REVISITING TENANT JOB CREATION IN LARGE POOLED REGIONAL CENTER PROJECTS

By Joseph P. Whalen (Friday, December 25, 2015)

I. POTENTIAL EB-5 REFORM LEGISLATION

Pending in Congress when I began writing this essay, *was* an EB-5 focused *bipartisan, bicameral, compromise* bill intended for inclusion in a much larger "Omnibus" funding bill. The enacted Omnibus bill did not include that EB-5 bill. The EB-5 Regional Center Program was given a simple extension without change through the end of fiscal year 2016. The smaller bill (a mere 100 pages) was, and still is, intended to "*reauthorize the EB-5 Regional Center Program in order to promote and reform foreign capital investment and job creation in American communities*." The short title of the EB-5 bill was the "American Job Creation and Investment Promotion Reform Act of 2015" (hereafter, the *Reform Act*).[1]

Many of the same overarching provisions that were in the above reform bill are found in another bill (S. 2415 which is slightly shorter at 74 pages) known as the "EB-5 Integrity Act of 2015" (hereafter, the *Integrity Act*).[2] While I prefer not to speak or write in "absolutes", I will be so brash as to affirmatively state that it is my firm belief that "nothing pleases everyone".[3] That is how I feel about the aforementioned EB-5 bills. I like much of them, some parts more than others. This article will mainly focus on a topic about which I have strong feelings, and about which I have written extensively,

[1] http://www.leahy.senate.gov/imo/media/doc/MDM15J00.pdf The title might change again, next time around.

[2] https://iiusa.org/blog/wp-content/uploads/2015/12/MDM15J79.pdf Same *proviso* as above. This was introduced by Sen. Jeff Flake (R. AZ) on 12/17/2015. I have not extensively compared these two bills. ***Many others will do it***.

[3] I expect additional bills will come along, and more negotiations (fights) will happen in Congress over immigration.

specifically, the so-called "*tenant-occupancy jobs*". I do not like that label very much anymore because it has been tainted with some rather ridiculous misconceptions and unsavory connotations. A perfectly good concept; it requires rehabilitation to restore it to general acceptable use.

II. MY EB-5 REGIONAL CENTER BACKGROUND

When I began working in the realm of EB-5 Regional Center adjudications at USCIS-HQ, I had never heard of it before. I vaguely knew that there was some sort of investor visa and that was about all I knew. The concept of Regional Centers was completely new to me. It was not routinely taught as part of basic training at the Academy. There was no form or fee for Regional Center requests. They were requested via "proposals". There was no uniformity in those proposals. Also, I found that the regulations left much to be desired; *when I was eventually pointed at them, that is*. That is a whole other story which can wait for another time.

Anyway, I was told to go try to work through all of the RC "files" which were a messy pile of binders and/or file folders. The sizes of the "files" varied greatly as did their content. I was to review all of them and try to make sense of them. There were files for RCs that had been approved as well as for those that had been denied. Some of the RCs that were approved very early in the program had simply faded away. Very few of the early approved RCs were still active. Aside from the most prominent RCs, or those who contacted us with questions, I had no easy way of knowing precisely which RCs were still in existence. You see, none had any reporting responsibilities or direct USCIS oversight. They generated no fee revenue for the agency to support any proper oversight. Their only measure of success came from their investors' I-526 and I-829 stats, or "bragging rights" which they could incorporate into their marketing campaigns. The Program was obscure; an orphan.

III. EB-5 ECONOMICS & JOB CREATION PREDICTIONS

Moving right along with my anecdotal reminiscences. In reviewing so many old files, I began to find similarities and differences throughout and amongst them. Admittedly, I am not an economist. My Bachelor's and Master's Degrees are in Anthropology, specializing in Archaeology. Those disciplines also emphasize the importance of statistics and attention to detail. Therefore, I was quick to grasp the importance of the economic analyses I was seeing.

