

## **A TRADE OFF BETWEEN QUALITY AND QUANTITY IN EB-5<sup>1</sup>**

*By Joseph P. Whalen (September 30, 2012)*

The **stand-alone EB-5 entrepreneur** is held to a different demonstrable<sup>2</sup> result than the **Regional Center affiliated investor** for valid reasons. Let's explore them.

The ordinary family-based immigrant new arrivals of nearly one-million per year contain among them enough **small-scale entrepreneurs** to fill that historic *niche* in American society and our nation's economy. After all, just how many mom-n-pop groceries, liquor stores, gas stations, dry-cleaners, and diners does America need? We get by just fine as is. There is no need to allow the *tiny fragment of immigrant visas allocated under the EB-5 category* to be wasted on these types of businesses.

The maximum number of EB-5 visas is approximately 10,000 (it is a *percentage* available from the overall pool, which is usually this figure in practical reality). That maximum includes both the principal investor and his or her dependent spouse and unmarried children under age 21. In reality, the category would become fully subscribed each year once somewhere between 3,000 and 3,500 I-526 petitions have been approved **and** all the principals' and dependents' visas have been issued and/or adjustments of status completed for the fiscal year. Even if using the grossly overstated allocation figure of 10,000 visas per year, because the vast majority of EB-5 investments are at the TEA rate of \$500,000 each, that only totals 5 billion dollars. Realistically, using the 3,000 low-end visa use estimate per year, we are more likely looking at 1.5 billion. That is less than USCIS' annual budget. If 3,500 investments were made at the TEA rate, we would only be looking at 1.75 billion invested. That is also, less than USCIS' annual budget.

The EB-5 true entrepreneur is forced to create a **minimum of ten (10) full-time, permanent jobs for qualifying employees**<sup>3</sup>. The true entrepreneur was initially envisioned as one of those pioneers of business that we all learned about in history class or dream about becoming "one day". They were never envisioned as running the corner minimart which has replaced the corner grocer, butcher, or baker in old ethnic neighborhoods of yesteryear. There are still plenty of small-scale immigrant entrepreneurs who are self-employed and who employ their family in such businesses but they are generally already immigrants based on a family connection. Grandma's brother waited 20 years for a visa; he has to survive when he gets here!

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<sup>1</sup> It's a trade off in quantity and quality of JOBS CREATED!

<sup>2</sup> Definition of **demonstrable**  
*adjective*

- clearly apparent or capable of being logically proved: *the demonstrable injustices of racism*

Above found at: <http://oxforddictionaries.com/definition/english/demonstrable>

<sup>3</sup> 8 CFR § 204.6(e) work authorized folks, excluding self and family.

On the other side of the EB-5 equation are the large-scale projects that pool the funds of multiple EB-5 investors plus domestic investors. Those large-scale pooled investments are intended to be large enough to have ramifications or a wide ripple effect at least in the regional economy and quite possibly the national economy. What the investors' contributions lack in quality, it makes up for in quantity. The reverse is applied to the stand-alone true entrepreneur. What the solo performer lacks in quantity, (s)he is expected to make up for in quality.

By now you may be grumbling something like: "What the heck is he babbling about now?" I am talking about compliance with the terms of the EB-5 visa demanded for the lifting of conditions and the differences in that compliance between two dissimilarly situated I-829 filers. Still lost? I will break it down.

§610(c) of Pub. L. 102-395 (Judiciary Appropriations Act of 1993) [8 USC § 1153 Note], *as amended*, **modifies the mechanisms for demonstrating compliance** with INA §203(b)(5) when submitting a request to lift conditions as required by INA § 216A. The following chart might help you see what is required of each of these EB-5 conditional residents in their I-829 petitions.

