MY OFFERINGS TO USCIS EB-5 PROGRAM AUGMENTATION EFFORTS

By Joseph P. Whalen (Tuesday, May 10, 2016)

Introduction

USCIS requested comments, observations, thoughts & ideas, and *most importantly*, useful suggestions & solutions concerning the following topics.

- Minimum investment amounts;
- The TEA designation process;
- The regional center designation process, including, but not limited to,
    - the exemplar process and
    - the designation of the geographic scope of a regional center; *and*
- Indirect job creation methodologies.

I offer the following towards the current effort, however I want to point out that I have been offering comments on these topics for at least the past five years through published articles, web postings, contributions to books devoted to EB-5, and direct submission of comments to the agency. Please see my many written materials at: http://www.slideshare.net/BigJoe5

My Thoughts on the Minimum Investment Amounts

USCIS and INS before it, has had the authority and ability to increase the minimum amounts for EB-5 investment purposes from day one. This authority was in the original statute that created the EB-5 visa classification. When INS promulgated the original EB-5 regulations it chose not to take advantage of its authority to set an amount above the basic amount for high employment areas. The so-called "upward adjustment". INS knew that any investor who was not a real entrepreneur would seek the cheapest option and that those folks would comprise the vast majority of would-be EB-5 immigrants, so, why bother to even contemplate an "increased" investment route. They were right.

With that reality clearly stated up-front, we are left only with a standard amount and a reduced investment amount. *See* 8 U.S.C, § 1153(b)(5)(C)(i)&(ii).[1] In that the basic amount was set in 1990, and it is now 2016, it boggles my mind why the amount has not

[1] **(C) Amount of capital required**
(i) In general
Except as otherwise provided in this subparagraph, the amount of capital required under subparagraph (A) shall be $1,000,000. The Attorney General, in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified under the previous sentence.
(ii) Adjustment for targeted employment areas
The Attorney General may, in the case of investment made in a targeted employment area, specify an amount of capital required under subparagraph (A) that is less than (but not less than ½ of) the amount specified in clause (i).

been adjusted upward, especially with the surge in interest that began in 2007-2008. I would like to see an increase in the basic amount and an increase in the TEA amount. The reduced investment amount does not have to be set at **half** the basic amount, the statute says the reduced amount *may not be less than* **half**. I suggest that the basic amount be adjusted upward to make up for inflation and then the TEA investment be set at three-quarters of that. Moving forward, the basic investment amount should be adjusted every five years and tied to a reliable index. I suggest that USCIS consult financial and economic experts in other Departments as to which index is most suitable and reliable to this purpose.

An Idea Regarding TEA Designation

How about USCIS work out some agreements (MOUs) with other Departments/Agencies in order to tap into their expertise?

- Maybe the Dept. of Commerce's **Bureau of Economic Analysis** (BEA) should have to review and approve a State Government Agency's **methodology** for reasonableness before it is used for EB-5 purposes as to designating TEAs?
- Maybe the Dept. of Labor's **Bureau of Labor Statistics** (BLS) and/or the **Census Bureau** could be consulted about the **inputs** (the actual numbers, the unemployment rates, etc…) used in the approved methodologies?
- Perhaps there are additional sources that might assist in "**validating**" the data used as inputs depending on the industry involved in the EB-5 project.
- When these **TEA designations** are **accepted** by USCIS, perhaps it should be "locked in" **for the duration** of the project?

Regional Center Designation Process

Those U.S. entities, whether individuals, private companies, governmental organization, or any combination of them, need to demonstrate up-front sufficient knowledge, skills, and abilities (KSAs) to meet their obligations and responsibilities to the EB-5 Program, gov't regulators of all types, the U.S. workforce, and the EB-5 investors. In order for them to demonstrate their KSAs, USCIS-IPO must first spell them out.

I believe that it is this shortcoming in the governmental oversight that has opened the door to fraud. But even more than fraud, the EB-5 Program is plagued with incompetent players. Although the I-924 form instructions address KSAs, they have been underemphasized. Applicant entities have been given too much wiggle room and have perverted the concepts of a "general proposal" and "general predictions". USCIS mgmt., AAO, and certain factions within the EB-5 stakeholder community are equally to blame for this sad state of affairs.

