



# Questions and Answers

## USCIS Quarterly EB-5 Stakeholders Meeting June 30, 2011

### I. Questions and Answers

#### 1. Escrow Accounts

- a. When a Regional Center (RC) uses an escrow account for investors' investments, can the money be held in escrow until the investor's conditional immigrant visa is issued or only until the I-526 is approved?

**Response:** USCIS does not require the use of escrow agreements. However, such agreements are permissible if the terms of the escrow agreement comports with 8 CFR 204.6(j)(2), which requires that the I-526 petition must be accompanied by evidence that the required amount of capital has been placed at risk (actual commitment of the required amount of capital). Acceptable escrow agreements may allow for the withholding of funds in escrow until the investor's EB-5 visa is issued if the agreement is otherwise EB-5 compliant.

- b. Setting up an escrow account is a standard way for RCs to receive investors' funds. Please confirm that for cases which are not affiliated with an RC that putting funds in an escrow account is permissible if all funds are committed to be released to the new commercial enterprise upon the approval of the individual's I-526.

**Response:** USCIS does not require the use of escrow agreements. However, such agreements are permissible if the terms of the escrow agreement comports with 8 CFR 204.6(j)(2), which requires that the I-526 petition must be accompanied by evidence that the required amount of capital has been placed at risk.

#### 2. Timeframe to Examine Lawful Source of Investor Funds

In proving the source of funds, an alien may claim that certain assets were liquidated or sold. USCIS's EB-5 training materials state that "If the assets were acquired recently, ask for evidence of how and when they were obtained." Please explain how an adjudicator will define the word

“recent” in his/her review of the application. How recent is recent? 5 years? 10 years? If an investor bought a house in 2002 and sold it in 2010, will he be asked to provide evidence regarding the source of funds used to buy the house initially? How far back must we go to obtain documentation?

**Response:** The definition of “capital” at 8 CFR 204.6(e) makes clear that assets acquired, directly or indirectly, by unlawful means shall not be considered to be capital under INA 203(b)(5). Likewise, 8 CFR 204.6(j)(3) requires that I-526 petitions must be supported by evidence of the source of the investor’s capital. The 2008 EB-5 training materials referenced in the question do not define the word “recent”. Defining a blanket timeframe for the examination of the lawful source of an investor’s funds is not appropriate. Circumstances may differ from case to case. In some instances the source of the capital is readily apparent based upon the evidence presented, where in other cases the evidence regarding the source of the capital may be more tenuous, requiring supplemental documentation.

### **3. Documentation of Comingled Funds**

Recently, USCIS released materials used to train officers in the adjudication of EB-5 cases. This document well instructed us on how to trace the source of the investment fund. The original text reads: “An alien may show a large amount of capital in an investment or bank account, but be unable to show where it was before the account was opened, look out for new accounts and ask where large amounts of unexplained capital came from.”

The law only requires investors prove that the money they will invest into the EB-5 project was legally obtained. The investor should not be asked to explain the source of all the money in his or her bank account. To our understanding, if the investor’s account contains one million dollars, and the investor is investing \$500,000 in a Targeted Employment Area (TEA), the investor need only explain the source of funds for the \$500,000 investment.

**Response:** The source of comingled funds in an investor’s account may need to be documented in order to demonstrate compliance with 8 CFR 204.6(e) and 8 CFR 204.6(j)(3) in certain circumstances. Oftentimes, the transfer of investment funds involves multiple transactions from different sources. It may not be apparent from the initial record which funds are for the EB-5 investment and which funds are to be used for other purposes. In addition, 8 CFR 204.6(g)(1) requires that the source of all of the EB-5 and non-EB-5 capital in the EB-5 capital investment project must be identified and shown to have been derived from lawful means.

### **4. Uses of Capital**

Some within USCIS seem to think that all EB-5 funds must be used directly to create jobs, almost as if it is put into a trust fund from which only wages can be paid. In reality, capital may very likely more efficiently create more jobs by putting it into capital improvements, equipment etc. or even to pay off old high interest loans or to buy out owners who are standing in the way of more efficient operation. All that should matter is that the invested capital is spent in such a way that the business plan projects enough jobs to satisfy the EB-5 requirements and that ultimately those jobs are in fact created. Is this correct?

