EB-5 Job Creation

I. Investment Must Result in Creation of 10 New Full-Time Jobs

A. Statutory Requirement

INA §203(b)(5)(ii) requires that a qualifying investment in a new commercial enterprise "create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters)."

What Jobs Count for EB-5 Purposes?

Full-Time Employment – employment in a position that requires **at least 35 hours** of service per week at any time, regardless of who fills the position. INA§203(b)(5)(D), 8 C.F.R. §204.6(e).Contract (1099) employment does not count; must be W-2 (regular payroll) positions. In the case of the Immigrant Investor Pilot Program, "full-time employment" also means employment of a qualifying employee in a position that has been created *indirectly* through revenues generated from increased exports resulting from the Pilot Program that requires a minimum of 35 working hours per week. 8 C.F.R. §204.6(e).

Job-Sharing Arrangements –whereby two or more qualifying employees share a full-time position count as full-time employment, provided the hourly requirement per week is met. Note: Combinations of part-time positions do NOT qualify as job- sharing even if, when combined, such positions meet the hourly requirement per week. 8 C.F.R. §204.6(e).

Employment of a Qualifying Employee – U.S. Citizens, Lawful Permanent Residents, "Other Immigrants" lawfully authorized to work in the U.S. (conditional resident, temporary resident, asylee, refugee, alien remaining in U.S. under suspension of deportation). 8 C.F.R. §204.6(e). Non-immigrants are not qualifying employees, thus are not counted The alien entrepreneur, spouse, sons or daughters are not qualifying employees.

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Note: Other relatives of the alien entrepreneur may be counted if they have the requisite immigrant status and work authorization.

C. "Troubled Business" Exception

1. If the new commercial enterprise is a troubled business, the 10-job requirement does not apply. Instead, the alien entrepreneur must submit evidence that the number of existing employees is being or will be maintained at no less than the pre-investment level for a period of at least two years. 8 C.F.R. §204.6(j)(4)(ii).

2. Definition of "troubled business", 8 C.F.R. §204.6(e): A business that
   - has been in existence for at least two years;
   - has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526; and
   - the loss for such period is at least equal to 20% of the trouble business' net worth prior to such loss.

When Must the Jobs Exist?

The statutory language is prospective (an investor must show that his/her investment "will create" the requisite 10 full-time jobs), thus the jobs do not need to exist at the time of I-526 filing.

II. Proving Job Creation at I-526 stage

A. Where the requisite 10 full-time jobs have already been created at the time of I-526 filing

The I-526 petition must be accompanied by documentation consisting of photocopies of relevant tax records, Forms I-9 or other similar documents for 10 qualifying employees. 8 C.F.R. §204.6(j)(4)(i)(A).

B. Where the requisite jobs have not yet been created

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A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than 10 qualifying employees result, including approximate dates, within the next two years, and when such employees will be hired. 8 C.F.R. §204.6(j)(4)(i)(B).

1. The USCIS precedent decision Matter of Ho, 22 I & N Dec. 206, 19 Immigr. Rprt. B2-99 (Assoc. Comm'r, Examinations 1998), articulates a standard for EB-5 business plans with respect to employment creation:

> According to 8 C.F.R. § 204.6(j)(4)(i)(B), if a petitioner has not already met the employment-creation requirement, he must submit a comprehensive business plan from which it is clear that the business will in fact require 10 qualifying employees within the next two years. To be "comprehensive," a business plan must be sufficiently detailed to permit the Service to draw reasonable inferences about the job-creation potential. Mere conclusory assertions do not enable the Service to determine whether the job-creation projections are any more reliable than hopeful speculation.
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> A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

III. Proving Job Creation at I-829 Stage

A. For regular EB-5

Evidence that the 10 full time positions have been created include payroll records, relevant tax documents (e.g. W-2 forms), and Forms I-9. 8 C.F.R. § 216.6(a)(4)(iv).

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1. Notes on Form I-9 Employment Eligibility Verification

- I-9 forms are important because they verify that an employee is authorized to work in the U.S., which is important because the jobs created by the EB-5 entity must be "for qualifying employees."
- I-9 Forms need to be filled out within three business days of the employment start date. The form used must be the one with the proper revision date. For employees hired on or after November 7, 2007 the I-9 with revision date of 06/05/07 must be used (no previous editions are accepted).
- I-9 Forms should be kept for all employees who work from day one of the investment. I-9 forms that have been lost should be re-executed.
- I-9 Forms must be completed out properly so that the authorizing document(s) is/are clearly indicated. The attorney should ask for the underlying authorizing documents to check that the I-9 information is verifiable. Also, check if all the forms used were appropriate for the date they were filled out.

B. For Regional Center

1. Job creation includes direct and indirect jobs and is based on the Economic Analysis included in the Regional Center Application. An economic impact analysis captures the direct effects of the project as well as the secondary indirect and induced effects. Each time a dollar changes hands for products or services, it increases the measurement of output. The economic definitions of "direct," "indirect" and "induced" employment impact under the IMPLAN input-output model are:

a. Direct effects are the changes in the industries to which a final demand change was made. Direct jobs include more than W-2 jobs. For example if the project is a hotel development, direct jobs include hotel W-2 employees as well as employees of restaurant tenants or gift shop tenants who are non-W-2 employees of a hotel.

b. Indirect effects are the changes in inter-industry purchases as they respond to the new demands of the directly affected industries. In the hotel example, this includes the increased purchases by the hotel and its restaurant/gift shop tenants. Thus, if they buy equipment and supplies, jobs created in the equipment companies and suppliers will be counted as indirect jobs.

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c. Induced effects typically reflect changes in spending from households as income increases or decreases due to changes in production. In the hotel example, this includes the increased purchases by hotel patrons and its tenants' employees spending their paychecks. If they go to Starbucks across the street from the hotel to get coffee, the jobs created in Starbucks are induced jobs.

2. Job Creation Issues Can Be Raised in Regional Center Requests for Evidence

a. New Jobs vs. Job Relocation – Jobs that result from moving a business from site A to site B are not "new" jobs, but already existing jobs that were simply relocated. Relocated jobs do not count as job creation, since job "creation" for EB-5 purposes means the generation of new jobs that did not previously exist.
b. Direct job count – In an economic impact analysis, since the direct job figure is the base for the multiplier used to determine the indirect job count, USCIS wants to know exactly how the direct job figure was arrived at. It wants to see something measurable—statistics that are based not on estimates but on market research showing examples of similar businesses that actually exist.
c. How many of the direct and indirect jobs satisfy the definition of "full time."
d. Permanent vs. Seasonal/Temporary jobs.

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