

NEXUS REVISITED: “BECAUSE OF” AND “BUT FOR”

By Joseph P. Whalen (December 22, 2012)

Sometimes folks bring projects to me that they think just great because they are likely to be profitable but I have to tell them that it won't work as an EB-5 project. The key element that is usually missing is a strong, clear nexus between the EB-5 funds and the jobs being created or the fact that jobs would merely be relocated from a nearby facility. When I say that the project lacks a money to jobs nexus, many will scratch their head and look at me cock-eyed with a quizzical expression on their face and either walk away or ask for a detailed explanation. Once the detailed explanation begins, some will walk away in a hurry however, a few will stay to the bitter end. Will you keep reading to the bitter end? I wonder.

Where to begin? INA § 203(b)(5) calls upon the EB-5 alien entrepreneur or investor to plunk down either \$500,000 or \$1,000,000 and create 10 full-time jobs for American workers. In a “stand-alone” or “direct” investment, there are only direct jobs of “qualifying employees” on the payroll of the EB-5 alien. There is no question of nexus in such a situation. Nexus is a moot point and redundant when the EB-5 alien is signing the paycheck or has an ownership interest in the business that actually employs the worker.

In the Regional Center context, nexus is a major issue. Matter of Izummi, 22 I&N Dec. 169 (AAO 1998) tells us:

“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.” At p.179 [Bold in original, underlining added.]

Footnote 7 from original:

“⁷Whether or not \$500,000 must be made available for the loans to export companies or whether \$500,000 must merely be made available to the credit corporation extending the loans, it is clear that making \$500,000 available to **AELP** is not sufficient. AELP’s primary purpose is apparently to locate potential alien investors. AELP does not extend the loans to the export companies and is not the entity most closely engaged in employment creation, indirect or otherwise.” [Note: **AELP was the Regional Center in this case.**]

So, back in 1998, AAO recognized that indirect jobs required showing a nexus to the EB-5 money. AAO clearly indicated that the Service [now USCIS] has an interest in examining the “manner in which funds are being applied”. Also, in *Izummi*, at the very least, AAO began with a presumption that “indirect jobs” start out with a “tenuous” nexus. That said, a well-written and soundly-reasoned *Matter of Ho*¹ compliant Business Plan (BP) can spell out a strong, clear, and credible nexus which is then bolstered by an associated Economic Analysis (EA). I-O models, especially IMPLAN (but others as well) already contain some nexus in that certain groupings exists in the multiplier tables. Certain “input” already has a level of connectivity in the varying levels of the multipliers from one input to another. A stronger nexus is mathematically demonstratable once the pathways have been identified. For instance, a restaurant that specializes in omelets will have a very strong and clear nexus to its egg supplier, but probably zero nexus to the local art supply store. Nexus makes sense and leaps from the page while, a lack of nexus is usually quite obvious as well. It simply makes no sense to try to connect two or more completely disparate entities.

But for the omelet restaurant, the egg producer would not have needed to hire that extra employee. The extra employee at the chicken ranch is helping to collect, package and/or deliver more eggs than before **because of** that new nearby omelet restaurant. **Nexus** is a palatable and palpable connectivity that can almost be felt or touched; it makes clear sense to a rational mind. Has your project got nexus? Can you explain a rational connection between the EB-5 money & activities and indirect jobs claimed?

¹ 22 I&N Dec. **206** (AAO 1998) at p. 213, and 5th prong from the holding:
(5) In order to demonstrate that the new commercial enterprise will create not fewer than 10 full-time positions, the petitioner must either provide evidence that the new commercial enterprise has created such positions or furnish a comprehensive, detailed, and credible business plan demonstrating the need for the positions and the schedule for hiring the employees.