

KSAs FOR REGIONAL CENTERS

By Joseph P. Whalen (October 6, 2012)

I have recently begun to emphasize some of the finer nuances and more subtle aspects of Regional Center Applications. This latest point has to do with the qualifications of the people and the organizations seeking Regional Center Designation. I urge all I-924 Applicants to take stock in what they have to offer their EB-5 investors and at the same time figure out how to prove to USCIS that they know what they are really getting themselves into by seeking Regional Center Designation. Once you have determined what you have to offer the overall EB-5 Regional Center Program then, by all means, lay it on the table as part of the application package. While USCIS has not come forward and said this in a straightforward manner, these have been underlying considerations all along. Read between the lines in the AAO Regional Center Decisions starting with the first Dismissal of an Appeal in 2008 through the most recent Affirmance of a Termination in July 2012.

Ask yourself which “***Knowledge, Skills, and Abilities***” (KSAs) were insufficient or totally absent among those denied Regional Center Applicants in order to produce such proposals that: *lacked focus; were vague; were unsupported by reason; contained gross errors in judgment, logic, and/or ordinary common sense; were loaded with very bizarre assumptions; were based on incorrect statistical data; demonstrated grand failures to check simple facts; were unrealistic; were loaded with discrepancies; lacked credibility; and the list of faults could go on and on for several pages.* Now ask yourself what you have to offer that is better.

Regional Centers and their EB-5 investors need additional clarifications on the broad concept of “***Knowledge, Skills, and Abilities***” (KSAs). Any Regional Center Applicant has to make *a sufficient showing that demonstrates the required KSAs for the scope of operation requested in the RC proposal* in order to pass their “audition” through surviving the rigorous vetting involved in this particular adjudication process. On the flipside, USCIS will have been satisfied that the Applicant has the required KSAs and wherewithal to get the job done.

In the course of my intensive study and research into EB-5 laws and history, I found that the closest comparable adjudication to the USCIS Form I-924 performed by the agency is the adjudication of Form I-905. The nature of that adjudication is a helpful guide for certain, general, but very practical concepts. I found it very informative, helpful, and enlightening to compare the *Independent Credentialing Organizations* For Immigrant Healthcare Workers to *EB-5 Regional*

Centers For Immigrant Investors and/or Entrepreneurs. Each **entity** is seeking authorization, designation, or in the best expression of purpose, “licensure” from USCIS to market specific products and services to aliens in order to *facilitate* and *enable* them in *their* individual quests¹ (*petitions and applications*) for visas.

The I-905, [Application for Authorization to Issue Certification for Health Care Workers](#), has been described by AAO as “seeking licensure to certify”.... “medical positions” and/or “medical professionals”. AAO has made it clear that the applicant for that **license** needs to “demonstrate that its evaluators are competent to certify the educational credentials of those medical professionals seeking such certifications”. They have gone on to state that “the Form I-905 requests that the applicant *“Explain [its] expertise, knowledge, and experience in the health care occupations for which [it seeks] authorization.”*” Note that this evaluation is context specific. See hyperlink *infra*.

I feel that the I-924, [Application For Regional Center Under the Immigrant Investor Pilot Program](#) could be improved by looking to the form I-905 and the AAO Administrative decision posted as [Nov092006_01M4212.pdf](#) in which it found that the applicant for approval as an “*Independent Credentialing Organization*” provided insufficient information as to its *knowledge, skills, and abilities (KSAs)* required for the tasks involved in the licensure sought. AAO summed up that “[t]he applicant did not otherwise explain its expertise, knowledge, and experience pertinent to health care occupations.”

I have suggested to USCIS changing the I-924 instructions as follows. Under the heading: “**What is the Purpose of this Form?**” item #1 should be expanded upon by adding more precise language as to the required KSAs. As an example, I offered the following as a place to start:

“... A critical component of this request entails demonstrating that the applicant entity possesses the necessary knowledge, skills, and abilities (KSAs) to successfully operate the Regional Center in conformance with its legally mandated purposes. As per 8 CFR § 204.6(m)(6) “...*a regional center must provide USCIS with updated information to demonstrate the regional center is continuing to promote economic growth, improved regional productivity, job creation, or increased domestic capital investment in the approved geographic area.*” Therefore, the entity must present evidence that it understands its role and has the required expertise to perform

¹ This is not a typo. I meant quest and not request. A basic definition of quest is: A long and/or arduous search and/or journey. That describes the EB-5 visa pathway very well!

its underlying functions. The preceding is in addition to the specific KSAs needed for the facilitation of the specifically desired “*kinds of commercial enterprises that will receive capital from aliens*” as represented by the chosen NACIS codes, in which it seeks licensure to assist EB-5 investors establish and/or invest.”

