

Project Due Diligence for EB-5

by Joseph P. Whalen (March 21, 2013)

Many EB-5 investors later regret not performing sufficient Due Diligence on the specific project into which they invested via a Regional Center. While it is hoped that the Regional Center with which one deals is honest, it is also important to ensure that they are fully competent and EB-5 compliant. Even honest Regional Centers make some mistakes that come back to haunt their EB-5 investors. EB-5 legal requirements are highly complex and even the most honest and earnest of Regional Centers might make a mistake in just one aspect such that a project unsuitable for EB-5 investment slips through the cracks, is offered, and sold/subscribed.

Aside from the due diligence normally associated with any investment, EB-5 compliance is an added component. And just what are the additional considerations to determine EB-5 compliance? It depends on the specifics of the actual project as ALL the aspects to be independently verified and evaluated.

There are however some common points at issue.

- Whoever assists the EB-5 investor in performing the necessary Due Diligence should have the appropriate Knowledge, Skills, and Abilities (KSAs) for the task that they perform on the team.
- Actual Business Plans (BPs) submitted with I-526 visa petitions must be *Matter of Ho*-complaint.
- Job Creation Predictions must be based on Reasonable Methodologies so, an independent evaluation of reasonableness is well worth the effort.
- In general, an Economic Analysis utilizing a widely accepted Input-Output model has been the best way of establishing a Reasonable Methodology for predicting job creation.
- The source of input categories for use in producing the EA is the BP for the specific project, industry or trade associations, feasibility studies, or some other appropriate source.

- The data used as input must be “sourced” and those sources must be valid and “verifiable”. Independent verification is well worth the effort in this regard. Government surveys are a great place to start.
- Transactional Documents (TDs) should be thoroughly examined by the potential EB-5 investor’s own counsel and said counsel should have the appropriate KSAs; i.e. Securities Law background, worked for the SEC, specialization as recognized by their bar association.....
- Transactional Documents should also be thoroughly examined by the specialist in EB-5 Law. Very often, this component and the preceding are performed by the same person BUT that is where many failures occur. It may be best to have the TDs checked by two different pairs of eyes, each for only ONE aspect.
- Underlying all of the above and the one item that matters most is the business decision. Unfortunately, this is often not seriously considered by the potential EB-5 investor. Does this project make sense? Is the development of this “kind of commercial enterprise” NEEDED in this PLACE at this TIME? This is where a feasibility study comes in handy. It is not necessary that the Regional Center has performed a feasibility study because many local, state, and federal government agencies as well as schools/universities, and/or trade organizations have such data available.
- As so many EB-5 projects involve new construction or remodeling “to suite”; or renovation/restoration, the Eb-5 investor must be mindful of the multitude of “other” regulatory considerations that might be involved.
 - Some projects need Environmental Impact Statements or Reports.
 - Some offerings must be registered with the SEC.
 - Some offerings involve mitigation of archaeological or historic sites.

In conclusion, it is unwise NOT to independently evaluate the project offered. Due Diligence is especially necessary when the project is offered through an agent rather than directly from the Regional Center itself.