Construction Jobs Count in EB-5 Projects: Can we Count the Jobs with Confidence?

by Mona Shah, Esq. and Yi Song, Esq.

For the more seasoned EB-5 practitioner, memories of when construction jobs could not be counted towards the job creation requirement remain vivid. While it is true that the some construction jobs may now be counted, with the plethora of real estate projects being introduced and managed by Regional Centers (RCs) nationwide, can we really count these jobs with certainty?

It is well known that transparency is necessary for maintaining and stimulating strong and robust economies. The World Bank has ranked[1] the United States fourth (4th) out of 183 countries with respect to the ease of conducting business and fifth (5th) for protecting investors. With billions of dollars being poured into the EB-5 program, are USCIS policies consistent with investor expectations?

The present article focuses on the development and practical application of EB-5 rules pertaining to the job creation requirement for construction jobs. In doing so, the authors have thoroughly examined existing USCIS guidelines, salient issues raised in the Service's RFEs, AAO decisions, and relevant case law.

The Development of EB-5 Law: Construction Jobs

Under current EB-5 law, both direct and indirect construction jobs created as a result of a foreign entrepreneur's investment, which last for at least two (2) years, may now count as permanent jobs. If a construction project is not reasonably expected to last for at least two (2) years, then only the indirect and induced jobs can be counted.

It should be noted that the issue of construction jobs is not directly addressed in the current regulations. Under 8 CFR § 204.6 (g)(1), a foreign investor may invest in a new commercial enterprise "provided each individual investment results in the creation of at least ten full-time positions for qualifying employees." Historically, given the intermittent and seasonal nature of construction jobs, such jobs could not be counted towards fulfilling the job creation requirement. How then, has USCIS reached the conclusion that some construction jobs may now constitute full-time employment?

The Evolution of the EB-5 program: Historical and Financial Considerations

It is important to underscore the fact that the EB-5 investor program also serves as an alternative method of raising investment capital. Given this fact, it is important to consider certain historical and financial conditions that may be used to explain this shift in USCIS policy.

In 2003, the 9th Circuit decision of *Spencer Enterprises, Inc. v. United States*[2] made it extremely difficult to argue that construction jobs should qualify as full-time employment. There, the court held that full-time employment means continuous, permanent employment. As a result, during

this period, EB-5 construction jobs (direct and indirect) could not be included in final job creation numbers.

In the case of *Spencer*, an EB-5 investor, Li-Hui Chang, filed her I-526 petition with the Service on May 4, 1998. (NB: This occurred before the four (4) major EB-5 "precedent decisions"[3] were published). The Service denied Chang's petition on January 27, 1999, which she appealed to the Administrative Appeals Office (AAO). After the AAO upheld the Service's denial, the petitioner then filed an appeal before the Eastern District in California in 2001. The case eventually made its way for review and re-consideration before the 9th Circuit in 2003.

However by 2008, the financial crisis, ignited by the U.S. sub-prime housing market, plunged the world into a great recession. Banks were unwilling to lend and many construction projects were halted mid-way. Since the EB-5 program was established to create jobs though alternative sources of investment capital, as a practical matter, it made very little sense to stifle the growth of the construction industry, which is a large creator of jobs and provider of much needed tax revenues.

Senator John Cornyn (R- TX) voiced this reasonable concern in his December 10, 2008 letter to USCIS. In his letter, the Senator requested USCIS to publish its "views on the job creation requirement as it applies to Regional Centers generally and the construction industry specifically"[4]. It is widely believed that this letter facilitated a positive and favorable change in the Service's views and interpretation of EB-5 job creation rules.

