Considerations For The EB-5 *Entrepreneur* As Opposed To An EB-5 *Investor*

By Joseph P. Whalen (Saturday, July 4, 2015)

When an immigrant entrepreneur seeks an EB-5 visa on his or her own, without affiliation to a Regional Center, the rules are slightly different. The major difference is that, unlike the Regional Center Program, the unaffiliated EB-5 visa is permanent and in no danger of "expiring". That is a distinct advantage. One drawback is that no "indirect" jobs count towards meeting the requirements for lifting conditions from status. The following differences can be viewed differently by different people. Some will see advantages and others will see disadvantages.

Large pooled investments may afford an *investment* opportunity for someone who has no *entrepreneurial* aspirations. Those individuals who are affiliated with a Regional Center will skate by in relation to the requirement that the alien self-petitioner "*will be engaged in the management of the new commercial enterprise*". *See* 8 C.F.R. § 204.6(j)(5)

C.F.R. § 204.6 Petitions for employment creation aliens.

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(j) *Initial evidence to accompany petition.*

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(5) To show that the petitioner is or will be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation, as opposed to maintaining a purely passive role in regard to the investment, the petition must be accompanied by:

(i) A statement of the position title that the petitioner has **or** will have in the new enterprise and a complete description of the position's duties;

(ii) Evidence that the petitioner is a corporate officer or a member of the corporate board of directors; or

(iii) If the new enterprise is a partnership, either limited or general, evidence that the petitioner is engaged in either direct management or policy making activities. For purposes of this section, if the petitioner is a limited partner and the limited partnership agreement provides the petitioner with certain rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act, the petitioner will be considered sufficiently engaged in the management of the new commercial enterprise.

Another topic of major significance is the "capital" that one must "invest". Each of these words is specifically defined in the controlling regulations for this immigrant visa category. In addition, these words represent *concepts* that have been discussed at length in many sources. It is therefore important to study them and the related materials. The regulatory definitions and major administrative precedents follow.

(e) *Definitions.* As used in this section:

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act.

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Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

***Matter of Soffici,* 22 I&N Dec. 158 (BIA 1998)**, held, in pertinent part:

> (2) **Loans obtained** by a corporation, secured by assets of the corporation, do **not** constitute capital invested **by** a **petitioner**. Not only is such a loan prohibited by 8 C.F.R. § 204.6(e), but the petitioner and the corporation are not the same legal entity.
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> (3) A petitioner's **personal guarantee** on a business's debt does **not** transform the business's debt into the petitioner's personal debt.
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> (4) A petitioner must present **clear documentary evidence of the source of the funds** that he invests. He must show that the **funds are his own** and that they were **obtained through lawful means**.

***Matter of Hsiung*, 22 I&N Dec. 201 (AAO 1998)**, held, in pertinent part:

> (1) A promissory **note secured by assets owned** by a petitioner can constitute capital under 8 C.F.R. § 204.6(e) **if**:
>
> **a)** the assets are specifically identified as securing the note;
> **b)** the security interests in the note are perfected in the jurisdiction in which the assets are located; and
> **c)** [1] the assets are fully amenable to seizure by a U.S. note holder.
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> * * * * *
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> **(3) Whether a petitioner uses a promissory note as capital under 8** C.F.R. § 204.6(e) or as **evidence of a commitment to invest cash,** he must show that he has placed his assets at risk. **In establishing that a sufficient amount of his assets are at risk**, a petitioner must demonstrate, among other things, that the **assets securing the note are his,** that the **security interests are perfected**, that the assets are **amenable to seizure**, and that the assets have an adequate fair market value.

[1] Slight reformatting for clarity, clauses are not demarcated **a) – c)**, in original.

Matter of Izummi, 22 I&N Dec. 169 (AAO 1998), held, in pertinent part:

> (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.
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> (8) Reserve funds that are not made available for purposes of job creation cannot be considered capital placed at risk for the purpose of generating a return on the capital being placed at risk.
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> (9) The Service does not pre-adjudicate immigrant-investor petitions; each petition must be adjudicated on its own merits.
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> (10) Under 8 C.F.R. § 204.6(e), all capital must be valued at fair market value in United States dollars, including promissory notes used as capital. In determining the fair market value of a promissory note, it is necessary to consider, among other things, present value.
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> (11) Under certain circumstances, a promissory note that does not itself constitute capital may constitute evidence that the alien is "in the process of investing" other capital, such as cash. In such a case, the petitioner must substantially complete payments on the promissory note prior to the end of the two-year conditional period.
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> (12) Whether the promissory note constitutes capital or is simply evidence that the alien is in the process of investing other capital, nearly all of the money due under the promissory note must be payable within two years, without provisions for extensions.