**Response:** USCIS will determine whether the funds must be used to directly create jobs based upon the economic model and business plan submitted and approved with the petition. The capital investment must be fully infused into the job creating enterprise most closely responsible for the capital investment activities that will create the jobs. The approved business plan guides the expenditure of these funds which could include purchases of items such as property, inventory, equipment, office supplies, wages, etc. From an economic perspective, these purchases generate further indirect and induced job creation.

## 5. Diversification

Can an EB-5 Investor in a Regional Center divide his money into 2 or more businesses so long as each business satisfies EB-5 requirements? Can he do this in EB-5 Direct?

**Response:** Yes, according to 204.6(e): Commercial enterprise means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

## 6. Evidence of Capital “At Risk” for I-526

In several memos written by attorneys on EB-5 regulations, it is stated that in respect of EB-5 new commercial enterprises, even though the statute requires an EB-5 petitioner to have invested or be in the process of investing the required capital, USCIS effectively requires the entire capital amount to be already invested and at risk in the commercial enterprise at the time the I-526 petition is filed. Please confirm that this is correct. If not, what is the timeframe in which the entire capital amount of \$1,000,000 needs to be invested in the new commercial enterprise after the Form I-526 is filed.

**Response:** 8 CFR 204.6(j)(2) requires that the I-526 petition must be accompanied by evidence that the required amount of capital has been placed at risk, and notes the following:

*Evidence of a mere intent to invest, or prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital.*

This regulatory requirement has been in place since the inception of the EB-5 program. The capital does not have to be fully invested at the time of the filing of the I-526 petition. However, the evidence provided in support of the investor’s I-829 petition must show that the investor has invested or was actively in the process of investing the requisite capital, and that the investment was sustained throughout the period of conditional permanent residence. See INA 216.6(d) and 8 CFR 216.6(c).

## **7. Project Size Requirement**

In a Regional Center is there a project size requirement, or could it be one investor, with one property, leased to a single tenant that would provide multiple jobs. Is there any way this scenario would work for an individual, or would it be necessary to go the RC route since all the jobs would be indirect?

**Response:** There is no project size requirement in a Regional Center application. Without all of the details, USCIS cannot speculate about what may or may not be qualifying. The regulations at 8 CFR 204.6(j)(4) outline the requirements for job creation for regular program investors and Regional Center investors. In short, regular program investors must directly create at least 10 full time positions for qualifying employees, while Regional Center investors must show that at least 10 full time positions for qualifying employees will be created either directly or indirectly.

## **8. Regional Center – Set Up and Ownership by an Alien Investor**

Can the Regional Center be set up and operated by the alien investor?

**Response:** There is nothing that prohibits ownership of a regional center entity by an alien.

## **9. Supporting Documents for a Regional Center Pilot Program I-526 Petition**

The instructions for Form I-526 do not cover the supporting documents required in connection with a regional center pilot program I-526 petition. Can you give us a list of the required supporting documents?

**Response:** The required supporting documents will vary based on the Regional Center application. Upon approval of a Regional Center application, the approval notice will list the documents that should be submitted in support of the I-526 petitions. Additionally, the regulations at 8 CFR 204.6(j) describe the initial evidence which should accompany an I-526 petition. Lastly, please note that USCIS intends to revise the I-526 and I-829 instructions in the near future.

## **10. Crediting Indirect Positions created prior to Regional Center approval**

Can a foreign investor invest in a business which is included in a pending Regional Center petition, and propose taking credit in his I-526 only for direct jobs initially? However, if the Regional Center petition is approved, can he take credit for both direct and indirect/induced jobs when submitting his I-829? For example:

- a \$4million project,
- 30 direct jobs and 10 indirect/induced jobs are projected
- 3 investors invest \$1million each before the Regional Center is approved and one invests \$1million after the Regional Center is approved.

Can the 40 jobs be allocated equally with the I-829s to both the pre-Regional Center approval investors and the post Regional Center approval investor.

**Response:** No investor may file an I-526 petition seeking credit for indirect job creation prior to the approval and designation of the regional center entity that is associated with the capital investment project. I-526 petitions filed prior to the approval of the regional center application can only be credited with qualifying jobs created directly within the investor’s new commercial enterprise at the I-829 petition stage. The determination of whether or not an I-526 petition is a Regional Center-associated petition is determined at filing. If it is a regular petition it is governed by 8 CFR 204.6(j), if it is an RC petition, it is governed by 8 CFR 204.6(j) and (m).

