

HOW TO SUCCESSFULLY PLAN AND FULFILL THE EB-5 JOB CREATION REQUIREMENTS

By Darren Silver

Job creation is a key element to successfully removing conditions on an EB-5 investor's Conditional Permanent Resident status. EB-5 businesses, like any other, are subject to market forces and other factors that can lead to changes in its operations and also in its ability to meet the goals in its business plan in support of EB-5 investors. In situations where an EB-5 project clearly departs from the business plan and evidence provided in support of I-526 petitions, it is important to understand how job creation was presented when the I-526 application was approved and also to evaluate how these changes may impact I-829 petitions given United States Citizenship and Immigration Services' current job creation policy.

MAKING WAVES WITH THE I-526 PROCESS

According to the policy, EB-5 investors must create full-time employment for 10 or more qualified employees, which must be proven at the end of a two-year conditional residency period for the I-829 filing in order to have the conditions on the initial green card removed.

To receive approval on an I-526, USCIS regulations generally require petitioners to include a business plan that proves that jobs will be created within the two-year period of conditional residence. Positions must be filled by "qualified employees," which means they may not be filled by independent contractors or by multiple part-time positions combined to create one full-time position. Full-time is at least 35 hours of service per week and the USCIS interprets direct and indirect construction jobs that are created by the petitioner's investment.

The Service deems employment in industries such as construction, tourism and such to satisfy the definition of "permanent." Instead of the number of employees, USCIS looks at the position in determining the number of full-time positions. Therefore, even where a project experienced a high turnover rate and had multiple employees filling in a position, it does not prevent that position from being considered a "full-time" position – all that needs to be demonstrated is that a particular position remained constant.

USCIS may take into consideration the economic models that rely on certain variables showing job creation and amount of investment when calculating indirect job creation for those who file regional center petitions, in the process of determining whether the required infusion of capital or creation of direct jobs will result in a certain number of indirect jobs. Direct and indirect positions that are created by the petitioner's investment and that are expected to last at least two years may count as permanent jobs at both the I-526 and I-829 stages.

MOVING ON TO THE I-829 PROCESS

At the I-829 stage, USCIS relies on both I-526 and I-829 regulations in determining whether an EB-5 investor has sufficiently proved job creation as set out by the I-829 regulations.

In making the “reasonable time” determination, the Adjudicator’s Field Manual clarifies that officers should consider the evidence submitted along with the I-829 petition regarding when the jobs are expected to be created, reasons why the jobs were not created as previously anticipated by the I-526 petition, the nature of the industry or industries tied to the job creation, and any other evidence the petitioner has to offer. Based on the proof, USCIS may determine that a longer timeframe is needed.

Generally, jobs that will be created within a year of the two-year anniversary of the investor’s conditional residency may be considered to be created within a reasonable time. On the other hand, jobs created three years or more after investor’s conditional residency was granted are not.

At this point, USCIS’ main concern is whether the investor has invested the necessary capital and created the requisite jobs through that investment. For a troubled business scenario, the investor must provide evidence that the commercial enterprise kept at least the same number of existing employees compared to the pre-investment level for the period after his or her admission as a Conditional Permanent Resident.

For regional center investments, the investor may show that the positions were directly or indirectly created by the commercial enterprise. It is not necessary to prove that the jobs still exist at the time of the I-829 petition’s adjudication; rather, USCIS will credit jobs to investors as long as they can show that their investment did in fact create at least 10 full-time jobs for qualifying employees, and that these jobs were intended to be permanent when created.

HOW TO PROVE JOB CREATION

The investor can provide documentation such as payroll records, relevant tax documents, Employment Eligibility Verification to prove job creation. Based on practice, we recommend including quarterly tax returns in order to establish the number of employees, as well as W-2 forms. For regional center investments, evidence of job creation should include an updated economic analysis report showing reasonable methodologies, including multiplier tables, feasibility studies and similar things. It is the investor’s burden to prove that the methodology is reasonable, meaning that he or she must demonstrate that the given inputs are reasonable, and support the numbers with relevant evidence. If, for example, the input has to do with expenditures, such as qualifying construction expenditures, the investor should support the data with receipts, financial records and pro-forma statements. If the input is revenues, relevant evidence might include tax returns, financial records and financial projections.