USCIS Loosens Rules Regarding Construction Jobs

On January 16, 2009, under pressure from stakeholders such as regional centers and EB5 Practitioners USCIS released a policy memo directed at construction jobs in response to Senator John Cornyn's question directed to USCIS's opinion about construction job creation where large multi-year EB-5 investment projects were involved. USCIS's present policy that although construction jobs did not count toward the 10 direct (or indirect, in the case of the regional center) jobs that must be created by each investor, indirect job creation (again in the case of a regional center) did not count. This policy or guidance did not make sense. In relevant part, Senator Cornyn's letter stated that: *"Indirect and induced jobs created as a result of construction jobs whether counted or not may be included in the job count. Even when the construction jobs may not be counted towards the job creation requirement, they do have indirect and induced impacts that are eligible to be included in the final job count because they are 'continuous, permanent employment'."*[5]

USCIS' response marked a significant development in job creation for the EB-5 program. Subsequently, on June 17, 2009, the agency issued a Memorandum from Donald Neufeld (i.e. the "Neufeld Memo"), which further addressed the issue of construction jobs[6]. The Neufeld memo stated that construction jobs must be continuous full-time employment, rather than intermittent, temporary, seasonal, or transient. He underscored the point that it is the "position" created, which must be full-time rather than the employee. In addition, Neufeld stated that the employees hired must be qualifying employees[7]. In the context of direct stand-alone programs,

an independent contractor does not meet the requirement for job creation. In addition, multiple part-time positions cannot be combined to qualify as full time employment.

The June 17, 2009 Neufeld Memo further states that:

"Although employment in some industries such as construction or tourism can be intermittent, temporary, seasonal or transient, officers should not exclude jobs simply because they fall into such industries. Rather, the focus of the adjudication should be on whether the position, as described in the petition, is continuous full-time employment rather than intermittent, temporary, seasonal or transient. For example, if a petition reasonably describes the need for **general laborers [Emphasis added]** in a construction project that is expected to last several years and would require a minimum of 35 hours per week over the course of that project, the positions would meet the full-time employment requirement. However, if, for example, the same project called for electrical workers to provide services during three to four five week periods over the course of the project, such positions would be properly deemed to be intermittent and not meet the definition of full-time employment."

USCIS' new position has considerably relaxed the rules relating to job creation for construction projects under the regional center program. By allowing indirect and induced construction jobs as well as direct (at least two (2) years in duration) construction jobs to be counted, RC's have a real potential to attract more investors and hence more investment funds. However, while USCIS is to be commended for the issuance of guidance related to construction jobs, the Service has not clearly delineated the rules for stand-alone versus RC projects. Confusion remains as a result of the mixed use of adjudication standards for regional center programs and for non-regional center programs.

USCIS' Position on Construction Jobs: Recent RFEs and AAO Decisions

Based on recently-issued Requests for Evidence, USCIS has acknowledged that the indirect and induced jobs created by construction projects may be counted towards the total job count, even if the direct construction jobs are intermittent, temporary, seasonal and transient, provided that the EB-5 project is "massive, expansive, and major".

To substantiate an assertion that a project will be "massive, expansive and major", EB-5 investors must submit substantial evidence showing that the scale, location, and level of sophistication required for the project is such that it requires more than 2 years for completion. Examples of such a project include a forty (40) story hotel building in Manhattan and a nuclear power factory.

How does one show that a construction project will take two (2) or more years to be completed? In this regard, USCIS has issued many RFE's requesting detailed explanations and timelines of the various construction phases in RC projects as well as verification of the estimated costs for construction projects. In an effort to ensure compliance with *Matter of Ho*[8], in addition to the explanations mentioned, USCIS has also been requesting independent supporting documentation to corroborate each assertion. These detailed requests clearly state that supporting documents should include the analysis methods used to derive a project's estimated timeline and cost.

USCIS has approved petitions, which include supporting documents in the way of comparable study reports, affidavits of construction professionals (architects etc.) - who can reasonably be considered to be "experts" in their field given their educational and extensive background in various aspects of construction projects - and feasibility studies of similar construction projects in terms of scale, location, and the like, which have taken two (2) or more years to completion. These studies reasonably provide benchmarks against which similar construction projects before the Service may be evaluated. It is also a good idea to submit the staffing requirements for construction projects - i.e. the types of construction workers that will be required and the length of time for which they will be needed.

