U.S. Citizenship and Immigration Services

Questions and Answers

A Discussion about the EB-5 Immigrant Investor Program Teleconference
February 26, 2014

Overview

On February 26, 2014, the Public Engagement Division and USCIS Immigrant Investor Program Office (IPO) hosted an engagement on the EB-5 Immigrant Investor Program. The information below provides a review of questions submitted by stakeholders and the responses provided by IPO.

Questions and Answers

1. Provide Clarification on Sale of Regional Centers. On May 30, 2013, UCSIS released its long awaited binding EB-5 policy guidance. Missing from this guidance was the topic of regional center sales. Previously, USCIS had held that sales were permitted but required amendments. In recent adjudications, USCIS seems to be shying away from this position. Clear guidance is urgently needed.

Response: A sale of a regional center *entity* is not prohibited. The instructions for Form I-924 Application For Regional Center Under the Immigrant Investor Pilot Program, provide that regional centers must notify USCIS within 30 days of a change of:

- Address
- Contact information
- Regional center principal(s)
- Contracting agents or similar changes in the operation or administration of the regional center.

Accordingly, if a regional center entity is sold, the regional center must notify USCIS of the sale within 30 days and USCIS may require the new principals of the regional center entity to file a Form I-924A, Supplement to Form I-924. The regional center may also file an I-924 amendment to reflect the sale.

2. Is there any problem if the developer has the option to redeem an investment at a fixed amount (or provide a property in addition to or in lieu of a dollar return), as long as it is not an option of the investor?

Response: The answer will depend on the specific facts involved and the terms of any agreement. As noted in the May 30, 2013 policy memo, if the immigrant investor is guaranteed the return of a portion of their investment, or is guaranteed a rate of return on a portion of their investment, then the amount of the guaranteed return is not at risk. Thus, IPO will review the evidence to determine:

- If there is a risk of loss and a chance for gain, and
- Whether there is a promise to return or redeem some portion of the minimum required investment amount.

Depending on the terms of the agreement there may be questions relating to whether the investor has the potential for gain if the agreement does not represent a promise or guarantee that diminishes the contribution of capital below the minimum required amount.

3. What is an "objective mistake of fact or law" that eliminates deference?

Response: We consider an objective mistake of law or fact to involve a determination where the officer misapplied the applicable eligibility criteria, or failed to take into consideration a fact that would have been determinative in the eligibility decision.

For example, an objective mistake of law or fact would be present if an officer approved a petition for the reduced investment amount based on a determination that the unemployment level in the targeted area was 125% of the national average rather than the required 150%.

However, where an officer uses his or her judgment during the adjudications to make subjective determinations to assess the facts and make a determination while applying the correct eligibility criteria would not be considered an objective mistake of law or fact.

For example, an officer's decision that the business plan is comprehensive and credible under Matter of Ho, 22 I&N Dec. 206 (Assoc. Comm'r 1998) involves a subjective determination, and unless such decision is based on an objective mistake of fact or law, would generally be provided deference.

4. Does the formation of a new company post 11/29/90 and the purchase of assets by that company from a company that went out of business qualify as a "new commercial enterprise?" We have seen USCIS denials where a new company is formed, acquires substantial assets from a company that went out of business, as well as other assets from other companies still in business, and employs more than 10 full-time U.S. workers, on the basis that the new company did not qualify as a "new commercial enterprise."

a. Does it make a difference how long the company the assets were acquired from was out of business before the assets were acquired?
b. Does it make a difference if the company whose assets were acquired sent all their employees to work at another company owned business before the assets were acquired?
c. Does it make a difference if the acquisition is not just assets but stock?
d. Does it make a difference if the company whose assets were acquired continued to operate in the same or different location?
e. Does it make a difference if the foreign national acquiring the assets is entering into a different type of business, i.e. acquiring assets from an internist office to use in an orthopedist office, acquiring assets from a furniture company to use in a hotel or bed and breakfast?

Response: The determination of whether a new commercial enterprise has been established will ultimately depend on:

- The facts involved and whether the facts support the claim that the new company is a new commercial enterprise, or,
- Through the purchase of assets of an existing business (formed on or before 11/29/1990), and whether it is merely a reorganized or restructured entity that has not shown the degree of restructuring or reorganization required by 8 C.F.R. § 204.6(h)(2) to constitute it as a new commercial enterprise.