I was also intrigued at the various economic models employed to generate those analyses. Some worked well, made sense, and matched methodologies that I was able to independently verify. A few economic analyses seemed to have been made up out of thin air, without any sense or substance to them. Those files in general, and the economics specifically, ran from the good, to the bad, to the very ugly! Eventually, I was exposed to the actual statutes and then the Precedent Decisions governing EB-5 and Regional Centers, then I began to deeply study them. It took months of deep study to get a tight grasp on this subject matter, and I have not finished studying yet, probably never will.

One thing I had to examine closely was the concept of the varying classifications of, and labels for, jobs. EB-5 is actually labeled in the Immigration and Nationality Act (INA) as the "employment creation" visa classification. *See* INA § 203(b)(5) [8 U.S.C. § 1153(b)(5)]. It is therefore imperative to understand the meanings of certain descriptors in two important contexts. EB-5 law and economics use the terms "direct" and "indirect" to describe the jobs being created. Economics uses an additional term, "induced" which for EB-5 purposes are just a subset of "indirect" jobs. Lastly, the term "direct" as used by economists might also be considered

"indirect" for EB-5 purpose while some EB-5 "indirect" jobs function as "direct" jobs for economic analysis input purposes. Confused yet? Just wait!

The above distinctions were not clearly spelled out in EB-5 statutes, regulations, precedent, or policy; which led to confusion all around. Under current EB-5 law, a "direct" job is filled by a directly paid employee of the EB-5 investor, it is full-time (at least 35 hours per week), permanent (year-round job, not seasonal, intermittent, or transient in nature), and is filled by a lawfully authorized U.S. worker who is among the *qualified employees* listed in EB-5 regulations. Therefore, there must be an employer-employee relationship between that worker and the alien investor. Contractors and employees of others, such as through temp agencies, do not count for anything. Presently, the EB-5 investor would need an "equity/ownership" interest in a *new commercial enterprise* (NCE) which is also the *job-creating entity* (JCE). Changes embodied in the proposed legislation recognize the practical differences in these various terms and attempt to bridge the gap.

Here is an excerpt from the *Reform Act*[4] which illustrates this point.

> "… Section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)) is amended by adding at the end the following:
>
> > "(E) REGIONAL CENTER PROGRAM.— ……
> >
> > "(iv) INDIRECT JOB CREATION.—The Secretary of Homeland Security shall permit aliens seeking admission under this subparagraph to satisfy only up to 90 percent of the requirement under subparagraph (A)(ii) with jobs that are estimated to be created indirectly through investment under this paragraph in accordance with this subparagraph. **An employee of the** new commercial enterprise **or job-creating entity** may be considered to hold a job that has been **directly** created.
> >
> > "(v) COMPLIANCE.— ……
> >
> > "(II) JOB AND INVESTMENT REQUIREMENTS.—

[4] Although numbered slightly differently, the verbiage in the *Integrity Act* is nearly identical.

"(aa) RELOCATED JOBS.—

In determining compliance with the job creation requirement under subparagraph (A)(ii), the Secretary may include **jobs** estimated to be created under a methodology whereby jobs are **attributable to prospective tenants occupying commercial real estate** created or improved by capital investments, but only if the number of such jobs estimated to be created has been determined by an economically and statistically valid methodology and such jobs are **not existing jobs that have been relocated.**

In my opinion, this is a very welcome change because the changes proposed in this law **would** bring *EB-5 legal terminology* in line with *accepted economics terminology*. In addition, the inclusion of jobs created by *third-parties* just makes sense. Regardless of whether they are *tenants* or not, third party jobs should count **if** viewed as "base-level" jobs when they are created "on-site". Jobs such as these are the ones that can be used as **input** in an economic model as "direct" jobs created on-site in a commercial property developed at least in part with EB-5 funds. Although these jobs are "direct" for purposes of input in the economic model, they will be "indirect" jobs for EB-5 purposes. This last point comes into play when determining what evidence will be required in order to demonstrate job creation in the investors' form I-829 petition adjudications. Evidence selection can be difficult if the differing contexts are not fully understood. Confusion is never a welcome thing!

