USCIS Clarifies Key Aspects of EB-5 Program

By Stephen Yale-Loehr*

The U.S. Citizenship and Immigration Services (USCIS) recently issued two memos concerning the fifth employment-based preference (EB-5) immigrant investor program. One memo, issued June 12, 2009, responds to recent EB-5 recommendations by the USCIS ombudsman.[1] The second and more important memo, issued June 17, 2009, clarifies three key components of the EB-5 program.[2] This article: (1) summarizes both memos; (2) provides practice pointers for attorneys, investors, and regional centers; and (3) discusses other EB-5 issues that the agency still needs to address.

1. EB-5 Overview

As background, Congress created the EB-5 category in 1990 for immigrants seeking to enter the United States to engage in a commercial enterprise that will benefit the U.S. economy and create at least 10 full-time jobs.[3] The basic amount required to invest is $1 million, although that amount is lowered to $500,000 if the investment is made in a targeted employment area (TEA).[4] Of the approximately 10,000 EB-5 green card numbers available each year, 3,000 are reserved for entrepreneurs who invest in TEAs.[5] A separate allocation of 3,000 visas exists annually for EB-5 investors who immigrate through a regional center.

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[1] Memorandum from Michael Aytes, Acting USCIS Deputy Director, to Richard Flowers, Acting USCIS Ombudsman, *Response to Recommendation 40, Employment Creation Immigrant Visa (EB-5) Program Recommendations* (June 12, 2009), *at* http://www.dhs.gov/xlibrary/assets/uscis_response_cisomb_rec_40.pdf [hereinafter June 12 memo].

[2] Memorandum from Donald Neufeld, Acting USCIS Associate Director, Domestic Operations, to all USCIS offices, File No. HQDOMO 70/6.1.8 AD09-04, *EB-5 Alien Entrepreneurs - Job Creation and Full-Time Positions (AFM Update AD 09-04)* (June 17, 2009), *at* http://www.uscis.gov/files/nativedocuments/eb5_17jun09.pdf.

[3] INA § 203(b)(5), 8 U.S.C. § 1153(b)(5). For a detailed treatment of the EB-5 immigrant investor category, see 3 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration Law and Procedure § 39.07 (rev. ed. 2009).

[4] INA § 203(b)(5)(C)(ii), 8 U.S.C. § 1153(b)(5)(C)(ii).

[5] INA § 203(b)(5)(B)(i), 8 U.S.C. § 1153(b)(5)(B)(i).

Historically, only about 1,000 people a year have immigrated to the United States each year as EB-5 investors.[6] That number has started to increase, however, with the proliferation of EB-5 regional centers. There are nearly 50 approved EB-5 regional centers, with another 40 or so regional center applications pending. The USCIS estimates that over 90 percent of EB-5 immigrants invest in regional centers rather than create their own companies. Regional centers are important vehicles for large-scale investment of capital for commercial economic development and job creation. Many regional centers are located in economically distressed and rural areas, and many are established in conjunction with state and local economic development agencies.[7]

With the recent growth of the EB-5 program, the USCIS has faced more and more questions about key ambiguities in its EB-5 regulations. The June 17 and June 12 memos attempt to answer some of those questions.

2. The June 17 EB-5 Memo

The June 17 memo, issued by Donald Neufeld, Acting USCIS Associate Director for Domestic Operations, technically modifies the agency's Adjudicator's Field Manual (AFM).[8] The memo addresses three key issues in the EB-5 program: (1) when jobs must be created; (2) how to document proof of job creation in I-829 petitions; and (3) what constitutes a full-time job for EB-5 purposes.

A. When EB-5 Jobs Must Be Created

The June 17 memo assumes that jobs have to be created. Thus, all initial I-526 petitions, including those filed through EB-5 regional centers, must include a business plan showing that jobs will be created within a certain period of time.[9] This is true even for I-526 petitions that will rely on indirect job creation.[10]

When the jobs must be created, however, has been ambiguous. The USCIS has interpreted the statute to generally require proof of job creation by the time the investor files his or her I-829

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[6] *See, e.g.,* Office of Immigration Statistics, U.S. Dep't of Homeland Security, 2007 Yearbook of Immigration Statistics 20 (2008) (Table 6), *at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/ois_2007_yearbook.pdf (last visited June 21, 2009).