USCIS needs to closely examine the role of the Regional Centers and produce practical expectations of the services it needs to provide. Once that is sorted out, USCIS must discern basic KSAs for the Regional Centers to demonstrate and have some baseline suggestions and parameters spelled out. I would caution against being too rigid. By way of an example to avoid, do not copy the “evidence possibilities” embodied in the extraordinary ability or exceptional ability immigrant visa categories. Those were based on narrowly defined statutory definitions. The requirements for Regional Centers are much more loosely defined in the statute and any adjustments to the regulations need to maintain the open-ended qualifications currently depicted.

That said, very broad possibilities for desired KSAs, loosely defined are the way to go with this. Numerous non-committal and wishy-washy possibilities are best. I say this because of the huge number of possibilities available under the NAICS codes. The [2012 NAICS Codes](#) structure encompasses well over two-thousand industry categories. There are too many potential means to satisfy the KSAs for the Regional Center applicants for USCIS to be overly specific. I would stick with making the applicant define its own parameters and showing by comparison to the standards accepted in that industry (or those industries) what is needed for the task(s) at hand. I would not make it as rigid as the Permanent Labor Cert process but that could serve as a basic frame of reference. I’d tell them to “**Define your needs and then show us that you have what it takes.**”

Perhaps OOH or something similar can help them figure it out. Resumes, educational credentials, job descriptions, one’s curriculum vitae, lists of publications: books, blogs, or articles and things along those various lines should suffice as evidence for **individuals**. Established **entities** might have more and different items to offer such as: annual reports, balance sheets, the ubiquitous tax returns and associated IRS “schedules” and/or SEC filings—EDGAR printouts might be available. Many possibilities exist in over two-thousand industry categories as defined in NAICS.

Let’s take a closer look at what the Department of Labor (DOL) asks about in the labor certification form itself and some of the associated information used to complete it.



E. Agent or Attorney Information (If applicable)

1. Agent or attorney's last name	First name	Middle initial	
2. Firm name			
3. Firm EIN	4. Phone number	Extension	
5. Address 1			
Address 2			
6. City	State/Province	Country	Postal code
7. E-mail address			

F. Prevailing Wage Information (as provided by the State Workforce Agency)

1. Prevailing wage tracking number (if applicable)	2. SOC/O*NET(OES) code
3. Occupation Title	4. Skill Level
5. Prevailing wage \$	Per: (Choose only one) <input type="checkbox"/> Hour <input type="checkbox"/> Week <input type="checkbox"/> Bi-Weekly <input type="checkbox"/> Month <input type="checkbox"/> Year
6. Prevailing wage source (Choose only one) <input type="checkbox"/> OES <input type="checkbox"/> CBA <input type="checkbox"/> Employer Conducted Survey <input type="checkbox"/> DBA <input type="checkbox"/> SCA <input type="checkbox"/> Other	
6-A. If Other is indicated in question 6, specify:	
7. Determination date	8. Expiration date

G. Wage Offer Information

1. Offered wage	To: (Optional)	Per: (Choose only one)
From: \$	\$	<input type="checkbox"/> Hour <input type="checkbox"/> Week <input type="checkbox"/> Bi-Weekly <input type="checkbox"/> Month <input type="checkbox"/> Year

H. Job Opportunity Information (Where work will be performed)

1. Primary worksite (where work is to be performed) address 1		
Address 2		
2. City	State	Postal code
3. Job title		
4. Education: minimum level required: <input type="checkbox"/> None <input type="checkbox"/> High School <input type="checkbox"/> Associate's <input type="checkbox"/> Bachelor's <input type="checkbox"/> Master's <input type="checkbox"/> Doctorate <input type="checkbox"/> Other		
4-A. If Other is indicated in question 4, specify the education required:		
4-B. Major field of study		
5. Is training required in the job opportunity? <input type="checkbox"/> Yes <input type="checkbox"/> No	5-A. If Yes, number of months of training required:	

USCIS regulations for the I-140 still ask for Form ETA 750, Application for Alien Employment Certification, but after March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089. See 20 C.F.R. § 656.17 (a)(l). Regardless of form numbers or versions, it is the information elicited that I wish to explore and borrow from for Regional Centers.

Starting with H. 3 through H.15, we see the need to *identify the job* and then we see the *information* that DOL finds *pertinent*.



