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CREATING JOBS THROUGH EB-5 INVESTMENT

# R.I.P.—Tenant Occupancy Jobs?

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On May 15, 2018, the USCIS issued a surprise announcement that it was updating the EB-5 Policy Manual to take the use of tenant occupancy jobs for EB-5 projects completely "off the table" going forward. To many in the industry, the announcement was surprising because many of us did not think tenant occupancy jobs were even an issue these days. While there have been industry efforts to "settle the issue" in favor of being allowed to count tenant occupancy jobs in the various EB-5 legislative reform proposals, there had been few, if any, substantive discussions at stakeholder engagements or meetings about this issue. There are other matters of far greater concern to the industry, including guidance on the re-deployment of EB-5 investor funds in an age of painfully slow case adjudications and VISA retrogression.

In fact, many in the industry I have talked to since the May 15th Policy Manual change have indicated that it has been quite a while since tenant occupancy jobs have been a serious consideration for any project. At EPR, we have not even had a serious discussion with a project about using tenant-occupancy jobs for about five years—or shortly after the USCIS issued its December 2012 USCIS guidance memo on tenant-occupancy jobs. In our experience, most project developers have over time come to the conclusion that trying to use tenant-occupancy jobs is not worth the uncertainties associated with either receiving a USCIS approval or waiting through what was likely to be a much more lengthy USCIS case review—even if the project felt it had a winnable tenant occupancy job argument. Our experience is that trying to use tenant-occupancy jobs for a case filing nearly always results in a Request for Evidence (or a RFE). Adjudications are already way too long, so why take the risk of giving a case officer even more fodder to ask questions about? Why delay the approval of an investor petition or exemplar filing by asking for something that anyway seemed nearly impossible to obtain?

A little history on the whole issue—at least as I remember it—may be instructive to understanding where we are as of May 2018. I recall back in the early-to-mid-2000s, when the industry was strongly advocating for the USCIS to allow tenant-occupancy jobs, the EB-5 program was very different than it is today. Back then, there were not nearly as many players in the industry and the norm in job impact studies was to estimate EB-5 program job impacts by using estimates of what today are known as economically direct jobs. EB-5 funds back in those earlier times also tended to comprise a higher percentage of the project's overall capital stack. As a result, there was a lot higher level of tension between the job counts estimated by economists and the need for projects to have the highest defensible job counts possible in order to help projects raise enough EB-5 capital to allow a project to go forward.

For tenant occupancy jobs, one typical job estimating procedure back then was to use 3rd party, per square foot data for prospective tenants based on their expected industry profile (such as professional office services, retail stores, and/or restaurants) to help estimate the number of employees that were likely to be located in a project's new or expanded space (which was built with the project's EB-5 capital). In this way, there was a "direct facilitating" connection between the EB-5 investment capital used to construct the new space and the number of new employees at tenant businesses occupying that space—this reasoning went. Therefore, after construction and lease up, it was thought at the time to be reasonable to include the estimated job count of space-occupying tenants as economically direct job inputs into the

project's input-output tool (such RIMS II, IMPLAN, REDYN or others). As such, those tenant jobs were then used to calculate the resulting economically indirect jobs through one of the EB-5 program's "reasonable methodologies."

While this approach resulted in higher, project-accommodating job impact counts, it was always in the "grey area" technically. Some projects even took this approach further—counting as new jobs to the economy (and "approvable" for EB-5 purposes) any jobs associated with tenant re-locations from existing space, even if they were moving in from another location within the area. Sometimes, USCIS case officers disagreed. Lawsuits were filed, adjudicated, and settled. Efforts to allow tenant occupancy jobs by the industry persisted. Some project developers at the time built their business models around being able to use tenant occupancy jobs to raise EB-5 capital.

The fight for tenant occupancy jobs was important because, at that time, many projects were having trouble creating enough EB-5 program-eligible jobs to make using the EB-5 program worthwhile. This was due in part to the fact that USCIS rules generally did not allow projects to count construction activity jobs created by a project. The USCIS considered such construction activity jobs to be temporary or intermittent jobs, and were not considered to be permanent jobs eligible for EB-5 program job benefits.

Fortunately, that USCIS construction job interpretation then changed with the publication of guidance on the construction jobs issue in the two so-called "Neufeld memos" which were released in June 2009 and December 2009. This also was just about the time that the industry was successful in getting the USCIS to relent on the issue of tenant occupancy jobs. I can vividly remember a stakeholder session held in the basement of the U.S. Capitol sometime in the late-Summer or Fall of 2009 (in conjunction with an IIUSA meeting!) when then EB-5 Program Manager Sasha Haskell announced that the USCIS would begin to allow tenant occupancy jobs to be used in EB-5 job impact analyses.

The reaction in the room was a measurably upbeat. The post-Haskell comment led to it becoming standard practice for projects to use tenant occupancy jobs in the industry, particularly with respect to "mixed use" and other similar projects involving the construction of facilities. Although it was argued in some circles that the technical case for using estimated tenant job counts as inputs into job impact models was shaky, the industry broadly accepted the approach. After all, the USCIS had said—about as clearly and unambiguously as it could—that it was OK for projects to use tenant occupancy jobs. That USCIS decision, along with the emerging opportunity to use at least some of the construction activity jobs for a project, in fact seemed to usher in what looking backwards suggests was the "golden age" for using tenant occupancy jobs.