<b><u>I-829, <i>Petition by Entrepreneur to Remove Conditions</i></u></b>	
<b><u>Stand-Alone Entrepreneur</u></b>	<b><u>Regional Center Affiliated Investor</u></b>
<p><b>INA § 216A [8 U.S.C. 1186b]</b>            * * * * *</p> <p>(d) Details of Petition and Interview.-</p> <p>(1) Contents of petition.--Each petition under subsection (c)(1)(A) shall contain <b><u>facts and information demonstrating</u></b> that the alien</p> <p style="padding-left: 40px;">(A)</p> <p style="padding-left: 80px;">(i) invested, or is actively in the process of investing, the requisite capital; and</p> <p style="padding-left: 80px;">(ii) sustained the actions described in clause (i) throughout the period of the alien's residence in the United States; and</p> <p style="padding-left: 40px;">(B) is <i>otherwise conforming to</i> the requirements of section <b><u>203(b)(5)</u></b></p>	

INA § 203(b)(5) [8 U.S.C. 11853(b)(5)]

\* \* \* \* \*

(5) Employment creation. -

(A) **In general.** - Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise (including a limited partnership)--

(i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and

(ii) which will 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 immigrant and the immigrant's spouse, sons, or daughters).

\* \* \* \* \*

(D) **Full-time employment defined.**--In this paragraph, 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.

**8 CFR § 204.6 Petitions for employment creation aliens.**

(e) *Definitions.* As used in this section:

§610 P. L. 102-395 [8 USC 1153 Note]

**Employee** means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise. In the case of the Immigrant Investor Pilot Program, "employee" also means an individual who provides services or labor in a job which has been created indirectly through investment in the new commercial enterprise. This definition shall not include independent contractors.

(c) **In determining compliance with section 203(b)(5)(A)(iii)[(ii)]** of the Immigration and Nationality Act [8 U.S.C. 1153(b)(5)(A)(iii)[(ii)]], and **notwithstanding the requirements of 8 CFR 204.6**, the Secretary of Homeland Security **shall permit aliens** admitted **under the pilot program** described in this section **to establish reasonable methodologies for determining the number of jobs created** by the pilot program, **including such jobs which are estimated to have been created**

***Full-time employment*** means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week. ***In the case of the Immigrant Investor Pilot Program,*** “full-time employment” also means employment of a qualifying employee in a position that has been created ***indirectly*** through revenues generated ~~from increased exports~~ ***resulting from the Pilot Program*** that requires a minimum of 35 working hours per week. A job-sharing arrangement whereby two or more qualifying employees share a full-time position shall count as full-time employment provided the hourly requirement per week is met. This definition shall not include combinations of part-time positions even if, when combined, such positions meet the hourly requirement per week.

***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.

***indirectly*** through revenues generated from increased exports, improved regional productivity, job creation, or increased domestic capital investment **resulting from the pilot program.**

(j) *Initial evidence to accompany petition.* A petition submitted for classification as an alien entrepreneur must be accompanied by evidence that the alien has invested or is actively in the process of investing lawfully obtained capital in a new commercial enterprise in the United States which will create full-time positions for not fewer than 10 qualifying employees. **In the case of petitions submitted under the Immigrant Investor Pilot Program**, a petition must be accompanied by evidence that the alien has **invested**, or is actively in the process of investing, **capital obtained through lawful means within a regional center** designated by the Service in accordance with paragraph (m)(4) of this section. **The petitioner may be required to submit information or documentation that the Service deems appropriate in addition to that listed below.**

(j) (4) *Job creation* —

(i) *General.* To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

(A) Documentation consisting of photocopies of **relevant tax records**, Form I-9, or other similar documents for ten (10) qualifying employees, **if such employees have already been hired** following the establishment of the new commercial enterprise; **or**

(B) A copy of a **comprehensive business plan** showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

(j) (4) *Job creation* —

(iii) *Immigrant Investor Pilot Program.* To show that the new commercial enterprise located within a regional center approved for participation in the Immigrant Investor Pilot Program meets the statutory employment creation requirement, the petition must be accompanied by **evidence that the investment will create full-time positions for not fewer than 10 persons either directly or indirectly** through revenues generated from increased exports resulting from the Pilot Program. **Such evidence may be demonstrated by reasonable methodologies including those set forth in paragraph (m)(3) of this section.**

**(m) *Immigrant Investor Pilot Program* —**

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**(3) *Requirements for regional centers.*** Each regional center wishing to participate in the Immigrant Investor Pilot Program shall submit a proposal to the Assistant Commissioner for Adjudications, which:

