Tenant-Occupancy?--OR--Is It Really Just Insufficient Nexus? And More Ramblings On The Pitfalls Of Failing To Plan Ahead

By Joseph P. Whalen (February 19, 2012)

On Friday February 17, 2012, USCIS sent out a message concerning EB-5. They entitled it "Tenant Occupancy" and the major points are laid out below.

- For purposes of the job creation requirement numerous I-924 Applications have utilized what has been commonly termed a "tenant-occupancy" methodology.
- The "tenant-occupancy" methodology seeks credit for job creation by independent tenant businesses that lease space in buildings developed with EB-5 funding.
- USCIS continues to recognize that whether it is economically reasonable to attribute such "tenant-occupancy" jobs to the underlying EB-5 commercial real estate project is a fact-specific question.
- Each case filed will depend on the specific facts presented and the accompanying economic analysis.
- USCIS adjudications will continue to be made on a case-by-case basis.
- USCIS does not intend to revisit factual findings.
- I-526, *Immigrant Petitions by Alien Entrepreneurs* and I-829, *Petitions by Entrepreneurs to Remove Conditions* will have predictability in connection with early regional center adjudications.

I find the message strange and wonder why it was sent. Is it some type of "heads-up" for an impending onslaught of RFEs, NOIDs, and/or Denials? I must wonder if, in fact, a huge number of piss-poor Regional Center Proposals were filed in a mad rush in an attempt to beat the I-924 Fee. Has USCIS been sitting on a pile of crap for a year wondering what to do?

My best guess is that this issue boils down to mostly a NEXUS problem but they didn't know what to call it. An additional problem is likely to be an overabundance of poor quality Business Plans and associated substandard Economic Analyses based upon them. I urge folks to re-read *Matter of Izummi* and my various articles on EB-5 money-to-jobs Nexus. I ask that once these promised RFEs come along that folks share the contents.

The next part was written in November 2011. In December 2011, AAO upheld the Victorville Termination. At that time the issue had warped into a bid to preserve jobs in a non-troubled business. A very strange case indeed.

Victorville's Achilles' Heel: Job Creation Nexus

EB-5 is the "employment creation" visa. Each EB-5 investor has to be credited with ten (10) jobs at the end of the process. Legacy INS (now USCIS) regulations first defined the *qualifying* employees and *qualifying* jobs which were subsequently codified by Congress. The Pilot Immigration Program with its Regional Centers was created by Congress in 1993, [8 USC § 1153 Note] to allow for bigger projects and included "indirect" jobs also.

The terms "direct", "indirect", and "induced" as *descriptors* for jobs as used as **input** (and output) in econometric models and the economic analyses produced by them have specific meanings that differ from the EB-5 meaning. In EB-5 parlance, "*direct*" jobs are *on the alien entrepreneur's payroll* and all others are "*indirect*". EB-5 "*indirect*" jobs can and do usually include ALL jobs even when the collectively owned business has actual on-the-books employees. In those instances, those few on-the-books employees will generally be used as input into the econometric model along with other **base-level jobs** attributable to the project. They usually can only be attributed to the first EB-5 investor's I-829 anyway. That is, if they are actually needed but they usually are not needed.

Other jobs attributable to the project as "direct" as **input** in a model only will include jobs such as mall or office building tenants' employees or factory workers whose employment was made possible by directly building a facility or loaning funds for its construction. This is acceptable when there is a clearly palpable[1] connectivity between the EB-5 funds and the newly created jobs. In short, this is known as clearly demonstrating a sufficient *nexus*.

The AAO has expressed this concept in *Matter of Izummi*, 22 I&N Dec. 169 (AAO 1998). *Izummi* did involve a Regional Center investor as denoted in (2) it was an investment under the Immigrant Investor Pilot Program. Prong (4) tells us that the EB-5 investors' money "must be made available to the business(es) most closely responsible for creating the employment on which the petition is based". *Izummi* held, in pertinent part:

> (2) Under the Immigrant Investor Pilot Program, if a new commercial enterprise is engaged directly or indirectly in lending money to job-creating businesses, such job-

[1] Able to be touched or felt **:** tangible. Easily perceptible by the mind **:** manifest
See: http://www.merriam-webster.com/dictionary/palpable

creating businesses must all be located within the geographic limits of the regional center. The location of the new commercial enterprise is not controlling.

(3) A petitioner may not make material changes to his petition in an effort to make a deficient petition conform to Service requirements.

(4) If the new commercial enterprise is a holding company, the full requisite amount of capital must be made available to the business(es) most closely responsible for creating the employment on which the petition is based.

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"It could perhaps be argued that, when the owner of a corporation pays a million dollars for shares in his business and earmarks the money for equipment, inventory, and working capital, some of the working capital will in fact be spent on initial salaries and expenses. In the partnership scenario, the new commercial enterprise is the partnership, and it too will need to spend money on initial salaries and expenses. The Service distinguishes these two situations in that, in the former example, the employment-creating entity is spending the money. In the latter example, the employment-creating entity never receives the money spent on the partnership's expenses. Especially where indirect employment creation is being claimed, and the nexus between the money and the jobs is already tenuous, the Service has an interest in examining, to a degree, the manner in which funds are being applied. **The full amount of money must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based.**7 The Service does not wish to encourage the creation of layer upon layer of "holding companies" or "parent companies," with each business taking its cut and the ultimate employer seeing very little of the aliens' money." **[bold in original]** *At p. 179*

One primary principle expressed in *Izummi* is now a major fundamental building block for today's rather ubiquitous Limited Partnerships with separate "subscription fees" or "management fees" completely distinct and apart from the required minimum investment amount. However, **another** currently topical principle as to the importance of showing a *sufficient nexus* comes from the same decision. Interestingly, the entire *Izummi* decision uses the word "**nexus**" only once as shown in the excerpt above. That situation addressed in *Izummi* was quite a bit different from the current issue in the Victorville case.

