"Within the Scope" Analysis of the EB-5 Regional Center Is Analogous to AC21's "Same or Similar Occupation Classification" Determination

By Joseph P. Whalen (January 1, 2012, revised 3/17/12)

USCIS has put forth its new position that it will no longer arbitrarily (and/or irrationally) deem *any-and-all* post-approval changes made in an EB-5 investment as impermissible material changes.[1] This is a welcome recognition of the realities of economic growth through business developments as well as the heretofore-inappropriate rigidity that resulted when one specific point made in *Izummi*[2] grew beyond its intended purpose and usefulness.

In a stand-alone EB-5 entrepreneurial venture or a non-Regional Center EB-5 group investment, when the jobs have not yet been created at time of filing the I-526, the petitioner is required to put forth a plan to create the required jobs within the time allowed for that purpose. Notwithstanding the plan submitted and eventually accepted by USCIS as to its potential to achieve the goals of EB-5, the EB-5 investor is not bound to that original plan. The requirements for the lifting of conditions from status are statutorily mandated as making and sustaining the investment at the statutorily prescribed minimum amount of capital and the creation of the required minimum number of direct full-time "on-the-books" jobs for qualifying employees.

The Regional Center affiliated EB-5 investor is not similarly situated to the non-affiliated investor. The affiliated investor is afforded the luxury of counting indirect jobs in addition to, or completely in place of, any direct "on-the-books" full-time jobs for qualifying employees. The affiliated investor is reliant on the plans and associated job creation projections contained within the approved economic analyses presented by the Regional Center on his/her behalf. The Regional Center will have gone to great lengths to convince USCIS of its

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[1] Is this a sign of a true paradigm shift for USCIS towards the Customer-Service Orientation appropriate for a Benefits Granting Agency and away from the Law Enforcement bent left over from INS; or a mere reprieve from the "*Gotcha*" mentality within the "*Culture of NO!*" and limited to a single context? Time will tell.

[2] *Matter of Izummi*, 22 I&N Dec. 169 (BIA 1998) held in pertinent part:
(3) A petitioner may not make material changes to his petition in an effort to make a deficient petition conform to Service requirements. This prong related to a Regional Center's previously vetted and approved standard financial transaction documentation that had been changed post-approval ***such that*** it was no longer EB-5 compliant when put into actual use with individual EB-5 investors.

intentions to focus its investment activities within well-defined parameters. The Regional Center will have made its arguments and presented its well-supported strategies and had its econometric methodologies and/or models fully scrutinized or "vetted" by USCIS. Therefore, the Regional Center will have fully explained its "scope of investment activities" and its "job creation projection methodologies" within its proposal to USCIS. USCIS will have stated the approved scope of the Regional Center in the USCIS Designation Approval Notice. *See* 5 USC § 558 and 8 CFR § 204.6(*m*) (5) and (6).

The affiliated investors who wish to rely on indirect jobs are somewhat at the mercy of their Regional Center to keep their specific investment project(s) on track in terms of time management and remaining within the USCIS-approved parameters of operation. This is not to say that once a particular investor is associated with a particular Regional Center project that (s)he is trapped in, or bound to, that one project. On the contrary, the investor, in careful coordination with the Regional Center, may shift from the initial plan **but** they are limited to the USCIS-approved parameters or in other word, they must stay "*within the scope of* the Regional Center" as approved by USCIS **if** they wish to count indirect jobs. *See* 8 CFR § 216.6 and § 204.6(*j*) (4) (iii) and (*m*) (7) (ii).

Notwithstanding the aforementioned considerations, the Regional Center affiliated investor **can stray** outside the USCIS-approved parameters **but only if**, (s)he can ultimately **prove** the required **direct** full-time, "on-the-books" **jobs** for qualifying employees. If the affiliated investor can make good on the statutory requirements of the "regular" or "stand-alone" program, then (s)he is in the same position as the non-affiliated investor and enjoys the **same freedoms** and is subject to the **same restrictions** that apply to them. *See* INA § 216A (d) [8 USC § 1186b (d)] and INA § 203(b) (5) [8 USC § 1153(b) (5)].