The various factual distinctions noted in the question would be relevant to the analysis. However, the mere fact that an entity formed after 11/29/1990 purchased assets of a previous entity does not in and of itself mean that the entity is not a new commercial enterprise. The nature, timing, and extent of the asset purchase will be evaluated to determine if this is simply an asset purchase in the course of

operating and growing the new commercial enterprise, or if the asset purchase is more likely the acquisition and restructuring/reorganization of an existing business (formed on or before 11/29/1990). If the facts show that the asset purchase was more likely a purchase of an existing business, then the facts will be reviewed consistent with *Matter of Soffici*, 22 I&N Dec. 158 (Assoc. Comm'r 1998) and other applicable law to determine if the business purchased was restructured or reorganized such that a new commercial enterprise resulted.

5. Census tract aggregation—will USCIS accept a targeted employment area (TEA) constructed from an aggregation of census tracts (using the prescribed Bureau of Labor Statistics methodology) from the individual investor or must this type of TEA designation be in the form of an official state designation?

Response: The investor must present a letter from the state government certifying that the geographic or political subdivision is a high unemployment area when he or she claims that his or her investment is in a new commercial enterprise principally doing business in:

- A geographic or political subdivision of a metropolitan statistical area, or
- Of a city or town with a population of 20, 000 or more

This information is usually acquired by aggregating census tracts.

As stated in the May 30, 2013, policy memo, USCIS defers to state determinations of the appropriate boundaries of a geographic or political subdivision that constitutes the TEA.
According to 8 C.F.R. § 204.6(j)(6): "to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:

. . . (ii) In the case of a high unemployment area:

(A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or

(B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. 204.6(i)."

As such, a TEA constructed from an aggregation of census tracts to claim that a particular geographic or political subdivision is a high unemployment area would not meet the regulatory requirements, absent a state designation letter. This type of TEA designation must be in the form of a letter from an authorized state official.

6. Evidence at Form I-829, Petition by Entrepreneur to Remove Conditions—What evidence does USCIS accept at the Form I-829 stage to support the creation of MODEL derived DIRECT jobs? Would this be justification of the input (i.e., revenue or expenditures) or would it be actual payroll documentation?

Response: "Direct jobs" are identifiable jobs for qualifying employees located within the commercial enterprise into which the alien investor has directly invested his or her capital. The implication is that

the petitioner has some operational control over the employees being counted for purposes of job creation. To show employment creation, the principal alien can submit payroll records for the new commercial enterprise relevant tax documents for the new commercial enterprise, Forms I-9 for all employees hired, or any other evidence deemed appropriate by the petitioner.

"Model derived jobs" describes jobs that are indirect or induced and are established through the creation of a model, which can involve direct jobs as an input. Investors should carefully review the job-creation model on which they are basing their eligibility and submit evidence appropriate to that model. In other words, the type of evidence needed to establish job creation would depend on the model being used.

> *For example, if the model were based on revenue, then evidence of revenue would need to be provided. If the model were based on the number of workers per square foot in a particular industry, the evidence should establish that this industry in fact occupies the square footage that the model predicted. USCIS will also accept payroll documentation to support the creation of jobs derived from a model using direct inputs.*

NOTE: *In a post-engagement follow-up inquiry, the above question was further clarified to refer to the "direct job numbers that are the output of the economic model when expenditures or revenue are used as the input. These model-derived direct jobs are not actual jobs you can identify."*

In response to the clarification, IPO would like to note that these model-derived "direct" jobs, while "direct" in the economic sense, are not direct jobs in the sense of the EB-5 regulations. With that said, USCIS accepts model-derived "direct" employment counts sufficiently evidenced from the estimates provided by an input-output (I/O) model. In instances where the model-derived "direct" jobs are not specifically identifiable, and are based solely on an output of the model, USCIS will review all evidence submitted by the petitioner pertaining to the input (e.g. revenues, expenditures, construction timeline) used in the I/O model to estimate qualifying job creation to determine if the evidence has shown by a preponderance that the requisite jobs have been created.

7. An investor approached one of our clients expressing interest in investing in a public works project, but the information supplied on the EB-5 website seems to indicate that a commercial enterprise connected with an EB-5 investor must be "for-profit activity." Does this preclude a public works project?

Response: According to 8 C.F.R. § 204.6(e), the new commercial enterprise is required to be a for-profit entity. In cases where an investor may claim indirect job creation through an investment into a new commercial enterprise associated with a regional center, the actual job-creating entity (JCE) may be separate from the new commercial enterprise. The new commercial enterprise may pool investor funds to be loaned to a separate not-for-profit JCE, such as an entity undertaking a public works project. However, the petitioner will still be required to demonstrate, among other requirements, that:

- The new commercial enterprise itself is engaging in for-profit activity,
- The invested funds are placed at risk for the purpose of generating a return, and
- That the investment into the new commercial enterprise is likely to result in the requisite job creation.