[7] A chart of active EB-5 regional centers is at: http://www.millermayer.com/LinkClick.aspx?fileticket=dE%2fgrYpeBOM%3d&tabid=126&mid=863.

[8] The AFM is at http://www.uscis.gov/propub/ProPubVAP.jsp?dockey=724ce55f1a60168e48ce159d286150e2. Since the June 17 memo updates the EB-5 sections of the AFM, this article cites to the AFM rather than the memo.

[9] AFM § 22.4(c)(4)(D)(ii)(a).

[10] *Id*.

petition, or within a reasonable time thereafter.[11] But an investor with an approved I-526 petition must still go through consular processing or adjustment of status before they will become a conditional resident and the two-year clock for filing the I-829 petition begins. That time varies from investor to investor.

The June 17 memo asserts that the average processing time for consular processing or adjustment of status is about six months.[12] The memo continues:

> Accordingly, in order to best approximate the two-year period of conditional residence, the two-year period described in 8 C.F.R. § 204.6(j)(4)(i)(B) will be deemed to commence six months after the adjudication of Form I-526. USCIS officers should ensure that the business plan filed along with Form I-526 reasonably demonstrates that the requisite number of jobs will be created by the alien's investment by the end of the two-year period that commences six months after the adjudication of the petition.[13]

Effectively, this means that all I-526 petitions must show that the requisite number of jobs will be created within 2.5 years.

The June 17 memo fails to provide guidance on how detailed a business plan must be. In 1998 the Administrative Appeals Office (AAO) set forth EB-5 business plan requirements in *Matter of Ho*.[14] According to that decision, as part of an I-526 petition an EB-5 investor must submit a comprehensive business plan showing the need for at least 10 qualifying employees, and when the employees will be hired. The plan should include a description of the business; the business' objectives; a market analysis including names of competing businesses and their relative strengths and weaknesses; a comparison of the competition's products and pricing structures; a description of the target market and prospective customers; a description of any manufacturing or production processes, materials required and supply sources; details of any contracts executed; marketing strategy including pricing, advertising, and servicing; organizational structure; and sales, cost and income projections and details of the bases therefore. In addition, specifically with respect to employment, the business plan must set forth the company's personnel experience, staffing requirements, job descriptions for all positions, and a timetable for hiring.[15] That decision arose in the context of an individual entrepreneur setting up his own company, however, not an EB-5 regional center case.

The June 17 memo acknowledges that "special considerations" are necessary for I-526 petitions filed through regional centers that wholly or partly rely on indirect job creation.[16] Such petitions may use reasonable methodologies to establish the number of jobs that may be created.[17] Some

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[11] 8 C.F.R. § 216.6(a)(4)(iv).
[12] AFM § 22.4(c)(4)(D)(ii)(a).
[13] *Id*.
[14] Matter of Ho, 22 I. & N. Dec. 206, 19 Immigr. Rep. B2-99 (Assoc. Comm'r, Examinations 1998).
[15] *Id*.
[16] AFM § 22.4(c)(4)(D)(ii)(b)(i).
[17] *Id*.

of those methodologies, however, may not expressly state when the jobs will be created. In such circumstances, the memo instructs adjudicators to "explore whether there are reasonable and/or accepted temporal assumptions that can be attributed to the particular economic model and consider such assumptions in determining compliance with the two-year requirement."[18] The memo offers the following example from a handbook for the Regional Input-Output Modeling System (RIMS II), an economic model commonly used to show indirect job creation:

> RIMS II, like all I-O [input-output] models, is a "static equilibrium" model, so impacts calculated with RIMS II have no specific time dimension. However, because the model is based on annual data, it is customary to assume that the impacts occur in 1 year. For many situations, this assumption is reasonable.[19]

The June 17 memo continues that if no reasonable and/or accepted temporal assumptions can be made with respect to a particular economic model, USCIS adjudicators may presume that the jobs will be created within the required period of time, provided that the investor meets certain requirements.[20] Many economic models used to demonstrate indirect job creation rely on certain assumptions or variables to show the requisite job creation. For example, according to the memo:

