

Which Came First, The Chicken or The Egg? For EB5: Was It The Business Plan or The Economic Impact Analysis?

By Joseph P. Whalen (June 4, 2014)

Introduction

For years I have stressed to anyone interested in establishing an EB-5 Regional Center or originating a project for an established Regional Center, that in order to perform a valid and reliable Economic Impact Analysis you have to have a solid Business Plan first. Before you start worrying or cringing or cursing me, please hear me out. I do understand that in order to gain interest in an idea and to get at least a preliminary estimate of the job count, which would then give you a ballpark number of potential EB-5 investors, that nobody is going to go all out and commission expensive studies too quickly. That would be an unwise move. That being said, and as I've said before, the **formal** and **fully EB-5 compliant** Business Plan and Economic Impact Analysis **should** *come as late in the process as is feasible* so that they may be as close to reality and as accurate as possible prior to submission to USCIS with either an I-924 or I-526.

More Fundamental Questions

In light of the above, the question then becomes “How do we get started?” The best answer I can give is to come up with the *best estimates* you can *based on the opinions of trusted experts in the specific industries and businesses* that you want to promote. That situation begs the question “How do we figure out what would be good to promote in our chosen geographic area?” To that I say, look around. Check with local municipal and county governments, as well as state and federal agencies to see what information is already available for the established, desired, or potential geographic area(s) where you want to work. In addition to the government, there may be information available from universities, think tanks, trade organizations, or other respected experts and reliable sources. Be creative but not TOO creative and be sure to watch out for someone or some biased organization with a skewed point of view or a hidden agenda. At this point some folks may be asking themselves “What was I thinking when I even considered EB-5 in the first place?” That's an easy one to answer. You were thinking about less expensive financing for major projects that would help the economy where you and yours live and work. As expensive as it is to establish an EB-5 Regional Center or formulating any **EB-5 suitable**

project or investment vehicle, it can pay off big time. Just think about interest rates on loans in the single digits and very forgiving payback arrangements. Due to the legal requirements and the necessary processing delays for the EB-5 investors, most EB-5 financing is getting paid off last in the grand scheme of things and the investors may need delays before full repayment in order to fit within specific legally required timeframes for their individual immigration needs and purposes.

Preparing to File with USCIS

There are different strategies and different options for how to proceed in the EB-5 realm. There are two basic levels when filing an I-924 for *initial designation* as a Regional Center. **First**, there is the less expensive and simpler approach of offering basic information to support the I-924 application. This would be the fastest route to obtaining Regional Center Designation. It only requires an application supported by a **general proposal** that leads to **general predictions** using a valid **reasonable methodology**. What that boils down to is a Business Plan for either an immature project still in the very early planning stages, or a *sample* or “*archetype*” project in an industry that feels *familiar, safe, and comfortable*. That type of Business Plan will necessarily be one that is **not Matter of Ho**¹ compliant which is supported by a “hypothetical” economic impact analysis. This type of application package as with a more highly developed package would be submitted along with other supporting documentation would help to demonstrate the knowledge, skills, and abilities (KSAs) of the individuals and “entity” applying for designation. While you can get faster Approval of the I-924 and an official USCIS Designation Letter, you get no deference to a *named specific project*, either because there isn’t one, or the plans and predictions are still too vague. There will be a need to file something more specific later and it will have to stand up to full scrutiny but as there will be certain aspects and issues that have been settled as to those KSAs, as well as the generally accepted reasonable methodologies, geographic area, industry clusters, certain kinds of businesses, financing mechanisms (loan vs. equity, etc...); follow up processing should be faster without the need to beg for expedited adjudication of the application or petition.

¹ [Matter of Ho, 22 I&N Dec.206 \(AAO 1998\)](#) This case calls for a comprehensive, detailed and credible business plan and lists many common elements that USCIS expects to see.

