

**I FINALLY FOUND THE REAL MEANING OF THE “TENANT
OCCUPANCY METHODOLOGY” AND ITS APPARENT SOURCE!
ALTERNATE NAMES: “ABSENTEE LANDLORD METHODOLOGY” OR
“REAL ESTATE SPECULATOR” METHODOLOGY”, YOU DECIDE!**

By Joseph P. Whalen (September 19, 2012)

I must admit that I was confused, in part, by USCIS' utter inability to make itself plainly understood on this point in its EB-5 Engagements. The confusion from which I was suffering had to do with the so-called *Tenant Occupancy Methodology*. As I read through the [Carlsson Complaint](#), a light went on and I began to see *the real issue*. My utter lack of understanding was made possible by the obfuscations of advocates and poor communication skills by USCIS.

The passage in the *Carlsson Complaint* that opened my eyes was this:

“... When a project centers on property renovation, the **precise identity** of the tenants who will occupy the property post-renovation and **the way in which said tenants will generate future jobs** *cannot be known with certainty before the property is ready for occupancy*. Once the identity of the tenants that occupy the space becomes known, a project's initial forecast may change as was the case in plaintiffs' project.” *At p. 13*

To that, I say “Yes”, it is more likely than not true that the IDENTITY(IES) of the "tenant business(es)" might not be known up-front. However, the *characteristics and type(s) of the business(es)* must be from among the approved industries in the requested operational parameters and within the ultimately defined and approved "*scope of the Regional Center*". The Regional Center (RC) defined its own scope when it presented its proposal. Since you are going to **renovate** the space, you **MUST KNOW** how to plan that renovation. You cannot take an empty building and create a *restaurant* for a tenant to operate a *gym*, a *florist*, or a *manufacturer*!

While retaining some flexibility is permissible and desirable for everyone and in keeping with the Congressional Intent of the Program to improve the regional economy, when the RC tries to venture too far, it creates an untenable situation for USCIS. **IF** 200 or 300 RCs were to continually shift outside their scope, **THEN** the Program would become unmanageable. **Limits** *must be set for the Program* and this is one of them.

The RC defined its own parameters in its proposal. If said RC wants to change its parameters it must do so in the manner proscribed. In *Matter of Izummi*, 22 I&N Dec. 169 (AAO 1998), the RC tried to hijack an investor's petitioning and appeal processes for a Regional Center amendment. It is understandable that there was

true confusion on the correct process in 1998. The process has evolved since then and RCs now have a separate Form and process for this purpose and must use it.

This methodology which in my *not-so-humble* opinion, has been very poorly named as the “**Tenant Occupancy**” Methodology is really nothing more than blind real estate speculation with little or no real planned use for the property beyond profit. It would be easier to understand if it were called the “**Absentee Landlord**” Methodology or the “**Blind Greed**” Methodology or the “**Real Estate Speculator**” Methodology! Please take painstaking notice that in that last suggested alternate name, I said *speculator*, not *developer*. That was for a distinct reason. An actual “developer” has a specific plan to develop a property regardless of whether it is its own plan or that of the client for whom it will develop the property. The mere speculator has no real plan beyond finding a prime location at a low enough price to be very reasonably assured of turning a profit when it sells or leases out that real estate holding. It matters little, if at all, to the speculator as to what develops at their prime location. If the property will be leased out, the *real estate speculator* turned “**Landlord**” does not really care what his or her “**Tenant**” is or does as long as they pay the rent. Here, job creation potential is peripheral or an afterthought, if given any thought at all.

The above described “**Absentee Landlord**” or “**Real Estate Speculator**” methodology is a piss-poor basis for any EB-5 Regional Center. An investor in that type of willy-nilly investment is not specifically focusing on funneling their money into specific *kinds of commercial enterprises* for the express purpose of attempting *to create jobs* in sufficient quantity to meet the demands of the EB-5 Immigrant Visa or the “Pilot” Program via the Regional Center. Note that I am addressing the “EB-5 Immigrant Visa” requirements as something different from the “Pilot Program Requirements” for a reason. They are *qualitatively* different.

The underlying straight-forward statutorily-defined EB-5 Immigrant **Visa** by itself has clear but cold, hard, and well-defined requirements:

- spend a minimum amount of money and
- create a minimum number of direct full-time, permanent jobs for “qualifying employees” (ten per EB-5 entrepreneur/investor)
- by the individual EB-5 alien’s deadline!

The “Pilot” Program allows one to meet the basic statutory requirements through a looser approach which includes “reasonable methodologies” that predict “indirect” jobs *in addition to*, or *completely in place of*, the required jobs. The basic components used to explain the **accepted** reasonable methodologies are the comprehensive, detailed, and credible Business Plan (BP) and the predictions

described in the Economic Analysis (EA) based upon that BP. The data used as input in *that* EA derived directly from, or were inspired by, *that* associated BP.

One type of data which has been successfully used as “input” is the number of jobs cast or described as “direct” for the specific purpose of use as “input” in the model used to create *that* EA. Since EB-5 law defines “direct” jobs differently than the “direct” jobs used as input in EAs, there has been profound confusion all over the place in the EB-5 world inside and outside of government.

In many successful Regional Center Proposals, the jobs used as EA input as “direct” may, and usually do, include jobs that are **not** *EB-5 direct on-the-books employees of the actual alien* who invested the required money. In many instances, the actual employees are those of a “third-party” such as the **tenant** at the location, which was *specifically developed as the EB-5 qualifying investment vehicle*. That **may** be OK. It depends on more **details** than I just presented, which were precisely: **none!**

IF the Regional Center clearly defines which “*kinds of commercial enterprises*” it will seek to support and develop in its “*limited geographic area*”, **THEN** its efforts to achieve its specifically approved **objectives** in support of the “Pilot Program’s” stated **goals** are indicative of, and supportive of, a qualifying money-to-jobs nexus. The mere mundane landlord-tenant relationship alone is insufficient to establish the required **nexus**, [*i.e.*, a **palpable connectivity** that is easily felt or touched and is often clearly discernible with the naked eye]. The simplistic example of “mall **tenant’s jobs**” as being suitable as input in a well defined interdependent relationship (clear nexus situation) has been taken out of context and misconstrued.

IF a property is *specifically developed* in order **to** (1) *meet a need*, or (2) *fill a void* in the local/regional economy such that: (3) new businesses spring up, or (4) existing businesses survive, or (5) expand [(6) rather than merely relocate across the street or across town]; **THEN** (7) the new commercial *tenants have been facilitated* in their efforts and ability to (8) increase the employment in the immediate and surrounding area. That, in my *not-so-humble* opinion is an EB-5 qualifying nexus for appropriately labeled “**tenant jobs**” which should count as EB-5 indirect jobs.

The speculative approach of “**build it and they will come**” or as more aptly expressed for this case “**buy it and hope for the best**” is not now nor has it ever been EB-5 qualifying, nor has it been permitted by USCIS for any Regional Center, ever.

That’s my two-cents, for now.