

WHAT IS NEEDED IN A REGIONAL CENTER "BUSINESS" PLAN A.K.A. A REGIONAL CENTER "OPERATIONAL" PLAN?

By Joseph P. Whalen (Monday, May 30, 2016)

The EB-5 *Regional Center*, itself, is often a distinct and separate entity from any proposed project's developer. This reality means that any I-924 application package seeking either *initial designation* **or** a *significant, substantial, substantive, and/or "material" amendment* needs to be supported by a specific business plan for that *Regional Center*. This type of a *business plan*, better known as, an **operational plan**, for the *Regional Center* has different requirements than the *project-specific* business plan described in *Matter of Ho*. The *Regional Center* operational plan is partly guided by the EB-5 implementing regulations and partly by normal and ordinary business practices. No matter the specific details, there are common components due to specific common needs.

The *Regional Center* has certain obligations and responsibilities towards its EB-5 investors. Upfront the *Regional Center* must provide evidence in support of the investors' I-526 immigrant petitions. The I-526 immigrant visa petition, is only the first step in an alien's immigration process. *Matter of Ho*, 22 I&N Dec. 206 (AAO 1998) is an Administrative Precedent Decision that provides a "blueprint" for EB-5 Business Plans (BPs) intended for the business venture whether for a sole proprietorship, partnership, or a massive *pooled investment* project. In the *Regional Center* context, these BPs will additionally form a foundation upon which to build an Economic Impact Analysis (EIA) to predict indirect job creation.

Matter of Ho-compliant BPs¹ relate directly to the proposed investment vehicle through a large **pooled investment**, which is the statutory focus of *Regional Center*

¹ "... To be "comprehensive," a business plan must be sufficiently detailed to permit the Service to draw reasonable inferences about the job-creation potential. Mere conclusory assertions do not enable the Service to determine whether the job-creation projections are any more reliable than hopeful speculation.

A **comprehensive** business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any

Program. See § 610(a), Pub. L. 102-395 (Oct. 6, 1992), as amended, see APPENDIX. Very often these BPs are for new large-scale real estate development projects, but some are devoted new business creation, or perhaps business expansions. Whatever it is, the BP will be very specific to that one pooled investment vehicle.

The *Regional Center* is a separate business unto itself. EB-5 *Regional Center* sponsored projects encompass "pooled" investments designed to have positive economic effects on a regional or larger scale. While the Regional Center plays a major role in these projects, the individual alien investors are the ones that must meet very specific legal requirements in order to obtain greencards for themselves, spouses, and unmarried minor children. The BP and EIA are foundational documents that will be provided to the alien investors in support of their individual I-526 immigrant visa petitions. However, the alien investors' EB-5 legal requirements do not end there, the deal structure and the documentation underlying and evidencing the deal must comply with a host of other legal requirements.

Among other things, the *Operational Plan* needs to show that the project sponsor, and/or the *Regional Center*, fully understands what it owes to the EB-5 investors and how those obligations and responsibilities will be met. In short, the plan must state what information, data, and documentation will be tracked and/or collected during the course of the project development and offered to the EB-5 investors as evidence in support of their I-829 petitions to lift conditions on status (discussed in detail, below).

This particular article focuses only on the EB-5 requirements. It must be noted that other government agencies have legal requirements addressing additional and quite different issues beyond those specific to EB-5. Those additional compliance issues cannot be forgotten or ignored. The *Operational Plan* needs to plainly state what legal

contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. ⁴ Most importantly, the business plan must be credible."

Footnote 4: The Service (now USCIS) recognizes that each business is different and will require different information in its business plan. These guidelines, therefore, are not all-inclusive.
Ho at p. 213 [**Bold** in original.]

requirements must be met and **outline precisely how** the *Regional Center* will meet that myriad of legal requirements. Will it be in-house or under contract?

The individual alien investor and family may obtain **conditional** greencards based on an approved **I-526** immigrant petition. However, the Regional Center's and/or Developer's **responsibilities towards the EB-5 investors** do not end there. Within the 90-day period approaching the expiration date printed on the investor's conditional greencard, (s)he must file an **I-829** petition in order to have their conditional status converted into regular, permanent greencard status. *If they fail to file OR if their I-829 petition is denied* (usually due to project failure OR insufficient job creation to cover all alien investors) then their status will be terminated and they will be **subject to removal** (formerly called "**deportation**") instead of on the path towards naturalization. In the alternative, the alien may choose to try again which is a costly option. Not only will the alien have to invest again elsewhere, older children might age-out of dependent status.

As mentioned above, there are regulations that provide some guidance on the content of Regional Center *Operational Plan*. Unfortunately, the regulations require one to “decipher” what needs to be addressed in that *Operational Plan*. 8 CFR § 204.6(m)(3) speaks to the overall requirements for a Regional Center Proposal (now more broadly addressed in the I-924 form instructions); 8 CFR § 204.6(m)(6) tells us, in a general way, about the Regional Center's annual reporting requirement (now more broadly addressed in the I-924A form instructions); and 8 CFR § 216.6 speaks to I-829 requirements. For nearly two decades there were no forms. Instead, only the regulations and normal, ordinary business practices guided Regional Center sponsors (now called applicants). Let's take a close look at those regulations.