As an example of the above "*potential for confusion*", please consider this. The aliens form a partnership which purpose is to make a loan to a developer as ***one-third of the capital stack*** in a large *commercial construction project*. One component in the hypothetical "*mixed-use commercial property development*" is a hotel. The employees at the hotel will be employees of a *job-creating entity* in which the alien has no ownership interest but the jobs will count as "direct" jobs for input into an economic model **and** to satisfy the aliens' job creation requirement as "indirect" jobs.

Additional "indirect" (and "induced") jobs will be forecast as a result of careful and complex economic calculations.

As an aside, please recall that the *EB-5 Regional Center Program* is supposed to **encourage** *domestic capital investment*. It is an underlying purpose of the *Program*, in general. So, by purposely limiting the percentage of EB-5 funds within the capital stack, as was done in the above example, the need for *domestic capital investment* is emphasized. *See* 8 U.S.C. § 1153 *Note: Immigration Program*, excerpt is included further below.[5]

I recognized the utility of *reconciling* the *terminology* as used by economic models *with* the EB-5 meanings and adapting to accommodate the *reality* of the situation back when I was adjudicating requests for Regional Center designation. Some other folks became, *and remain*, confused by the differing meanings of the descriptors for jobs, *among other things*. It is refreshing to see the attempts to provide clarifications in the proposed reform legislation (the *Reform Act* and the *Integrity Act*). Since Congress is taking a breather from EB-5-related legislation, perhaps they can also consider affirmatively adopting the concept of FTEs (full time equivalents)? Yes, the *Integrity Act* has been introduced, however, if it survives and moves forward, it is likely that several amendments and/or riders will be offered in the coming session.

IV. TENANT-OCCUPANCY & "*BUT-FOR*" FACILITATION THEORY

Next, let us dig deeper into the concept of "*tenant-occupancy*" jobs. USCIS adopted the moniker "*tenant-occupancy*" in some stakeholder

[5] **8 U.S.C. § 1153 Note: Immigration Program**
Pub. L. 102–395, title VI, §610, Oct. 6, 1992, 106 Stat. 1874 , as amended by Pub. L. 105–119, title I, §116(a), Nov. 26, 1997, 111 Stat. 2467 ; Pub. L. 106–396, §402, Oct. 30, 2000, 114 Stat. 1647 ; Pub. L. 107–273, div. C, title I, §11037(a), Nov. 2, 2002, 116 Stat. 1847 ; Pub. L. 108–156, §4, Dec. 3, 2003, 117 Stat. 1945 ; Pub. L. 111–83, title V, §548, Oct. 28, 2009, 123 Stat. 2177 ; Pub. L. 112–176, §1, Sept. 28, 2012, 126 Stat. 1325.

engagements prior to using the term in two early guidance documents. *The* major flaw, in my opinion, was that USCIS did not define that term before using it, which merely compounded confusion all around. I will hazard a guess that many people still do not understand the *Tenant-Occupancy Economic Model*.

On **April 27, 2012**, the USCIS Director spoke with stakeholders via an engagement series entitled: "*Conversation with the Director - Tenant-Occupancy Economic Model*" where USCIS invited interested individuals to participate in a discussion about the use of the tenant-occupancy economic model in the EB-5 Immigrant Investor Program. This engagement came a mere few days ahead of the full spectrum EB-5 Quarterly Stakeholder Engagement, held on May 1, 2012. Eventually, USCIS posted a written Q&A which remains posted online.[6] Through these turbulent times, it seems that there was *plenty opportunity for confusion*.