> [A] model might demonstrate that the requisite jobs will be created if a Regional Center infuses $10 million into a particular industry. Similarly, a model might demonstrate that, using accepted multipliers, the creation of 100 direct jobs will result in a certain number of indirect jobs. Under such circumstances, the I-526 petition should demonstrate that the required infusion of capital or the creation of the direct jobs will occur within two [actually, 2.5] years.[21]

B. Proof of Job Creation Required at the I-829 Stage

The June 17 memo also addresses what kind of evidence an investor must supply at the I-829 stage to prove that the jobs have actually been created. The regulations require an I-829 petition to include evidence that the investor "has created or can be expected to create within a reasonable time ten full-time jobs for qualifying employees."[22] If the jobs have not actually been created when the I-829 petition is filed, the June 17 memo encourages adjudicators to be flexible in determining whether they will be created within a reasonable period of time.[23] The memo elaborates:

> In making the "reasonable time" determination, officers should consider the evidence submitted along with the petition that demonstrates when the jobs are expected to be

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[18] *Id*.
[19] *Id*. *See generally* Bureau of Economic Analysis, U.S. Dep't of Commerce, Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (RIMS II) 8 (3d ed. 1997), *at* http://www.bea.gov/scb/pdf/regional/perinc/meth/rims2.pdf.
[20] AFM § 22.4(c)(4)(D)(ii)(b)(i).
[21] AFM § 22.4(c)(4)(D)(ii)(b)(ii).
[22] 8 C.F.R. § 216.6(a)(4)(iv).
[23] AFM § 25.2(e)(4)(D).

> created, the reasons that the jobs were not created as predicted in Form I-526, the nature of the industry or industries in which the jobs are to be created, and any other evidence submitted by the petitioner.[24]

This test essentially adopts a case-by-case analysis of what constitutes a reasonable period of time. What constitutes a reasonable time in one context may not be deemed reasonable in another context. In close cases, the June 17 memo offers a 51% test: "If after considering the evidence, the officer determines that the jobs are more likely than not going to be created within a reasonable time, Form I-829 should be approved . . . if the petitioner is otherwise eligible to have his or her conditions removed."[25] If, however, the officer determines that the jobs will not be created within a reasonable period of time, the June 17 memo instructs adjudicators to deny the I-829.[26] This means that USCIS adjudicators are not supposed to delay deciding an I-829 petition to give an investor more time to create the necessary number of jobs.

C. "Full-time" Jobs in the EB-5 Context

The June 17 memo also addresses what constitutes a full-time job for EB-5 purposes. Section 203(b)(5) of the Immigration and Nationality Act (INA) requires an investment in a new commercial enterprise to create full-time employment for at least ten qualified employees. A 2002 amendment to the INA further defines full-time EB-5 employment as "employment in a position that requires at least 35 hours or service per week at any time, regardless of who fills the position."[27] The USCIS and the courts have generally interpreted the full-time employment requirement to exclude jobs that are intermittent, temporary, seasonal or transient in nature.[28] For example, the USCIS historically has not counted direct construction jobs for EB-5 purposes because the agency views such jobs as temporary, not permanent. The USCIS has counted, however, the indirect and induced jobs created by direct construction jobs.

The June 17 memo liberalizes the agency's views on construction jobs in the EB-5 context:

> USCIS . . . now interprets that direct and indirect construction jobs that are created by the petitioner's investment and that are expected to last at least 2 years, inclusive of when the petitioner's I-829 is filed, may now count as permanent jobs. Although employment in some industries such as construction or tourism can be intermittent, temporary, seasonal or transient, officers should not exclude jobs simply because they fall into such industries. Rather, the focus of the adjudication should be on whether the position, as

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[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11031(f), 116 Stat. 1758 (2002). *See also* Memorandum from William R. Yates, BCIS Acting Assoc. Dir. for Operations, to all BCIS offices, File No. HQ40/6.1.3, *Amendments Affecting Adjudication of Petitions for Alien Entrepreneur (EB-5)* ¶ 4 (June 10, 2003), *reprinted in* 8 Bender's Immigr. Bull. 1179 (July 1, 2003).
[28] *See, e.g.*, Spencer Enterprises v. United States, 229 F. Supp. 2d 1025, 1039 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