***Matter of Ho*, 22 I&N Dec. 206 (AAO 1998)**, held, in pertinent part:

> (1) Merely establishing and capitalizing a new commercial enterprise and signing a commercial lease are not sufficient to show that an immigrant-investor petitioner has placed his capital at risk. The petitioner must present, instead, **evidence that he has actually undertaken meaningful concrete business activity.**

(2) The petitioner must establish that he has **placed his own capital at risk**, that is to say, he must show that he was the legal owner of the invested capital. **Bank statements and other financial documents do not meet this requirement if the documents show someone else as the legal owner of the capital.**

(3) The petitioner must also establish that he acquired the legal ownership of the invested capital through lawful means. **Mere assertions about the petitioner's financial situation** or work history, **without supporting documentary evidence, are not sufficient** to meet this requirement.

(4) To establish that qualifying employment positions have been created, INS Forms I-9 presented by a petitioner must be accompanied by other evidence to show that these employees have commenced work activities and have been hired in permanent, full-time positions.

(5) In order to demonstrate that the new commercial enterprise will create not fewer than 10 full-time positions, the petitioner must **either** provide evidence that the new commercial enterprise has created such positions or furnish a comprehensive, detailed, and credible business plan demonstrating the need for the positions and the schedule for hiring the employees.

The concept of capital includes "indebtedness" and "cash equivalents". A note, in particular, a **promissory note** secured by assets owned by a petitioner can constitute capital. The foregoing is intended to allow a petitioner/alien entrepreneur to submit a promissory note as a cash equivalent representing his or her own indebtedness secured by assets owned by him or her as the instrument of investment. The presentation of a promissory note from some third-party, payable to the alien self-petitioner is insufficient by itself. In such a situation, the note, similar to a gift, would have to be fully supported with the same types of evidence from that third party as would be required from the investor/alien entrepreneur. In other words the third party would have to prove the "security" of the note and show the legal source and path of funds. Aside from very close family relationships such as between spouses or parent-child relationships, very few third parties would agree to such an intrusive burden upon their financial privacy.

With all of the foregoing duly noted, there are some ***technicalities*** that must not get lost in the shuffle. Preparing for an EB-5 petition filing is not a simple task. If the jobs have not yet been created then a comprehensive business plan must be submitted. Such plan must be detailed and credible. The level of detail expected was spelled out in one of the 1998 EB-5 Precedent Decisions. The following excerpt has been tossed around *ad nauseum* for years but this discussion would be incomplete without it. I go a bit further than most and include a little bit before and after the critical paragraph.

> "… To be "comprehensive," a business plan must be sufficiently detailed to permit ~~the Service~~ [USCIS] to draw reasonable inferences about the job-creation potential. Mere conclusory assertions do not enable ~~the Service~~ [USCIS] to determine whether the job-creation projections are any more reliable than hopeful speculation.
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> 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 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.
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> Certainly no astute investor would place half a million or a million dollars into a business that he had not thoroughly researched. Creating a comprehensive business plan as described above is normal practice for any ~~businessman~~ [business-person] seeking to operate a viable business. …"
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> "

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[4] The Service 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

There is one more tidbit from *Izummi* that I was saving especially for this part of the discussion. The third prong states that "[a] petitioner may not make material changes to his petition in an effort to make a deficient petition conform to ~~Service~~ [USCIS] requirements." As I often describe the *level of quality* that the I-526 supporting documentary evidence meet is like "**Mary Poppins**" — *practically perfect in every way*. This is so because of the "priority date" factor. Ask yourself a few questions and answer them honestly and then re-examine any plans for investing for purposes of seeking an EB-5 visa.

Is it fair to allocate, tie-up, or reserve a numerically limited visa based on any of the following facts?

- The business plan presented is so poorly supported by crucial details that it will take a ton of effort to make it viable. In short, a substandard business plan filed prematurely.
- A plan to invest in such a fanciful venture that you cannot make it through a single read without either laughing or crying, hysterically. In short, a lousy business idea.
- A petition package that is not fully funded; where the money needed to carry out the plan is based on a speculative source. In short, a non-millionaire trying to pass him- or herself off as a millionaire investor.

Is denial the better and more just choice? Should poor planning be rewarded? Should unfunded or under-funded ventures be permitted? Is it more appropriate to demand that EB-5 visa petitions be ***approvable at time of filing*** just as any other preference visa category demands?

§204.6 Petitions for employment creation aliens.

(a) *General.* A petition to classify an alien under section 203(b)(5) of the Act must be filed on Form I-526, Immigrant Petition by Alien Entrepreneur. The petition must be accompanied by the appropriate fee. **Before a petition is considered properly filed**, the petition must be signed by the petitioner, and the **initial supporting**

documentation required by this section must be attached. Legible photocopies of supporting documents will ordinarily be acceptable for initial filing and approval. However, at the discretion of the director, original documents may be required.

(b) [Reserved]

(c) *Eligibility to file*. A petition for classification as an alien entrepreneur may only be filed by any alien on his or her own behalf.

(d) *Priority date*. The priority date of a petition for classification as an alien entrepreneur is the date the petition is **properly filed** with ~~the Service~~ [USCIS] or, if filed prior to the effective date of these regulations, the date the Form I-526 was received at the appropriate ~~Service Center~~ [filing address].