The **second** common approach in an I-924 application for initial Regional Center Designation is to include at least one “actual” project supported by a *Matter of Ho* compliant Business Plan and highly detailed Economic Impact Analysis based on widely accepted methodologies which if applied correctly will most assuredly be accepted as reasonable. The Economic Impact Analysis in this type of application package needs to cover all the bases. This approach may be more time consuming to prepare and adjudicate but the money from EB-5 investors will likely get released to the project a whole lot faster in the end. That is so because it is a single step rather than a two-step approach. For future projects, each supported by an I-526 Exemplar in an I-924 Amendment, **or** submitted as by a volunteer guinea pig investor through submission of a real I-526 Petition as a test case, *more on “follow-ups” below*. Those will be the same follow-up steps as for the first approach discussed above **but** your *initial project* can get started and EB-5 funded faster.

This second approach is naturally more expensive to prepare but I think it is well worth the time, effort, and expense. You just have to be more meticulous in case preparation and presentation. A succinct **Executive Summary** that presents an *inductively-reasoned narrative* that will aid the USCIS Adjudication Team to grasp all of the premises and assumptions underlying that *initial* project, its associated job creation and, “other positive economic impacts” helps a great deal. Through this approach, in your USCIS Designation Letter/I-924 Approval Notice, you can get deference to the materially unchanged Business Plan and Economic Impact Analysis associated with a specifically named project. Just think of the marketing advantages to that!

I-924 Application vs. I-526 Petition: That is the Question!²

Regarding the “follow-up” mentioned above primarily in connection to the quick designation with no deference approach, when the project planning has progressed sufficiently; *which will always be a well considered judgment call on the applicant’s part*; what is the next step? There are two potential paths to follow, they are:

1. Allow one EB-5 investor to file a real I-526 Visa Petition and act as a test-case (guinea pig), or
2. The Regional Center files an I-526 Exemplar as an I-924 Amendment.

² I have written about this previously at:

<http://www.slideshare.net/BigJoe5/advantages-to-i-526-exemplar-petition-approval-via-an-i924-amendment-application>

The two approaches listed above are both valid options. That being said, there are vast differences between the two options. The I-526 is an actual visa petition and as such has to be pretty much perfect upon filing with extremely limited ability to make any substantive corrections. The “filing date” of any **approved** preference category³ “**visa petition**” will be transformed into a “priority date” for visa number allocation purposes. That means that **IF** the EB-5 category becomes backlogged **THEN** the Department of State would be legally required to change the Monthly Visa Bulletin to include a “cut-off date” for that category. That means waiting for the date to progress until the intending immigrant’s “priority date” becomes “current”. Until now, the EB-5 category has NEVER been anything but current in over two decades but that is highly likely to change as soon as this summer (July or August, perhaps a little later in 2014).

The other path to follow is to file the Exemplar I-526 as an I-924 Amendment. The Form I-924 is an application rather than visa petition. This is a critical legal point. That application can be perfected after filing because it has no “priority date” issue. The only true prerequisite to filing is for the named I-924 applicant to exist as a legal entity at the time of filing. That point will have been settled in the *initial* Regional Center *designation* application. There will usually be new and/or additional project specific limited partnerships (LPs) or limited liability companies (LLCs), etc... However, since the **existing** Regional Center is the applicant and there is no priority date involved, even this detail can be delayed and corrected later. Remember that at this stage, many things are happening simultaneously in an often rapidly changing, highly dynamic business environment. While some folks at USCIS may want things set in stone from day one (at time of filing), that simply does not mesh with reality. Finally, USCIS has had a changing of the guard. To put it another way, there appears to be a paradigmatic shift in-process. Paradigms are major underlying theoretical constructs that guide just about everything within its purview. Legacy INS was a law enforcement agency that was “saddled with” deciding a few immigration benefits. Legacy INS spawned and then nurtured the “Culture of NO!” USCIS on the other hand is a “benefits granting (or determination) agency” that is still finding its own identity and corporate culture based on Integrity, Respect, Ingenuity, and Vigilance with an emphasis on Customer Service.

That’s my two cents, for now.

³ EB-5 = Employment-Based, Fifth Preference visa category.