

Victorville's Achilles' Heel: Job Creation Nexus

EB-5 is the “employment creation” visa. Each EB-5 investor has to be credited with ten (10) jobs at the end of the process. USCIS regulations first defined the *qualifying* employees and *qualifying* jobs and it was subsequently codified by Congress. The Pilot Immigration Program with its Regional Centers was created by Congress in 1993, [8 USC § 1153 Note] to allow for bigger projects and included “indirect” jobs also.

The terms “direct”, “indirect”, and “induced” as *descriptors* for jobs as used as **input** (and output) in econometric models and the economic analyses produced by them have specific meanings that differ from the EB-5 meaning. In EB-5 parlance, “*direct*” jobs are *on the alien entrepreneur's payroll* and all others are “*indirect*”. EB-5 “*indirect*” jobs can and do usually include ALL jobs even when the collectively owned business has actual on-the-books employees. In those instances, those few on-the-books employees will generally be used as input into the econometric model along with other **base-level jobs** attributable to the project. They usually can only be attributed to the first EB-5 investor's I-829 anyway. That is, if they are actually needed but they usually are not needed.

Other jobs attributable to the project as “direct” as **input** in a model only will include jobs such as mall or office building tenants' employees or factory workers whose employment was made possible by directly building a facility or loaning funds for its construction. This is acceptable when there is a clearly palpable¹ connectivity between the EB-5 funds and the newly created jobs. In short, this is known as clearly demonstrating a sufficient *nexus*.

The AAO has expressed this concept in *Matter of Izummi*, 22 I&N Dec. [169](#) (AAO 1998). *Izummi* did involve a Regional Center investor as denoted in (2) it was an investment under the Immigrant Investor Pilot Program. Prong (4) tells us that the EB-5 investors' money “must be made available to the business(es) most closely responsible for creating the employment on which the petition is based”.

¹ Able to be touched or felt : [tangible](#). Easily perceptible by the mind : [manifest](#)
See: <http://www.merriam-webster.com/dictionary/palpable>

Izummi held, in pertinent part:

(2) Under the Immigrant Investor Pilot Program, if a new commercial enterprise is engaged directly or indirectly in lending money to job-creating businesses, such job-creating businesses must all be located within the geographic limits of the regional center. The location of the new commercial enterprise is not controlling.

(3) A petitioner may not make material changes to his petition in an effort to make a deficient petition conform to Service requirements.

(4) If the new commercial enterprise is a holding company, the full requisite amount of capital must be made available to the business(es) most closely responsible for creating the employment on which the petition is based.

“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*

One primary principle expressed in *Izummi* is now a major fundamental building block for today’s rather ubiquitous Limited Partnerships with separate “subscription fees” or “management fees” completely distinct and apart from the required minimum investment amount. However, **another** currently topical principle as to the importance of showing a *sufficient nexus* comes from the same decision. Interestingly, the entire *Izummi* decision uses the word “**nexus**” only once as shown in the excerpt above. That situation addressed in *Izummi* was quite a bit different from the current issue in the Victorville case.

The City of Victorville, CA sought to use EB-5 funding to replace or at least *supplement* its own capital investment that would normally be raised through issuing more bonds or further increasing taxes. EB-5 funds can be legally used to supplement *or* fully fund infrastructure projects but only to the point where such projects would generate enough jobs to allocate to the EB-5 investors. So, if an EB-5 funded infrastructure project does generate enough “direct” or “base-level” jobs to be used as input into an econometric model to generate additional “indirect” and “induced” jobs then they can all count as *EB-5 indirect* jobs.

A Regional Center cannot fund a project with insufficient job creation and then piggyback off wholly domestically funded collateral or peripheral projects made possible through its *minor involvement in infrastructure projects* which were made possible with EB-5 funds. Some *prospective, collateral, or peripheral* job creation does count as allocatable **EB-5 indirect job creation** but only on those base-level jobs and/or funding with **sufficient nexus** to EB-5 funded projects.

The Victorville Regional Center (VRC) attempted to parlay twelve (12) “direct” base-level jobs² at a wastewater treatment facility being funded with EB-5 money into 1,273 total “*direct*” and “*indirect*” jobs by including the 420 “direct” base-level employees at a bottling plant to be built nearby with *non-EB-5 funds not directly associated with the VRC*. The bottling plant would merely be a customer to the wastewater treatment facility. Since there is no realistic employment creation multiplier that could be applied to reach a required minimum 500 jobs to allocate to 50 investors at 10 jobs each based on the attributable 12 jobs, two approaches were attempted. A capital expenditure model lacked a realistic nexus between the EB-5 and non-EB-5 money. The EB-5 money spent on a wastewater facility cannot be palpably connected to the expenditures of an unassociated corporation who might built a plant and become a customer of the wastewater facility.

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² In this sense “**direct**” jobs are being used as a label for the **base-level jobs** within an econometric model as **input** to arrive at *projections* of indirect jobs within the economic analysis produced through the model. In terms of meeting EB-5 employment creation requirements, **ALL** of the **jobs** created would **count as “indirect” to the EB-5 investors**. In the alternative, basing indirect job creation projections on capital expenditure alone, the money lacks nexus to VRC and the EB-5 investors.