An AAO decision[9] (dated January 6, 2010, with File No. SRC 08 064 52066) further confirms USCIS' position that construction jobs that are not counted as direct jobs may nevertheless be counted as indirect or induced jobs in the regional center context:

"Shorter term construction jobs less than three years in duration have been determined to be of such a short term in nature as to not be sustained and to decrease and disappear as the initial construction activities wind down to completion. Such shorter term construction jobs in many locations are seasonal at best. Nevertheless, for all capital investment expenditures for the construction phase, all capital-induced "down-stream" support activities and "indirect" jobs impacted and associated with the construction activities such as **suppliers, transportation, engineering, and architectural services, maintenance and repair services, interior design services, manufacturing of components and materials,** etc., may be factored into the calculations for creation of indirect jobs."[10]

The authors believe that USCIS is unlikely to make any further drastic policy changes with respect to its position on construction jobs. Such changes, as occurred in 1998, will undoubtedly open the floodgates of litigation against the Service. Moreover, under the Administrative Procedure Act (APA), an agency decision or finding of fact may be reversed if it is considered "arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence." [11]

Conclusion:

The major cases, memos, and AAO decisions primarily addresses non-regional-center projects. However, today, the vast majority of I-526 petitions are submitted under the regional center program. Moreover, it is widely recognized that some USCIS adjudicators apply non-regional-center construction job rules to regional centers. The sheer magnitude of the EB-5 program calls for more transparent regulations and policies in the EB-5 arena. The EB-5 program has the potential to create even more jobs and alternative sources of investment capital - a "win-win" for all concerned. As a result, comprehensive, consistent, and predictable EB-5 adjudication guidelines are needed more than ever before.

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[1] World Bank and International Finance Corporation in Economy Ranking:http://www.doingbusiness.org/rankings The Ease of Doing Business Index

[2] *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1039 (E.D. Calif. 2001) aff'd 345 F. 3d 683 (9th. Cir. 2003).

[3] *Matter of Soffici*, (A76 472 614 June 30, 1998); *Matter of Izumii*, (A76 426 873 July 13, 1998); *Matter of Ho*, (WAC-98-072-50493 July 31, 1998); and *Matter of Hsiung*, (A76 854 232 July 31, 1998)

[4] Letter to Senator John Cornyn from USCIS offices File No. CO703.2342, Re: *Job Creation Requirement for Immigrant Investor* (January 16, 2009), P.1, Para. 1.

[5] *Id.* P. 1, Para. 4

[6] Memorandum from Donald Neufeld, Acting USCIS Associate Director, Domestic Operations, to all USCIS offices, File No. HQDOMO 70/6.1.8 AD09-04, *EB-5 Alien Entrepreneurs - Job Creation and Full-Time Positions (AFM Update AD 09-04)*(June 17, 2009).

[7] US citizens, LPR's, Asylees and certain EAD holders.

[8] *Matter of Ho*, (WAC-98-072-50493 July 31, 1998).

[9] Office of Administrative Appeals, Filed by Texas Service Center, File No. SRC 08 064 52066 (dated January 6, 2010)

[10] AAO decision dated January 6, 2010, File No. SRC 08 064 52066)

[11] 5 U.S.C. § 706; *McDade v. West*, 223 F. 3d. 1135, 1139 (9th Cir. 2000)

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Mona Shah or Mona Shah as she is more commonly known. Born in the UK, Mona graduated from the University of Northumbria in England in 1990. Mona was admitted as a Solicitor of the Supreme Court of England & Wales in 1993, and was admitted to the New York Bar and the United States Federal Bar in 1997. After moving to New York in 1995, she established her own law firm in New York City in 1997. The firm handles legal matters for clients worldwide. Her firm also has a London affiliate office which allows for the representation of European, Middle-Eastern and South Asian clients. Mona has over 17 years of legal experience, with more than 13 years concentrated in U.S. immigration and family law and litigation. Her firm, Mona Shah and Associates, represents individual, high profile and corporate clients from all over the world. Mona is highly proficient and experienced in EB-5 law and practice, and is the author of a forthcoming book for investors on the EB-5 laws and procedures. She has hands-on experience setting up and establishing EB-5 Regional Centers. Mona was also one of the 4 original founders of New York City Regional Center and the only Immigration Attorney on the team. Mona also founded the New York Immigration Fund, RC; her firm, Mona Shah & Associates, exclusively handled the Times Square Hotel project. Mona Shah & Associates handles the EB-5 Investor petitions for multiple regional centers. Mona has authored and published numerous articles

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