## 11. EB-5 Basic or Direct Petitions

Are the following statements correct with respect to EB-5 Basic or Direct Petitions?

- a. Investors may pool their funds and jointly invest with other EB-5 investors (as with RC petitions), so long as they are “actively involved” e.g., shareholders of a business in which they have voting rights as to management and policy

**Response:** 8 CFR 204.6(g) specifically allows immigrant investors to pool their investments with others seeking EB-5 status. Each investor must invest the statutorily required amount (\$500,000 or \$1 million) and the jobs created by the new commercial enterprise will be allocated among those within the pool seeking lawful permanent residence status.

8 CFR 204.6(j)(5) requires an investor to be “engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation, as opposed to maintaining a purely passive role in regard to the investment...”

- b. Investors may diversify their funds into one or more businesses either directly or through an investment company.

**Response:** The original EB-5 program did not allow for indirect investment through an investment company that relies on the crediting of jobs in businesses that are not wholly owned by the new commercial enterprise. This is due to the fact that job creation can only be credited through the creation or preservation of jobs that are directly within the commercial enterprise in which the EB-5 Investor made his or her investment. Any such diversification of EB-5 investments must occur within the new commercial enterprise but the structure of the new commercial enterprise may consist of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. See 8 CFR 204.6(e) and 8 CFR 204.6(j)(4).

- c. Investors may invest in Targeted Employment Areas.

**Response:** Yes. INA section 203(b)(5)(B) allows for investment within designated Targeted Employment Areas.

- d. Petitions are adjudicated based on the order they are submitted; i.e., RC petitions submitted after EB-5 Basic petitions (I-526s) have been filed are not put ahead of them.

**Response:** Basic I-526 petitions have a processing workflow that is separate from regional center-associated I-526 petitions. However, the target processing time for each workflow is currently the same.

## 12. Documentation for I-829 to Prove Indirect Jobs Using Expenditure Model

What documentation is required at the I-829 stage to prove indirect jobs with an expenditure model? What if some of the foundation facts on which the economic report was based have occurred and others have not?

**Response:** The determination regarding whether the investor has met the job creation requirements will be established by a review of the required initial evidence at 8 CFR 216.6(a)(4) for the Form I-829 petition. Investors must show at the time of the removal of conditions that they performed the activities described in the approved Form I-526 petition, and the economic analysis of the activities must be based upon the associated approved regional center methodology for demonstrating job creation.

An investor's I-829 petition to remove the conditions which was based on such a project within an approved I-526 petition involving the crediting of jobs based on a capital expenditure econometric model needs to be supported by evidence showing that the funds were expended in the job-creating activities outlined within the Form I-526.

The impacts on the ultimate outcome of a given I-829 in the event that some of the foundation facts on which the economic report was based have occurred and others have not are dependent on the specific fact pattern of the case.

## 13. Adjudicator Training – Burden of Proof

Are the newly assigned EB-5 adjudicators trained to understand that the burden of proof in I-526 petitions adjudications, in particular with regard to the source of funds requirement, is no higher than a preponderance of the evidence? Adjudicators of late appear to be analyzing the source of funds issue using a much higher standard. They are issuing Requests For Evidence (RFEs) demanding a penny to penny paper trail for capital sources akin to an *Izummi* “path of funds” analysis – which is only applicable to the tracing of funds from the investor's personal account into the new commercial enterprise. This requirement is not applicable to the source of funds documentation, which often involve transactions, accumulations of salary, etc. that occurred over time many years ago, and in countries where documentation is limited due to local customs. In the past, the supervising officer of the EB-5 unit has stated that in analyzing source of funds, USCIS strives to be reasonable on the basis of evidence that is available. Please confirm that this continues to be true.

**Response:** All USCIS adjudicators are trained to understand the burden of proof based upon the preponderance of evidence standard, to include EB-5 adjudicators. If a petitioner feels that an RFE is issued in gross error, then an inquiry can be made to the EB-5 mailbox requesting a

review of the appropriateness of the RFE. It is helpful to provide a copy of the RFE in such inquiries.

#### **14. Clarification on Amount of Capital needed for TEA**

Can USCIS clarify the amount of capital that an investor must demonstrate for a Targeted Employment Area? For some of my clients that invested through a Regional Center with capital investment of \$500,000, I have received requested from EB-5 adjudicators that demand investor to demonstrate Source of Fund for amounts above the \$500,000 investment.

