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Judge Doubts DOJ Can Keep Trump-Era EB-5 Rule Change

By **Hannah Albarazi**

Law360, San Francisco (May 13, 2021, 9:07 PM EDT) -- A California federal magistrate judge appeared unwilling Thursday to accept the Biden administration's defense of a Trump-era policy nearly doubling the EB-5 visa program's investment requirements, saying she doesn't think the new U.S. secretary of Homeland Security can approve the rule change made by Trump's unlawfully appointed former acting secretary.

U.S. Magistrate Judge Jaqueline Scott Corley — accepting as "pretty well-established" that Kevin McAleenan unlawfully served as the acting U.S. secretary of Homeland Security under the Trump administration — said her reading of the Federal Vacancies Reform Act doesn't permit ratification of McAleenan's policy increasing the amount of capital required for EB-5 visas.

During a video hearing Thursday, Judge Corley pressed U.S. Department of Justice attorneys to explain why she shouldn't grant summary judgment to California-based Behring Regional Center LLC and halt the EB-5 rule change, which, among other things, increased the minimum investment amount from \$1 million to \$1.8 million.

Judge Corley said the Federal Vacancies Reform Act — which limits who can serve in an acting role and how long they can serve — didn't permit McAleenan to promulgate and sign the final rule. McAleenan, who wasn't next in line for the position of acting secretary of Homeland Security, lacked authority under the law to make the EB-5 rule change and therefore his action can't be ratified, the judge said.

The issue here, Judge Corley said, is that "the wrong person took the position of the secretary."

But DOJ attorney August Flentje said the agency action taken by McAleenan is "delegatable" and not one of the narrowly defined functions and duties, as defined by the Federal Vacancies Reform Act, that only the secretary can perform. Flentje further argued that now that the Senate has **confirmed** President Joseph Biden's pick for secretary of Homeland Security, Alejandro Mayorkas, he has the authority to ratify this rule change.

But Judge Corley said that's not her reading of the Federal Vacancies Reform Act.

"This is just a matter, I think, of statutory interpretation," Judge Corley said.

The Behring Regional Center in Contra Costa County, which sponsors projects using funds from EB-5 investors, sued the government in December 2020, challenging the EB-5 rule change made by the Trump administration.

The rule change raised the program's investment bar to \$1.8 million while also increasing the minimum amount in a targeted employment area — a high-unemployment or rural area — from \$500,000 to \$900,000.

Additionally, the rule change prevents U.S. cities and towns with a population of 20,000 or more within a metropolitan area from being deemed targeted employment areas, even if they suffer from high unemployment. State participation in the designation of targeted employment areas was also

ended by the rule change.

The lawsuit pointed to a **November 2020 order** from U.S. District Judge Nicholas G. Garaufis in the Eastern District of New York that then-acting Homeland Security chief Chad Wolf was improperly appointed and lacked the authority to limit the Obama-era Deferred Action for Childhood Arrivals program. The Behring lawsuit pointed to Garaufis' order and others as evidence that when McAleenan signed the final rule change to the EB-5 program in July 2019, it was done unlawfully.

Following the **reasoning** of two other federal judges before him, Judge Garaufis concluded that Kirstjen Nielsen, the Senate-confirmed leader of DHS under the Trump administration, had incorrectly revised the order of succession when she tapped McAleenan to replace her.

In March, Judge Corley delayed ruling on the **preliminary injunction** sought by Behring and converted the arguments into motions for summary judgment.

That same month, a group of businesses that raise money from foreign investors seeking visas through the EB-5 program hit the federal government with a lawsuit in D.C. federal court, seeking to block the rule change that restricts the redeployment of EB-5 investment funds to certain preapproved geographic areas.

On Thursday, Judge Corley gave no indication that she agreed with the government's interpretation of the Federal Vacancies Reform Act, and Behring's attorney, Todd Alexander Pickles of Greenberg Traurig LLP, lauded her interpretation of the law.

Pickles told Judge Corley that her interpretation of the statute was "exactly right."

"You've hit the nail on the head, repeatedly," Pickles said.

Judge Corley took the matter under submission without issuing a ruling.

Counsel for Behring declined to comment Thursday, and the DOJ did not immediately respond to requests for comment.

Behring is represented by Todd Alexander Pickles of Greenberg Traurig LLP.

The government is represented by August Flentje and Glenn M. Girdhar of the DOJ's Civil Division.

The case is Behring Regional Center LLC v. Wolf et al., case number 3:20-cv-09263, in the U.S. District Court for the Northern District of California.

--Editing by Rich Mills.