For example, the following was included in the posted **Q&A**:

> **Q:** In a case where the EB-5 business is a real estate development, which leases space to tenant businesses who then hire employees, do the following factors increase the likelihood that those tenant's jobs can count toward satisfying the job requirements of the development's EB-5 investors:
>
> **a.** The tenant business is a new business which did not merely move from another location.
> **b.** The tenant business received cash from the development for tenant improvements.
> **c.** The tenant business received a loan from the development.
> **d.** The tenant received free rent or rent reductions.
> **e.** The tenant received an equity investment from the development.
>
> **A:**
>
> ***a.*** *The tenant business is a new business which did not merely move from another location.*

[6] http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2012/May%202012/May_2012_Quarterly_EB5_Engagement_Executive_Summary.pdf

This is not acceptable. None of the EB5 capital would be flowing to the jobs created by the tenant. [7]

b. *The tenant business received cash from the development for tenant improvements*
This is not acceptable. The tenants would still be responsible for creating the jobs. The EB-5 capital would simply be improving/outfitting /customizing the structure already owned by EB-5 capital.

c. *The tenant business received a loan from the development.*
This is acceptable with caveats. This effectively represents the co-mingling of capital. Similar to the quid pro quo expenditure agreement referenced above, however, this will render the agency vulnerable to fraud because the tenants could form an agreement beyond the adjudicative scope of USCIS to funnel the funds back to the developer. In addition, USCIS would need to define the constraints of the loan amounts and duration. Otherwise, the developer could loan $0.01 to a tenant to take credit for any jobs created. Finally, the tenant business must verify that the jobs are new jobs not transferred from elsewhere.

d. *The tenant received free rent or rent reductions*
This is acceptable with caveats. Similar to (b) above, this effectively represents the comingling of capital as the free rent/rent reductions acts as a loan. The same caveats apply here as in (b) above. In addition, this will cause a significant decrease in rental income for the EB-5 NCE, which should be an investment at-risk, not at-loss. USCIS would still need to define the constraints of the rental discount required, which effectively serves as a loan. It is highly unlikely, however, that the free rent or rent reduction over a 2.5-year period would sum to a total amount that could be considered a substantial investment in the tenant business.

e*. The tenant received an equity investment from the development*
This is acceptable with caveats. Again, this effectively represents the co-mingling of capital as in (b) above. The same caveats apply here.

[7] I believe that a mere *passive landlord-tenant relationship* will never qualify for EB-5. However, if a commercial space is **built-to-suite** ***a*** *particular type of business* which is *needed, in that location, at that time*, then the tenant's new employees in a truly new business (not merely relocated) should count for EB-5 purposes, even if ***the*** *particular commercial tenant* is unknown when construction (including renovation) commences. Merely slapping on a coat of paint and fixing broken windows is **insufficient** to be considered for *facilitation-based tenant job credits*. Real estate speculation will never qualify for EB-5 purposes due to lack of focus on anything but potential profit with no focus on employment creation. *See* http://www.slideshare.net/BigJoe5/carlsson-et-al-v-uscis-et-al-restraining-order-denied

On **May 8, 2012**, USCIS put forth its EB-5-related **deference policy** via "**Operational Guidance**" entitled: *Guidance on EB-5 Adjudications Involving the Tenant-Occupancy Methodology*, OG-602-.06-001, which stated, in pertinent part:

> "A decision on the economic methodology presented in an EB-5 case is a very fact-specific and fact-dependent one. Consistent with our deference policy, ISOs should rely on a previous determination that the economic methodology is reasonable when the methodology is presented to us in a later proceeding based on materially similar facts. For example:
>
> > If we approved a Form I-924 regional center application based on a specifically identified project, including the specific location and industry involved, we will not revisit the determination that the economic model and underlying business plan were reasonable when adjudicating related Form I-526 petitions, Form I-485 applications, or Form I-829 petitions.
> >
> > If we approved a Form I-526 petition for an immigrant investor based on a specifically identified project not associated with a regional center, we will not revisit the determination that the business plan was reasonable when adjudicating the investor's related Form I-485 application or Form I-829 petition.
>
> If, however, the facts underlying application of the economic methodology have materially changed,[8] then we will conduct a fresh review of the new facts to determine whether the petitioner or applicant has complied with the requirements of the EB-5 program, including the job creation requirement."

