OBFUSCATORS BEWARE
INCESSANTLY REPEATING A FALSEHOOD DOES NOT MAKE IT TRUE

By Joseph Patrick Whalen (Friday, January 22, 2016)

I have noticed, *here and there*, some misstatements, slips of the tongue, bogus assertions, hyperbole, mischaracterizations, and clear falsehoods. In other words, there have been some blatant obfuscations[1] put forth in the EB-5 stakeholder community. One obfuscation that really bothers me is the unsupported assertion that USCIS abruptly changed "long-settled" interpretations of EB-5 jurisprudence as to indebtedness as capital, and issued a "new policy" about it. That statement is not true. Self-proclaimed "long-time" EB-5 practitioners assert that this alleged "new policy" is against EB-5 statute, regulation, and precedent. The problem with that argument is that EB-5 statute, regulation, and precedent, actually support the USCIS clarification.

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

(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.

[1] ***Obfuscate*** (verb) to *make (something) more difficult to understand*; Politicians keep *obfuscating* the issues; Their explanations only serve to *obfuscate* and confuse. http://www.merriam-webster.com/dictionary/obfuscate

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.

So, the regulation is pretty clear about *indebtedness* as *capital*. I cannot see how anyone could fail to understand its meaning. Regulations are written under a general authority to implement and enforce the laws entrusted to the agency. The above regulations were properly promulgated after the Immigration Act of 1990 (IMMACT90) was passed, the pertinent part is shown below. The original rulemaking[2] took place in 1991. I have written about it previously, see here.[3]

8 U.S.C. §1153. Allocation of immigrant visas

(b) Preference allocation for employment-based immigrants

Aliens subject to the worldwide level specified in section 1151(d) of this title for employment-based immigrants in a fiscal year shall be allotted visas as follows:

(5) Employment creation

(A) In general

Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise (including a limited partnership)-

(i) in which such alien has invested (after November 29, 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and

(ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

[2] http://www.slideshare.net/BigJoe5/original-eb5-fr-notice-1991
[3] http://www.slideshare.net/BigJoe5/original-ins-view-of-employment-creation-immigrants

The final argument of the obfuscators is that USCIS' alleged "new policy" is not only unsupported by, but is actually contrary to, precedent. I don't know what alleged precedent the obfuscators are talking about. They conveniently fail to cite any such cases. I do know which precedents support USCIS' clarification of policy.

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

> (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.

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: the assets are specifically identified as securing the note; the security interests in the note are perfected in the jurisdiction in which the assets are located; and the assets are fully amenable to seizure by a U.S. note holder.
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> (2) When determining the fair market value of a promissory note being used as capital under 8 C.F.R. § 204.6(e), factors such as the fair market value of the assets securing the note, the extent to which the assets are amenable to seizure, and the present value of the note should be considered.
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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.

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

> (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.
>
> (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 Soffici, 22 I&N Dec.158 (AAO 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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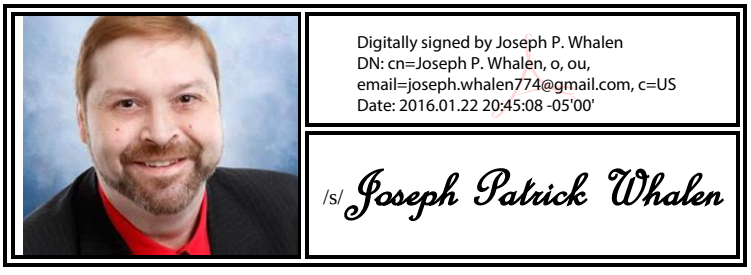
> (4) A petitioner must present clear documentary evidence of the source of the funds that he invests. He must show that the funds are his own and that they were obtained through lawful means.

Yes, the above is very repetitive which begs the question: *What did you not understand about it*? Also, **2016 – 1998 = 18** *years* since these Administrative Precedent Decisions[4] were issued. Did the obfuscators think nobody would notice?



[4] http://www.justice.gov/eoir/precedent-decisions-volume-22