The Draft EB-5 Policy Guidance Document of **November 9, 2011**, states:

> "Historically, USCIS has required a direct connection between the business plan the investor has provided and the subsequent removal of conditions. USCIS would not approve a Form I-829 petition if the investor had made an investment and created jobs in the United States if the jobs were not created according to the plan presented in the Form I-526. While that position is a

> permissible construction of the governing statute, USCIS also notes that the statute does not require that direct connection. In order to provide flexibility to meet the realities of the business world, USCIS will permit an alien who has been admitted to the United States on a conditional basis to remove those conditions when circumstances have changed. An individual investor can, at the prescribed time, proceed with his or her Form I-829 petition to remove conditions and present documentary evidence demonstrating that, notwithstanding the business plan contained in the Form I-526, the requirements for the removal of conditions have been satisfied.
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> USCIS notes, however, that it is more beneficial for an immigrant investor to utilize the business plan contained in the Form I-526. As the Ninth Circuit Court of Appeals has recognized, if the alien investor is seeking to have the conditions removed from his or her status based on the business plan contained in the Form I-526, USCIS may not revisit certain aspects of the business plan, including issues related to the economic analysis supporting job creation. *Chang v. U.S.*, 327 F.3d 911, 927 (9th Cir. 2003). If, however, the immigrant investor is seeking to have his or her conditions removed based on a business plan not consistent with the approved I-526, the *Chang* decision does not foreclose USCIS from requiring or requesting evidence to prove the element of job creation. This may include revisiting issues previously adjudicated in the Form I-526, such as the economic analysis underlying the new job creation."

Great! Now, how will this freedom to shift and change in response to outside forces work in practical application? The determination as to whether a "new" or "revised" project remains "within the scope" of the Regional Center lies squarely with USCIS. Legally, it is the actual EB-5 investor who is required to meet the burden of proof in connection with any petition or application for any benefit under the Immigration and Nationality Act (INA) submitted to USCIS. Morally, ethically, *and if it expects to continue to do business as an EB-5 Regional Center*, it is the obligation of that Regional Center to supply this required evidence of the business plan and economic analysis.

Technically, USCIS can demand this evidence be submitted by the individual EB-5 investors in support of their I-829s. However, this is the most impractical procedure imaginable. A bulk filing by the Regional Center on behalf of its

investors is the most proficient approach and USCIS has shown that it is willing to change with respect to this issue in the near future.[3]

Harkening back to USCIS' May 18, 2011, EB-5 Proposal, I suggest that USCIS consider establishing a process to accept an Exemplar I-829 in advance of I-829 mass filings for a given project when there has been a substantial change from the original project that supported the I-526s of these same investors. An Exemplar I-829, will allow the Regional Center to present its altered or new business plan (or a comprehensive hindsight report of what actually happened) and its economic analysis (or once again, a hindsight report) based on a previously vetted and accepted econometric methodology for an *ab initio* analysis or "verification". It would be improper to **amend** any Regional Center Designation as to its scope of operations during the course of adjudicating the investors' I-526 or I-829 petitions.[4] However, this intended ***ab initio* analysis** if performed in an effort to determine if the altered project remains within the parameters of the underlying Regional Center Designation is not only acceptable but quite proper and in keeping with the Congressional Intent of the EB-5 statutes. *See* 5 USC § 558(c) (2).[5]

Matter of Perez-Vargas, 23 I&N Dec. 829 (BIA 2005)[6], held:

> Immigration Judges have no authority to determine whether the validity of an alien's approved employment-based visa petition is preserved under section 204(j) of the Immigration and Nationality Act, 8 U.S.C. § 1154(j) (2000), after the alien's change in jobs or employers.

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[3] See USCIS' "*I-526, Supporting Statement 11-2-11*", **Document ID**: USCIS-2007-0021-0024 at: http://www.regulations.gov/#!documentDetail;D=USCIS-2007-0021-0024 and for an explanation of the suggestions and USCIS' responses see: http://www.slideshare.net/BigJoe5/potential-developments-for-uscis-form-i-526

[4] An improper amendment was attempted and failed in *Izummi*.

[5] **5 USC § 558** Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses.

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(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise**, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given**--

(1) **notice** by the agency in writing of the facts or conduct which may warrant the action; and

(2) **opportunity** to demonstrate or achieve compliance with all lawful requirements. .....

