Klasko, Rulon, Stock & Seltzer, LLP
Practice limited to Immigration and Nationality Law
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New Developments in EB-5s

(June 2009 to June 2010)

July 7, 2010

By H. Ronald Klasko

The following are new developments, or clarifications, coming from EB-5 stakeholders meetings and memoranda during the above time period:

Condition Removal

- If a derivative has not had CPR status for at least 21 months when the principal files the I-829, the derivative must file his/her own separate I-829.
- The approval of the I-526 is given deference at the I-829 stage. However, if the underlying facts have materially changed, there is evidence of fraud or misrepresentation or the I-526 decision is determined to be legally deficient, the I-829 cannot be approved.

Troubled Business

- A troubled business must have at least 10 employees.
- A regional center can count indirect jobs saved for purposes of qualifying as a troubled business.
- Troubled business petitions may be expedited.
- All of the jobs identified in the I-526 petition must be saved in order for any investor to be approved.

Jobs

- If the investment and the job creation took place many years ago, an I-526 filed today can qualify.
- Investors may have to go beyond the I-9 to meet their burden of proof that the 10 employees are "qualifying employees".
- The number of indirect jobs quantified through the input/output model analysis will be considered to be full time and qualifying for EB-5 purposes. The issue of full time is therefore only relevant to the analysis of direct jobs.

1800 John F. Kennedy Boulevard, Suite 1700
Philadelphia, PA 19103
Telephone 215.825.8600 Facsimile 215.825.8699
www.klaskolaw.com

317 Madison Avenue, Suite 1518
New York, NY 10017
Telephone 212.796.8840 Facsimile 212.297.1799
www.klaskolaw.com

- If a position will last two years, it doesn't matter that the actual employees will vary from day to day or week to week.

- The business plan filed with the I-526 must reasonably demonstrate that the requisite number of jobs will be created within 2 ½ years after the adjudication of the I-526.

- Direct and indirect construction jobs that are expected to last at least 2 years can count as permanent jobs.

- The requisite employment does not include independent contractors. In addition, multiple part time positions may not be combined to create one full time position.

- At the I-829 stage, the petitioner must show that jobs can be expected to be created within a reasonable time. In making the "reasonable time" determination, officers should consider evidence that demonstrates when the jobs are expected to be created, the reason that the jobs were not created as predicted in the I-526, the nature of the industry in which the jobs are to be created and any other evidence.

TEA

- States cannot designate TEAs that do not meet the statutory definition of TEA.

- Both the new commercial enterprise and the capital investment project must be principally doing business in a TEA.

- The TEA determination must be made at the time of filing each investor's I-526 or at the time of the investment, whichever occurs first. If the investment money is put into escrow, the time to determine TEA is at the time of filing the I-526.

- An attempt to "gerrymander" to create a high unemployment area will not be accepted unless it is accompanied by a state government designation. USCIS has no authority to question or challenge a state high unemployment designation.

RC

- A regional center EB-5 requires a business plan.

- There can be only one G-28 on a regional center EB-5 petition; the regional center and the investor cannot have separate G-28 attorneys.

- If the capital infusion happens pursuant to the business plan, and if the investment scheme "comes to fruition" as described in the business plan, no other proof of job creation is required (the economic data submitted with the I-526 will be accepted for purposes of the I-829).

- All 10,000 of the EB-5 numbers are available to regional center investors.

- The issue of whether indirect job creation outside of the regional center area qualifies is presently an open issue with CIS.

- For purposes of regional centers, if the economic model cannot conclusively state that indirect jobs will be created within 2 ½ years, and if there are "no reasonable and/or accepted temporal assumptions that can be made with respect to a particular economic model", USCIS may presume that the jobs will be created within the required period of time if the required infusion of capital or creation of direct jobs on which the economic model is based will actually occur within 2 ½ years.

- A regional center proposal may include an "exemplar" I-526.

- A regional center can file an amended regional center proposal to eliminate uncertainty as to whether an investment project is materially different from the exemplar investment project that was approved in the regional center proposal. Once approved, this should be given deference and not revisited in the adjudication of individual EB-5 petitions as long as the underlying facts remain unchanged.

Investor/Investment

- In order to qualify for "actively in the process of investing", an investor must meet the promissory note requirements of Matter of Izummi.

- There is no requirement that the investment be made for a specific period of time, such as 5 years. The only requirement is that the funds must be committed until after removal of conditions.

- Third party guarantees do not abrogate the requirement that the investment be "at risk".

- An investor can have a guaranteed redemption at market price – but not at a pre-agreed price.

- If the investor provides evidence that the invested funds reflected personal funds of the investor, invested funds coming from the bank account of the investor's business may qualify if the other shareholders confirm that these were the personal funds of the investor.

- There is no minimum age for an EB-5 investor.

NCE

- An investment in a business established after 1990 meets the "new commercial enterprise" requirement without any expansion of the business. The expansion test only applies if the business is created before November 29, 1990.

- An investor can make a qualifying investment in a holding company, which then invests in a non-wholly owned subsidiary, which operates and develops the job-creating project.

- The I-526 must be based on one new commercial enterprise – it cannot include unrelated entities.

Material Change

- The business plan and the I-526 may not be materially changed after the petition has been filed. USCIS will not approve requests to delay the filing of the I-829. If there is a material change in the business plan, the investor must file a new I-526. If this happens before conditional residence is granted, the new business plan will be used to evaluate eligibility at the I-829 stage. If it occurs after conditional permanent residence is approved, an I-407 abandonment application must be filed, after which a new adjustment of status application can be filed.

- Dependents have to file I-407 applications at the same time as the principals. In order to readjust, a dependent must still be the spouse or unmarried child under 21 of the EB-5 principal alien.