LIMITED JOB DISCRIMINATION IS OK

By Joseph P. Whalen (August 22, 2012)

DOJ acknowledged in a Press Release dated August 22, 2012[1], that a very limited amount of specific selectivity is permissible in the hiring process when it is demanded by a legal mandate to do so. A settlement was reached and announced "*prior to the Justice Department filing a complaint in this matter*." *Id*. at ¶ 3.

> "Under the INA, **employers may not discriminate** on the basis of citizenship status **unless required to comply with law**, regulation, executive order or government contract. Although MicroLink Devices is a party to several federal contracts subject to the International Traffic in Arms Regulations (ITAR), which control the export and import of sensitive technology, ITAR does not require or permit employers to limit job applicants to or prefer U.S. citizens in the hiring process. The job postings therefore impermissibly discriminated against non-citizen workers eligible for the advertised positions, such as lawful permanent residents, refugees and those given asylum in the United States." *Supra* at ¶ 2. [**Emphasis Added**.]

Among the potential scenarios where the pool of job applicants may be narrowed is in the EB-5 Employment Creation Visa context. The EB-5 Immigrant Visa is made available to aliens who invest a statutorily mandated minimum amount of capital in a job-creating commercial enterprise but must eventually and within a maximum period create (or preserve) a minimum number of jobs. Those jobs are limited to "Qualifying employees" as defined by law.

8 CFR § 204.6 (*e*) provides a definition of this term for EB-5 purposes:

> *Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien. [Underline added.]

[1] **"Justice Department Settles Discrimination Claim Against Illinois Company"**

The regulatory definition derives from the statute itself. That statute is the Immigration and Nationality Act (INA) and the statutory language in **INA § 203 (b)(5)(A) [8 USC § 1153 (b)(5)(A)]** demands certain results from the alien's efforts in exchange for the Immigrant Visa, specifically in clause **(ii)** it demands the alien to "*benefit the United States economy and create full-time employment for not fewer than 10 United States **citizens** or **aliens lawfully admitted for permanent residence** or **other immigrants lawfully authorized to be employed** in the United States (other than the[EB-5] immigrant and the immigrant's spouse, sons, or daughters).*" Those who do not fit are not "protected individuals" under the law.

In addition, paragraph **(D)** of the above section provides that "*...the term "full-time employment" means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.*" [*Emphases Added.*] This statutory "definition" or "parameter" was added in an amendment in 2002, on the heels of various lawsuits amid controversy. In light of that contextual fact, the legislation was *reactionary*, in part, *ameliorative*, in part, and a bit *rushed* and *political*, in parts.

One must be mindful that INS had originally allowed "job-sharing" arrangements to count for the stand-alone entrepreneur when it promulgated the initial regulation in response to IMMACT90. That major overhaul in 1990 was the vehicle through which the "investor visas" was made statutory for the first time. Such status was previously available pursuant to a regulatory provision crafted as a "*labor certification exemption*" rather than a "*visa classification*" set by a statutory definition.

With that bit of history in mind, we must recognize that job-sharing is not the same as simply adding multiple part-time jobs of side-by-side co-workers to count as being equal to full-time positions. It is **most likely** that Congress meant to allow Full-Time Equivalent (FTE) calculations as used in standard economic models to be allowed but only in the "Pilot Immigration Program" which allows "indirect jobs" for Regional Center affiliated investors as determined by "reasonable methodologies".

Given the preceding contextual and historical information regarding EB-5 "qualifying employees", a certain amount of selective hiring or "discrimination" is required in EB-5 commercial enterprises and therefore is NOT a violation of the anti-discrimination provisions of the INA. It is **most likely** that Congress did not mean to include FTEs outside of the Regional Center context **or** allow any *unauthorized workers (illegal aliens)* to count in the mix for ANYONE when it wrote and amended these statutory provisions but EB-5 is also finding its place.