8. The types of regional center applications:

The May 30, 2013 memo discusses the different types of projects that can be submitted to support Form I-924, including hypothetical projects, which do not receive deference, and actual projects filed

with an exemplar Form I-526, Immigrant Petition by Alien Entrepreneur, which can receive deference.

If a regional center has an actual project but not enough information to file an exemplar I-526, will USCIS's approval be the same as it is for a hypothetical project? That is, the regional center's geographic area and industries may be approved, but there will be no deference to the project?

Response: No, we consider an approval of Form I-924 application based on a hypothetical project to be different than a Form I-924 application based on an actual project. So, an approval of a Form I-924 application based on an actual project would not be the same as an approval based on a hypothetical project. Deference will be provided to determinations based on actual projects (absent a material change in facts, fraud or willful misrepresentation, or an objective mistake of fact or law), and our approval notices now specifically describe the extent to which deference will apply.

In the instance you describe, if USCIS approves a Form I-924 application based on an actual project that does not include an exemplar Form I-526, and the comprehensive business plan submitted in support of the Form I-924 application based on an actual project is deemed compliant with *Matter of Ho*, we will defer to that determination in future petitions involving the same comprehensive business plan (absent fraud, willful misrepresentation, or an objective mistake of fact or law). The same level of deference also applies to the associated economic analysis submitted in support of an approved Form I-924 application based on an actual project.

9. Guest expenditures: What is the legal standard for allowing EB-5 investors in a hotel to obtain credit for guest expenditure jobs: that the guests would not be in the area "but for" the hotel, or that the hotel is the "primary reason" the guests are in the area?

a. These standards are different. The hotel might make it possible for someone to stay in the area by offering rooms when other hotels are full, but visitors may be coming for some other reason.
b. Or is there another standard?

Response: USCIS reviews these analyses and projections to determine if they are economically or statistically valid. As such, it is a fact specific determination based in large part on the reliability of the underlying market study and supporting evidence, and the manner in which that information or data is used in the economic analysis and job creation projections. An applicant can establish that a hotel and consequently, hotel and associated hotel revenues, are creditable for job creation through several means.

The first of these is unmet aggregate demand. USCIS examines the occupancy rates of hotels in the area when reviewing new hotel projects. If occupancy rates for hotels are high in a particular area, a successful argument can be made that a new hotel will serve unmet demand rather than serve existing hotel visitors to that area. If an applicant demonstrates in their business plan (data and market studies) that high hotel occupancy rates exist, USCIS considers that as evidence that there is unmet demand and that guest expenditures for hotel revenues (including restaurants, meeting facilities and concessions within the hotel) represent new spending and consequently new jobs for the area.

USCIS would also consider guest spending (i.e., hotel revenues) from a proposed new hotel in an area as new spending and consequently new jobs for the area if an applicant can demonstrate that they are providing a differentiated product to serve a special market segment. For example, the construction of a hotel to provide facilities for longer-term guests (usually called residence hotels) in an area where none exists, supported by a market study estimating current and future demand for this market

segment, would more than likely demonstrate the serving of new demand (hence new expenditures) rather than displacing current visitors. Similar successful arguments have been made for five star hotels and for budget hotels in areas where:

- There is aggregate unmet demand in an area, and
- No comparable facilities exist.

USCIS also considers arguments that guest expenditures for hotel revenues represent new spending and consequently new jobs for the area if the new hotel is in response to another facility, say a sports arena or entertainment venue.

10. What is the standard for determining the geographic range of a regional center? This is particularly critical when regional centers (RCs) can sponsor projects/investors outside their approved area, as there needs to be reasonable predictability for investors whether the expansion will be considered approvable in the context of Form I-526 petitions. Is the standard more flexible in the expansion context than in initial filing?

Response: The standard for determining the geographic area of a regional center is the same regardless of when or how that regional center geographic request is submitted. USCIS will review the proposed geographic area of a regional center and will deem it acceptable if the applicant can establish by a preponderance of the evidence that the proposed economic activity will promote economic growth in the proposed area. The question is a fact-specific one and the law does not require any particular form of evidentiary showing, such as a county-by-county analysis. In USCIS's experience, the reasonableness of a regional center's proposed geographic area may be demonstrated through evidence that the proposed area is contributing significantly to the supply chain, as well as the labor pool, of the proposed projects.

We understand the value of predictability in the context of associated Form I-526 petitions. An amendment to Form I-924 with an exemplar presenting the project to USCIS for approval (and subsequent deference) before the filing of associated Form I-526 petitions allows for a level of predictability for regional centers and investors. We also understand that we need to ensure that our processing times substantially improve in order to maximize the value for applicants to file an amendment to Form I-924 with an exemplar, before they file Form I-526 under that project.