(i) Clearly describes how the regional center focuses on a geographical region of the United States, and how it will promote economic growth through increased export sales, improved regional productivity, job creation, and increased domestic capital investment;

(ii) Provides in **verifiable detail how jobs will be created indirectly** through increased exports;

(iii) Provides a **detailed statement** regarding the amount and source of capital which has been committed to the regional center, as well as a description of the promotional efforts taken and planned by the sponsors of the regional center;

(iv) Contains a **detailed prediction regarding the manner in which** the regional center will have a **positive impact on** the regional or national **economy in general** as reflected by such factors as increased household earnings, greater demand for business services, utilities, maintenance and repair, and construction both within and without the regional center; and

(v) Is supported by **economically or statistically valid forecasting tools**, including, but not limited to, **feasibility studies, analyses** of foreign and domestic markets for the goods or services to be exported, and/or multiplier tables.

**8 CFR § 216.6 Petition by entrepreneur to remove conditional basis of lawful permanent resident status.**

(a) *Filing the petition* —

(1) *General procedures.* A petition to remove the conditional basis of the permanent resident status of an alien **accorded conditional permanent residence pursuant to section 203(b)(5) of the Act** must be filed by the alien entrepreneur on Form I-829, Petition by Entrepreneur to Remove Conditions. The alien entrepreneur **must file Form I-829 within the 90-day period preceding the second anniversary** of his or her admission to the United States as a conditional permanent resident. ....with fee.....

(a) (4) *Documentation.* The petition for removal of conditions must be accompanied by the following evidence:

(i) Evidence that a commercial enterprise was established by the alien. Such evidence may include, but is not limited to, Federal income tax returns;

(ii) **Evidence** that the alien **invested** or was actively in the process of investing the requisite capital. Such evidence may include, but is not limited to, an audited financial statement ***or other probative evidence***; and

(iii) **Evidence** that the alien **sustained the actions described in paragraph (a)(4)(i) and (a)(4)(ii) of this section** throughout the period of the alien's residence in the United States. The alien will be considered to have sustained the actions required for removal of conditions if he or she has, in good faith, substantially met the capital investment requirement of the statute and continuously maintained his or her capital investment over the two years of conditional residence. ***Such***

***evidence may include, but is not limited to***, bank statements, invoices, receipts, contracts, business licenses, Federal or State income tax returns, and Federal or State quarterly tax statements.

(iv) **Evidence that the alien created or can be expected to create within a reasonable time** ten full-time **jobs** for qualifying employees. In the case of a “troubled business” as defined in 8 CFR 204.6(j)(4)(ii), the alien entrepreneur must submit evidence that the commercial enterprise maintained the number of existing employees at no less than the pre-investment level for the period following his or her admission as a conditional permanent resident. **Such evidence may include payroll records, relevant tax documents, and Forms I-9.**

<b><u>Stand-Alone Entrepreneur</u></b>	<b><u>Regional Center Affiliated Investor</u></b>
<p>This “entrepreneur” is limited to the items listed in the regulations and/or statute. In short, this petitioner must support the I-829 with hard evidence of having created 10 full-time permanent jobs. This means payroll records.</p> <p>The individuals employees must be identified.</p> <p>USCIS will verify each employees work eligibility. USCIS runs E-Verify, so just expect that all your employees’ information will be run in E-verify. It is safest if you use E-Verify.</p> <p>Since “specific evidence” is spelled out, that is what you must submit.</p>	<p>This “investor” must submit “other” evidence if NOT doing exactly as the stand-alone “entrepreneur” is doing. Also such evidence must be deemed appropriate for the purpose submitted.</p> <p>Such “other evidence” may take many different forms and/or styles, as well as more varied document possibilities.</p> <p>“Reasonable Methodologies” were put forth up-front. In order to lift conditions, the “assumptions” supporting indirect job creation must be substantiated with corroborating documentary evidence.</p> <p>To determines what documents will work means isolating the “facts” that need to be “proven”.</p> <p>Therefore you must determine what documents support <b><u>that particular</u></b> “<i>finding-of-fact</i>” and submit it.</p>

Many **indirect** job creation projections are based on stated assumptions. **Assumptions** in this context may later morph into *conditions precedent* that are deemed necessary for the fulfillment of obligations and supportive of a finding that due to the completion of one stated objective or the meeting of a benchmark or deadline for completion of **some identified condition** that **another stated result is reasonably also deemed true and/or accomplished**. If X is proven true, then Y is accepted as true.

