U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

December 20, 2012 **GM-602-0001**

Guidance Memorandum

SUBJECT: Operational Guidance for EB-5 Cases Involving Tenant-Occupancy

Purpose

This guidance memorandum (GM) is intended to facilitate adjudication of cases involving issues related to the "tenant-occupancy" methodology for establishing job creation in EB-5 cases. The guidance has been formulated following careful internal deliberation, consultation with sister government agencies, and review of responses to requests for evidence (RFEs) issued in February 2012 to a number of outstanding Regional Center applicants who relied on the tenant-occupancy methodology. This guidance will be applied to pending cases and cases filed on or after the date of this guidance that rely on the tenant-occupancy methodology. This guidance does not rescind or supersede other EB-5 guidance.

Scope

Unless specifically exempted herein, this GM applies to and binds all U.S. Citizenship and Immigration Services (USCIS) employees.

Background

Among the issues raised in the February 2012 RFEs, USCIS sought evidence that the projected jobs attributable to prospective tenants (which would occupy the commercial space created by the EB-5 capital) would represent newly created jobs, and not jobs that the tenant had merely relocated from another location. This determination is necessary to assess whether there is a reasonable causal link between the EB-5 enterprise and the job creation that would allow for the attribution of the tenant jobs to the EB-5 enterprise. These RFEs suggested the types of evidence applicants could submit to make this showing.

Implementation

Prior to issuing the February 2012 RFEs, USCIS determined that the tenant-occupancy methodology can satisfy the EB-5 program requirement of presenting a "reasonable methodology" that is "supported by economically or statistically valid forecasting tools," if the applicant presents in "verifiable detail" information sufficient to establish by a preponderance of the evidence that the tenant jobs have resulted from the EB-5 enterprise (i.e., that the creation of

tenant jobs were facilitated by the EB-5 enterprise, for example through a showing of constraint on the supply of appropriate commercial space or of excess demand for such space).

In regional center cases that rely on tenant occupancy models, as in any other regional center cases, USCIS requires evidence that the claimed jobs result, directly or indirectly, from the economic activity of the EB-5 commercial enterprise. Jobs that are merely re-located rather than created do not count. With respect to indirect job creation, the task for the applicants and petitioners is to project the number of newly created jobs that would not have been created but for the economic activity of the EB-5 commercial enterprise. In making that projection, they are to use economically and statistically valid forecasting tools.

Whether an applicant or petitioner has demonstrated that an EB-5 enterprise caused the creation of indirect tenant jobs will require determinations on a case-by-case basis and will generally require an evaluation of the verifiable detail provided and the overall reasonableness of the methodology as presented. To claim credit for tenant jobs, applicants and petitioners may present evidence backed by reasonable methods that map a specific amount of direct, imputed, or subsidized investment to such new jobs. However, for applicants and petitioners that instead seek to utilize a facilitation-based approach, USCIS will not require an equity or direct financial connection between the EB-5 capital investment and the employees of prospective tenants. Rather, facilitation-based tenant job credit will depend on the extent to which applicants or petitioners can demonstrate that the economic benefits provided by a specific space project will remove a significant market-based constraint. One way applicants and petitioners can make this showing is to indicate how a specific space project will correct market imperfections and generate net new labor demand and income that will result in a specified prospective number of tenant jobs that will locate in that space. In high unemployment areas in which new projects are not likely to significantly displace other income or labor, applicants and petitioners should generally indicate how a specific project will fill an existing investment void in that area to generate new demand for the tenant business. Prospective tenant jobs demonstrated by reasonable methods and supported by verifiable evidence pursuant to the above approaches may be used as direct inputs into appropriate regional growth models to generate the number of indirect and induced jobs that result from the credited tenant jobs.

Where applications for regional centers are approved based on their use of tenant-occupancy projections, the approval notices should contain appropriate language regarding the assumptions underlying the approval, which if not borne out may impact related adjudications at the I-526 or I-829 stages.[1] For example, a Form I-924 with I-526 exemplar may be approved where no specific tenant has been identified to occupy space but where the applicant or petitioner reasonably projects that a restaurant will eventually lease the premises.[2] If, after approval of the I-924, the space is leased to a different type of tenant (i.e., a type of restaurant that yields different expected employment or a non-restaurant), or fails to achieve previously projected

[1] USCIS will still apply the principles outlined in this guidance to Regional Centers that currently have an approval notice that does not include this language, subject to application of established USCIS policy calling for deference to prior decisions.

[2] A specific tenant does not need to be identified in order for the business plan to meet program requirements. However, the type of industry of the prospective tenant should be identified (e.g., a restaurant tenant or a clothing store tenant) to meet the legal requirements set forth in *Matter of Ho* and 8 CFR 204.6(j)(4)(i)(B).

occupancy rates, such a change alone will not generally constitute a material change that triggers the elimination of deference in an actual Form I-526 or negates any possibility of individual investors removing their conditions at the Form I-829 stage.[3] However, while such modified tenancy arrangement(s) may be permissible under EB-5 program rules, they could nevertheless impact the project's ultimate job creation numbers. Therefore, the approval notice should caution that the approved job creation estimates are based on a restaurant occupying that space, and that if no tenant or a different type of tenant eventually occupies the space, the economic impact analysis and ultimate job creation numbers will be revisited in future adjudications that relate to that project.

USCIS will issue separate guidance on crediting jobs in a situation where more than one EB-5 entity may be seeking credit for the identical job position. In the interim, where only one case filed with USCIS has sought credit for a specific job position, that case should be credited with the job, provided that all program requirements have been satisfied.

Adjudication of cases involving tenant-occupancy should proceed based on these principles.

Use

This GM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions or suggestions regarding this GM should be addressed through appropriate channels to the Service Center Operations Directorate.

[3] For example, it is not necessarily a material change if a shopping mall fails to lease one out of 50 retail spaces. By contrast, for example, if the projection was for a single type of tenant to occupy the entire building space and no tenant materializes, that may be a material change.