

Notes from the 03/16/2010 EB-5 Forum at the USCIS California Service Center in Laguna Niguel, CA

Participants

Attendees included lawyers (apparently the majority), representatives of current and potential regional centers from around the county, and other stakeholders including a few potential investors. The event was hosted by Chris Robinson (the CSC Community Engagement Officer) and Christina Poulos (CSC Director), but Q&A was largely handled by “the panel” including:

- Blake Goto: CSC Division III Supervisor Immigration Services Officer (in charge of the EB-5 team)
- Lynn Nguyen-Ho: CSC Division III Assistant Center Director
- Sheila Fisher: CSC Chief Service Center Counsel
- Alexandra “Sasha” Haskell: SCOPS/Business Employment Services Team EB-5 Portfolio Manager (the representative from USCIS headquarters)

Updates

The forum began with a few updates from Lynn and Sasha. Of particular interest:

- The regional center application processing time is currently four months.
- The guidelines for expedite requests are the same for EB-5 related cases and all other cases; there is no special treatment for EB-5 cases. Specifically, USCIS does not require use of escrow agreements and does not consider escrow issues as a basis for expediting an application.
- There has been some reorganization at USCIS headquarters. The Business Employment Services Team under Service Center Operations is in charge of EB-5 issues (under Barbara Velarde with Robert Krushka moving to a different area), and policy questions and public meeting requests and the questions no one wanted to answer at the forum can be directed through the newly-created Office of Public Engagement. Headquarters are “actively working” on a “Regional Center Form” as well as a “public law rule” and FAQ to be published on the website.

Q & A

The forum was largely devoted to Q&A between the audience and the panel.

One major issue was dealt with at length and not clearly resolved was the question of the “causation” interpretation of job creation, where one must be able to draw a line between the investment and the job creation and show “which investor’s investment created which job.” Participants argued for allowing a venture capital model in the RC context, such that investment could be pooled and diversified among several projects and total job creation credited to all investors (i.e. 5 investors pool \$5 million to fund 5 projects, of which one project succeeds and creates 60 jobs, which are divided among the investors



regardless of whose \$1 million funded the project that happened to succeed). Sasha went on record as saying “the agency is not opposed to the venture capital arrangement, but no guarantees until we see it on paper,” but it was not entirely clear whether the panel understood quite what was being proposed and there were strong reservations expressed, especially by Blake. Some points emphasized by the panel:

- a. It must be shown that all of the investors’ money was used in connection with job creation. Blake and Sasha apparently interpret “used” as meaning directly contributing to the job creation, though they showed willingness to waver on this point, but they emphasized that at very least they need to see that the capital was “used” as in “not kept in reserve.” The flow of capital must also be possible to trace and present transparently.
- b. Complex models for investment structure and job creation are allowable, but must have been clearly presented up front in the economic analysis and the “road map” set out by the I-526 or Regional Center business plan. (Sasha)
- c. A qualifying investment must be in a “new commercial enterprise” *singular*, and a “diversified” investment cannot involve unrelated entities. (Blake)
- d. A venture capital model might be possible in a regional center context only, not for what Sasha terms “stand-alone filing” (non-Regional Center).

Other highlights from responses provided by the panel:

1. As expressed in previous forums, the burden is on the petitioner to demonstrate that an area qualified as a TEA at the time of investment.
2. The possibility of premium processing for EB-5 is under review but apparently not likely to be available any time soon as they are worried about too much demand.
3. The agency is not willing to offer concurrent filing of I-526 and I-485 at this time “as part of a larger strategy.”
4. I-526 petitions can be filed for applicants under the age of 21.
5. USCIS has not had dialogues with or received oversight from SEC related to EB-5 investment offerings.
6. The agency has no official preference between RIMS II and IMPLAN job creation methodology. (According to Sasha, the key point is that the “underlying business plan” should clearly present the inputs into the job creation model.)
7. There is no discussion currently on raising the investment thresholds from \$500,000 and \$1 million.
8. The panel agreed that “five years sounds reasonable” for a minimum term of investment/loan, though the regulations do not specify a time frame but only the principle that funds must be committed until after removal of conditions for all investors.
9. Although 3,000 of the 10,000 EB-5 visa quota is specifically allotted to Regional Center cases, regional center cases are not limited to 3,000.
10. According to Sasha, the annual reports from regional centers are currently “in three boxes” and are of wildly varying content. The agency does not plan to publicly report data collected from



Regional Centers, though in the future there may be an annual report published offering general information and statistics based on the Regional Center reports.

11. Regarding what constitutes a “material change” that would require filing a new I-526:
 - a) There is no clear guidance on this, except a recent (non-precedent) AAO decision not yet published on the website. (Blake)
 - b) The case studies proposed mostly sounded like “material changes” to Sheila (the legal counsel), whose advice was “if in doubt, go with a new I-526.”
 - c) The “alien-centric” regulations do not allow for a “material change” to be reported once by the regional center rather than individually by new I-526 petitions for all the investors affected. (Sasha)