8 CFR § 204.6(m)

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

(i) **Clearly describes how** the regional center focuses on a geographical region of the United States, and how it will promote economic growth ~~through increased export sales~~, improved regional productivity, job creation, and increased domestic capital investment;

(ii) Provides in verifiable detail how jobs will be created indirectly through increased exports; [Subsequent legislation made the “export” focus optional.]

(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;

(iv) Contains a detailed prediction regarding the manner in which the regional center will have a positive impact on the regional or national economy in general as reflected by such factors as increased household earnings, greater demand for business services, utilities, maintenance and repair, and construction both within and without the regional center; and

(v) Is supported by economically or statistically valid forecasting tools, including, but not limited to, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and/or multiplier tables.

(6) **Termination of participation of regional centers.** To ensure that regional centers continue to meet the requirements of section 610(a) of the Appropriations Act, a regional center must provide USCIS with updated information to demonstrate the regional center is continuing to promote economic growth, improved regional productivity, job creation, or increased domestic capital investment in the approved geographic area. Such information must be submitted to USCIS on an annual basis, on a cumulative basis, and/or as otherwise requested by USCIS, using a form designated for this purpose. USCIS will issue a notice of intent to terminate the participation of a regional center in the pilot program if a regional center fails to submit the required information or upon a determination that the regional center no longer serves the purpose of promoting economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment. The notice of intent to terminate shall be made upon notice to the regional center and shall set forth the reasons for termination. The regional center must be provided 30 days from receipt of the notice of intent to terminate to offer evidence in opposition to the ground or grounds alleged in the notice of intent to terminate. If USCIS determines that the regional center's participation in the Pilot Program should be terminated, USCIS shall notify the regional center of the decision and of the reasons for termination. As provided in 8 CFR 103.3, the regional center may appeal the decision to USCIS within 30 days after the service of notice.

(7) **Requirements for alien entrepreneurs.** An alien seeking an immigrant visa as an alien entrepreneur under the Immigrant Investor Pilot Program must demonstrate that his or her qualifying investment is within a regional center approved pursuant to paragraph (m)(4) of this section and that such investment will create jobs indirectly through revenues generated from increased exports resulting from the new commercial enterprise.

(i) **Exports.** For purposes of paragraph (m) of this section, the term “exports” means services or goods which are produced directly or indirectly through revenues generated from a new commercial enterprise and which are transported out of the United States; [Subsequent legislation made the “export” focus optional.]

(ii) **Indirect job creation.** To show that 10 or more jobs are actually created indirectly by the business, reasonable methodologies may be used. Such methodologies may include multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and other economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment.

The above is not very helpful towards guiding one in creating an *Operational Plan* for an EB-5 Regional Center. The main point of 8 CFR § 204.6(m) is to guide one on how to obtain Regional Center status rather than how to maintain it or how to service the needs of its alien investors. Thankfully, the above regulations are not the only source of guidance. We now have form instructions added to the mix. However, even before form instructions there was additional information available but it was not very obvious. It took “foresight” in order to ferret out what parts of associated regulations would guide a Regional Center sponsor/applicant in planning for the successful operation of that center.

As distilled solely from the regulations, applicants must submit a proposal which:

- 1) **clearly describes how** the regional center ... will promote economic growth;
- 2) **provides** a detailed statement regarding:
 - a) the amount and source of capital which has been committed to the regional center,
 - b) the promotional efforts taken and planned by the sponsors of the regional center;
- 3) **contains** a detailed prediction regarding the manner in which the regional center will have a positive impact on the regional or national economy in general as reflected by such factors as:
 - a) increased household earnings,
 - b) greater demand for business services,
 - c) utilities,
 - d) maintenance and repair, and
 - e) construction both within and without the regional center; and
- 4) **To ensure** the regional center continues to meet the program requirements, it must **provide** USCIS with updated **information demonstrating**:
 - a) That the regional center is continuing to promote economic growth through submission of proscribed information:
 - (i) annually,
 - (ii) on a cumulative basis,
 - (iii) and/or as otherwise requested by USCIS.

The above regulatory items provide a starting point for any EB-5 Regional Center Operational Plan. Notice the “active” words that help to guide this effort such as “clearly describes how”, “provides”, “contains”, “to ensure”, and “demonstrating”. In order to meet these “demands”, the Regional Center needs a plan to make it happen. Verbs do not execute themselves, people do, and people need instructions on how to make that happen. For instance, in order to report information, it must first be gathered and perhaps sorted. Which information should be collected, and how? What evidence will suffice? I trust that the reader sees where this is going. If not, it is leading to a plan of operation.

