JOBS THE ALIEN CREATED OR CAN BE EXPECTED TO CREATE WITHIN A REASONABLE TIME

By Joseph P. Whalen (October 25, 2012)

If only all of life ran on a perfect schedule then nobody involved in EB-5: the immigrant investors, the Regional Centers, the actual businesses utilizing the EB-5 funds, and USCIS would ever have to worry about determining the meaning, or practical application, of "within a reasonable time" to "expect" job creation to be fulfilled. Welcome to reality. Plans change. There are forces in this world beyond the control of the individual immigrant investor, and the large-scale projects with which they become affiliated through their "pooled investments" via their Regional Centers.

The regulations governing the lifting of conditions from the residence status of an immigrant investor and derivative family members allows some leeway. Even as contemplated for the stand-alone entrepreneur, Legacy INS recognized that plans might change or at least not run perfectly "on time". It was for this reason that Legacy INS allowed for "*Evidence that the alien created* ***or can be expected to create within a reasonable time*** *ten full-time jobs for qualifying employees.*" 8 CFR § 216.6 (a)(4)(iv). ***[Emphases Added]***

As one might imagine, an extremely large-scale project might be more susceptible to "delays" than a small-scale business venture based on as little as $500,000.00. Unfortunately, Congress only gave the immigrant investor two-years to create the required jobs regardless of whether the investor is going it alone, in a small group, or a billion dollar project. I can see that that two-year period should be enough time to figure out if a "new" small to medium sized business, which is only striving to create ten full-time jobs, will fold or not as so many new businesses of that character which are destined to fail do so in short order. With that said, the large-scale project involving tens or hundreds of millions of dollars or perhaps over a billion dollars is likely to have a completely different startup schedule. In the huge project, it may take well over that mere two-year period to get through the planning stages alone before ever breaking ground. Even if EB-5 investors come on board in phases, so to be *closely associated with allocatable jobs as they are created progressively*, delays can still happen unexpectedly.

When it comes to the "EB-5 Regional Center Program", Congress left it to the agency to create the "Program" through regulations. The statutory source is Pub. L. 102-395, § 610(a) and provides, in pertinent part:

> "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**. ....."

At its core, the above excerpt only says that there ***shall be an EB-5 Program***. The phrase "implement the provisions" is a clear directive to write regulations and thereby create the desired Program. The remainder of the statute provides only the most basic and minimal of parameters for this almost completely undefined "Program". Of course, it must be kept in mind that EB-5 is an "immigrant visa classification" and the Program was intended to increase utilization of that visa. Increased EB-5 visa utilization would in turn, increase the job creation that goes along with it. In later revisions and especially in paragraphs (c) and (d) of §610 we find that Congress clearly placed the bulk of the responsibility for the Program upon USCIS as the agency within DHS (*which succeeded INS who represented the Attorney General*), that handles visa petition adjudications.

It should be noted that Legacy INS and later USCIS had some differences-of-opinion with various Consulates about just what the Consular Officer (ConOffs) could do once USCIS (or INS) had OK'd the investor's plans. Some ConOffs tried to re-adjudicate visa classification petition decisions by challenging the business plan acceptance which was already hashed out between INS/USCIS and the investor/entrepreneur. Fortunately, that is no longer a problem. ConOffs are sticking to the admissibility determination alone, as it should be. It appears to me that today, those old DOS-INS (and USCIS) differences-of-opinion have shifted to inside USCIS, between groups or "camps" of adjudicators. There appear to be anal hide-bound restrictionists on one side and more liberal "out-of-the-box" thinkers on the other. Reality lives somewhere in-between but probably closer to the "out-of-the-box" camp. While certain outspoken advocates, some of whom at least approach the title of *obfuscator extraordinaire*, would have USCIS rubber stamp totally outrageous and ridiculous explanations, most of them go too far. In the end, the "reasonable time" determination is *context-specific* and made on a *case-by-case basis* based on the explanation offered and the evidence that supports the *findings-of-fact* about reasonableness.