

Insufficient Nexus for an EB-5 Regional Center Program/Project

By Joseph P. Whalen (February 20, 2012)

With so many folks trying to break into the EB-5 Regional Center business, I feel the need to revisit some basics that many of the *newbies* seem to be having difficulty “*wrapping their heads around*”. Take this as fair warning, I am going to make use of a bunch of clichés for the ease of getting the point across.

A prospective Regional Center Applicant may find projects that have just broken ground but still need further capital investment; or may find some that need only a little further development in regard to planning before breaking ground. This can be a good way to proceed in order to get started in developing a new Regional Center (RC). However, mistakes have been made and more folks will likely repeat the same mistakes until word gets around as a warning of what **not** to do.

In a situation where someone else has done the planning and brings you a project merely looking for EB-5 capital, it could be a gift or a trap. You will only be able to tell the difference after you complete your own due diligence into the individuals or groups who approach you and seriously evaluate the project. You will need your own business analyst to evaluate the viability and feasibility of the project; and then have your own economist evaluate its job creation potential. Even if you are presented with a completed Business Plan (BP), it may be insufficient *as is* and/or it may *fall short* of the level of detail needed for an EB-5 BP to be presented as evidence in support of your USCIS Form I-924. Also, the BP may be insufficient for your economist to produce a viable EB-5 supporting Economic Analysis (EA). Lastly, will it produce enough jobs to bother with it?

The next problem that I can readily see are situations where the RC hangs back searching for a project that has already broken ground. If you wait until too late in the project before committing to it, there is not much left for you to take credit for.

Now, here are some of the promised clichés. These first few relate to timing :

- The early bird gets the worm. (Right to claim early created jobs.)
- Arriving [too] late to the party. (Too few jobs created after joining in.)
- Missing the boat. (Trying to buy-in to a completed project.)
- Haste makes waste. (Committing TOO early to a low job-yield project.)
- Life is passing you by. (Again, trying to buy-in to a completed project.)

These next few clichés relate to nexus:

- Riding coattails. (Piggybacking off someone else’s success.)
- Building a foundation. (Creating job creation opportunities.)
- Stolen glory. (Piggybacking off someone else’s success.)
- Someone “standing on your shoulders” vs. you “standing on theirs”.

So how does any of that relate to a Regional Center?

Risk avoidance is a natural instinct. Unfortunately, in EB-5 at any rate, too much risk avoidance defeats the Congressional Intent of the Regional Center Program. Congress chose to reward aliens with visas for taking a chance on the United States through their efforts to increase employment opportunities and otherwise promote economic growth. Congress did not envision allowing aliens to usurp the successes of someone else and “buy” a well-advanced or completed project and take credit for the jobs already created by someone else’s efforts. So, if a Regional Center wants to count and allocate the jobs from day one, they need to be committed at the groundbreaking or almost immediately thereafter. This is not to say that the Regional Center **must** obtain all of its EB-5 investors prior to breaking ground, merely that the RC be committed to the project it wishes to promote to aliens seeking EB-5 visas early enough in order to reasonably lay claim to those early jobs. It is also in these early commitment situations where the various potential financial maneuvers need to be laid out to USCIS. The Regional Center is more free to be creative than many incorrectly believe. Starting all the way back with *Izummi* (where money was gobbled up in fees and shifted outside of TEAs and outside the RC approved area completely, see:

<http://www.justice.gov/eoir/vll/intdec/vol22/3360.pdf>), continuing with PIDC (shifting money from Tommy D’s in a TEA to Butcher & Singer outside a TEA, see: http://www.uscis.gov/err/B7%20-%20Form%20I-526%20and%20I-829/Decisions_Issued_in_2010/Apr232010_01B7203.pdf) as well as CARc and the Watergate (unanticipated financial maneuvers see:

http://www.uscis.gov/err/B7%20-%20Form%20I-526%20and%20I-829/Decisions_Issued_in_2010/Sep212010_01B7203.pdf), through Victorville (misstating several key facts as recited in the December 21, 2011 AAO Decision and the earlier CSC Decision see: <http://www.slideshare.net/BigJoe5/victorville-rc-terminarion-cert-to-ao-5242011> and <http://www.slideshare.net/BigJoe5/victorville-ao-final-termination-dec-2011>), the

problems have been in stating that the money would be spent one way and then inappropriate spending it in another manner. If one is honest and forthright, transparent complexity can be stated up-front to allow for shifting and maneuvering to meet the needs of the project's development. **To the contrary, misdirecting the money does not work.** There have been problems demonstrating a palpable connectivity between the actual money that created the jobs and how someone else's money can be replaced by EB-5 money AFTER the job creation has been accomplished. (*Hint: EB-5 does not work that way!*) An additional problem has been in demonstrating a sufficient EB-5 money to jobs nexus in more complex and multi-component projects. In order to get a better grasp on these various concepts please see this visual depiction of various EB-5 money to job nexus possibilities: <http://www.slideshare.net/BigJoe5/depictions-of-eb5-money-to-jobs-nexus>.

The recent USCIS e-mail message regarding what it labels as the “*tenant-occupancy methodology*” really relates to money-to-jobs nexus. EB-5 investors through their RC project can lay the foundations for others to build upon. If the RC investors build/refurbish a mall, office building, shopping center, factory or mixed-use complex, they have made it possible for their tenants to easily, quickly, and readily open for business thus creating jobs. **Tenants can piggyback** off of the RC-constructed or remodeled facility. The EB-5 **investors cannot piggyback** off of completed or nearly completed projects and count jobs already created. Coming late to the party and buying-in to a completed facility such as described, does **NOT** allow the EB-5 investor to benefit from the tenant jobs. I admit that this is an oversimplification, but if that's what it takes to get the point across, so be it!

Upcoming In-Person Events

I will be discussing the latest developments in EB-5 especially to do with Regional Centers at two presentations in April. I will serve as a faculty member at the American Immigration Lawyers Association (AILA) **2012 EB-5 Investor & Regional Centers Conference: A Practice Skills Workshop** to be held **Friday - Saturday, April 20-21, 2012** at the Atlantis Resort Hotel in Nassau, Bahamas. Please check the [AILA EB-5 Conference](#) webpage for the Event [Agenda](#). AILA has filed for CLE and specialized credit in all jurisdictions with mandatory CLE and specialized requirements. Registrations Information is found [here](#).

The following week I will present at the **Friday April 27, 2012**, Event in NYC. See more at: <http://www.eb5newyorksummit.org/> and Register here: <http://newyorksummit.eventbrite.com/> & See me at: <http://eb5news.blogspot.com/>