USCIS revisited this subject matter again on **June 22, 2012**, in its "*Engagement with Director Mayorkas and USCIS Economists*" wherein USCIS invited any interested individuals to participate in a stakeholder engagement with USCIS. It seems that a few questions from this and earlier engagements needed further study by USCIS economists before the agency was willing to say anything. This engagement resulted in more questions and answers being posted on **July 3, 2012** (found here). It seems to me that too many real estate agents are trying to leverage EB-5 funds for ***non-***

[8] Discovery of fraud and/or willful material misrepresentation is always a "material change" that must be revisited.

qualifying investments.[9] Anyway, the information resulting from this event was rather minimal so it is copied below, in full.

Questions and Answers: EB-5 Economic Methodologies[10]

Release Date: July 03, 2012

On June 22, 2012, USCIS hosted a public engagement featuring two economists who work on the EB-5 Immigrant Investor program. Following that engagement, some stakeholders sought clarification as to certain points raised by the economists. USCIS is now pleased to provide clarification as to two of the primary questions raised.

EB-5 Projects Involving Hotel or Resort Development

Q: When an EB-5 project involves the development of a hotel or resort, when is it economically reasonable to input projected funds spent by visitors into economic models to project indirect and induced job creation resulting from the spending of these potential hotel occupants (e.g. on rental cars, dining, etc.)?

A: In general, job credit based on "visitor spending" is appropriate only where the applicant or petitioner can show by a preponderance of the evidence that the development of the EB-5 project or resort will result in an increase in visitor arrivals or spending in the area. Applicants or petitioners should provide reasonable estimates of how new visitor spending and tourism demand is driven by the specific project that is the subject of the application or petition. If the applicant or petitioner presents a reasonable case that the visitor spending and demand for tourism generated by a project is new then it may be reasonable to conclude that the specific project has generated an increase in demand, and thus, has generated increased employment in the region resulting from the projected increase in visitor spending. If the applicant or petitioner meets this burden and the application or petition can otherwise be considered reasonable, new visitor spending revenue can be considered an eligible input to an appropriate regional input-output model.

Regardless of whether visitor spending is shown to be attributable to a particular project, jobs created from construction (lasting over two years), management, and operation of the hotel or resort, including hotel revenues, can be considered eligible inputs to an appropriate regional input-output model assuming that the application or petition can otherwise be considered reasonable.

[9] *See* http://www.slideshare.net/BigJoe5/lipstick-on-a-pig-in-immigrant-investing

[10] USCIS wasted this opportunity by not providing much worthwhile discussion or useful examples or direction. *See:* http://www.slideshare.net/BigJoe5/eb5-job-creation-conditions-precedent-inquiry-42415-signed and http://www.slideshare.net/BigJoe5/a-trade-off-between-quality-and-quantity-in-eb5

Acquiring Real Estate[11]

Q: May a regional center use funds from EB-5 investors to acquire real estate?

A: In general, yes, subject to the requirement of *Matter of Izummi*, 22 I & N Dec. 169 (Comm'r 1998), that 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." For example, a job-creating enterprise may propose to allocate some EB-5 funds to purchasing land and allocate other EB-5 funds to developing and operating a business on the purchased land, and the jobs created by the enterprise can be apportioned among all the EB-5 investors. It is important to note, however, that real estate acquisition is not generally recognized as a job-creating activity in and of itself. Thus, it is not generally reasonable to treat funds spent on real estate acquisition as inputs to an employment impact model. Where some EB-5 funds will be used for real estate acquisition, such apportionment should be detailed in the business plan.

USCIS does recognize that certain soft costs directly related to real estate transactions may reasonably be counted as valid job-creating expenditures and inputs to regional input-output models. In addition, soft costs related to the development and construction of EB-5-supported projects on designated land parcels may be considered on a case-by-case basis. If the input-output model utilized in the economic impact analysis provides specific categories for the soft costs, the multiplier categories specific to these costs should be used instead of bundling such costs under general construction expenditures.

