USCIS Evicts Tenant Occupancy Job Counting from EB-5

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On May 15, 2018, USCIS suddenly sent out to stakeholders the email message below, giving immediate notice that in new projects EB-5 investors will not be credited with jobs of tenants of the job creating enterprise, because "the relationship between the investment and the jobs is too tenuous." While comments are invited, the memo is not stated to be a draft and the Policy Memo has already been changed with immediate but non-retroactive effect.

Which Investors are Blocked by the New Policy?

Through a footnote in the memo, USCIS clarifies that I-526 petitions for investors in projects that already were the subject of approved or pending I-924 exemplar applications by regional centers or I-526 petitions by investors will be adjudicated under prior guidance that gave effect to "tenant occupancy" jobs under limited circumstances that supported causation. So only new projects that had not been the subject of either type of filing yet would be subject to the new policy. This is not ideal, but it reflects a USCIS approach to retroactivity that is respectful of the invested interests of developers and regional centers.

It seems that the following situations would be exempt from the new restrictive policy:

- I-526 petitions already pending
- I-526 petitions that will be filed in the future for projects that already were the subject of one of the following:
    - An approved or pending I-924 exemplar petition
    - An approved or pending I-526 petition by another EB-5 investor

How does a prospective investor confirm that a project claiming credit for tenant occupancy jobs is so "grandfathered" under prior policy? Notices of approval and receipt of I-526 petitions show only a person's name and case number and cannot be independently verified to be connected to a particular project. Notices of receipt of I-924 exemplar petitions only indicate the name of the regional center filing them and do not identify the project involved. I-924 exemplar approval notices in the past were letters that described the project and listed specific documents and date versions that were approved by USCIS, but approvals in the last year or so have identified the project only quite generally and have not listed approved documents. Therefore, investors would need to trust the offering party that the project is the subject of a grandfathering filing.

While a pending I-526 or I-924 filing about a project with no approvals seems to grandfather new investors, the new investor would only benefit from the grandfathering if the project in such

grandfathering petitions gets approved. If a project does not get approved in initial filings, for instance because of some other problem like a redemption clause or a lack of evidence of the full capital stack, it is conceivable that the petitions filed after May 15, 2018 would lose their "grandfathered" ability to be credited with tenant occupancy jobs. This prospect may limit the ability of such projects to attract EB-5 investors to fill remaining spots and could undermine the success of the project and its existing investors.

The primary people who will be negatively affected by this new policy include:

- Developers who had spent significant time and expense organizing a project involving tenant occupancy jobs that has not yet reached the point of causing an I-924 exemplar filing or an I-526 petition by an investor.
- U.S. workers who would have been able to get a job with such a project who will not
- Because of the risks associated with projects only having pending petitions pending on May 15, 2018, existing and future investors in such projects.

What Kinds of Projects (Jobs) are Really Affected?

Any project where the investors needed to claim credit for jobs of tenants. So if the job creating enterprise receiving the EB-5 capital used it to build a commercial building that it made a business of renting out, the investors used to have a chance under certain theories to claim credit for the jobs of workers employed directly and even indirectly by the tenant businesses in the building, but going forward they can't. The revised USCIS Policy Manual, quoted below, is somewhat detailed on what no longer is acceptable and why.

Most projects using EB-5 capital to construct buildings these days plan to create enough jobs for the EB-5 investors through the development expenses and the operational revenues of the core business (such as leasing operations), and they only included tenant occupancy jobs in the economic analysis for further "cushion" in case the other jobs did not pan out as planned. Those projects could just refrain from counting the tenant jobs and still qualify the investors even if not "grandfathered" under the rules above.

It seems still possible for a business plan to include financing by the New Commercial Enterprise (NCE) to a tenant business that will occupy space in the primary job creating enterprise (JCE) (the property developer). If EB-5 capital is loaned to or invested in the tenant to renovate its space or provide startup capital, then the tenant business is another direct JCE, and the fact that it is also a tenant of the primary JCE does not seem to justify not letting the EB-5 investors in the NCE count the jobs of that business. It is not clear what USCIS is referring to in the revised Policy Manual's reference to the prior policy crediting investors whose NCEs "map a specific amount of direct, imputed, or subsidized investment to new jobs" in tenant businesses. I suppose this may refer to the developer/landlord itself paying for the expenses of building out the space to fit a particular tenant, and maybe now this is not enough without specific financing from the

NCE to the tenant. The policy seems to make it much harder for investors to claim in their I-526 petition credit for tenant jobs when the nature and identity of the tenant is not yet even known.

What Might Be Next?