> described in the petition, is continuous full-time employment rather than intermittent, temporary, seasonal or transient. For example, if a petition reasonably describes the need for general laborers in a construction project that is expected to last several years and would require a minimum of 35 hours per week over the course of that project, the positions would meet the full-time employment requirement. However, if, for example, the same project called for electrical workers to provide services during three to four five-week periods over the course of the project, such positions would be properly deemed to be intermittent and not meet the definition of full-time employment.[29]

The memo also clarifies that the key is whether the position lasts for two years, not whether the same person works in that position the entire time:

> Generally, it is the position that is critical to the full-time employment criterion, not the employee. Accordingly, the fact that the position may be filled by more than one employee does not exclude a position from consideration as full-time employment. For example, the positions described above would not be excluded from being considered full-time employment if the general laborers needed to fill the positions varied from day to day or week to week as long as the need for the position remains constant.[30]

The memo elaborates, however, that an employee, not an independent contractor, must fill the position.[31] Moreover, the memo forbids investors from combining multiple part-time positions to create one full time position.[32]

3. The June 12 EB-5 Memo

In March 2009, the USCIS Ombudsman issued a report offering eight recommendations to improve the EB-5 program.[33] On June 12, Michael Aytes, Acting USCIS Deputy Director, authored a memo responding to those recommendations. The memo agreed with some of the Ombudsman's recommendations and stated that others would require legislative action. Three observations about the June 12 memo:

- The Ombudsman recommended that the USCIS issue standard operating procedures (SOPs) to instruct EB-5 adjudicators not to reconsider or re-adjudicate the indirect job creation methodology in regional center EB-5 cases. The USCIS concurred with the intent of this recommendation "to the extent that EB-5 adjudicators should not re-adjudicate the indirect job creation methodology for Regional Center cases absent clear

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[29] AFM § 22.4(c)(4)(D)(ii)(b)(iii).
[30] *Id*.
[31] *Id*.
[32] *Id*.
[33] See USCIS Ombudsman, *Employment Creation Immigrant Visa (EB-5) Program Recommendations* (Mar. 18, 2009), *at* http://www.dhs.gov/xlibrary/assets/CIS_Ombudsman_EB-5_Recommendation_3_18_09.pdf. For a summary and analysis of the EB-5 report, see Carolyn S. Lee,' Nicolai Hinrichsen & Stephen Yale-Loehr, *USCIS Ombudsman to the Rescue: Trying to Save the EB-5 Program*, 14 Bender's Immigr. Bull. 657 (June 1, 2009).

error or evidence of fraud."[34] The memo continued, however, that EB-5 adjudicators will review "I-829 petitions to ensure that all measurable variables and assumptions that underlie the indirect job creation methodology have, in fact, been met."[35] The memo gave the following example:

> For example, an investor may make a proposal to create a shopping center that would be leased to various businesses. At the I-526 stage, the investor may claim that this proposal would result in the hiring of a certain number of employees by the tenant-businesses and that a certain number of indirect jobs would be created as well. USCIS must ensure that the tenant jobs have substantially been filled to support the indirect job count. This is not re-adjudicating the job creation methodology, merely, verification of an assertion previously made during the I-526 stage. In the alternative, if the job creation was based on total expenditure of capital to create the shopping center, USCIS must make sure that the full amount has, in fact, been invested in the job creating enterprise to support the job count.[36]

The USCIS noted that it would develop additional training sessions for its EB-5 adjudicators rather than issue SOPs.

- The June 12 memo acknowledged that its EB-5 regulations need to be updated.[37] The agency offered no timetable for publishing new regulations, however.

- The June 12 memo agreed with the Ombudsman's recommendation to offer faster processing (also known as premium processing), for a fee, to EB-5 investors. However, the memo noted that it "because of the complexity of the issues presented by EB-5 petitions, the agency does not believe that it is possible to provide Premium Processing Service for EB-5 petitions under the current statutory scheme. The agency believes that a longer processing time as well as an increase in the premium processing fee may be necessary before EB-5 petitions will be eligible for Premium Processing Service."[38] Thus, the USCIS punted to Congress on this issue.

