purposes unrelated to the business activities of the JCE. Based on this apparent diversion and the seriousness of its consequences, USCIS has determined that the Regional Center does not serve the purpose of promoting economic growth in compliance with the requirements of the Program.

3. Lack of Regional Center due diligence, monitoring and oversight

As detailed in the NOIT, the Regional Center, both in its approval letter from USCIS and in the organizational documents of the limited partnership that it sponsored, bears responsibility for the actions of the limited partnership (the NCE). Accordingly, the diversion of NCE funds as well as the alleged violation of federal securities laws indicates a lack of management and oversight by the Regional Center. In the NOIT, USCIS questioned the Regional Center's ability to properly engage in future management, monitoring and oversight as required by the Program because of the preliminary injunction and asset freeze, which result in the Regional Center having insufficient control over its own operations.

Although the Receiver is currently in charge of the Regional Center's operations, as noted above, receiverships are by their nature temporary.⁸ There was no evidence in the NOIT Response which provided any long-term or permanent solutions to the management and oversight issues raised by USCIS. Although the Receiver did discuss possible future plans for the Regional Center in the Supplemental NOIT Responses, these plans were preliminary and uncertain. For instance, they were dependent on various factors, such as finding viable buyers, lenders and alternative sources of funds for the Regional Center.⁹ On May 18, 2016, the Receiver noted, "I am meeting with one such regional center [that may be in a position to take over the Regional Center]". However, as of his July 25, 2016 filing, no progress had been made on finding a long-term solution for the management of the Regional Center and no evidence indicates circumstances have changed to date.¹⁰ Even if the Receiver could progress with his plans, and receive court permission to do so, it is unclear if and when any change in management would be able to take effect. And even if the Receiver could do so, it would not change the overwhelming evidence that the Regional Center's past actions were inconsistent with the purpose of promoting economic growth.

Neither the First NOIT Response nor the Supplemental NOIT Responses provided any evidence in opposition to the allegation of the lack of due diligence, monitoring and oversight by the Regional Center. Conceding that there were misdeeds and lack of due diligence, monitoring and oversight by the Regional Center in the past, the Receiver and his attorney in the NOIT Response try to outline actions currently

⁸ The October 22, 2015 court order granted the SEC's motion to appoint a "temporary" receiver over the Regional Center and some of its related entities. Pages 14- 15 of that order states that the Receiver must submit Quarterly Status Reports to the Court including the Receiver's recommendation for a continuation or discontinuation of the receivership and the reasons for the recommendations.

⁹ In his July 25, 2016 statement accompanying the Supplemental NOIT Responses, the Receiver stated that he was still in the process of negotiating with lenders for a loan to cover certain developmental costs for the project.

¹⁰ In his July 25, 2016 statement accompanying the Supplemental NOIT Responses, the Receiver stated "I am still engaged in discussions with persons and entities who may be in a position to take over the Regional Center."

being taken by the Receiver to mitigate the harm caused by the Regional Center's failure to uphold its responsibilities in the first place. The Regional Center's responsibility to perform due diligence, monitor and oversee its projects, as outlined in its approval letter and organizational documents, is crucial to promoting economic growth in compliance with the Program. Due consideration is given to all remedial measures undertaken to strengthen the Regional Center's oversight capabilities, but here such measures cannot retroactively cure its past failures. Regardless of any corrective action that is being or may be attempted pursuant to a court order, the allegations of improper activity indicate that the Regional Center was acting at odds with the purpose of promoting economic growth and weigh heavily against any remedial measures that could be undertaken.

Based on the existing record, including evidence provided in response to the NOIT, USCIS has determined that the Regional Center no longer serves the purpose of promoting economic growth because of its failures to perform adequate due diligence, monitoring and oversight.

Conclusion

Both the Attorney Cover Letter dated December 21, 2015 and the Receiver's NOIT response dated December 22, 2015 in the First NOIT Response requested that USCIS grant more time to the Regional Center to permit the Receiver to continue his investigation and consider viable next steps. In the recovery plan filed with the court on January 20, 2016, which stated that the Receiver had "completed much of his analysis of the business and financial activities" of the Regional Center and related entities, the Receiver anticipated "that the [Regional Center's Market] project can be completed and leased in the [sic] approximately nine (9) months." In his letter to USCIS dated July 25, 2016, the Receiver described ongoing challenges facing the project, stating that "approximately [REDACTED] will be required to carry out the proposed development" because there is insufficient cash flow from the other components of the project, and the Receiver was then "negotiating with lenders." It has been almost 11 months since the First NOIT Response was received. USCIS has considered all of the evidence in the record, including the First NOIT Response and the two Supplemental NOIT Responses. USCIS has determined that the Regional Center no longer serves the purpose of promoting economic growth, in part because of the alleged diversion of EB-5 funds and the lack of past Regional Center due diligence, monitoring and oversight, and the NOIT Response has not outlined sufficient reasons for USCIS to further delay terminating the Regional Center pursuant to 8 CFR § 204.6(m)(6). (b)(4)

For the reasons described above and set forth in the NOIT and pursuant to 8 CFR § 204.6(m)(6), USCIS has determined that the Regional Center no longer serves the purpose of promoting economic growth and hereby terminates the Regional Center's participation in the Program.

Procedure to Appeal the Decision to Terminate

If you disagree with this decision, or if you have additional evidence that shows this decision is incorrect, you may file a motion or an appeal to this decision by filing a completed Form I-290B, Notice of Appeal or Motion, along with the appropriate filing fee. A copy is enclosed. You may also include a brief or other written statement and additional evidence in support of your motion or appeal. The Form I-290B

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must be filed within 33 days from the date of this notice. If a motion or appeal is not filed within 33 days, this decision is final.

You must send your completed Form I-290B and supporting documentation with the appropriate filing fee to the address indicated below.

If using the U.S. Postal Service:

USCIS
P.O. Box 21100
Phoenix, AZ 85036

If using USPS Express Main/Courier:

USCIS
Attn: 290B
1820 E. Skyharbor Circle S, Suite 100
Phoenix, AZ 85034

Your motion or appeal must be filed on Form I-290B and must be accompanied by a fee of \$630.00. The check or money order used for the Form I-290B filing fee must be drawn from a bank or other financial institution located in the United States and must be payable to U.S. Department of Homeland Security.

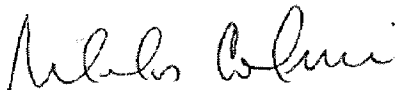
In support of your appeal, you may submit a brief or other written statement for consideration at the time of initial filing of the Form I-290B or within 30 calendar days of filing. If you are filing an appeal of this decision, you may, if necessary and for good cause, request additional time to submit a brief or other statement by submitting a written explanation for the need for additional time. Any brief, written statement or other evidence in support of an appeal that is not filed concurrently with Form I-290B, including any request for additional time for the submission of a brief must be sent directly to the Administrative Appeals Office (AAO) at:

USCIS Administrative Appeals Office
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, NW, MS 2090
Washington, DC 20529-2090

The appeal of the termination may not be filed directly with the AAO. The appeal of the termination must be filed in accordance with the Form I-290B instructions and at the address indicated above.

For more information about the filing requirements for appeals and motions, please see 8 CFR § 103.3 or 103.5, or visit the USCIS website at www.uscis.gov.

Sincerely,



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Nicholas Colucci
Chief, Immigrant Investor Program

Enclosure: (1) Notice of Intent to Terminate issued on November 20, 2015

cc: Michael A. Grassmueck