

## Some Thoughts On USCIS' Tenant-Occupancy RFE

By Joseph P. Whalen (February 28, 2012)

Suzanne Lazicki over at LUCID Professional Writing ([www.lucidtext.com](http://www.lucidtext.com)) has been kind enough to share and post the contents of certain recent EB-5 Regional Center RFEs (shown further below in “smaller font” and indented). The language on the topic of the “Tenant-Occupancy” methodology in these various RFEs is reportedly identical *but for* the the applicants’ names. I see *some* very good, useful, and important considerations being expressed by USCIS that should help to ensure effectuation of Congressional Intent to spur regional economic growth.

Unfortunately, I also see some fundamental misunderstanding of the EB-5 Regional Center concept within the Pilot Program. Once again, the “Culture of NO!” is rearing its ugly head and once again it emanates from the California Service Center. When Congress created the concept of “Indirect Jobs” specifically within the EB-5 context, it was not making a wholesale import of concept from Econometrics<sup>1</sup>. If Congress had meant to do so, they would have specifically referenced such concepts. Congress did not do so.

§ 610 of Pub. L. 102-395, title VI, Sec. 610, Oct. 6, 1992, 106 Stat. 1874, *as amended*, [or 8 USC § 1153 NOTE: Pilot Immigration Program] provides, in pertinent parts:

(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 pilot program to implement the provisions of such section.

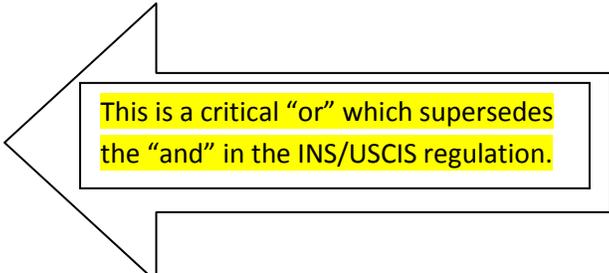
**[Statutory creation of the Immigrant Investor or *Employment Creation* “Pilot Program.”] [NOTE: INA § 203(b)(5) is titled as “Employment Creation”.]**

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<sup>1</sup> An economic or econometric "model or methodology" speaks to the selection of a viable scientific and mathematical approach to be applied though the selection of appropriate input categories and values based on location and industry. The result of the calculations is the "economic or econometric analysis". That is the economist's work product which contains the job creation prediction or projections and is submitted as evidence. The selections of the model/methodology and the suitable inputs are dictated by, or inspired by, the credible, comprehensive business plan. Remember: garbage in = garbage out.

Such **pilot 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.*



This is a critical “or” which supersedes the “and” in the INS/USCIS regulation.

**[Statutory “definition” or “explanation” of a Regional Center:]**

*“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.”*

**[Statutory framework for application procedures:]**

*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.”*

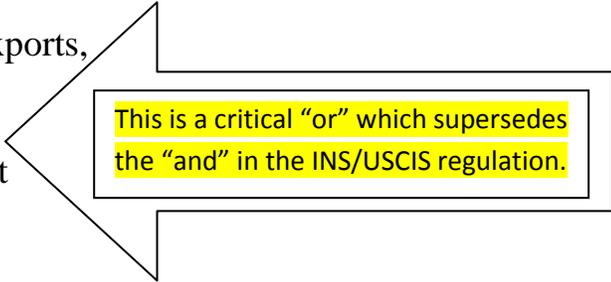
(c) In determining compliance with section 203(b)(5)(A)(iii)[(ii)] of the Immigration and Nationality Act [8 U.S.C. 1153(b)(5)(A)(iii)[(ii)]], and

notwithstanding the requirements of 8 CFR 204.6, the Secretary of Homeland Security shall permit aliens admitted under the pilot program described in this section to

- establish **reasonable methodologies** for
  - ✓ determining the number of jobs created by the *pilot program*, **including**
  - ✓ such jobs which are estimated to have been created **indirectly**
- through

**[Laundry list for Economist if one bothers to provide it!]**

- ✓ revenues generated from increased exports,
- ✓ improved regional productivity,
- ✓ job creation, **or**
- ✓ increased domestic capital investment



This is a critical “or” which supersedes the “and” in the INS/USCIS regulation.

- resulting from the pilot program.”

This last bullet point above supports an inclusive concept for **nexus** between the EB-5 money and jobs such that certain underlying yet critical infrastructure expansion and/or development projects, which have a direct effect on the **feasibility** and success of subsequent, additional, & associated Regional Center projects should count for the aggregate creditable job creation tally. In this first scenario, the Regional Center acting on behalf of its investors must commit to the overall project up-front in order to count the early jobs even if the EB-5 money from individual aliens comes later (i.e., after escrow upon I-526 approval). The Regional Center cannot hold back and shop around for a done deal to simply “buy into” with little or no real risk involved for the aliens seeking EB-5 visas.