[6] Subsequently overruled by *Matter of Neto*, 25 I&N Dec. 169 (BIA 2010) but remains persuasive as applied to the EB-5 context.

In the following excerpt, the BIA further clarifies its position that USCIS (*on behalf of DHS*) has the needed expertise as well as the original jurisdiction to make re-determinations, just as it has the expertise and original jurisdiction to make the initial decision in all visa petitions, especially employment-based visa petitions.

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> "Moreover, we agree with the DHS that a determination under section 204(j) of the Act whether a change in employment affects the viability of an employment-based visa petition is one which requires some expertise in assessing the similarity in certain types of employment. The respondent argues that the employment description on which his visa petition was approved, i.e., inspecting wood cabinets under the occupational title of carpentry, is substantially similar to the new employment that he obtained in 2002, i.e., installing marble counters. As is clear from the transcript of proceedings, however, the Immigration Judge was not confident that these jobs, which involve two different materials, were the same or similar. Furthermore, even assuming the techniques used in the different jobs involved similar principles and methods, it would be difficult for the Immigration Judge to assess whether the new job description included the same level of responsibility and skill, and whether the job would have an adverse impact on the United States labor market.
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> Original jurisdiction over employment-based visa petitions lies with the DHS following issuance of a labor certification by the Department of Labor ("DOL"). *See* 8 C.F.R. §§ 204.5(b), (d). It therefore follows that any redetermination of the visa petition's validity would also lie with these government entities, and not with the Immigration Judge. *See Matter of Arthur*, 20 I&N Dec. 475, 479 (BIA 1992) (noting that an inquiry into the merits of a visa petition would "constitute a substantial and unwarranted intrusion into the district director's authority over the adjudication of visa petitions"); *see also Matter of H-A-*, 22 I&N Dec. 728, 736 (BIA 1999); *Matter of Aurelio*, *supra*, at 460-61; Memorandum from James A. Puleo, Acting Executive Associate Commissioner, Office of Operations, to INS officials (Dec. 10, 1993), *reprinted in* 70 Interpreter Releases, No. 48, Dec. 20, 1993, at 1676 & app. III at 1692-93 (discussing the agreement between the INS and the DOL regarding guidelines for handling changes to labor certifications and employment-based visa petitions where there is a successor in interest to the original employer)." *Perez-Vargas at pp. 831-832*

*Matter of Al Wazzan***,** 25 I&N Dec. 359 (AAO 2010), held:

> (1) Although section 204(j) of the Immigration and Nationality Act, 8 U.S.C. § 1154(j) (2000), provides that an employment-based immigrant visa petition shall remain valid with respect to a new job if the beneficiary's application for adjustment of status has been filed and remained unadjudicated for 180 days, the petition must have been "valid" to begin with if it is to "remain valid with respect to a new job."
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> (2) **To be considered "valid"** in harmony with related provisions and with the statute as a whole, the petition must have been filed for an alien who is **"entitled"** to the requested classification and **that petition must have been "approved" by a U.S. Citizenship and Immigration Services ("USCIS") officer pursuant to his or her authority under the Act.**

The second prong if applied to an I-526, would mean that one is **entitled** if they have put forth a plan and have enough lawful funds to invest. The I-526 and the **plan** submitted in support thereof would **only** be **valid if approved**. *Approval* of the I-526 is *contingent on a USCIS Officer* approving the plan submitted as supporting evidence. An Officer may request further evidence or issue a notice of intent to deny and may consider any evidence and/or rebuttal received in response.

It is clear that a plan in support of an EB-5 investment can be filed, altered, and then approved. Only after it has been reviewed and approved will the alien be somewhat "locked-in" except as already provided for in the I-829 regulations. This same logic applies to the *ab initio* analysis or "verification" of an EB-5 investment to see if it **remains** "within the scope" of the Regional Center when substantial changes have occurred after the approval of the I-526. *See Chang*, *supra* and 5 USC § 558.

> (3) Congress specifically granted USCIS the sole authority to make eligibility determinations for immigrant visa petitions under section 204(b) of the Act.
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> (4) **An unadjudicated immigrant visa petition is not made "valid" merely through the act of filing the petition with USCIS** or through the passage of 180 days. **[Emphasis added.]**

The third and fourth prongs reinforce the propositions that filing alone is not enough to ensure approval. This is also true for the submission of additional evidence later in the process in support of a substantial change in a project. Ultimately, USCIS has the final administrative-level say on employment-based[7] visa petition approvals.

