

EB-5 JOB CREATION: “*CONDITIONS PRECEDENT*” INQUIRY

By Joseph P. Whalen (April 24, 2015)

Introduction

I confess that a good sized portion of this essay is recycled.¹ I figured: “Why mess with something that works well ‘as is’.” During the course of a recent EB-5 teleconference call, I was reminded of the *importance of, and need to recirculate, this particular information* due to the sustained expanding interest in EB-5 as a funding source. With so many uninitiated folks barreling headlong into the frenzy and buying into the hype and misinformation, I wanted to provide a splash of cold water in their faces. I felt it was necessary to make these overly anxious developers and new Regional Centers, *especially* all those “no deference” Regional Centers,² seriously consider some tricky aspects of their obligations and responsibilities to their EB-5 investors. Yes, you do have obligations and responsibilities to them!³

In the Regional Center context, the vast majority of new jobs are indirect jobs that have been projected through an Economic Impact Analysis (EIA). The evidence requirements for projected indirect jobs are quite different from evidence requirements for true ‘direct’ jobs which have specific evidence possibilities listed in the regulations. Projected indirect jobs require more creativity as to the potential documentary evidence that might serve the purpose. Once the *specific facts* that must be proven are identified, then the commensurate evidence needs can be determined, and then targeted for systematic collection. It is extremely difficult to try to dig through multiple years’ worth of paperwork as an afterthought when the investor asks for evidence that proves indirect job creation. *Do go there!*

¹ See <http://www.slideshare.net/BigJoe5/a-trade-off-between-quality-and-quantity-in-eb5> and; <http://www.slideshare.net/BigJoe5/business-plan-and-the-economic-model-and-evidence-considerations-for-an-i-924-may-17-2011> see the footnotes *especially* and; <http://www.slideshare.net/BigJoe5/suggested-agenda-items-for-uscis-eb5-economist-engagement>

² See <http://www.slideshare.net/BigJoe5/no-deference-regional-center-game-plans>

³ See <http://www.slideshare.net/BigJoe5/role-of-the-regional-center-in-eb5>

Obligations and Responsibilities

Please remember that the *I-526 Petition* and accompanying Business Plan (BP), lay a foundation. Execution of the BP, is the *building*⁴ upon that foundation. Subsequently, this will not only produce a new business and jobs but also a huge paper trail. That trail will provide evidence and a bunch of excess clutter. The documents extracted from the clutter must be chosen wisely for submission in support of the *I-829 Petition*, which will be filed some years down the road, in order to get conditions lifted. Getting from a *tacit acquiescence* to attempt to create jobs through an investment in an entrepreneurial endeavor, to the *lifting of conditions upon satisfactory proof of success*, is not a simple task. There are many steps to take and when a Regional Center is “coordinating” that effort then that Regional Center has to be prepared to do its part.

Background

At this point, I need to back up a bit in order to add some background information and describe the context a bit better. Essentially, an EIA is expert written testimonial evidence which mixes quantitative and qualitative aspects. In the end, an EIA is an **expert opinion testimonial**. That **Project-Specific EIA** will have both, objective and subjective components that must be evaluated. The framework for the review of that class of evidence has been cobbled together from the statutes, regulations, and especially, administrative precedent decisions as follows:

“Letters may generally be divided into two types of testimonial evidence: **expert opinion** evidence and written **testimonial** evidence. Opinion testimony is based on one's well-qualified belief or idea, rather than direct knowledge of the facts at issue. *Black's Law Dictionary* 1515 (8th Ed. 2007) (defining "opinion testimony"). Written testimonial evidence, on the other

⁴ This can be read as a noun or verb and it still conveys a correct message.

hand, is testimony about facts, such as whether something occurred or did not occur, based on the witness' direct knowledge. *Id.* (defining "written testimony"); see also *id.* at 1514 (defining "affirmative testimony").

Depending on the specificity, detail, and credibility of a letter, USCIS may give the document more or less persuasive weight in a proceeding. The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998)."

See: [\(AAO APR062015 09D2101\)](#) pp. 14-15, H1-B Appeal Dismissed

Hard Questions⁵

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 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 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

⁵ The following is the recycled material.

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 only as direct employees of the factory, not the aliens who are just supplying financing. For EB-5 purposes, the factory workers are indirect in relation to the aliens who only provided financing.

Based on the new 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's 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 “comprehensive, detailed and credible” Business Plan 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 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 find the answers.

Failing to Plan = Planning to Fail!



Dated this 24th day of April, 2015.

X

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