We believe we are making substantial progress toward improving Form I-924 processing times and believe as IPO continues to increase staff that a similar reduction in Form I-526 processing times will follow. Predictability, consistency, and efficiency in processing, in addition to quality and integrity, are all important goals for IPO as we administer the EB-5 program.

11. What if any limits on bridge financing should investors know about? The May 30 memo does not mention any temporal or other limits on using EB-5 funds to repay bridge financing.

> *For instance, the USCIS response to the recent Office of Inspector General (OIG) report stated that "USCIS has denied and will continue to deny cases where a project is already completed and circumstances do not warrant attribution of jobs to a proposed late-stage investment."*

This concept was not mentioned in the memo. What is it that must have occurred before a project is completed? Subscription of the EB-5 investment? Form I-526 filing? It seems inappropriate to require Form I-526 approval before project completion, because investors cannot know how long Form I-526 adjudication can take, and sometimes it takes years—longer than most projects, and such a policy would undermine the entire purpose of a bridge loan. Likewise, is there any particular EB-5-related event that must have occurred before bridge financing is advanced for EB-5 funds to be allowed to replace such financing?

Response: Generally, the replacement of bridge financing with EB-5 investor capital should have been contemplated prior to acquiring the original non-EB-5 financing. However, even if the EB-5 financing was not contemplated prior to acquiring the temporary financing, as long as the financing to be replaced was contemplated as short-term temporary financing which would be subsequently replaced, the infusion of EB-5 financing could still result in the creation of, and credit for, new jobs.

Consistent with the policy as set forth in the May 30, 2013, policy memorandum, the focus is on the nature of the underlying financing in order to determine that the financing to be replaced by the EB-5 funds is truly bridge or temporary financing or if the EB-5 funds are being used to merely refinance longer-term debt. If the underlying financing was bridge financing, which is a fact-based determination based on the terms of the underlying financing and the circumstances surrounding the use, application, and plan at the time the financing was obtained to replace it with other longer-term financing such as EB-5 funds, then jobs created through the use of the bridge financing could still be credited to the EB-5 investors. However, if the petitioner fails to establish that it is more likely that the EB-5 funds are being used to replace bridge or temporary financing, then jobs created through the use of the prior financing would not be credited to the EB-5 investors.

For example, if the EB-5 funds are being used to refinance debt initially contemplated as longer-term debt.

12. Can investors in a project qualify for $500,000 minimum investment by investing in a new commercial enterprise that will create jobs in a collection of separate TEAs without creating most of the jobs in one of them?

Response: Yes, as long as the job-creating entities are principally doing business in the designated TEAs, and if the investment is within a regional center, the job-creating entities are located in the geographic area of the regional center. Most of the jobs do not have to be created in one particular TEA if multiple TEAs are involved and the facts support a finding that the job-creating entities are principally doing business in the TEAs.

13. Does a regional center application seeking approval based on hypothetical projects require "verifiable detail" or similar standard for market feasibility analysis or validation of costs and timeline for construction to support assumptions made in the economic analysis, or is it enough to present a basically credible hypothetical business plan?

Response: A reasonably credible sample ("hypothetical") business plan that provides a general market feasibility analysis, cost estimates, and timeline for construction may provide a basis for establishing eligibility for initial regional center designation. Regional center applications based on hypothetical projects still require an economic analysis with verifiable detail pertaining to how the jobs are going to be created. However, the level of detail and degree to which it needs to be verifiable is not as rigid as it is for Form I-924 applications based on actual project proposals and a *Matter of Ho* compliant comprehensive business plan. Understanding that these are sample projects that are presented only to demonstrate that:

- The types of projects that the regional center may pursue to create jobs, and
- The range of assumptions that are acceptable as inputs into the economic modeling supporting Form I-924 applications based on sample projects which will not receive deference in later Form I-526 adjudications

are different than those assumptions and inputs that are used to support Form I-924 applications based actual projects that may receive deference in later Form I-526 adjudications based on the same actual projects.

Existing regulations however still require an economic analysis for all regional center applications, and those analyses need to provide enough detail for USCIS to verify generally how the jobs will be created.

14. The May 30 memo states that a Regional Center may operate out of its area of operations and North American Industry Classification System (NAICS) if job creation requirements are met. Does this mean a California regional center may submit a project in New York? Or must the "new" area of operations be contiguous to the approved region of operations?

Response: With respect to the question on whether a regional center's geographic area must be contiguous, the "new" area of operations must be contiguous to the approved regional center geographic area (since it would involve an expansion of the geographic area). Consistent with the Form I-924 instructions, USCIS requires that a regional center focus on a contiguous geographic area. A regional center designated to operate in California would not be approved to operate a project in New York and its geographic area would not be expanded to include New York.