IF the agency is serious about reform then this part of the EB-5 Program must be tightened. The very fact that the agency has allowed the ranks of Regional Centers to swell

to over 800 is a sign that the Regional Center "Designation" has been given too freely. Lastly, when regulations are updated, the Regional Center process must be clearly recognized as "**licensure**" and treated as such. *See* 5 U.S.C. § 551(8-10).[2]

Regional Center Geographic Scope

While the potential geographic area encompassed by an EB-5 Regional Center has not yet been definitively defined, we are not completely in the dark. The area needs to be "contiguous" but can cross a body of water, such as a bay, or river if the areas on both sides have a suitable connection. In other words, the proposed area needs to make sense in an economic sense at the very least. There are communities that have a clear relationship with one another, even across state lines. Whatever the criteria used to support the viability of a particular area, it has to make sense.

Since the EB-5 Regional Center Program was created by Congress in an effort to improve their local economies and Congress is composed of Representatives that serve their individual districts and Senators who serve their whole states, there is reason to believe that "regional" has a flexible meaning. At the very least, an EB-5 Regional Center should be no smaller than a Congressional district. However, as mentioned above, there are legitimate communities that cross state lines, I cannot support a restriction that limits an EB-5 Regional Center to a single state. Lastly, while I would not restrict these regions in order to prevent crossing state lines, the maximum size should be limited to that which makes sense and can be justified through the production of supporting argument and evidence. Such evidence often includes, but is not limited to, economic analyses, feasibility studies, and/or market research studies. It has to make sense.

---

[2] 5 U.S.C. § 551

(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;
(10) "**sanction**" includes the whole or a part of an agency-
(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;
(B) withholding of relief;
(C) imposition of penalty or fine;
(D) destruction, taking, seizure, or withholding of property;
(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;
(F) requirement, revocation, or suspension of a license; or
(G) taking other compulsory or restrictive action;

Found at:
http://uscode.house.gov/view.xhtml?req=(title:5%20section:551%20edition:prelim)%20OR%20(granuleid:USC-prelim-title5-section551)&f=treesort&edition=prelim&num=0&jumpTo=true

Dummy[3] **I-526 Process**

Others use the term "*Exemplar* I-526" as a label for the "shared project-specific supporting documentation" that is submitted to USCIS for an "advance vetting" in hopes of obtaining a "provisional approval". Since there is no "priority date" at issue, the documentation in this submission is wide open for correction, up to and including, material changes. Once the coveted "Provisional Approval" is achieved, the Regional Center can then merely provide a copy of the "approved" documentation to the investor (or a copy of a detailed, project-specific Provisional Approval Notice) in support of the individual I-526 immigrant visa petition. However, it would be more efficient if the *provisionally approved shared documentation* were incorporated by reference instead of requiring pointless submission of repetitious and extraneous materials in every investor's I-526 petition package. Once USCIS establishes a new and improved e-filing system that includes an electronic repository or document library for these project specific packages, this approach will save time, effort and money for everyone including USCIS.

Indirect Job Creation Methodology

To this point in the evolving world of EB-5 requirements, the agency and the serious members of the EB-5 stakeholder community have adopted the Economic Impact Analysis (EIA) based on a *Matter of Ho*-compliant Business Plan[4] (BP) as the appropriate means for demonstrating indirect job creation. In the early days, i.*e.* *the Dark Ages*, of the Immigrant Investor Pilot Program, some rather bizarre methods were advanced and attempted, and some slipped by the unprepared INS adjudicators. The early Regional Centers submitted some indirect job creation predictions that, *in hindsight*, were laughable and far off the mark. More recently, qualified economists have been engaged to produce higher quality EIAs using widely-accepted methodologies for predicting economic impacts including job creation.

Since there are two input-output (IO) models that were commissioned by the federal government, input-output models have been accepted by USCIS as valid for EB-5 indirect job prediction. In addition to the two models used by government agencies, namely RIMS II and IMPLAN, there are other widely accepted IO models that also work for EB-5 purposes. I see no reason to change this methodology. I would be very suspect of any "homemade" economic analysis model. So, unless the economist were at least a Nobel Prize contender, I would not accept it. *Thanks for considering my suggestions.*

---

[3] Others use the term "Exemplar I-526" as a label for the "share project-specific supporting documentation" that is submitted to USCIS for an "advance vetting" in hopes of obtaining a "provisional approval". Since there is no "priority date" at issue, the documentation in this submission is wide open for correction, up to and including, material changes. Once the coveted "Provisional Approval" is achieved, the RC can then merely provide a copy of the "approved" documentation to the investor (or a copy of a detailed, project-specific Provisional Approval Notice) in support of the individual I-526 immigrant visa petition.

[4] *Matter of Ho*, 22 I&N Dec.206, 213 (AAO 1998) describes what is expected in an EB-5 Business Plan (BP).