The direct opposite is also true. The underlying Regional Center projects that directly make feasible certain subsequent, additional, & associated tenant job creation efforts should allow for certain subsequently created jobs to count for the aggregate creditable job creation tally. This approach also requires a sufficient nexus in order to reasonably count the jobs for EB-5 purposes. A major flaw in demonstrating sufficient nexus is basing the entire project on a lousy business plan in the first place. Does this “limited geographic area” which

comprises the Regional Center jurisdiction actually need this mall, factory, office building, industrial park, or whatever facility? Are the economic realities supportive of the development of this project? Does it make good business sense to embark on this course of action/development based on the current economic climate in this place?

The “Pilot Program” has only been defined thus far as it directly relates the establishment or designation of a “Regional Center”. However, it was always also intended to have “other positive economic effects” on a regional or national level. There is a fine line between a clear nexus and an exaggerated claim to the indirect jobs from “antecedent, subsequent, additional, & associated projects”.

Now, let’s closely examine the purported RFE language.

“Upon further review, it appears that \_\_\_RC is using EB-5 capital to construct commercial buildings. The **job creation estimates** employed in this application are **based**, at least in part, **on the assumptions that direct employees of the future tenants of the buildings can be utilized as inputs into the applicable input-output model.**”

This is a valid methodology if there is a **sufficient nexus**. *Would the creation of suitable space fill a void within the Regional Center’s limited geographic area?* There must be a palpable and palatable connectivity between these factors in order to make it work. I have encountered folks who are contemplating a headlong dive into EB-5 while having a “*Field of Dreams*” outlook and mentality—“build it and they will come”. EB-5 does not work that way. The real “business decisions” must always come first because if the ultimate job creation does not happen then conditions cannot be lifted at the end of the immigration process. In that case, everybody loses, including the regional economy within the “limited geographic area” of the Regional Center.

“However, USCIS has concerns that the attribution of these direct jobs to the EB-5 investment may not be based on **reasonable economic methodologies**, and therefore do not demonstrate in “verifiable detail” that the requisite jobs will be created.”

I agree with **part** of the sentiment expressed in the above statement. Reasonable economic methodologies under EB-5 must make sense. However, if USCIS attempts to import only the most onerous and overly rigid concepts from econometric theory and methodologies in an attempt to arrive at a resounding “NO!” then they will kill EB-5 Regional Centers and the Pilot Program all together. If the thinly disguised tunnel-vision expressed below is allowed to fester

and is subsequently adopted then you can flush each and every I-924 straight down the toilet right now—it's over.

“Rather, **contemporary economic methodologies** appear to **indicate** that such **jobs** would be **more appropriately be attributed to the tenants** themselves and **not to \_\_RC** because the **demand for labor precedes the decision about where to house that labor** as a general economic principle. For example, if a ~~federal agency~~ **[business]** determined that additional ~~federal~~ employees needed to be hired to fulfill the ~~agency's mission~~ **[business' plans]** at a particular location, the **[business]** ~~federal agency~~ would see to hire the requisite number of employees and as part of that process, would also take steps to lease the appropriate physical premises to provide sufficient workspace for the new hires. In this instance, it is the ~~federal agency~~ **[tenant business]** that is creating the jobs through its decision to hire more employees, **not the landlord [or property developer, i.e. Regional Center] who will ultimately lease the workspace to the [business] federal agency.**”

The above language and the expressed approach conflate issues. As we know, USCIS has a habit of conflating issues. The EB-5 Regional Center's efforts as the *de facto* “landlord” or more appropriately “developer” **or more likely** as a “lender to the actual developer” fulfills the mandate for the Pilot Program to “promote economic growth through” .... “job creation” and “other positive economic effects” such as “increased domestic capital investment” and “regional productivity”.

The following language makes it clear that USCIS is **misunderstanding** the critical differences between the **words used as labels for jobs as descriptors within two distinct contexts**. The context of I-O Models uses words and concepts that do not directly equal the same words within the EB-5 context. Please compare the concept expressed in this passage to the one that follows:

“Proving "direct-like" jobs may be achieved in different ways depending on the specifics involved. When the Economic Analysis bases and ties its projection as to indirect job creation on **a base level of newly created jobs** attributable to the alien's investment in a particular commercial enterprise rather than simply to **the dollar amount of the investment**, it is critical to differentiate between "direct employees" **on the alien's payroll** vs. "direct employees" **of a third party** who are "indirect employees" for EB-5 purposes. *Third party direct employees* used as "direct jobs" in terms of input into the Economic Model may be termed as "hypothetical" or "base level jobs" or some other terminology that clearly distinguishes them as not on the alien's payroll. This is critical at the I-829 stage as to the evidence that will be required to lift conditions on residence. The classic and easiest example that illustrates this is "mall tenants' employees" while another could be "factory workers" when the alien is loaning money to an industrialist in

order to let that other person or entity build, convert, or expand a factory. Simply basing the job creation projections on amount of investment may be easier to prove but both should be considered as the end result in net new jobs may vary.”<sup>2</sup>