USCIS seems to be looking for ways to tighten the EB-5 program, including proposed regulations requiring more investment and narrowing the areas in which the lower investment can be used, and recent adjudications challenging offerings that arguably offer only "debt arrangements" with investors. This step might be part of a larger evolution, similar to what happened in the late 1990s resulting in *Matter of Izummi* and other precedent decisions restricting the program, or maybe not. USCIS already had tried to stop the aggressive crediting of tenant occupancy jobs in 2012 and is now just backtracking on the exceptions it had recognized in that process. Next steps might include limiting the extent that investors claim credit for the job creation caused by the injection of other capital than EB-5 investment into the JCE, or narrowing the economic methodologies it finds reasonable to count indirect jobs including construction impacts-- both of which have been the topics of criticism by some congressional representatives and commentators. USCIS might start announcing other restrictive interpretations, but at least this time, unlike the late 1990s or even 2012, the agency has taken care to protect vested interests of stakeholders in the policies under which projects have been developed.

References and Texts

Here is the full USCIS Policy Alert found at https://www.uscis.gov/policymanual/Updates/20180515-EB5TenantOccupancyMethodology.pdf:

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Policy Alert

SUBJECT: Rescission of Guidance Regarding Tenant-Occupancy Methodology

Purpose

U.S. Citizenship and Immigration Services (USCIS) is revising policy guidance in the USCIS Policy Manual to reflect that, as of May 15, 2018, USCIS no longer considers tenant occupancy to be a reasonable methodology to support economically or statistically valid forecasting tools.

Background

Foreign nationals may seek an immigrant visa under the regional center program to comply with the job creation requirement under section 203(b)(5) of the Immigration and Nationality

Act (INA) by establishing "reasonable methodologies for determining the number of jobs created by the program, including such jobs which are estimated to have been created indirectly…" USCIS has determined that tenant-occupancy methodologies result in a connection or nexus between the investment and jobs that is too tenuous. Therefore, USCIS no longer considers this methodology to be reasonable or a valid forecasting tool under the regulations.

USCIS will continue to give deference to Form I-526 and Form I-829 petitions directly related to previously approved projects, absent material change, fraud or misrepresentation, or legal deficiency of the prior determination.[1] Except for cases involving deference, this update is controlling and supersedes any prior guidance on this topic.

1 Specifically, petitions directly related to projects included in pending or approved applications or petitions at the time of the policy change will be adjudicated under prior guidance. See USCIS Policy Manual, Volume 6, Immigrants, Part G, Investors, Chapter 6, Deference [6 USCIS-PM G.6].

Here is the revised Policy Manual language at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartG-Chapter2.html#S-D:

6. Rescission of Guidance on Tenant Occupancy Methodology

As of May 15, 2018, USCIS rescinded its prior guidance on tenant occupancy methodology. Previously, on December 20, 2012, USCIS had issued policy guidance defining the criteria to be used in the adjudication of applications and petitions relying on tenant occupancy to establish indirect jobs. See Operational Guidance for EB-5 Cases Involving Tenant-Occupancy, GM-602-0001, issued December 20, 2012. In November 2016, USCIS published consolidated policy guidance on immigrant investors in this Policy Manual, including guidance on the tenant occupancy methodology. That guidance provided that investors could (1) map a specific amount of direct, imputed, or subsidized investment to new jobs, or (2) use a facilitation-based approach to demonstrate the project would remove a significant market-based constraint.

The first method requires mapping a specific amount of direct, imputed, or subsidized investment to new jobs such that there is an equity or direct financial connection between the EB-5 capital investment and the employees of prospective tenants. In practice, however, the construction of standard office or retail space alone does not lead to a sufficient connection for this type of mapping such that tenant jobs can be credited to the new commercial enterprise. The existence of numerous other factors, such as the identity of future tenants and demand for that type of business, makes it difficult to relate individual jobs to a specific space.

The second method looks at whether the investment removes a significant market-based constraint, referred to in the 2012 guidance as the "facilitation based approach." In providing this approach as an option, USCIS explicitly allowed applicants and petitioners to avoid having to establish an equity or direct financial connection between the EB-5 capital investment and the employees of prospective tenants. As of May 15, 2018,

however, USCIS determined that that allowance was ill-advised, because a direct financial connection between the EB-5 capital investment and the job creation is necessary to determine a sufficient nexus between the two. Reliance on a showing of constraint on supply or excess of demand by itself does not establish a causal link between specific space and a net new labor demand such that it would overcome the lack of a sufficient nexus.

Moreover, allowing applicants and petitioners to use prospective tenant jobs as direct inputs into regional growth models to generate the number of indirect and induced jobs that result from the credited tenant jobs leads to a more attenuated and less verifiable connection to the investment. There is also no reasonable test to confirm that jobs claimed through either tenant-occupancy methodology are new rather than relocated jobs such that they should qualify as direct inputs in the first place.

In sum, tenant-occupancy methodologies described in the 2012 Operational Guidance and previously incorporated into the Policy Manual result in a connection or nexus between the investment and jobs that is too tenuous [87] and thus are no longer considered reasonable methodologies or valid forecasting tools under the regulations. [88]

87.

See, for example, *Matter of Izummi*, 22 I&N Dec. 169, 179 (Assoc. Comm'r 1998) (holding that the full amount of the money must be made available to the business(es) most closely responsible for creating the employment on which the petition is based).

88.

See 8 CFR 204.6(j)(4)(iii) and (m)(3).