RENT-A-CENTERS HAVE OBLIGATIONS THAT SIMPLY CANNOT BE IGNORED

By Joseph P. Whalen (Tuesday, October 11, 2016)

Many readers know that I am not in favor of the term "Rent-A-Center" (RAC) when talking about EB-5 Regional Centers (RCs). As much as I personally have reservations about some of these RCs in their current form, this type of RC has the **potential** to be a vast improvement on the earlier talk of, and attempts at, "buying and selling"[1] RCs. From one point of view, a well-run RAC could be the ideal RC,[2] the very epitome of Congressional Intent for the Program. If the EB-5 stakeholder community and USCIS can agree on some basic ground rules for the RAC concept; then such an agreement could help speed up the adjudication process, improve the integrity, and results; of the EB-5 RC Program.

An ideal RC will become an integral component of the regional economic infrastructure.[3] Another way of putting it is that an ideal RC will become a new regular player in the economic development game in a specified market. EB-5 stakeholders and USCIS need to return to thinking of RCs as sponsors[4] of EB-5 suitable development projects. It is the services which are expected of a "sponsor" that need clarity and uniformity. This is easier to see if RC designation is affirmatively viewed as *licensure*.[5] The conditions of that license are not clearly

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1 http://www.slideshare.net/BigJoe5/regional-center-designation-cannot-be-sold-or-transferred-but-the-underlying-business-can

2 http://www.slideshare.net/BigJoe5/role-of-the-regional-center-in-eb5

3 http://www.slideshare.net/BigJoe5/regional-center-as-a-lasting-addition-to-the-regional-economic-infrastructure

4 *See* **8 C.F.R. §204.6 Petitions for employment creation aliens.**

(m) *Immigrant Investor Pilot Program—*

(3) *Requirements for regional centers.* Each regional center wishing to participate in the Immigrant Investor ~~Pilot~~ Program shall submit a proposal …, which:

(iii) Provides a detailed statement regarding the amount and source of capital which has been committed to the regional center, as well as a description of the promotional efforts taken and planned by the sponsors of the regional center;

5 *See* **5 U.S.C. § 551 Definitions.**

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

defined yet. This situation needs to change with gaps being filled and ambiguities cleared up. Necessary changes can easily be incorporated into the long-promised and overdue, upcoming EB-5 rulemaking. Precisely which *knowledge, skills,* and *abilities* (KSAs)[6] are needed, the RC's responsibilities towards its EB-5 (and domestic) investors, and overall obligations of EB-5 RC Program participation; all need clarification.

In the early days of some RACs, "sponsors" obtained RC Designation any way they could, including exaggerating (lying), and then whored their status. In other words, RC "sponsorship" could be bought for the right price, regardless of EB-5 suitability or *in*appropriateness of the project. Some early RACs sold "sponsorship" to whosoever needed cheap EB-5 financing as long as they were willing to pay the "sponsor" for it. Those unsavory practices merely gave EB-5 opponents more ammunition. Those practices also lead to grand failures, plus legal action against some RCs and their "sponsors". The taint of those awful things must be obliterated. In this author's opinionated opinion, the best means for preventing the perpetuation, or return to "bad practices" that destroy credibility of the EB-5 Regional Center Program, is through proper and complete education of all of this program's participants.

Potential EB-5 investors must take responsibility for their choices so they had better be fully informed when making these big decisions. In that vein, failure to perform due diligence can no longer be the "norm" for aliens seeking EB-5 investments. The EB-5 investors, however, are not the only ones who need to improve their due diligence[7] efforts. RCs also have an obligation to investigate developers with whom they might do business. The RCs also need to be sure to vet the aliens and others seeking to invest. Finally, potential investors need to do some checking on the RC sponsors. Are they acting as broker-dealer or investment advisors? If so, are they properly registered/authorized? It is

6 http://www.slideshare.net/BigJoe5/amicus-brief-to-uscisipo-rc-ksas and http://www.slideshare.net/BigJoe5/ksas-for-regional-centers-10062012 and http://www.slideshare.net/BigJoe5/ksas-and-the-math-wiz-rc-dismissal

7 In some foreign countries, promoters are involved in EB-5 transactions. Some are good and others are not.

important to confirm their status with the appropriate state and federal authorities to see if broker-dealers or investment advisors are, in fact, registered and/or authorized to deal in securities. EB-5 investors had better also ask what specific services are being provided for that huge subscription or administrative fee, and get it in writing while you're at it.