The needed KSAs are determined by various sources. The DOL has devoted a great deal of effort into surveys and study about what is required of many occupations. The Bureau of Labor Statistics (BLS) produces the [Occupational Outlook Handbook](#) (OOH). In addition, the DOL [Employment and Training Administration \(ETA\)](#) also has another resource. The Occupational Information Network (O*NET) is a database of occupational requirements and worker attributes. The O*NET system, using a common language and terminology to describe occupational requirements, supersedes the seventy-year-old *Dictionary of Occupational Titles* with current information that can be accessed online.

H. Job Opportunity Information Continued

5-B. Indicate the field of training:	
6. Is experience in the job offered required for the job? <input type="checkbox"/> Yes <input type="checkbox"/> No	
6-A. If Yes, number of months experience required:	
7. Is there an alternate field of study that is acceptable? <input type="checkbox"/> Yes <input type="checkbox"/> No	
7-A. If Yes, specify the major field of study:	
8. Is there an alternate combination of education and experience that is acceptable? <input type="checkbox"/> Yes <input type="checkbox"/> No	
8-A. If Yes, specify the alternate level of education required:	
<input type="checkbox"/> None <input type="checkbox"/> High School <input type="checkbox"/> Associate's <input type="checkbox"/> Bachelor's <input type="checkbox"/> Master's <input type="checkbox"/> Doctorate <input type="checkbox"/> Other	
8-B. If Other is indicated in question 8-A, indicate the alternate level of education required:	
8-C. If applicable, indicate the number of years experience acceptable in question 8:	
9. Is a foreign educational equivalent acceptable? <input type="checkbox"/> Yes <input type="checkbox"/> No	
10. Is experience in an alternate occupation acceptable? <input type="checkbox"/> Yes <input type="checkbox"/> No	
10-A. If Yes, number of months experience in alternate occupation required:	
10-B. Identify the job title of the acceptable alternate occupation:	
11. Job duties – If submitting by mail, add attachment if necessary. Job duties description must begin in this space.	
12. Are the job opportunity's requirements normal for the occupation? <i>If the answer to this question is No, the employer must be prepared to provide documentation demonstrating that the job requirements are supported by business necessity.</i>	
<input type="checkbox"/> Yes <input type="checkbox"/> No	
13. Is knowledge of a foreign language required to perform the job duties? <i>If the answer to this question is Yes, the employer must be prepared to provide documentation demonstrating that the language requirements are supported by business necessity.</i>	
<input type="checkbox"/> Yes <input type="checkbox"/> No	
14. Specific skills or other requirements – If submitting by mail, add attachment if necessary. Skills description must begin in this space.	

USCIS uses the information that the U.S. EMPLOYER specifies on the ETA 9089, in order to *classify the position offered* within the appropriate statutory classification as defined in the INA. In the I-140, *Immigrant Petition for Alien Worker*, it is the **alien beneficiary** who must demonstrate the KSAs needed to satisfy the position as classified.

EB-5 is a very different employment-based classification. Rather than coming to work in the U.S. for a U.S. employer, **the EB-5 alien is coming to be an employer or** if affiliated with a Regional Center, **to facilitate employment creation for U.S. workers** through a pooled investment. *Those applicants who seek Regional Center Designation then become the individuals who need to demonstrate the required **KSAs*** to run the Regional Center; manage investments; and select appropriate business ventures that are suitable EB-5 compliant investment vehicles. While certain elements among the Regional Center-mandated² KSAs will be quite similar if not exactly the same across all Regional Centers, other aspects will depend on the scope of the Regional Center as requested in the I-924.

For instance, common requirements will be those needed to track the data required for annual reporting to USCIS on the I-924A; due diligence of funds; compliance with other government agencies relating to investments and international monetary transactions: SEC regulations, banking regulations, OFAC regulations such as the SDN List; and anything else that is pertinent to the specific transactions and the “*kinds of commercial enterprises that will receive capital from aliens*”. I will not address the common KSAs, I feel that USCIS must do that but first USCIS has to clearly define the reporting requirements and revise the I-924A. I will not get into too many specifics about the highly variable KSAs that could be required of the myriad of “*kinds of commercial enterprises that will receive capital from aliens*” because as previously stated, the NAICS Codes represent far too many possibilities. I will only offer limited examples. Taking for example, a mixed-use project that includes a restaurant, retail space, and a suite of physicians’ offices; what might be helpful KSAs to have among the Regional Center staff and/or consultants that are brought on board as needed? OOH has “occupation groups” defined for many different “*kinds of commercial enterprises*”. There is a “healthcare” group and I suppose that many folks involved in the plethora of occupations have probably worked in physicians’ offices at some point. So having folks with experiences in such settings might help your Business Plan writer on mundane details about what really goes on in such a work setting. The same should be true for restaurants and a wide variety of retail stores.

² These KSAs are mandated by reality and practicality rather than by statute or regulation.