On Matters Pertaining to Infrastructure Development and Expansion via EB-5

Introduction

The AAO has addressed the concept of, and the need to show a sufficient nexus between EB-5 money and the jobs attributable to the EB-5 investors in *Matter of Izummi*, 22 I&N Dec. 169 (AAO 1998). *Izummi* was a Regional Center affiliated investor as denoted in prong (2) of the holding. That case involved an investment under the Immigrant Investor Pilot Program. Prong (4) tells us that the EB-5 investors' money *"must be made available to the business(es) most closely responsible for creating the employment on which the petition is based"*. That language needs to be dissected carefully. That dissection will follow some further preliminary discussion on the primary concept from *Izummi*.

Izummi's Material Change Prohibition

The dreaded and woefully misunderstood and misconstrued prohibition against "material change" sprang forth from prong (3) of *Izummi*. The material change issue has validity when confined to it proper context and narrowly applied. USCIS has recently expressed a willingness to further study the issue and refine its interpretations and application of the material change prohibition. I view this change in direction as a positive step towards implementation of processes and procedures that will help achieve the Congressional intent behind the EB-5 Immigrant Investor Program and realize the true purpose and potential of EB-5 Regional Centers. I readily agree that certain very specific technical matters once thoroughly vetted and firmly settled are properly subject to the prohibition. However while the original subject matter was applied in a proper context, later expansions of the material change prohibition were done in error. I feel that this issue is being addressed and that now is the time to simply wait and see what USCIS comes up with via its newly adopted iterative policy development strategy. Further deep discussions should be facilitated through active participation in that process to include open discourse on the fine points involved in a free and frank exchange of ideas between USCIS and EB-5 stakeholders.

Izummi held, in pertinent part and as excerpted below:

> (2) Under the Immigrant Investor Pilot Program, if a new commercial enterprise is engaged directly or indirectly in lending money to job-creating businesses, such job-creating businesses must all be located within the geographic limits of the regional center. The location of the new commercial enterprise is not controlling.

(3) A petitioner may not make material changes to his petition in an effort to make a deficient petition conform to Service requirements.

(4) If the new commercial enterprise is a holding company, the full requisite amount of capital must be made available to the business(es) most closely responsible for creating the employment on which the petition is based.

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"It could perhaps be argued that, when the **owner** of a corporation pays a million dollars for shares in his business and earmarks the money for equipment, inventory, and working capital, some of the working capital will in fact be spent on initial salaries and expenses. In the **partnership** scenario, the new commercial enterprise is the partnership, and it too will need to spend money on initial salaries and expenses. **[USCIS] distinguishes these two situations** in that, in the former example, the *employment-creating entity is spending the money*. In the latter example, the *employment-creating entity never receives the money spent on the partnership's expenses*. **Especially where indirect employment creation is being claimed**, and the **nexus between the money and the jobs** is already tenuous, **[USCIS] has an interest in examining**, to a degree, **the manner in which funds are being applied**. **The full amount of money must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based.**[7] The Service does not wish to encourage the creation of layer upon layer of "holding companies" or "parent companies," with each business taking its cut and the ultimate employer seeing very little of the aliens' money." **[bold in original]** *At p. 179*

Footnote from *Izummi*:

[7]Whether or not $500,000 must be made available for the loans to export companies or whether $500,000 must merely be made available to the credit corporation extending the loans, it is clear that making $500,000 available to **AELP [the Regional Center's EB-5 Partnership]** is not sufficient. AELP's primary purpose is apparently to locate potential alien investors. AELP does not extend the loans to the export companies and is not the entity most closely engaged in employment creation, indirect or otherwise.

The Promised Dissection as it Relates to Infrastructure

"must be made available to the business(es) most closely responsible for creating the employment on which the petition is based"

The contexts under scrutiny in *Izummi* were quite specific to that case and others just like it. In that instance, the Regional Center had set up partnerships as

bureaucratic and/or administrative layers that did little more than eat up or siphon off the aliens' money into their own pockets. Such an arrangement could not and indeed did not create the required jobs. *Numerous later successful Regional Center projects have been able to provide a certain amount of infrastructure development which was closely associated with and indeed made possible job creation in an indirect manner.* The simple basic examples of financing through loans and direct investment which results in the building, refurbishing, and/or expanding of a mall, office building, factory, or a mixed-use facility in which tenants or recipients of loans actually create the jobs have been successful. On the other hand, when the actual contributions, necessity, and/or importance of the EB-5 financed project are so peripheral, insignificant, and/or too distant in terms of the ***money-to-jobs nexus*** then that does not qualify under EB-5. Finding the balance between infrastructure investments and/or improvements and precisely which jobs are sufficiently connected to the EB-5 investment is not always easy and straightforward.

By way of extreme examples, think about these EB-5 nexus scenarios:

- The EB-5 Regional Center project is to "build a road system to and throughout an undeveloped part of a county " which has just been rezoned for manufacturing facilities. This will make it possible for lots to be sold to developers and/or manufacturers. Large developers will build factories either on their own or under specific contracts. Factories will be sold or leased to manufacturers. Manufacturers will produce products (widgets) for sale domestically and/or abroad.
    - Can the EB-5 investors who built the roads lay claim to having created the position for the janitor in the widget factory? How about the positions of sales clerks in the stores where the widgets are eventually sold? *I think not because there is insufficient nexus between the EB-5 money and the jobs*.
    - Can the EB-5 investors who built the roads lay claim to having created the positions for the new road maintenance crews and snow plow drivers who will maintain the roads? How about the new baristas at the coffee shops where the road crews meet at the beginning of their shifts and often have lunch? *I think they can claim these jobs as **indirect** and **induced** because of the direct connection (nexus)*.

Potential for Further Caselaw on EB-5 Nexus

One primary principle expressed in *Izummi* is now a major fundamental building block for today's rather ubiquitous Limited Partnerships with separate "subscription fees" or "management fees" that are completely distinct and apart from the required minimum investment amount. However, the **other currently topical principle** as to the importance of **showing a *sufficient nexus*** comes from the same decision. Interestingly, the entire *Izummi* decision uses the word "**nexus**" only once as shown in the excerpt above. That *nexus* situation addressed in *Izummi* was quite a bit different from the current issues in the Victorville case currently under review by AAO and stayed in the DC District Court until December 22, 2011. We'll have to wait and see.