USCIS revisited the so-called "*tenant-occupancy*" methodology yet again, and issued a **December 20, 2012**, "**Guidance Memorandum**" entitled: *Operational Guidance for EB-5 Cases Involving Tenant-Occupancy*, GM-602-0001. This later guidance went a bit further and did not merely echo earlier principles of deference, but instead identified underlying reasons for reliance on *tenant jobs*. This later memo stated, in pertinent part:

> "Whether an applicant or petitioner has demonstrated that an EB-5 enterprise caused the creation of indirect tenant jobs will require determinations on a case-by-case basis and will generally require an evaluation of the verifiable detail provided and the overall reasonableness of the methodology as presented. To claim credit for tenant jobs, applicants and petitioners may present evidence backed by reasonable methods that map a specific amount of direct, imputed, or subsidized investment to such new

[11] *See:* http://www.slideshare.net/BigJoe5/real-estate-as-a-capital-contribution-for-eb5

> jobs. However, for applicants and petitioners that instead seek to utilize a facilitation-based approach, USCIS will not require an equity or direct financial connection between the EB-5 capital investment and the employees of prospective tenants. Rather, facilitation-based tenant job credit will depend on the extent to which applicants or petitioners can demonstrate that the economic benefits provided by a specific space project will remove a significant market-based constraint. One way applicants and petitioners can make this showing is to indicate how a specific space project will correct market imperfections and generate net new labor demand and income that will result in a specified prospective number of tenant jobs that will locate in that space. In high unemployment areas in which new projects are not likely to significantly displace other income or labor, applicants and petitioners should generally indicate how a specific project will fill an existing investment void in that area to generate new demand for the tenant business. Prospective tenant jobs demonstrated by reasonable methods and supported by verifiable evidence pursuant to the above approaches may be used as direct inputs into appropriate regional growth models to generate the number of indirect and induced jobs that result from the credited tenant jobs.
>
> Where applications for regional centers are approved based on their use of tenant-occupancy projections, the approval notices should contain appropriate language regarding the assumptions underlying the approval, which if not borne out may impact related adjudications at the I-526 or I-829 stages. …"

In a rather short period of time, USCIS seemed to have flip-flopped on *tenant-occupancy* job methodology. It appeared that internal disagreements and/or confusion spilled inappropriately into public view.[12]

In my estimation, the most significant (and welcome) change came when USCIS officially recognized the "*facilitation-based approach*" to pooled investments which support "*facilitation-based tenant job credits*". In that approach, very specific assumptions underlie an approval of that methodology in a specific investment vehicle. Certain *assumptions* will need to be proven in order to support a *finding-of-fact* that the job creation predictions have come to fruition. Certain *assumptions* and *milestones* specific to the

[12] *In-fighting* really needs to remain inside an agency and stay out of public view. Stakeholders cause enough confusion without any help from the agency,

investment will become ***conditions precedent***[13] whose satisfaction must be sufficiently demonstrated by the evidence presented. At a later stage in case processing, *sufficient facts and information* will need to be submitted in order to satisfy USCIS (IPO) that the *conditions precedent* are proven by a *preponderance of the evidence*. Also, information on Forms I-829 and I-924A will need to agree as to the aggregate job creation reporting, *or else*.

Specific **evidence** supported by a reasonable methodology that **maps a specific amount of** direct, imputed, or subsidized investment **funds** is needed in order to substantiate the claim that an EB-5 enterprise *caused the creation of indirect tenant jobs*. What the above means, is that there must be a *credible money-to-jobs* ***nexus***[14] in order to prove that a particular EB-5 funded development or project actually did *facilitate* the creation of the tenant's business and thus its jobs. *See* *Matter of Izummi*, 22 I&N Dec. 169, 179 (AAO 1998)[15] (*... Especially where indirect employment creation is being claimed, and the* ***nexus*** *between the money and the jobs is already tenuous, the Service* [now USCIS] *has an interest in examining, to a degree, the manner in which funds are being applied. ...*). While the recordkeeping for the *facilitation-based approach* is not simple, neither is it impossible. There are now some EB-5 service providers out there who have *literally* "made it their business" to track the needed *facts and information* in order to make *facilitation-based employment-creation methodology* work easily for their customers.