**Say what? Let me give an example.**

Suppose the BP says that the project will entail building a factory. This factory will have three assembly lines. The BP says that upon completion of line two, line one will be up and running while construction commences on line three. The EA states that there will be X number of people employed at the factory. In the EA they were used as input described *for EA purposes only* as **direct** employees of the factory, not the aliens who are just supplying financing. *For EB-5 purposes*, the factory workers are **indirect** in relation to the aliens who provided financing only.

Based on the *new employment at the factory*, Y number of indirect and induced jobs will be created as a result. The EA breaks down this **additional** peripheral but dependent **job creation** into two categories (indirect and induced ) but **for EB-5 purposes, all three** job categories in the EA will be utilized as **indirect** jobs. The various crucial and pivotal activities were predicted to begin and end within stated temporal parameters (construction schedules). In this simple example, the completion of line two signals various things. Completion of line two was a *condition precedent* to line one being up and running and fully staffed. It is therefore indicative of job creation for the workers on line one. Let's just accept the fact that the workers could NOT start reporting to work on line one until the construction activities on line two ended. However, if it makes you feel better, let's say it was due to worker safety concerns coupled with workers having to attend and complete mandatory new employee orientation training which included safety issues such as emergency procedures, hazardous materials handling precautions, disaster drills, and first aid, including Red Cross CPR Certification Classes. OK?

Fulfillment of certain stated *assumptions* permits **presumptions** to be found readily acceptable. In this example, the job creation **projections** were *presumed to be valid* upon the fulfillment of the *condition precedent* of the completion of the construction of line two. This **presumption** was something that the parties *agreed to accept as true unless proven otherwise*. USCIS approved it, now you merely need to follow through with it; and then prove that you did via the documentation!

**Reasonable Methodologies** consist of a wide variety of possibilities. In order to be deemed “reasonable” the “methods” used for EB-5 Regional Center Program purposes must contain plausible explanations. In general, those will be based upon various widely accepted Econometric or Economic Models. Economists working with these models will generally utilize the data categories found in or inspired by the “comprehensive, detailed and credible” Business Plan to guide selection of data for input into the model. Sometimes the specific details and actual figures found in the BP might also be used as input in the model. The result of all that modeling will be an EA that the applicant hopes will be accepted by USCIS as reasonable, plausible, probable, and credible.

The information discussed in the assembly line example represented information from a BP used to produce an EA. In that EA, assumptions were stated that supported predictions. As those assumptions came true, the presumptions as to indirect jobs became probable. They would have been accepted as true upon corroboration of fulfillment of the *conditions precedent* as stated up-front. The question then remains; “What will constitute the corroborating evidence of fulfillment of the conditions precedent”? On this point, remember that you are dealing with a government bureaucracy so the simple answer is “paperwork”. The harder part of the equation and process is figuring out **which** papers to submit.

In order to determine which papers to present, you must identify the **precise facts you need to prove** to support fulfillment of the specific condition precedent. How would you prove that the construction of assembly line two has been completed? I don’t know because I have never built a factory that contained assembly lines. However, I do know that many factories with multiple assembly lines have been built. That tells me that someone somewhere must know the answer. How about you start with the very construction company that built it for you? They likely know what paperwork they produce that could serve as evidence. Perhaps they have to answer to local, state, or federal agencies about their activities? That is sure to produce paperwork! How was this construction activity paid for? Monetary transactions usually leave a paper trail. The bigger the expenditures, the bigger that trail becomes. There is no need to reinvent the wheel over these matters. You just have to do your legwork and homework on the subject matter in order to find the answers.

*That’s my two-cents, for now.*

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