Another important part of the successful EB-5 Regional Center Operational Plan is consideration of the *knowledge, skills, and abilities* (KSAs) needed to carry out that plan. Also necessary for the successful execution of a plan is having all the required resources. Again, I cannot stress strenuously enough that probably the most important resource is people in possession of the necessary KSAs to execute the plan. The next most important is the money to pay them. What are those \$50,000 to \$100,000 fees for?

This *Operational Plan* is also guided by the obligations and responsibilities the Regional Center bears to its EB-5 investors. First and foremost, if the Regional Center cannot produce (or procure) *Matter of Ho*-compliant business plans then its EB-5 investors will not obtain I-526 Petition approval and nothing else will matter. After that initial obstacle has been overcome, the real work may begin. Over the course of several years as a large-scale pooled investment progresses, the responsible Regional Center will be tracking data, information, and documentary evidence for EB-5 compliance purposes. Annually, the Regional Center will need to comply with its own USCIS reporting obligations on the form I-924A. Beyond its own reporting obligation to USCIS, it must be able to make reports to all of the investors involved in the project as dictated by its own agreements. Further still, the Regional Center will be expected to produce a packet of *prima facie* evidence in support of each of its EB-5 investors' I-829 Petition in order to have their conditions lifted from status. If the Regional Center does not start out with a clear focus on the end result for its EB-5 investors then it will find itself in a very bad position. It may have to spend excessive amounts to have somebody dig for the required data, information, and documentary evidence for its EB-5 investors' compliance needs. Having proper mechanisms already in place is more efficient and professional.



Dated this 30th of May 2016

/s/ Joseph Patrick Whalen

That's My Two-Cents, For Now!

APPENDIX

8 U.S.C. 1153 Note: Immigration Program [or EB-5 Regional Center Program]

Pub. L. 102-395, title VI, §610, Oct. 6, 1992, 106 Stat. 1874, as amended by Pub. L. 105-119, title I, §116(a), Nov. 26, 1997, 111 Stat. 2467; Pub. L. 106-396, §402, Oct. 30, 2000, 114 Stat. 1647; Pub. L. 107-273, div. C, title I, §11037(a), Nov. 2, 2002, 116 Stat. 1847; Pub. L. 108-156, §4, Dec. 3, 2003, 117 Stat. 1945; Pub. L. 111-83, title V, §548, Oct. 28, 2009, 123 Stat. 2177; Pub. L. 112-176, §1, Sept. 28, 2012, 126 Stat. 1325, provided that:

"(a) Of the visas otherwise available under section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)), the Secretary of State, together with the Secretary of Homeland Security, shall set aside visas for a program to implement the provisions of such section. Such program shall involve a regional center in the United States, designated by the Secretary of Homeland Security on the basis of a general proposal, for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment.

A regional center shall have jurisdiction over a limited geographic area, which shall be described in the proposal and consistent with the purpose of concentrating pooled investment in defined economic zones. [*<- Speaks to scope!*]

The establishment of a regional center may be based on general predictions, contained in the proposal, concerning the kinds of commercial enterprises that will receive capital from aliens, the jobs that will be created directly or indirectly as a result of such capital investments, and the other positive economic effects such capital investments will have.

"(b) For purposes of the program established in subsection (a), beginning on October 1, 1992, but no later than October 1, 1993, the Secretary of State, together with the Secretary of Homeland Security, shall set aside 3,000 visas annually until September 30, 2015² to include such aliens as are eligible for admission under section 203(b)(5) of the Immigration and Nationality Act [8 U.S.C. 1153(b)(5)] and this section, as well as spouses or children which are eligible, under the terms of the Immigration and Nationality Act [8 U.S.C. 1101 et seq.], to accompany or follow to join such aliens.

"(c) In determining compliance with section 203(b)(5)(A)(iii)(ii) of the Immigration and Nationality Act [8 U.S.C. 1153(b)(5)(A)(iii)(ii)], and notwithstanding the requirements of 8 CFR 204.6, the Secretary of Homeland Security shall permit aliens admitted under the program described in this section to establish reasonable methodologies for determining the number of jobs created by the program, including such jobs which are estimated to have been

² This program was again extended, as of now through September 30, 2016.

created indirectly through revenues generated from increased exports, improved **regional** productivity, job creation, **OR** increased domestic capital investment resulting from the program.

"(d) **In processing petitions** under section 204(a)(1)(H) of the Immigration and Nationality Act (8 U.S.C. 1154(a)(1)(H)) for classification under section 203(b)(5) of such Act (8 U.S.C. 1153(b)(5)), **the Secretary of Homeland Security may give priority** to petitions filed by aliens seeking admission under the program described in this section.

Notwithstanding section 203(e) of such Act (8 U.S.C. 1153(e)), immigrant visas made available under such section 203(b)(5) may be issued to such aliens in an order that takes into account any priority accorded under the preceding sentence."