Taking On The Confusion About Tenant Occupancy

By Joseph P. Whalen

With the overwhelming tidal wave of neophytes to EB-5 seeking Regional Center Designation, it is no surprise to me that so many were mistaken about what would be EB-5 compliant or not. This is a valid reason for a high denial rate, initially. Just wait.

The concept of counting the employees of third parties is not a new concept to EB-5. There is however, a proper way to approach the matter. The big "to do" over nothing, nothing being "Tenant-Occupancy", was due to a series of errors by newbies to EB-5. Those newbies exist both at USCIS and in the private sector.

The bulk of the problem came from outside of USCIS. People who were immigration practitioners for years but had never dealt with and probably never even heard of EB-5 began to hear about it and only saw dollar signs. These uninitiated neophytes ran head first into the sea of misinformation and misunderstanding thus, making it into an ocean of nonsense. People vaguely heard of utilizing "tenant" businesses' employees as indirect employees to satisfy job creation requirements and heard absolutely nothing that followed. So, without a sufficient understanding they lead their clients astray.

Then there was the problem of these neophytes not understanding the need for a *Matter of Ho*-compliant business plan. Such a plan is comprehensive, detailed and credible. It does not entail an absolute 100% list of items from a checklist as uninitiated adjudicators thought. Prong (5) from *Ho*[1] reads:

> (5) In order to demonstrate that the new commercial enterprise will create not fewer than 10 full-time positions, the petitioner must either provide evidence that the new commercial enterprise has created such positions or furnish a comprehensive, detailed, and credible business plan demonstrating the need for the positions and the schedule for hiring the employees.

[1] *Matter of Ho*, 22 I&N Dec.206 (AAO 1998)

This AAO Precedent Decision continues to explain about the business plan thus:

> "….. To be "comprehensive", a business plan must be sufficiently detailed to permit the Service to draw reasonable inferences about the job-creation potential. Mere conclusory assertions do not enable the Service to determine whether the job-creation projections are any more reliable than hopeful speculation.
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> A **comprehensive** business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives.[2] The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should[3] contain sales, cost, and income projections and detail the bases therefor.[FN4] Most importantly, the business plan must be credible.
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> Certainly no astute investor would place half a million or a million dollars into a business that he had not thoroughly researched. Creating a comprehensive business plan as described above is normal practice for any businessman seeking to operate a viable business. Without knowing whether a business is feasible and has the potential for long-term survival, neither the petitioner nor the Service can reasonably conclude that it will create permanent, full-time employment. It is not too onerous to ask a petitioner who has not yet met the employment-creation requirement to submit to the Service a real business plan. Other administrative agencies, such as the Small Business Administration, and private financial institutions routinely require the submission of detailed business plans

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[2] Stick with minimum and only add what is necessary to get your point across.
[3] AAO was "shoulding" all over itself. If a judge did that, he'd be accused a "legislating from the bench". Clarifications and suggestions even in a Precedent Decision are not the same as statute and APA notice and comment rulemaking. They are only highly valued "interpretations" unless grounded in a higher authority, this is not.

> before extending loans to businesses. Permanent resident status is no less significant a matter than a loan.
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> [FN4] The Service recognizes that each business is different and will require different information in its business plan. These guidelines, therefore, are not all-inclusive." At 213 [**Bold** in original, <u>underline</u> added]

While the entire passage is important, some folks seemed to have overlooked the footnote which expressly provides for flexibility. Here, we can begin to see even more confusion. *Matter of Ho* was a reaction to extremely lousy business plans that were then handed over to economists who were unfamiliar with EB-5 laws and concepts.

While business plans have improved since *Matter of Ho* came along in 1998, economic analyses are still feeling their way in 2013. To make matters worse, USCIS like its predecessor agency, Legacy INS, started in the cheapest way they could when trying to get input from economists and hired too few inexperienced economists at too low of a wage. This of course only re-fueled, reinvigorated, and reinforced the "Culture of NO!" at CSC. Adjudicators were able to persuade the neophyte economists (with zero knowledge of EB-5 law) to go along with their draconian interpretations. <u>*Or so I would imagine*</u>.

Neophyte economists outside of USCIS, even if long experienced, were asked to create viable job forecasts for EB-5 investors and Regional Centers. I say neophyte in terms of exposure to and understanding of EB-5 requirements. Those unfortunates were asked to work in a <u>specific context</u> without understanding it and were <u>not even handed the pertinent regulations and statutes</u> which govern EB-5 and specifically list line items to be included in their analyses. This of course, only further confused the USCIS adjudicators who went after the minutiae listed in the regulations.

Owing to all that confusion, the tried and true use of third party jobs came under fire when certain totally confused applicants tried to push through projects that took the wrong approach. They did not understand the need for there to be a clear **nexus** (palpable connectivity or causal link) amongst the EB-5 funds and activities that show aid and support for the creation of those third party jobs.

Instead, all they heard was “tenant businesses’ employees” and did not realize that they could **NOT** be a mere passive landlord, or more rightly so, a real estate speculator. Creating a landlord-tenant relationship is insufficient because it is only a passive real estate transaction.

Affirmative action**s** by the landlord in support of the tenant businesses are required. I’ve said it before and I’ll say it again, merely slapping a coat of paint on the walls and doing necessary structural repairs is not enough. Building-to-suite in support of a specific “kind of commercial enterprise” perhaps along with other incentives are required to demonstrate a nexus between the EB-5 funds and activities and the third party jobs for them to count in EB-5. Building-to-suite may be for a specific known tenant or may be for an unknown tenant but a specific “kind of commercial enterprise” known to be lacking in the area and for which the Regional Center has sought and received the green-light from USCIS to try to attract, i.e., *within the scope of the Regional Center*.

Remember folks that the Regional Center had a hand in defining its own scope. They put forth business plans and economic analyses in support of their Proposals and/or Applications when they sought Designation and perhaps expanded their scope through subsequent amendments. It is either duplicitous or extremely naïve for them to come back later and say they did not know what they were authorized for, and what was expected of them, it was in their initial request and any subsequent amendments; and lastly, it was spelled out in their Designation Letters.

That’s my two-cents, for now.

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