In conjunction with most visa petitions, indeed, **all** "preference" petitions, there is another line of cases that is applicable across categories, which must not be ignored or overlooked. 8 C.F.R. § 204.6(j) is rather lengthy but one of the essentials, aside from the required business plan, *when the jobs have not yet been created*, another initial evidence requirement is demonstrating that the investor has enough money to invest the required amount and actually invests it. Only a fool would file an I-526 if (s)he did not have the required funds in hand ***plus*** money to live on while the business gets off the ground. These are standard initial issues to be demonstrated upfront in order to secure the priority date. The following are some cases on point and related or analogous issues.

Matter of Katigbak, 14 I&N Dec. 45 (R.C. 1971), stands for the proposition that the self-petitioner and/or beneficiary must actually be *eligible at time of filing* in order to rightfully be accorded the filing date as the priority date for visa allocation and issuance purposes.

Matter of Izummi is one of the 1998 EB-5 Precedent Decisions and incorporates the *eligibile at time of filing* requirement into I-526 petitions.

Matter of Bardouille, 18 I&N Dec. 114 (BIA 1981), applies and reinforces the same *eligible at time of filing* concept and requirement to family-based visa petitions, *as applicable*.

Matter of Pazandeh, 19 I&N Dec. 884 (BIA 1989), recognizes that it is possible that an **initial** requirement may cease to be of any concern *with the passage of time*.

In *Ogundipe v. Mukasey*, 541 F. 3d 257 (4th Cir. 2008), the Court recognized that newly submitted evidence of a fact or facts that *actually existed at time of filing* could be considered at a later point in proceedings. The Court rejected a rigid procedural stance that would deprive someone of something for which (s)he was actually qualified. In that case, the Fourth Circuit was interpreting the phrase "***approvable when filed***" for grandfathering under section 245(i) adjustment of status cases. While Rev. Ogundipe was the beneficiary in a 4th preference employment-based I-360 petition proceeding as an immigrant religious worker (a pastor), the ***concept*** applies across a wide variety of immigrant visa classifications.

Matter of Michelin Tire Corporation, 17 I&N Dec. 248 (R.C. 1978), dealt with a non-immigrant intracompany transferee "L" visa petition. In that case the Regional Commissioner of Legacy INS, applied the *eligible at time of filing* principal from *Katigbak* (an **immigrant** worker visa case), to **non-immigrant** temporary worker visa petitions. I believe that if it were fought in court that this would be found to be ultra vires. This is because the "one year" of continuous employment requirement which was in contention is statutorily required to be proven in relation to "*time of application for admission into the United States*" rather than *at time of filing* the non-immigrant visa petition form, which has no priority date at issue.

Al-Humaid v. Roark et al., No. 3:09-CV-982-L (N.D. Texas, January 26, 2010), involved the unsuccessful challenge to the denial of an I-526 immigrant visa petition by alien entrepreneur for an EB-5 visa. The AAO had dismissed the appeal on April 20, 2009. It is posted on the USCIS website as: Apr202009_02B7203.pdf. Sam A. Lindsay, United States District Judge in the Northern District of Texas at Dallas noted the following:

> "…. On June 19, 2007, USCIS issued another RFE requesting the production of further evidence to show that Plaintiff's money was being actively invested in HAK Company, not just sitting in a corporate account. USCIS received Al-Humaid's response on July 27, 2007, and subsequently

denied his I-526 Immigrant Petition one month later, on August 27, for failure to meet the burden of proof in the proceedings.

Al-Humaid appealed his petition's denial to USCIS's Administrative Appeals Office ("AAO") on September 25, 2007. AAO issued a Notice of Intent to Deny and another RFE on February 26, 2009, expressing several concerns, including concern that over 80% of Plaintiff's $1,000,000 capital "investment" was sitting idly in a corporate account, not being placed "at risk" for the purpose of job creation. After reviewing Al-Humaid's response, AAO upheld the prior decision of USCIS and denied Plaintiff's I-526 Immigrant Petition, determining that Al-Humaid had not demonstrated that he had created or would create the necessary jobs and that his comprehensive business plan, stating that HAK Company would employ forty-two workers, was not credible. ...." At pp. 2-3

Matter of Lett, 17 I&N Dec. 312 (BIA 1980), Decided by the Board March 18, 1980.

- Managing one's own investment by a "qualified investor" ***will not*** be deemed "unauthorized employment" that would bar adjustment.
- Self-employment by an "unqualified investor" ***may*** be, and probably will be, construed as unauthorized employment barring adjustment.
- A Motion to Reopen deportation proceedings must be supported by *prima facie* evidence of eligibility for the relief sought.

Lett was also excludable by virtue of a criminal record. He was required to submit a waiver application (I-601) but did not do so. He had a qualifying relative (a USC child) for whom he must demonstrate extreme hardship if he were to be deported. The appeal was DISMISSED, *without prejudice to re-filing a properly supported Motion*.

There are many critical and difficult issues to address in an EB-5 case. It is not simple and it is not exactly the same for the entrepreneur and investor. Choose wisely as to which path you take.

Dated this 4th day of July, 2015

X Joseph P. Whalen

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That's my two-cents, for now!