Frequently, investors have questions as to how to determine their position in queue relative to other investors for the allocation of full-time jobs based on their project. The default rule is that these positions will be allocated according to the date their I-829 petition was filed. However,

project documents could choose an alternative method of allocating the created jobs if they so desire. For example, project documents signed by investors can clarify that jobs will be allocated to investors based on the date they receive their conditional permanent residency or can specify some other event that would dictate job allocation for all investors.

MATERIAL CHANGE IN THE CONTEXT OF I-829 PETITIONS

The concept of “material change” is significant for EB-5 petitions in the sense that the law requires petitioners to establish eligibility at the time of filing and that a petition cannot be approved if, after filing, the immigrant investor becomes eligible under a new set of facts or circumstances. Changes that are considered material that happen after the filing of an immigrant investor petition will result in the investor’s ineligibility if the investor has not obtained Conditional Permanent Resident status.

However, USCIS will not deny an I-829 petition solely on the basis that the investor failed to follow the business plan submitted along with the initial I-526. USCIS permits for investors’ pursuit of other business opportunities within an industry category not previously approved for the regional center.

Quite frequently, as a course of nature of many businesses, material change issues may arise because a project’s development departed from the actual provisions in the original business plan. However, according to the May 30, 2013 EB-5 Adjudications Policy Memorandum, USCIS began to take a more lenient position on the issue of material change, agreeing that “the process of establishing a new business and creating jobs depends on a wide array of variables over which an investor or the creator of a new business may not have any control.” That Memorandum provided an overview of the consequences that changed business plans could have, depending on when the change occurred during the course of the investor’s immigration process. USCIS’ position on material change was affirmed in USCIS Policy Manual Update of November 30, 2016.

For investors who have yet to attain their Conditional Permanent Resident status, if the material changes occurred after filing I-526, then the petition cannot be approved. The only remedy available to investors under these circumstances is to file a new I-526 petition that reflects the changed plans.

For investors who have already obtained their Conditional Permanent Resident status, USCIS takes a different approach. For those investors, as reflected in its 2013 Adjudications Policy Memorandum, and which continues to be valid policy, USCIS has agreed to “no longer deny petitions to remove conditions solely based on failure to adhere to the plan contained in the Form I-526 or to pursue business opportunities within an industry category previously approved for the regional center,” reasoning that it wishes to “prove flexibility to meet the realities of the business world,” and therefore is willing to provide different treatment to those investors already admitted to the U.S. on a conditional basis.

A caveat to this is that the investor must have filed the I-526 in good faith coupled with full intention to adhere to the business plan initially submitted and the I-829 petition will only be approved if the investor can also satisfy all other requirements set out for removal of conditions.

Thus, investors must still prove that they made an “at risk” investment, that the required amount of capital was made available to the NCE or JCE, that they sustained the investment throughout their period of conditional residence, and of course, that their investment has or can be expected to create within a reasonable period of time the requisite number of jobs. Changed circumstances may cause USCIS to take a more in-depth look at all the documentation that have been filed at the I-829 stage.

If business circumstances have changed subsequent to the I-526 filing, USCIS requires petitioners to submit relevant I-526 documents at the I-829 stage, including the initial business plan and economic analysis, so as to determine whether there are material changes that would impact deference. In certain changed circumstance cases, including for example, where the EB-5 project’s nature modified and departed from what was originally described in the initial business plan, or where the investment funds were diverted from the JCE to another entity, USCIS may have to revisit issues previously adjudicated in I-526 petition, including economic analysis underlying the job creation, to see how the multipliers and input variables may have changed, before making a decision on whether investors have met requirements for removal of conditions.

On the other hand, where investors closely follow the original business plan submitted as part of their I-526, USCIS will not revisit certain aspects of that business plan, including issues related to the economic analysis supporting job creation, and will instead rely on the previous decision if the petition claims to have satisfied the business plan.

In some circumstances, investors on I-829 petitions who included an economic analysis using different inputs than those included in the initial economic report submitted with their I-526 petition, can still be approved. Although this would be regarded as a “material change” due to critical changes to the business plan and economic analysis, investors who already have obtained conditional residency may still receive approval of their I-829 petition. They will need to provide an updated business plan as well as an updated economic report to supplement their I-829 petition and these documents should reflect the new inputs and explain specifically why the changes to the business were necessary. Under these circumstances, absent any other factors that would disqualify such investors’ I-829, they may still be able to receive credit for jobs created using their investment funds, as long as there is sufficient, credible evidence to establish the causal relationship between the two.