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Hot Topics in EB-5  
Investor Visas

# EB-5 Hot Topics

- Job Creation Methodology  
Issues for Regional Centers
- Source of Funds Issues



# Tenant Occupancy

- What is TO?
- What's the problem with TO?
- Why is TO important to EB-5 lawyers and their clients?

# Tenant Occupancy

- Sources of Law
- INA, §610(c) (1993)
- 8 CFR 204.6(m)(7)(ii)
- PL 107-273, The 21<sup>st</sup> Century DOJ Appropriations Act of 2002, §§ 11033 and 11037 (2002)

# Tenant Occupancy

- What is TO?
- Methodology that credits EB-5 investors with the job creation of tenant businesses in buildings created with EB-5 capital



# Tenant Occupancy

- What is the problem with TO?
- USCIS accepted it for 20 years
- February 17, 2012 TO Memo changes the policy

# Tenant Occupancy

- USCIS: RCs that claim TO jobs must provide evidence showing “excess demand” for the specific types of tenant businesses, to find a “nexus” between EB-5 capital and job creation. (TO Notice 2/17/2012)

# Tenant Occupancy

- Why is TO important to EB-5 lawyers and their clients?
- USCIS Notice: Our new economists and business analysts will advise adjudicators on crediting jobs based on TO





# Tenant Occupancy

- TO Notice: We do not intend to revisit factual findings
- I-526 and I-829 Petitions will have predictability in connection with “early regional center adjudications.”



# Tenant Occupancy

- Questions about retroactivity to ask RCs (and yourself)
- I-526 approved already based on TO model—will the new policy be applied to the I-829? (Chang v. U.S.)



# Tenant Occupancy

- Some I-526 petitions are approved in project based on TO model—will new policy be applied to later I-526 petitions in same project?

# Tenant Occupancy

- I-526 petitions filed for some or all investors based on TO model are approved in RC application—Will the new policy be applied to them?

# Tenant Occupancy

- I-924 approved for project based on TO model—will the new policy be applied to investors who filed an I-526 based on the I-924 approval?

# New Visitor Spending

- Related to Hotel or Resort Developments
- Job credit based on spending of hotel or resort visitors on rental cars, dining, other expenditures
- VS allowed only where the evidence shows that the EB-5 financed hotel or resort will produce an “increase in visitor arrivals or spending in the area.”



# Acquiring Real Estate

- Real estate acquisition is not, by itself, a job creating activity
- Real estate acquisition may be among the uses of EB-5 capital on a given project, such as development of an apartment complex
- The jobs created by the resulting business operated on the land can be allocated among the EB-5 investors in the project
- June 2, 2012 USCIS Q&A “clarification”



# Source of Funds Issues

- A large proportion of I-526 petitions result in RFEs on this issue
- No matter what the sending country, the most common RFE issue is what was the source of funds to acquire the asset sold or borrowed against?





# Source of Funds Issues

- Foreign business records
- Tax returns of any kind filed by or on behalf of investor within the past 5 years (as applicable)
- Any other evidence relating to the accumulation of capital by the investor
- Judgments of pending civil or criminal actions or in the past 15 years



# Source of Funds Issues

- Employment earnings
- Business income (profit distributions, bonus)
- Investment income
- Loan
- Gift (inheritance or advance on inheritance)



# Source of Funds Issues

- Prove investor has attained a “sufficient level” of income
- Savings and investment account statements
- Account for the investment capital, the administrative fee, and the cost of supporting the investor and household



# Source of Funds Issues

- No tax returns required by investor's jurisdiction
- Use audited financial statements—personal and business
- Bank statements showing deposits over time
- The harder case: Investor has taxable income, but hasn't filed or paid taxes as required
- Consider a loan from a legitimate source
- Source must be fully documented as if it were petitioner



# Source of Funds Issues

- Owner or shareholder of a profitable business
- Low income reported for tax minimization
- Prove the profitability and legitimacy of the company
- A company loan, fully documented with enforceable note, formally voted by the company, may not be a taxable event
- The investor must check with local tax counsel



# Source of Funds Issues

- How will the loan be repaid?
- Liquidation of assets in the home country?
- CIS adjudicators do ask for this evidence

# Source of Funds Issues

- Family gifts
- Document the relationship
- Draft an affidavit of gift
- Prove up the wealth of the donor in the same way as the investor



# Questions?

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