Lack of Transparent Complexity Up-Front and Insufficient Nexus

By Joseph P, Whalen (February 28, 2012)

The following three paragraphs are from page 8 of the December 21, 2011, AAO Decision[1] which Affirmed the CSC Decision to Terminate the "Pilot Program" "Regional Center" status for the Regional Center of Victorville, Inc., and these comprise the bulk of the explanation within the analysis section. I wish to highlight certain phrases and point out the deeper meanings that anyone interested in EB-5 needs to internalize if they want to succeed in such forms of investments.

> "USCIS may terminate the regional center's designation upon a determination that the regional center no longer serves the purpose of promoting economic growth. 8 C.F.R. § 204.6(m)(6). The issue to be resolved by the AAO in the instant case is whether the applicant continues to serve the purpose of promoting economic growth including through job creation.
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> The regional center must be terminated because the applicant is **seeking to invest capital only after the jobs** in question **have already been created**. DPSG and Plastipak began hiring in December 2009. As of June 2010, the IWWTF was 90 percent complete. Regardless of the stage of financing the investors propose to provide, it remains that the jobs for which the applicant wishes to receive credit already exist. **Notably, the record does not show that the applicant made a commitment to provide later-stage financing at the outset of the project**. Instead, the applicant appears to have **decided to commit capital toward later-stage financing only after the initial stages of the project that created the jobs in question were already complete**.
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> The applicant's **argument** that the IWWTF will be a **ghost plant** if it does not obtain bridge financing is **inherently** an argument that touches on ***preservation*** of jobs, **not *creation*** of jobs. The regulation at 8 C.F.R. § 205.6(j)(4)(ii) allows investors to be credited with preserved jobs, but only for investments in a troubled business. **The applicant has never claimed or documented that the alien investors will be investing in a troubled business**. As such, they may not rely on job preservation arguments to establish eligibility for benefits under the EB-5 visa program."

Regional Centers have much more leeway than they realize. IF you spell out the particular path that the intended project will take and the actual anticipated part that the aliens' money will play THEN you can plan all sorts of possibilities. Bridge financing *to be replaced by* EB-5 money is doable. Early stage domestic investments *to be supplemented with infusions of* EB-5 money is doable. Earlier non-EB-5 investors *to be displaced by* EB-5 investors is doable. This non-exhaustive list of possibilities contains viable options, however, the key is stating so, up-front. The Regional Center needs to commit to the project early enough to make these possibilities acceptable to USCIS.

[1] See: http://www.slideshare.net/BigJoe5/victorville-aao-final-termination-dec-2011

A Regional Center cannot *hold back* and *shop around* for a completed or nearly completed project and try to buy-in at the last minute. Where the hell is the "at-risk" investment in an approach like that? One of the main duties of a Regional Center is to find and/or develop projects that it can market to EB-5 investors. EB-5 investors want you to present them with an investment opportunity that has a sufficient job-creating potential for them to get the conditions lifted from their status at the end of their immigration process.

Another major issue faced by Victorville was *insufficient nexus* in two areas. In the CSC Final Termination[2] issued October 20, 2010, a major point originating from *Matter of Izummi*, 22 I&N 169 (AAO 1998)[3]. was stated rather well on page 4, as follows.

> "To ensure that a regional center continues to meet the requirements of section 6l0(a) of the Appropriations Act, USCIS must be assured that the **terms and conditions of the operation of the regional center remain valid and unchanged after the regional center receives designation for the pilot program**."

Notice in the phrasing that "terms and conditions of the operation" are the aspects that must "remain valid and unchanged". That is the point that I got out of *Izummi* in the following passage.

> "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*
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> "[7] 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

[2] See: http://www.slideshare.net/BigJoe5/csc-victorville-rc-termination-oct-20-2010
[3] See: http://www.justice.gov/eoir/vll/intdec/vol22/3360.pdf (incorrectly attributed to BIA)

> 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."

The real main issue we can most easily glean from *Izummi* is the need for separate fees to be paid to the Regional Center. This has resulted in the ubiquitous subscription and/or management fees above and beyond the minimum required investment that everyone now takes for granted. The other major point I wish to point out is the duty of USCIS to closely examine the "how" of an investment. How is the money being spent? How are the jobs being created?

> **"Especially where <u>indirect employment</u> creation is being claimed, and the <u>nexus between the money and the jobs</u> is already tenuous, ...*[USCIS]... has an interest in examining, to a degree, the manner in which funds are being applied*."**

This is exactly what CSC did. CSC took a long hard look at these two "How" questions. In its October Termination, CSC found the economic analysis to be flawed. It could have all ended right there. No harm, no foul. Victorville, however, chose to continue pressing its case and in so doing, began to grasp at straws and make outlandish assertions. Without seeing each and every last scrap of paper submitted, I cannot find the exact point at which desperate assertions morphed into fabrications.

The initial and main problem with the money was merely *a flawed analysis with insufficient nexus* between the EB-5 and non-EB-5 funds. In regard to the money issue, at some point USCIS found that the money was not spent as the Regional Center stated it would be. CSC and AAO were kinder than I would have been. I would have made formal findings of material misrepresentation and instituted discipline with the BIA in regard to the blatant misstatements of facts about the money. As for the insufficient jobs nexus, it was just a bad analysis based on a bad plan.

I suppose that USCIS decided not to make formal findings due to the pending litigation. If they had, then the findings would probably have been spun as the "big bad USCIS" being "vindictive" instead of fully justified as I believe they would have been. It seems like it was a political decision to me. I have been known to be less than *politically correct* at times, another flaw of mine. *Que sera, sera!*