4. Practice Pointers

The June 17 memo effectively rules out EB-5 projects that will take longer than 2.5 years to create jobs. Thus, for example, a nuclear power plant project that plans to create thousands of permanent jobs, but not for five years, can't bring in EB-5 investors in the first year. Such investors could come in at year 3, however. That may hinder financing options for projects that need EB-5 investors at the start of a long-term project as seed capital.

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[34] June 12 memo, *supra* note 1, at 2.
[35] *Id*.
[36] *Id*.
[37] *Id*. at 3.
[38] *Id*. (footnote omitted).

The June 17 memo is helpful on the construction jobs issue. The memo allows direct construction jobs to count for EB-5 purposes as long as the position will last for at least two years. Moreover, the memo clarifies that the key is whether the position lasts for two years, not whether the same person works in that position the entire time.

The June 17 memo requires all I-526 petitions to include a business plan, but fails to specify how detailed that business plan must be. *Matter of Ho* sets out the business plan requirements for an individual (e.g., non-regional center) case. Not all of those requirements, however, apply to regional center cases. For example, job descriptions for all positions and a timetable for hiring are not practical in regional center cases. Attorneys will need to see how the USCIS interprets the business plan requirement for regional center cases.

5. Further Clarification Needed

While the June 17 memo addresses some key EB-5 issues, others remain unresolved. For example, regional centers have asked the USCIS to allow regional centers to voluntarily submit documents concerning a new project in an already approved regional center to the EB-5 headquarters staff or the California Service Center for a "pre-approval" review. Allowing regional centers and the USCIS to discuss and resolve key issues in a new project such as economic methodology, timetables, etc. would smooth I-526 processing and provide more certainty for regional centers, the USCIS, and investors. It would also save the USCIS time, so that each adjudicator would not have to review the same methodology and other issues common to the same project. Instead, CSC adjudicators could focus their attention on the individual investor's source of funds. The USCIS has not opined on this suggestion.

The June 17 memo also does not address what will happen if Congress fails to extend the EB-5 regional center program by September 30. For example, the USCIS has not stated whether it will continue to adjudicate I-526 petitions even after a sunset, as long as they are filed before September 30. Doing so would alleviate investors' anxiety about a possible congressional delay in renewing the program.

The June 17 memo also fails to address several ambiguities in TEA determinations. For example, most states update census tracts once a year. Assume that a regional center starts a project in a census tract that is a TEA for the current period but may not be a TEA for the following year. If funding is not be completed until the second year, when the tract may no longer qualify as a TEA, can EB-5 investors who come into the project the second year nevertheless invest $500,000 rather than $1 million? It makes little sense to require investors to invest in the same project at different amounts, based on the sole fortuity of when a state updates its TEA list. The USCIS needs to address this and other technical TEA issues.

Finally, the June 17 memo fails to address several other key EB-5 issues that remain unresolved, including: (1) what constitutes an impermissible guarantee; (2) what issues should be decided at each stage of the EB-5 process, so that previously decided issues won't be raised again; (3) how economic methodologies should apply to EB-5 projects, especially for indirect and induced jobs; (4) whether the USCIS can second-guess TEA determinations made by states; and (5) how "fund of funds" or "portfolio" types of regional centers work in the EB-5 context. In a June 24

conference call with EB-5 stakeholders, the USCIS promised to address these issues in future memos.

Conclusion

The USCIS probably believes that by issuing the June 12 and 17 memos, it has interpreted key aspects of the EB-5 program as liberally as it can under the existing statutory requirements. Any further changes must come from Congress. The Senate Judiciary Committee plans to hold an EB-5 oversight hearing soon. That hearing may prompt legislative action. Indeed, Invest In the USA (IIUSA), an EB-5 trade association, is working with key members of Congress to draft a bill to improve the EB-5 program in a variety of ways. Given the hurdles of getting any immigration-related bill through Congress, however, a general legislative overhaul of the EB-5 program may have to wait to be included with comprehensive immigration reform legislation.

In the meantime, attorneys, investors and regional centers will continue to grapple with the complexities of the existing EB-5 program. Qualifying a person for EB-5 status is one of the most complicated subspecialties in immigration law. A sophisticated knowledge of corporate, securities, tax, investment, and immigration law are all required. The two new USCIS memos clarify some key issues, but many more remain unresolved. Until they are, the EB-5 program will not reach its full potential.