The astute reader may have noticed the very particular phrasing I have been using. The phrase "*facts and information*" is drawn from INA § 216A,

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[13] See footnote 10, *supra*.
[14] See: http://www.slideshare.net/BigJoe5/nexus-revisited-because-of-and-but-for and http://www.slideshare.net/BigJoe5/tenant-occupancy-insufficient-nexus-and-victorville and http://www.slideshare.net/BigJoe5/how-many-kinds-of-nexus-can-you-find-within-eb5
[15] *See*: http://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3360.pdf

[8 U.S.C. § 1186b].[16] It is that section which lists the basic requirements for the lifting of conditions from status of EB-5 aliens. It cross-references INA § 203(b)(5) [8 U.S.C. § 1153(b)(5)] which is included in Pub. L. 102–395, title VI, §610, Oct. 6, 1992, 106 Stat. 1874 , *as amended*.[17]

> "(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 program to implement the provisions of such section. Such 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 program described in this section to establish reasonable methodologies for determining the number of jobs created by the 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 program.

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[16] **(d) Details of petition and interview**
(1) Contents of petition
Each petition under subsection (c)(1)(A) shall contain facts and information demonstrating that the alien-
(A)
(i) invested, or is actively in the process of investing, the requisite capital; and
(ii) sustained the actions described in clause (i) throughout the period of the alien's residence in the United
States; and
(B) is otherwise conforming to the requirements of section 1153(b)(5) of this title.

[17] As amended by Pub. L. 105–119, title I, §116(a), Nov. 26, 1997, 111 Stat. 2467 ; Pub. L. 106–396, §402, Oct. 30, 2000, 114 Stat. 1647 ; Pub. L. 107–273, div. C, title I, §11037(a), Nov. 2, 2002, 116 Stat. 1847 ; Pub. L. 108–156, §4, Dec. 3, 2003, 117 Stat. 1945 ; Pub. L. 111–83, title V, §548, Oct. 28, 2009, 123 Stat. 2177 ; Pub. L. 112–176, §1, Sept. 28, 2012, 126 Stat. 1325 , Pub. L. 114-113, §575, Dec. 18, 2015. "SEC. 575. Section 610(b) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (8 U.S.C. 1153 note) shall be applied by substituting ''September 30, 2016'' for the date specified in section 106(3) of the Continuing Appropriations Act, 2016 (Public Law 114–53)." *On page 285 of linked pdf.*

V. IN DETERMINING COMPLIANCE, PERMIT REASONABLE METHODOLOGIES FOR DETERMINING JOB CREATION

Anyone who has ever dealt with USCIS knows that, in a benefits request, the *burden of proof* is on the requestor. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA. 1966). Unless otherwise stated, the *standard of proof* employed in benefits requests is by a *preponderance of the evidence*. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989), held in part: "There is no catch-all definition of the term "preponderance of the evidence." .... when something is to be established by a preponderance of evidence it is sufficient that the proof only establish that it is probably true." The foregoing sums up the basic ground rules for benefits request adjudications.

In the vast majority of EB-5 cases, investments are made through Regional Centers. A Regional Center offer its investors the ability to utilize "*indirect jobs*" in order to satisfy their employment creation requirement. In these cases, while the investors must still meet the *preponderance* standard of proof, the *evidence* needed in order to meet that standard *is highly variable*, uncertain, flexible, "fluid, far-reaching, and dynamic"; as opposed to "static, constrained, and stagnant". If you are not following this, then just remember: "*there are very many possibilities when it comes to the potential pieces of documentary evidence that can prove job creation*" previously projected through an economic impact analysis (EIA). If you had not guessed, I am leading you back to the crux of the matter and the beginning. Here goes.[18]

Many indirect job creation projections are based on stated assumptions. Assumptions in this context may later morph into *conditions precedent* that are deemed necessary for the fulfillment of obligations and supportive of a finding that due to the completion of one stated objective; or

[18] Most of the following is recycled material. I see no need to change it. I do see a need to repeat it!

the meeting of a benchmark; or deadline for completion of some identified condition that another stated result is reasonably also deemed true and/or accomplished. If X is proven true, then Y is accepted as true. Say what? Let me give an example.