As it turned out, the "golden age" for using tenant occupancy jobs ended up being short-lived. The USCIS backtracking on tenant occupancy jobs began with a blitzkrieg of tenant occupancy RFEs that rained down on the industry back in February 2012—ironically shortly after the USCIS hired a number of new economists "to help" with EB-5 case reviews. To many observers back then, it seemed as though the first thing the "bevy of new USCIS economists" did was to tell EB-5 program managers that they had it all wrong on the tenant occupancy issue. We all remember the language in those RFEs that stated the connection of EB-5 capital invested to construct the new facilities and the tenant jobs was "too attenuated" to be eligible for EB-5 program job benefits. Many projects pushed back with varying degrees

of success. Some projects dropped the idea of using tenant occupancy jobs altogether. Some projects took the issue all of the way to the Decision Board and the courts, and some projects managing to prevail.

As those RFE adjudications were still playing out, the USCIS on December 20, 2012 issued guidance on the tenant occupancy issue. In the guidance memo, the USCIS noted that it was not opposed to counting tenant occupancy jobs "in principal," and it laid out two ways for projects to establish a sufficient nexus between the EB-5 capital invested and the indirect tenant jobs created.[1] The memo said this nexus could be demonstrated in two ways. The first involves a fact set where a project's New Commercial Enterprise ("NCE") would have to "map a specific amount of direct, imputed, or subsidized investment to such new jobs"—which upon translation appears to mean that developers/landlords will need to provide some sort of direct financing support to tenants. The most obvious ways to accomplish that link would be for developers to agree to own the tenant businesses outright and/or were open to undertaking joint ventures with their tenants. The second way to establish nexus was to demonstrate "facilitation-based approach," where the EB-5 investment capital contributed to the removal of a "market-based constraint." The removal of that constraint would also need to demonstrably "result in a specified prospective number of tenant jobs that will locate in" that newly constructed space. In other words, if a project could demonstrate that the constructed space was the missing catalyst to the creation of jobs at its tenant's businesses AND the project could reasonably estimate the number of new jobs that would be created by the tenant (or tenants), the EB-5 project might have a winnable case. This December 2012 guidance was clearly a "tightening of the rules," and appeared to be intended to significantly limit the use of tenant occupancy jobs for EB-5 projects from December 2012 going forward.

In our view, the requirements laid out in the December 20, 2012 tenant occupancy guidance memo made it difficult—if not nearly impossible—to try to bring tenant occupancy jobs into a project's "10 jobs per EB-5 investor" math. The two choices were challenging to demonstrate. The most straight-forward ways to satisfy the USCIS' requirements obligate petitioners/applicants to either enter unusual business relationships. Those prospective, unusual relationships significantly, and many times adversely, impacted the marketability of the tenant occupied space and/or involved onerous administrative documentation requirements. Both of those straight-forward ways also likely served to reduce the rate of return to capital for those projects. Surprisingly little information on this issue was subsequently provided by the USICS to the industry from mid-2013 through May 2018, outside of any interactions related to legislative attempts to reform the EB-5 program which included language intended to settle this issue in the affirmative.

I personally have mixed feelings about the announced change to the Policy Manual. Technically speaking, using tenant-occupancy jobs has always been "on the edge," if you speak to experts in the regional economics discipline with respect to the proper use of input-output analysis tools. So in that respect, it is probably better to say good-bye to tenant occupancy jobs if we as an industry want to make sure that our "U.S. jobs program" counts the new jobs we say the EB-5 program creates in the most accurate terms.

On the other side, the EB-5 industry is a big industry. Even though there may not be all that many program participants out there still using tenant-occupancy jobs as part of business model, this could disadvantage

[1] At the time, the USCIS appeared to be using the immigration definition of "indirect jobs."

a significant number of industry participants who got into this business relying on these prior policies made clearly permissible by past USCIS communications. In that respect, the May 15th announcement seems unfair, and raises the obvious question "Why now...?" Furthermore, the policy change was done and announced in a way which was not all that collaborative. In fact, it had the feel of a "*fait a compli*"...while your comments were invited over the next two weeks, any comments received will very likely be ignored since the policy change already went into effect as of May 15th.

This frustratingly inconsistent record of the evolution of USCIS adjudication policy on the tenant occupancy jobs issue is unfortunately the norm for our industry—rather than being the exception. At its core, it reflects the absence of a cogent set of detailed EB-5 program regulations that should have been developed years ago and available from the beginning of the program. Policy changes (including this one!) should have been made over time by established administrative procedures. Instead, the industry has had to rely on the history of case adjudications, guidance memorandums, and verbal and written information provided at stakeholder engagements by USCIS program personnel which always seem to be changing. Perhaps we should take some comfort in the fact that it could have been worse. The policy change could have been made retroactive, following the legislative approach that has contributed to the now 5-year EB-5 program reform stalemate. Even though a retroactive change would have raised obvious procedural and fairness issues, I guess we all should in fact be thankful for small favors.