When RAC principals know what they need to accomplish for their EB-5 investors (their "obligations"), then their RAC can become a force to be reckoned with, and a source of *various positive economic effects* in their *designated limited geographic area*. The first obligation is proper preparation and planning with an eye to detail. Before seeking any EB-5 investors, the RAC needs to locate a project partner, because an ideal RAC will not itself be a developer but instead it will be a "coordinator". The partner is often a developer but could be something else. Sometimes the RAC's main partner is a state or local government agency such as an economic development agency, planning board, or some variety of committee. The RAC needs to be diligent in ensuring that it only promotes EB-5 suitable investment vehicles.

Obviously, I am leading up to the responsibilities that the RAC has towards its investors by providing suitable documentation in support of the investors' Forms I-526. Supporting documentation will include a *Matter of Ho* compliant business plan (BP) and a suitable economic impact analysis (EIA) at the very least. Additionally, when the organizational and transactional documents, and various agreements typical of a securities offering are created, these must also be EB-5 compliant. Those same documents must also be compliant with whatever other laws and rules apply, *i.e.,* SEC, IRS, OFAC, FinCEN, etc… Another aspect that is integral to ensure smooth sailing is the **vetting process** employed on **all** prospective **investors** in a project whether seeking an EB-5 visa or not, and **all** of the **money** to be used in the project! Dirty money anywhere in the mix means that the whole project is disqualified!

§204.6 Petitions for employment creation aliens.

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(g) *Multiple investors*—(1) *General.* The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur by more than one investor, provided each petitioning investor has invested or is actively in the process of investing the required amount for the area in which the new commercial enterprise is principally doing business, and provided each individual investment results in the creation of at least ten full-time positions for qualifying employees. The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur even though there are several owners of the enterprise, including persons who are not seeking classification under section 203(b)(5) of the Act and non-natural persons, both foreign and domestic, **provided that** the source(s) of **all capital** invested is **identified** and all invested capital has been **derived by lawful means**.

(2) *Employment creation allocation.* The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. **No allocation need be made among persons not seeking classification** under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any **reasonable agreement** made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

As stated above, regardless of the total number of investors, all of the creditable jobs created shall be allocated to the EB-5 investors. These investors also need to be clear about their *pecking order* just in case there turns out to be insufficient job creation to allocate to all of the EB-5 investors.

Gaining "permission to try" via Form I-526 approval, is just the beginning. Based on the "priority date" which is the filing date of an approved I-526 immigrant petition, the investor can move forward in the process. An EB-5 investor must go through multiple steps in their quest for lawful permanent residence in the United States. After petition approval they apply for an immigrant visa through the State Department, if abroad, or apply for adjustment of status via USCIS, if lawfully present inside the United States. In either case, the alien must be *admissible as an immigrant*. Due to the foregoing, it is wise to vet the potential EB-5 investors for admissibility before accepting them. Even if a subscription or partnership agreement includes conditions that undisclosed issues leading to visa refusal or adjustment denial will **not** entitle the investors

to have their money returned (unless it is later determined to be **not** lawful), they might become pests or sue the offeror for a refund via a nuisance lawsuit. It is best to keep the inadmissible aliens out of the project all together.

Eventually, the admissible investors will be granted "conditional" lawful permanent residence for a period of two years. Within the 90 day period before the two year period expires, the conditional resident is required to file an I-829 petition requesting removal of conditions. What must be demonstrated at that point is: **(1)** that the money was properly spent in an effort to create (or preserve) at least ten qualifying jobs, and **(2)** proof of those jobs actually having been created (or preserved), as required. This background information is leading to the next obligation for RACs. How will the individual conditional immigrant prove those two critical points? It is an obvious obligation of the RAC to track information and collect evidence to prove these points, and hand it over to the investors in support of their Forms I-829. In closing, I wish to reiterate that a RAC can be an ideal RC if they are diligent and prepared to fulfil their obligations.

THAT'S MY TWO-CENTS, FOR NOW!