email: michael@usadvisors.org | skype: usadvisors | tel: 239.465.4160

Waffling like a Roadside Diner: The CSC Addresses Creative Job Counting Methodologies

by Brandon Meyer

When I attended the EB-5 Stakeholders Meeting at the California Service Center ("CSC") in March 2010, a Regional Center principal asked a question something along the lines of:

"In the venture capital ("VC") world, out of ten projects, VC firms expect nine to fail and maybe one will be the next Google. Since this is accepted business practice, can I count jobs using this same approach? Meaning, if four of my Regional Center projects fail (which, of course they won't) and project five creates enough excess jobs to satisfy the job creation requirements for the investors in projects one through four, will this work?"

"Likewise, can an investor's money be divided among the five projects or must it all go to one project?"

The answer provided at the March 2010 meeting was an unequivocal "no" to both questions. I

thought this was a reasonable answer. Thinking this to be reasonable and settled EB-5 law, I had a hard time understanding why the Regional Center principal who asked this question was so incredulous about the response. Now I understand why.

Apparently, "creative" job counting methodologies are creeping back into Regional Centers' designation applications. In some instances, Regional Centers believe that their well-meaning and well-intended, but questionable job counting approaches were actually approved by USCIS, when in fact their attorney failed to clearly explain this newly creative approach, which also happened to be missing from the business plan and other materials that were submitted to USCIS. The Regional Center, reasonably believing that USCIS has blessed their reinvention of the wheel, proceeds to circulate marketing materials to whoever is interested in seeing them. In approximately two-three years, the Regional Center hopes to deploy their creative job counting approach when their investors reach the I-829 stage. Unfortunately, having good intentions and engaging in best practices are sometimes mutually exclusive.

Having seen this pattern on a couple of occasions when representing individual investors in their I-526 Regional Center petitions, and having been met with various levels of denial and resistance when I raised this issue with the Regional Center, I decided that I would seek a reiteration of the definitive answer provided in March 2010. The July 28, 2010 CSC Liaison Meeting was my chance. This is where things get interesting…and even less clear.

During the Q&A session of the July 28, 2010 CSC meeting, I asked the following questions:

"Let's assume that I'm a prospective Regional Center investor. I want to invest in a Regional Center with projects 1-5.

"Must my $500,000 be invested in one of these projects, such as Project 1, or can my money be equally divided among Projects 1-5?"

"Consequently, at the I-829 stage, let's say my funds went to Project 1, which fails to create jobs. If Project 2 creates excess jobs, can I utilize jobs created by Project 2 to lift my conditions?"

"What if a Regional Center alluded to such a job counting arrangement in its RC designation without explicitly spelling it out? Is there a safe harbor for the investor?"

I expected to receive three quick "no's" to these questions and that this would be the end of the matter. Instead, I started getting a meandering, waffling response of "well, it depends on whether the different projects are separate or related, subsidiaries, the particulars of the project, yada, yada, yada. This waffling continued for a couple more minutes before it was abruptly cut off under the guise that I was intentionally asking tricky questions that were case-specific, and otherwise trying to trick the CSC into making policy in the field. Thus, it was all my fault and I should feel bad for committing some type of sin! Nothing could be further from the truth. I was merely seeking reiteration of what had been said in the past. Nevertheless, CSC did reveal that these questions were being considered at USCIS headquarters for definitive guidance, the timetable for which was unclear.

Therefore, maybe some type of a more creative approach may be blessed as compliant at some undefined point in the future under certain circumstances that have yet to be determined. So what

does one do in the meantime until this guidance is released, remembering that USCIS spent eight years mulling over regulations to deal with the 800 or so stalled EB-5 cases impacted by the 2002 amendments? After all, life must go on while bureaucrats mull over the fate of the world.

Here are the lessons I believe should be drawn from these experiences.

Bottom line to Regional Centers:

If your project is solid, there is no need to reinvent the wheel and come up with a highly creative approach to job counting. The project will create the requisite jobs. Creativity is good for the art gallery, but it's just inviting problems in the future in the Regional Center context.

Bottom line to attorneys representing Regional Centers:

Creativity is good for the art gallery, but it really isn't helping your Regional Center client in the future. Perhaps you think you're doing your Regional Center client a favor by blessing the creative approach, but if the history of the EB-5 program tells us anything, it's that a "by-the-book" conservative approach wins the race. Don't be afraid that advocating a conservative approach will result in the prospective Regional Center taking its business elsewhere. Telling clients what they want to hear may win the business, but it's not good practice.

Furthermore, creativity and envelope pushing are just exposing Regional Center investors and their attorneys to a potential future of pain and disappointment. The I-829 denial that was used as an example for the June 2010 EB-5 Stakeholders Meeting makes this crystal clear.

Bottom line to attorneys representing individual investors in Regional Centers:

When reviewing a Regional Center's business plan, partnership agreement, escrow agreement, marketing materials, offering memorandum, etc; if something looks wrong, it probably is. Do not be afraid to raise your concerns with the Regional Center. While everybody wants to be on good terms with Regional Centers, you represent the individual investor. The promise of endless case referrals from a Regional Center (which are frequently made, but rarely fulfilled) should not deter the attorney from representing the best interests of the client.

If the Regional Center's explanation is unsatisfactory, you may wish to have a serious discussion with your client (within SEC guidelines, of course) about whether he or she wants to proceed with an investment in that Regional Center. If the Regional Center fails or something else happens that the investor finds unacceptable, you will get sued along with the Regional Center if you failed to raise your concerns with the Regional Center or the client. It's just not worth the risk.

Conclusion:

While USCIS seems to waffle on whether a creative approach might be acceptable and may waffle on the circumstances under which a creative approach might also be acceptable, what is the point in finding out the hard way that a creative approach is not compliant with the EB-5 program? Again, I refer the reader to the I-829 denial featured in the June 2010 EB-5 Stakeholders Meeting. Conservatism may have a bad name on Air America (which went bankrupt and was quickly

forgotten), but sometimes it may be a better approach to EB-5 practice.

I hope that this essay does not come off as too sanctimonious or as the random missives of the naïve and unseasoned. However, nobody benefits from a return to the bad old days of EB-5 practice that characterized the period from 1998 to 2006. Pushing the envelope too far will get us back there faster than any of us can imagine.

Brandon Meyer is an Attorney with International Immigration Services, P.A. in San Diego, CA. He can be reached at Brandon@ezusimm.com and at (239) 261-6777 ext 103.

Tags

EB-5 regional center california service center

Author

Attorney

Brandon Meyer

Firm: International Immigration Services, PA
Practice Areas: Administrative Law, Immigration, Experienced EB-5 Attorney, EB-5 Regional Center Application Submission Provider
Languages spoken: English, Chinese (Mandarin), German
Email: brandon@ezusimm.com

Normal 0 Mr. Meyer oversees the San Diego, California office. Considered to be an exceptional EB-5 lawyer, ... read more »

Add New Comment

Post as ...

Showing 0 comments

Sort by Popular now Subscribe by email Subscribe by RSS

blog comments powered by **DISQUS**

- Home
- |
- FAQ
- |
- Contact Us
- |
- Directory
- |
- EB-5 Media
- |
- Blog
- |
- Seminar
- |
- RSS

EB-5 VISA *Waffling like a Roadside Diner: The CSC Addresses Creative Job Counting Methodologies*