Suppose the Business Plan (BP) says that the project will entail building a factory. This factory will have three assembly lines. The BP says that upon completion of line two, line one will be up and running while construction commences on line three. The EIA states that there will be X number of people employed at the factory. In the EA they were used as *input* described for EIA purposes as *direct* employees at the factory. They are not direct employees of the aliens who are just supplying financing. For *EB-5 compliance purposes*, the factory workers are *indirect* employees in relation to the alien investors.

Based on the new direct employment at the factory, Y number of indirect and induced jobs will be created as a result. The EIA breaks down this additional peripheral but dependent job creation into two categories (indirect and induced) but for EB-5 purposes, all three job categories in the EIA will be utilized as EB-5 indirect jobs. The various crucial and pivotal activities were predicted to begin and end within stated temporal parameters (construction schedules). In this simple example, the completion of line two signals various things. Completion of line two was a condition precedent to line one being up and running and fully staffed. It is therefore indicative of job creation for the workers on line one.

Let us just accept the fact that the workers could NOT start reporting to work on line one until the construction activities on line two ended. However, if it makes you feel better, let's say it was due to worker safety concerns coupled with workers having to attend and complete mandatory new employee orientation training which included safety issues such as

emergency procedures, hazardous materials handling precautions, disaster drills, and first aid, including Red Cross CPR Certification Classes. OK?

Fulfillment of certain stated assumptions permits presumptions to be found readily acceptable. In this example, the job creation projections were presumed to be valid upon the fulfillment of the *condition precedent* of the completion of the construction of line two. This presumption was something that the parties agreed to accept as true unless proven otherwise. USCIS approved it, now you merely need to follow through with it; and then prove that you did via the documentation!

Reasonable Methodologies consist of a wide variety of possibilities. In order to be deemed "reasonable" the "methods" used for EB-5 Regional Center Program purposes must contain plausible explanations. In general, those will be based upon various widely accepted Econometric or Economic Models. Economists working with these models will generally utilize the data categories found in or inspired by the *Matter of Ho*-compliant "comprehensive, detailed and credible" Business Plan[19] to guide selection of data for input into the model. Sometimes the specific details and actual figures found in the BP might also be used as input in the model. The result of all that modeling will be an EIA that the applicant hopes will be accepted by USCIS as reasonable, plausible, probable, and credible.

The information discussed in the assembly line example represented information from a BP used to produce an EIA. In that EIA, assumptions were stated that supported predictions. As those assumptions came true, the presumptions as to indirect jobs became probable. They would have been accepted as true upon corroboration of fulfillment of the conditions precedent

[19] *Matter of Ho*, 22 I&N Dec. 206 (AAO 1998) provided a description of a reasonable business plan now routinely expected for EB-5 purposes in both the direct and Regional Center investment contexts.

as stated up-front. The question then remains; "*What will constitute the corroborating evidence of fulfillment of the conditions precedent*"? On this point, remember that you are dealing with a government bureaucracy so the simple answer is "paperwork". The harder part of the equation and process is figuring out which papers to submit.

In order to determine which papers to present, you must identify the precise facts you need to prove to support fulfillment of the specific condition precedent. How would you prove that the construction of assembly line two has been completed? I do not know because I have never built a factory that contained assembly lines. However, I do know that many factories with multiple assembly lines have been built. That tells me that someone somewhere must know the answer. How about you start with the very construction company that built it for you? They likely know what paperwork they produce that could serve as evidence. Perhaps they have to answer to local, state, or federal agencies about their activities? That is sure to produce paperwork! How was this construction activity paid for? Monetary transactions usually leave a paper trail. The bigger the expenditures, the bigger that trail becomes. There is no need to reinvent the wheel over these matters. You just have to do your legwork and homework on the subject matter in order to ask the right questions and find the correct answers.

Failing to Plan = Planning to Fail!

Dated this 25th day of December, 2015

X

Joseph P. Whalen

Happy Holidays!