“USCIS observes that the tenant-occupancy methodology (that the direct jobs created by future tenants are intended to be attributable to the EB-5 investments) is **not economically reasonable on the facts as presented**. To allow for the existing methodology would require USCIS to credit the prospective EB-5 investors in the new commercial enterprise with the **employment impacts created by the unrelated business ventures** of future tenants (even though such tenants might engage in business activities within the requested industry categories and NAICS codes). After reviewing the tenant-occupancy methodology presented thus far, USCIS observes that the **nexus** between the investment and the job creation **is either too attenuated or too incomplete to constitute a reasonable economic methodology**. Consequently, **the existing record** presents USCIS with a justification to recognize only those employment impacts that could be attributed to \_\_RC, such as those resulting indirectly from the construction activity and, if applicable, the ongoing building management activities that will be required to maintain the building.”

The above emphasized phrases are crucial as to whether the ultimate answer in a specific Regional Center affiliated investment will be yes or no—thumbs up or thumbs down. The ultimate answer is always case specific and is directly tied to, and dependent upon, the **evidence** presented in the individual record. Such evidence consists in large part of the business plans and the economic analyses based upon them. The Regional Center Proposal must demonstrate the necessary interdependent relationship between the Regional Center’s activities and the activities of those other businesses associated with the overall project development. In other words, solid “*but for*” arguments must clearly illustrate the nexus. Sufficient nexus starts in the *Matter of Ho*<sup>3</sup> compliant, detailed, comprehensive, and credible business plan and must be carried over into the economic analysis.

*“However, USCIS does not foreclose the possibility that \_\_RC might present additional evidence to demonstrate an economically acceptable nexus between the EB-5 investment and responsibility for the job creation asserted in the application.*

Accordingly, \_\_RC may present additional evidence to demonstrate that the proposed methodology is economically reasonable.

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<sup>2</sup> From article at: <http://www.ilw.com/articles/2011,0525-whalen.shtm>

<sup>3</sup> *Matter of Ho*, 22 I&N Dec. 169 (AAO 1998) <http://www.justice.gov/eoir/vll/intdec/vol22/3362.pdf>

To help illustrate the factors that USCIS finds central to adjudicating the **fundamental reasonableness of this particular economic methodology**, USCIS requests that any response address the following points:

1. Evidence that there is excess demand for the specific types of tenants (various tenants as indicated in the business plan and economic analysis) to your construction project and business plan. Please provide a data-based assessment, and the source of data utilized by the assessment.

To show such excess demand, the assessment should:

1. Analyze whether prospective tenants which would locate in the commercial space that will be constructed and/or renovated under the proposed project are currently suffering from a lack of a unique or specialized business space, that, in economic terms, such prospective tenants are “constrained” from commencing or expanding their businesses by a lack of unique or specialized business space.
2. Provide a data-based analysis, including the source of data, which establishes whether there is “pent-up” demand for the specific professional and business services relevant to your project. Such data-based analysis should include:
  - i. Evidence of congestion externalities as demonstrated by a low vacancy-unemployment ratio pursuant to specific space and businesses seeking to expand, respectively; and
  - ii. Evidence of upward wage and rental pressures in specific regional sectors that are likely to be attracted to the proposed project space.
1. The jobs that become located within the tenant space of the project should be shown to be a result of an expansion in specific services driven by your project as opposed to tenant shifting and/or relocation of already-existing jobs. Please explain how it will be verified that the jobs that will become located within the tenant space of the project can be considered “new” jobs.

Alternatively \_\_RC is afforded the **opportunity to provide** business plans and an economic impact analysis for any industry categories and NAICS codes to **demonstrate employment creation which is not based on tenant occupancy.**”

On this last point, please remember the option afforded by the regulations as to job allocation among members of an investment group. Specifically, re-read 8 CFR § 204.6(g) and embrace it tightly. The EB-5 “investor” need not be the sole proprietor or majority owner of a business. An EB-5 “limited partner” can claim jobs created by the group’s investment activities in accordance with the group’s

EB-5 job credits allocation agreement. The whole landlord-tenant scenario can be avoided by making an equity investment in the underlying businesses to be opened or expanded in the property under construction or being remodeling.

(g) *Multiple investors* —

(1) *General.* The **establishment of a new commercial enterprise may be used as the basis of a petition for classification** as an alien entrepreneur **by more than one investor**, provided each petitioning investor has invested or is actively in the process of investing the required amount for the area in which the new commercial enterprise is principally doing business, and provided each individual investment results in the creation of at least ten full-time positions for qualifying employees. **The establishment of a new commercial enterprise may be used as the basis of a petition for classification** as an alien entrepreneur **even though there are several owners of the enterprise, including persons who are not seeking classification** under section 203(b)(5) of the Act and non-natural persons, both foreign and domestic, provided that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means.

(2) *Employment creation allocation.* The **total number of full-time positions created** for qualifying employees **shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification** under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. **The Service shall recognize any reasonable agreement** made among the alien entrepreneurs **in regard to the identification and allocation of such qualifying positions.**