The City of Victorville, CA sought to use EB-5 funding to replace or at least *supplement* its own capital investment that would normally be raised through issuing more bonds or further increasing taxes. EB-5 funds can be legally used to supplement *or* fully fund infrastructure projects but only to the point where such

projects would generate enough jobs to allocate to the EB-5 investors. So, if an EB-5 funded infrastructure project does generate enough "direct" or "base-level" jobs to be used as input into an econometric model to generate additional "indirect" and "induced" jobs then they can all count as *EB-5 indirect* jobs.

A Regional Center cannot fund a project with insufficient job creation and then piggyback off wholly domestically funded collateral or peripheral projects made possible through its *minor involvement in infrastructure projects* which were made possible with EB-5 funds. Some *prospective*, *collateral*, or *peripheral* job creation does count as allocatable **EB-5 indirect job creation** but only on those base-level jobs and/or funding with **sufficient nexus** to EB-5 funded projects.

The Victorville Regional Center (VRC) attempted to parlay twelve (12) "direct" base-level jobs[2] at a wastewater treatment facility being funded with EB-5 money into 1,273 total "*direct*" and "*indirect*" jobs by including the 420 "direct" base-level employees at a bottling plant to be built nearby with *non*-EB-5 funds *not directly associated with the VRC*. The bottling plant would merely be a customer to the wastewater treatment facility. Since there is no realistic employment creation multiplier that could be applied to reach a required minimum 500 jobs to allocate to 50 investors at 10 jobs each based on the attributable 12 jobs, two approaches were attempted. A capital expenditure model lacked a **realistic nexus** between the EB-5 and non-EB-5 money. The EB-5 money spent on a wastewater facility cannot be palpably connected to the expenditures of an unassociated corporation who might built a plant and become a customer of the wastewater facility. That was the outcome as stated for the reason to terminate the Regional Center as of the May 24, 2011, CSC Termination Decision affirmed on certification by AAO.

AAO Upheld the Victorville Regional Center Termination

In a Decision dated December 21, 2011, AAO upheld the CSC Director's earlier Termination and addressed the latest assertions from the applicant/respondent. The

[2] In this sense **"direct" jobs are** being used as a label for the **base-level jobs** within an econometric model **as input** to arrive at ***projections*** of indirect jobs within the economic analysis produced through the model. In terms of meeting EB-5 employment creation requirements, **ALL** of the **jobs** created would **count as "indirect" to the EB-5 investors**. In the alternative, basing indirect job creation projections on capital expenditure alone, the money lacks nexus to VRC and the EB-5 investors.

latest round of assertions was loaded with mischaracterizations and, in my opinion, outright false statements. Certain contradictions were stated but refuted by evidence already in the same record. The applicant/respondent made a lot of noise about how USCIS was cutting off common project financing methods or practices. That simply was not the reality of the situation. USCIS was cutting off the ability for a Regional Center to mislead it. USCIS was cutting off the ability for an applicant to lay out one course of action and then follow another. Specifically, the AAO Decision of December 21, 2011, contains the following on page 6:

> "The applicant responded to concerns about timelines by stating: "project-finance projects, such as this one, typically require three or more stages of financing; the EB-5 funds are a critical part of this project's funding life-cycle, and each phase is critical to job creation. Indeed, job creation will not occur unless the entire project is funded throughout." The applicant asserted that USCIS approved the concept of bridge loans when it approved the regional center application. The applicant continued that USC IS has no authority to link expenditure of alien investor funds to the construction phase only, but that the applicant could have done so had the director not terminated the regional center's status. The applicant claimed that it would have reached its $25 million goal but for the fact that the director terminated the regional center, and **it would have focused funds differently if the focus had been a condition of the original approval**. The applicant acknowledged that the IWWTF was "constructed with non-EB-5 funds," but asserts that existing: job creation is in jeopardy if the applicant's ability to refinance is in question. While the regulations do allow alien investors to rely on job preservation, they may only do so if the investment is in a troubled business. 8 C.F.R. § 204.6(j)(4)(ii). The applicant, however, has never asserted that the alien investors will be investing in a troubled business."

Of particular interest to me is the assertion that the Regional Center "*...would have focused funds differently if the focus had been a condition of the original approval*." To that I say, I agree that it could have been so *but for* the Regional Center's failure to sufficiently plan ahead for such a contingency. This case illustrates one of my favorite points to make: Transparent Complexity Up-Front is critical to retaining flexibility in the financial investment maneuvers of a Regional Center so as to protect the ability of their EB-5 investors in meeting the legal requirements of the EB-5 Immigrant Investor Program. Hopefully, others will benefit from the mistakes made here by learning from them.

Failing to Plan = Planning to Fail!