In addition, even if a **changed** project is **deemed acceptable**, that is merely an ***intermediary*** step. *See* 5 USC § 558(c) (3). It must be remembered that the Business Plan and Economic Analysis are merely supporting documents submitted as pieces of evidence in a broader *immigrant classification petition* context and/or within a follow-up *removal of conditions* process. So, even if the revised or completely new plan remains "within the scope" of the Regional Center, the overall project must still establish that it has made proper use of the EB-5 funds and created sufficient jobs for all of the EB-5 investors in that project in order to allow the lifting of conditions from the EB-5 investor's status. *See* INA § 216A (d) [8 USC § 1186b (d)] and INA § 203(b) (5) [8 USC § 1153) b) (5)].

This last step of "proving statutory compliance" is accomplished through meeting the *applicable* burden of proof under the *correct* standard of proof. *See* INA § 291 [8 USC § 1361], 5 USC § 556(d) and, *Matter of Chawathe* (see footnote 7, below). In meeting the burden of proof in the EB-5 removal of conditions context, the evidentiary showings (standards of proof) are not uniform across all I-829s. The **stand-alone** or "regular" EB-5 **investor** has **specific facts to prove**[8] while the Regional Center **affiliated EB-5 investor** must satisfy USCIS under the *preponderance of the evidence standard*[9] in order to **demonstrate** that the **assumptions**[10] underlying the job creation projections/predictions **have been**

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[7] The BIA has appellate jurisdiction over family-based visa petitions. See 8 CFR § 1003.1(b) (5) although this regulation along with various others needs to be updated to account for numerous statutory changes.

[8] The minimum of ten (10) new or preserved jobs all of which are "direct". "Direct" for EB-5 means that they are full-time (at least 35 hrs per week), "on-the-books" of the new commercial enterprise of which the investor has an ownership and/or control interest, and are filled by "qualifying employees" as defined by statute and clarified by regulations.

[9] *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), held in part: (3) In **most** administrative immigration proceedings, the applicant must prove by a preponderance of evidence that he or she is eligible for the benefit sought. ... However, more important here is **footnote 7:** The standard of proof should not be confused with the burden of proof. The burden of proving eligibility for the benefit sought remains entirely with the applicant. Section 316(b)(2) of the Act; *see also* section 291 of the Act, 8 U.S.C. § 1361 (2006). Additionally, the "preponderance of the evidence" standard does not relieve the petitioner or applicant from satisfying the basic evidentiary requirements set by regulation. There are no regulations relating to a corporation's eligibility as an "American firm or corporation" under section 316(b) of the Act. **Had the regulations required specific evidence, the applicant would have been required to submit that evidence.** *Cf.* 8 C.F.R. § 204.5(h)(3) (2006) (requiring that specific objective evidence be submitted to demonstrate eligibility as an alien of extraordinary ability).

[10] Are EB-5 **Indirect Jobs** predicted by an economic analysis' base-level of identifiable 'direct' jobs or merely base-level 'direct' jobs of a third-party, *i.e. tenant's employees in a mall, office or mixed-use building, or factory*?

successfully fulfilled or **are on the cusp of being achieved**. Different bases for job creation projections utilized different forms of evidence. Any oral or documentary evidence may be offered and received, *but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence*. An operative administrative agency decision (*whether preliminary or initial, during an intermediary step or transitional phase, through a motion, or on appeal*) may not be issued except upon due consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with all of the reliable, probative, and substantial evidence properly submitted and received into the record of proceeding. *See especially*, 5 USC § 552(a), § 556(c) and (d), and § 557(c).

Are they predicted on total expenditures into the project? Are they forecast by the specific amount of specific types of fully-leased useable space created or refurbished by the project, *i.e. a mixed use space with:* ***W*** *amount of full-service restaurant seating,* ***X*** *amount of retail store sales-floor space,* ***Y*** *amount of professional office suites, and* ***Z*** *amount of transient housing space (hotel/motel rooms)*?