

## **A Question to Ponder Regarding Regional Center Project Size Requirement**

By Joseph P. Whalen

In association with the recent EB-5 Teleconference, USCIS received some questions in advance as well as on the call itself. One item (#7) listed in the Q&A<sup>1</sup> that was distributed and posted, dropped and re-posted on the USCIS website asks a fundamental question and I do not agree with the answer given and think USCIS either misunderstood the question **or** was playing it safe and being purposely vague.

### **“7. Project Size Requirement**

In a Regional Center is there a project size requirement, or could it be one investor, with one property, leased to a single tenant that would provide multiple jobs. Is there any way this scenario would work for an individual, or would it be necessary to go the RC route since all the jobs would be indirect?

**Response:** There is no project size requirement in a Regional Center application. Without all of the details, USCIS cannot speculate about what may or may not be qualifying. The regulations at 8 CFR 204.6(j)(4) outline the requirements for job creation for regular program investors and Regional Center investors. In short, regular program investors must directly create at least 10 full time positions for qualifying employees, while Regional Center investors must show that at least 10 full time positions for qualifying employees will be created either directly or indirectly.”

I think it was a loaded question with an ulterior motive. I read the question as asking about the minimum number of investors required to “pool their investments” in a particular project presented at the I-526 petition stage that could still be considered as being *affiliated with a Regional Center* and thus utilize “indirect jobs” in the count. In order to answer this question, the statute must be dissected and read in the proper context. I suspect that the question was posed in order to illicit an inconclusive response that could be twisted in an attempt to allow a stand-alone investor to claim affiliation to a Regional Center (for a fee) and then count “indirect jobs” in contravention to, or subversion of, the law. Furthermore, I don’t care who I offended by my statement of that suspicion. In fact, he or she should take it as a compliment that I think that that person is devious rather than incompetent.

## **8 USC 1153 NOTE**

### **Pilot Immigration Program**

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<sup>1</sup>Q&A found at:

[http://www.uscis.gov/USCIS/Outreach/Upcoming%20National%20Engagements/National%20Engagement%20Pages/2011%20Events/June%202011/EB\\_5%20June%202011%20Stakeholder%20Meeting%20QA.pdf](http://www.uscis.gov/USCIS/Outreach/Upcoming%20National%20Engagements/National%20Engagement%20Pages/2011%20Events/June%202011/EB_5%20June%202011%20Stakeholder%20Meeting%20QA.pdf)

(a) Of the visas otherwise available under section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)), the Secretary of State, together with the Secretary of Homeland Security, shall set aside visas for a pilot program to implement the provisions of such section. **Such pilot program shall involve a regional center in the United States, designated by the Secretary of Homeland Security on the basis of a general proposal, for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, **or increased domestic capital investment**. A regional center shall have jurisdiction over a limited geographic area, which shall be described in the proposal and **consistent with the purpose of concentrating pooled investment in defined economic zones**. The establishment of a regional center may be based on general predictions, contained in the proposal, **concerning the kinds of commercial enterprises that will receive capital from aliens**, the jobs that will be created directly or indirectly as a result of such capital investments, and the other positive economic effects such capital investments will have.**

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(c) In determining compliance with section 203(b)(5)(A)(iii)[(ii)] of the Immigration and Nationality Act [8 U.S.C. 1153(b)(5)(A)(iii)[(ii)]], and notwithstanding the requirements of 8 CFR 204.6, **the Secretary of Homeland Security shall permit aliens admitted under the pilot program described in this section to establish reasonable methodologies for determining the number of jobs created by the pilot program, including such jobs which are estimated to have been created indirectly through revenues generated from increased exports, improved regional productivity, job creation, **or increased domestic capital investment** resulting from the pilot program.**

So, let's take a step back first. The Regional Center only exists as part of the Immigrant Investor Pilot Program. The Regional Center has to be authorized by USCIS. An alien investor can only count "indirect jobs" if it is filing under the auspices of a USCIS authorized and designated Regional Center. In order to become a Regional Center, the "sponsor" [applicant] must put forth an acceptable plan which, *in pertinent part*, establishes that it will be "concentrating pooled investment".

### **How can a single individual's investment reasonably be termed as "pooled"? It can't!**

A single EB-5 investor must demonstrate his or her own individual funds add up to the minimum required amount of either one or one-half million dollars. There is no "pooling" allowed for that minimum even if it really is from a husband and wife and any independently wealthy minor children pooling their personal funds. In such a case, for the EB-5 investment amount purposes, it is "family money" or joint or community property. While for immigration petitioning purposes, one spouse is the principal and the other is a derivative (along with any kids), for obtaining their visas.

Taking the MOST generous reading possible, a project **might** be considered as a Regional Center affiliated investment and could count "indirect jobs" if it has *at least one EB-5 investor* contributing his/her minimum amount of funds *with at least one non-EB-5 investor* (foreign or domestic) in order to be considered as "concentrating pooled investment". A stand-alone alien investor even contributing two million dollars all by him/herself cannot just "join" a Regional

Center in order to count “indirect jobs”. Regional Centers are not social clubs or fraternities, they are not community-based-organizations or cultural associations. Regional Centers cannot just market their USCIS designation for a fee in order to act as an “umbrella organization” or “small business incubator” to foster stand-alone or mom & pop investments seeking to count “indirect jobs”.

Stepping back a little bit further and one might take a less generous reading by giving full effect to every word in the statute. The Regional Center must submit plans and **predictions contained in the proposal, concerning the kinds of commercial enterprises that will receive capital from aliens, in which jobs will be created.** In that the Regional Center must discuss in its proposal the kinds (plural) of commercial enterprises (plural) that will receive **capital from aliens (plural)**, one might read the statute to require at least one EB-5 alien and at least one other foreign investor whether seeking an EB-5 visa or not. In addition, the Regional Center “sponsor” must state the “kinds” of commercial enterprises that will get those funds, so, a Regional Center would have to continually file amendments in order to act as an “umbrella organization” for stand-alone investors and would be found out in due course. On the other hand, if a Regional Center “sponsor” were to put forth a plan upfront that it would concentrate in *small EB-5 investor groups* and put USCIS on notice that that was its intent, then it could be doable. This latter approach would require a multi-faceted business plan consisting of a group of small projects supported by comprehensive business plans and associated economic analyses. That could be achieved through the use of transparent flexibility in an effort to maintain maximum flexibility. In short, the Regional Center would need a library of USCIS-vetted small projects that it could match up to small EB-5 investor groups, with or without a mix of domestic capital.

**The question then remains: What is the minimum number of EB-5 investors required for a qualifying group?**

Only because of the use of the word “or” in the statute, *a domestic investor* is **not an absolute requirement** but it is clear that it is among Congress’ desires in passing EB-5 into law that there should be some increased capital investment. An argument could be made that the domestic capital would be among the indirect and induced jobs and further positive economic effects. One would have to advise their economist to specify that in the economic analyses. With this in mind, USCIS might conclude that *at least one EB-5 investor can be paired with one domestic investor and qualify* for Regional Center affiliation and thus “indirect job creation” benefits. On the other hand, USCIS might conclude that one EB-5 investor is *insufficient* to qualify for Regional Center affiliation status *even with multiple domestic investors*. USCIS might conclude that the underlying statutory requirements of the EB-5 Pilot Program requires a minimum of two EB-5 investors because *the pooled investments of a Regional Center must contain the funds of “aliens” (plural in the statute) in order to count “indirect jobs” for EB-5 purposes*; and anything beyond that is just “icing on the cake” for the U.S. economy. That’s a question I’d like to see AAO tackle and publish an opinion about!