**Response:** 8 CFR 204.6(j)(3) Capital Obtained through Lawful Means: is concerned with “capital” as opposed to “required capital.” As such the EB-5 petitioner should submit evidence of the lawful source of any capital invested into an EB-5 investment project. In addition, 8 CFR 204.6(g)(1) requires that the source of all of the EB-5 and non-EB-5 capital must be identified and shown to have been derived from lawful means.

#### **15. Credit for All Jobs Saved or Created**

It is our understanding that when EB-5 investor money provides some of the funds for a business, the EB-5 investors get credit for all the jobs saved or created. Is this true?

**Response:** Yes. The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur by more than one investor, provided each petitioning investor has invested or is actively in the process of investing the required amount for the area in which the new commercial enterprise is principally doing business, and provided each individual investment results in the creation of at least 10 full-time positions for qualifying employees. The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur even though there are several owners of the enterprise, including persons who are not seeking classification under section 203(b)(5) of the Act and non-natural persons, both foreign and domestic, provided that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means. See 8 CFR 204.6(g).

#### **16. Maintaining Jobs Created by EB-5 Investment During Period as Conditional Permanent Resident (CPR)**

- a. If jobs are created on an indefinite full-time basis and then lost (such as by downturn of the business) after all EB-5 capital has been plowed into the business, but before the end of CPR status, can they be counted?

**Response:** Jobs created as a result of the EB-5 investment must be maintained through the entire two-year period of conditional permanent residence. INA 216A(d) and 8 CFR 216.6(c)(iv).

- b. If jobs must last to the end of CPR, what is the critical moment: filing of I-829 (which might precede end of two years of CPR by up to 90 days), end of CPR (two years), or approval of I-829?

**Response:** The job created as a result of the EB-5 investment must be maintained through the entire period of conditional residence. The conditional residence ends when the conditions are removed, at the time of approval of the I-829.

## **17. Counting Jobs held by Members of Indian Tribes**

May jobs held by members of Indian tribes in the U.S. count for EB-5 purposes?

**Response:** An investor may be credited with job creation if the incumbent meets the requirements of a qualified employee under INA 203(b)(5)(A)(ii) and 8 CFR 204.6(e), to include members of Indian tribes.

## **18. December 2009 Neufeld Memo**

Status update on USCIS review and response to the comments submitted by EB-5 stakeholders regarding the December 2009 Neufeld memo. Even if all comments and revisions are not yet resolved, whether those that are can be released to the public?

**Response:** USCIS is currently reviewing the December 11, 2009 comments and will post revised guidance for public comment upon conclusion of this review.

## **19. Job Creation – 2 ½ Year Rule**

Does the 2 ½ year rule in the Neufeld Memo regarding when jobs must be created date from the approval of an exemplar I-526 or each individual I-526?

**Response:** The June 17, 2009 memo specifically addresses the timeframe for the crediting of jobs within individual I-526 petitions. However, any exemplar I-526 petition presented within a Form I-924 application must demonstrate that the prospective timelines for the proposed capital investment project must be in keeping with the requirements for individual I-526 petitions in order for a determination that the exemplar filing is EB-5 compliant.

## **20. Economic Analyses**

- a. Objective rules as to how to use RIMS II would remove uncertainty and reduce the costs of Economic Analyses in support of an RC petition. Therefore, is this true:
  - An appropriately applicable area RIMS II Direct Effects Multiplier can be multiplied by the number of direct jobs and the resulting combination of direct, indirect and induced jobs can satisfy the EB-5 requirements if they create 10 total FT jobs.
  - An appropriately applicable area RIMS II Final Demand Multiplier can be multiplied by the number of millions of dollars invested and the resulting combination of direct, indirect and induced jobs can satisfy the EB-5 requirements of 10 FT jobs.



**Response:** The question seems to ask how to use RIMS II multipliers (Type II). If you are using direct job data, which should be fully justified and supported by the business plan, you multiply the number of direct jobs by the direct effects employment multiplier. This yields the total number of direct, indirect, and induced jobs.

Similarly, if you are using a capital expenditure model, you divide the investment amount by \$1,000,000. Next, you multiply the result by the final demand employment multiplier. The result encompasses direct, indirect, and induced jobs.

