

## **How Many Kinds of NEXUS Can You Find Within EB-5?**

The EB-5 Immigration Program allows aliens to obtain visas in exchange for creating a minimum of ten (10) full-time jobs for qualified U.S. workers. The added advantage to those aliens participating in the **Pilot Program** is that they can count indirect jobs created by others associated with them via a definitive connection with the same USCIS Approved and Designated Regional Center. That connection needs further study and explanation. That connection is what we are now affirmatively calling NEXUS. Nexus needs to be described, explained, and demonstrated sufficiently to satisfy USCIS that those particular jobs being claimed should be counted for the purpose of lifting conditions from the aliens' status. Some folks have done a better job at demonstrating a sufficient nexus than others.

What then is **NEXUS**? Look it up and you will find such definitions as: "A connection or series of connections linking two or more things; or A connected group or series; or A causal link" among others. I have found it useful to think of it in terms of a "cause and effect" relationship that clearly shows a palpable connectivity. In this instance "**palpable**" is defined as: "*Able to be touched or felt: Tangible; esp. of a feeling or atmosphere; So intense as to be almost touched or felt; [and my particular favorite]: easily perceptible by the mind: Noticeable and/or Manifest.*"

So far so good, but what precisely needs to be connected? Harkening back to the single mention of the concept within the AAO's EB-5 Precedents and we find one brief discussion in *Matter of Izummi*, 22 I&N Dec 169, 179 (AAO 1998).

"... "It was never AELP's intent...that 100% of the funds contributed by the foreign national investors would flow through the partnership and into the credit corporation for lending to U.S. export businesses." After AELP and the credit corporation deduct tens of thousands of dollars for their "expenses," however, it is not clear how much of the original money is made available for loans.

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.**<sup>7</sup> 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.]

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<sup>7</sup> Whether 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: In a letter dated February 8, 1995, the Assistant Commissioner for Adjudications designated American Export Partners, LLC ("AEP") a Regional Center and specified that individuals could file I-526 petitions with the Service "for new commercial enterprises located within the eight-county coastal areas, or *Lowcountry*, of South Carolina." Subsequently, AELP filed its certificate of limited partnership with the State of South Carolina, and AEP was designated as AELP's general partner. Not only was there a problem concerning insufficient money reaching the "job-creating entities" but they accepted the lower TEA amount for investments outside of TEAS and even worse, the money was actually redirected outside the approved Regional Center jurisdiction.]

*Izummi* primarily discussed the **money-to-jobs nexus**. However, if you look at the potential contexts for nexus found within the statute, there are more aspects to consider. Even in the limited discussion in *Izummi*, AAO alluded to the fact that the agency had "an interest in examining, to a degree, the *manner in which funds are being applied*." When they spoke of "*examining ... the manner*" they were speaking of a need to examine the processes as well as the connections employed to justify the inclusion the claimed jobs.

The EB-5 Pilot Program is really an **Employment Creation Visa Pilot Program** and the statute allows for counting indirect jobs created via the "economic growth" accomplished by the "Pilot Program". That "economic growth", in turn includes the following contexts: increased export sales, improved regional productivity, job creation, **or** increased domestic capital investment. **Note** that the preceding "or" means as little as one element will do (job creation would be the single element

that **MUST** be present in any **Employment Creation Pilot Program**) but any or all of the rest are welcome additions. The primary component of the Pilot Program is the establishment of Regional Centers. One of the several vague aspects of the Regional Center is the *other positive economic effects* such capital investments will have. The best clues we have as to the meaning of “*other positive economic effects*” are the four elements enumerated within the antecedent statutory provision providing for the creation of the Pilot Program under the heading “*economic growth*”.

**Exports** were the original core of the types of investments sought but that original focus was subsequently dropped and became only one potential aspect. Of the other elements, “**job creation**” is the primary focus while the other two elements are broad, expansive, and inclusive, i.e., **improved regional productivity** and **increased domestic capital investment**. Anyone seeking to truly understand the nexus possibilities in which to demonstrate valid arguments for the inclusion of certain indirect jobs needs to explore the broad concepts of “improved regional productivity” and “increased domestic capital investment” all made possible through the efforts of the “Pilot Program” and its “Regional Centers”.

***So, what’s the verdict?*** **IF** a Regional Center brings together EB-5 alien investors with domestic investors in order to spur *economic growth* through **improved regional productivity** which includes **jobs created** by “others” working closely with the EB-5 investors; **AND** as long as there is a “cause and effect” relationship that clearly shows a **palpable connectivity** that is *easily perceptible by the mind*; **THEN** all the jobs created by the ***overall project*** should be available for allocation to those EB-5 aliens who need them for immigration purposes. *See 8 CFR § 204.6(g)*.

Another aspect to consider is timing of the Regional Center’s commitment to the project. The Regional Center cannot hang back and shop around for a completed or nearly completed project and try to come in the backdoor. Any attempt to *usurp the job creation efforts* of someone else *after-the-fact* for aliens who had nothing to do with the project nor shared any of the risk, simply will not be found acceptable.

The key to making it work is to put forth a clear explanation that makes sense.