- b. Where an RC is approved for a State-wide area and uses State-wide RIMS II information and subsequently adds a business which is not a business with State-wide presence, can a supplemental Economic Analysis be submitted that substitutes the RIMS II information which applies to the location of the business without the necessity of doing an entirely new economic analysis.

**Response:** To determine the appropriate geographic area for the multipliers (RIMS or others) one must look to the nature of the industry. Auto manufacturing has wide-reaching impacts, while a local deli has a more restricted impact. Much depends on where the inputs of production are located.

If a regional center seeks to offer a capital investment project in a previously approved industry category in the regional center designation, then any I-526 petitions associated with that project should include a Matter of Ho compliant business plan, supported by an economic analysis that demonstrates the estimated job creation that will be realized through the project. The multipliers used in the economic analysis should be appropriate to the impacts of the project.

## 21. Definition of Direct Jobs in Both EB-5 Basic and RC Program

All economists agree that the following are direct jobs for purposes of EB-5 Program, and they are not indirect or induced, and therefore, they can be multiplied by the Direct Effects Multipliers to get credit for combined direct, indirect, induced jobs. Please confirm this:

- An investor or group of investors invest in a company which then invests in one or more other businesses. The employees hired by the business or businesses which ultimately receives the money from the company are direct jobs.
- An investor or group of investors invest in a building, which leases to qualifying new, expanding or troubled businesses. These tenants' employees are direct jobs.

**Response:** First, it is incorrect to suggest that all economists could agree on anything. In EB-5 we have a special use for multipliers because the goal of the analysis is to show a connection between the investment and the job creation. There are other applications of multipliers that are not confined by these requirements. Generally, the answer to this question lies in the business plan. What is the new commercial enterprise? What is its business?

## **22. Interest Paid on EB-5 Loan**

Is interest paid on an EB-5 loan by non-EB-5 capital part of the total project cost for purposes of an input to the expenditure amount used for calculating indirect/induced jobs. For example, lets say there is a \$100mm construction project financed \$50mm by EB-5 capital and \$50mm by non-EB-5 capital. Of the \$50mm non-EB-5 capital, \$8mm is used to make interest payments on the \$50mm EB-5 capital. Would the total expenditure amount for this project be \$100mm or \$92mm (for purposes of calculating the expenditure input in an economic job creation model)?

**Response:** Paying interest on a loan does not create jobs, therefore, should be removed from the investment amount.

## **23. Direct Jobs and Leased Space**

Where a regional center based EB-5 project involves building a shopping center to be leased to retail tenants, will new jobs created by these tenants be considered “direct” jobs for the purpose of I-829 conditions removal?

**Response:** Again, the business plan contains the answer. What is the business? Building shopping centers or building/leasing/operating shopping centers? Obviously, this is fairly case-specific and would require the details to give a complete opinion.

## **24. Indirect/Inducted Jobs Derived from Construction**

The 12/9/2009 memo clarified that direct construction job must be shown to have been positions lasting at least two years and through the filing of I-829. It would seem that neither of those requirements not apply to indirect and induced jobs arising from construction, but is that true? Is there any temporal element required to count jobs indirectly arising from construction per typical economic methodologies?

**Response:** No, there is no way to determine this information from widely-available models, so it is not possible to split out temporary construction in indirect jobs.

## **25. Property Development Financed by RC**

This question relates to a planned apartment complex to be financed in part by immigrant investors through an EB-5 Regional Center. The immigrant investors will invest in a separate entity that will develop and lease the apartments. The EB-5 RC application will submit an economic report showing expected job creation. Under EB-5 program rules, can the RC application claim, as indirect jobs, those positions at the development/leasing entity associated with the rental payments by occupants of the apartments? Can the application also claim, as indirect jobs, those jobs within the same RC boundaries that result from those same apartment occupants spending money for other goods and services (i.e., other than rent)? Note that the number of such jobs would be estimated, both for the rental payments and for the other expenditures of the apartment occupants, by putting the amount of these expenditures into an input-output model, noting the direct, indirect, and induced jobs the model predicts for those expenditures.

**Response:** This is a very case-specific question. The author should be cautious when attempting to count spending by apartment residents. This is not new spending within the economy like a tourist coming to town. This spending already exists. Moving into a new apartment doesn't generate new rounds of economic activity. There is also little job-creation related to leasing apartments.