



U.S. Department of Justice
Immigration and Naturalization Service

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Office of the Executive Associate Commissioner

425 I Street, N.W.
Washington, D.C. 20536

JUN -9 2000

The Honorable Patrick Leahy
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

Thank you for your letter dated May 10, 2000, regarding the immigrant investor visa program. In that letter you requested additional information regarding the structuring of an investment project and the survival of such a project if one or more of the petitioning investors is denied immigration benefits. I hope the following information is helpful.

First, with respect to the structuring of an investment project, your letter describes a situation where an entrepreneur would establish a corporation within an broad investment project and then accept financing from investors wishing to obtain immigration benefits pursuant to the immigrant investor visa program. It is important to point out that those persons wishing to obtain immigration benefits must have a hand in the creation of the new commercial enterprise in order to qualify for an immigrant investor visa. The financing of a corporation that has previously been established by another entrepreneur will not qualify an investor for benefits under the current law.

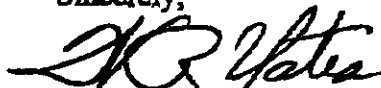
With that clarification, I will address the two issues referenced above. During the April 4 meeting with Vermont officials in Montpelier, I was asked whether the development of a year round resort could lay the foundation for qualifying immigrant investor visa petitions. While neither I nor my staff could state with any certainty whether or not any such petitions would ultimately be approvable, we did discuss the possibility that separate corporations could be developed by the petitioning investors within the resort complex. As an example, one petitioning investor or group of petitioning investors might start up a restaurant on the resort, whereas others might develop a golf course. Provided that these petitioners met all of the requirements under the law, they may qualify for immigrant investor visas.

With respect to your second question, although a petitioner must submit evidence of all sources of capital invested in the new commercial enterprise, whether a particular application will be approved is based on the merits of that petitioner's individual investment. Accordingly, as long as the new commercial enterprise is able to survive without the capital provided by the

accompanying denied petitions, an individual petitioner whose petition is otherwise approvable should not be affected by such denials.

I hope this addresses your questions. As reference, I have enclosed a copy of the notes that were prepared as a summary of our April 4 meeting. Should you wish to discuss this further, please contact me [REDACTED]

Sincerely,



William Yates

Deputy Executive Associate Commissioner
Immigration Services Division
Office of Field Operations

Enclosure

Meeting on Immigrant Investor Visas - REVISED
Montpelier, Vermont
Tuesday, April 4, 2000

INS: Bill Yates, David Dixon, Kathy Lorr, Susan Mathias, Maureen Stanton
Vermont Agency of Commerce and Community Development: Molly Lambert, Secretary;
John Kessler, General Counsel; Denise Beliveau; **Senator Leahy's Staff:** Tim Lynch
(Washington), Kathy Bolduc (Burlington), Fred Kenney (Montpelier); [REDACTED]

Are there factors used in determining whether an employee is a "qualifying employee?"

The term "qualifying employee" is clearly defined in the regulations and the statute at Section 203(b)(5)(A)(iii) of the Immigration and Nationality Act (INA). "Qualifying employee" as stated in 8 C.F.R. 204.6(ii) means a United States citizen, a lawfully permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. The definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

What types of indirect job creation caused by the new commercial enterprise does the INS favor?

The INS does not discourage or encourage any particular type of indirect job creation. Rather, INS is interested in the number of jobs created. Vermont's designation as a regional center enables indirect job creation to be used as an indicator of compliance. If the required investment is within an approved regional center, such as Vermont, under 8 C.F.R. 204.6(m)(7), a petitioner must demonstrate that the investment will create 10 jobs indirectly through revenues generated from increased exports resulting from the new commercial enterprise. In all cases, indirect job creation through increased exports is determined by applying an appropriate (i.e., industry- and geographically-specific) and current methodology to the specific data required for use of that methodology that is derived from the business plan for the new commercial enterprise (such as direct employment or sales information). The nexus between the new commercial enterprise and the jobs created indirectly through increases in exports must be clear. With regard to the requirement that the jobs be created indirectly through increased exports, "exports" are defined at 8 C.F.R. 204.6(m)(7)(i) as goods and services produced directly or indirectly in new commercial enterprises within the regional center and transported out of the United States.

The website for the Bureau of Economic Analysis at the Department of Commerce, www.bea.doc.gov, also provides information about indirect job creation.

How does a project reconcile the "chicken or the egg" scenario where the corporate structure is created to attract sufficient investors to finance the new activity?

The statutory and regulatory requirements were carefully reviewed in the meeting. All owners, investors and fund sources for a project must be identified at the time a petition is filed. Given that INS adjudicates all petitions on an individual basis, all fund requirements must be met before any petition is filed. After an enterprise is established it is not possible for new investors in the enterprise to claim to have played a role in the creation of that enterprise. At this point, the only option for a foreign investor seeking an immigrant investor visa is to expand the existing enterprise by more than 40% or to establish an entirely new enterprise on the site of an existing enterprise.

Field guidance on pooled investments is forthcoming and will be provided to interested Congressional Members as soon as it is available.

How should a project manager proceed if one investor out of a pool of 15 is found to have had an illegal revenue source? Should the project developer inflate the cost of the project to guard against this type of scenario?

INS does not recommend inflating the cost of a project. To do so would risk possible violation of other applicable regulations. Methodology for creating the project plan should demonstrate that enough jobs were created to meet the statutory requirements. Although it is possible for a project developer to proportionally reduce or increase the size of a project, INS' primary concern is that the named funds are going directly into the new enterprise or for expansion of an existing enterprise.

For INS purposes, when does the new company officially begin?

The Administrative Appeals Office (AAO) emphasized the date of the filing of the articles of incorporation as a significant date in the establishment of the new commercial enterprise. Therefore, individuals are more likely to have their I-526s approved if they are involved in the new commercial enterprise at the time the articles of incorporation are filed.

The two-year conditional status begins on the date that the immigrant investor visa is granted or on the date of adjustment if the alien is in the United States.

How may a project developer proceed if he or she cannot confirm the soundness of the fund source of a petitioner? Are there resources to assist a developer with pre-screening?

Bill Yates advised that petitioners should submit a cover letter that explains the concerns about their ability to establish the fund source. He explained that INS adjudicators are aware that financial record systems vary by country, but that INS is obligated to locate the source of all funds. If the new commercial enterprise is

located in a regional center, the methodology used to determine indirect job creation and the business plan for the new commercial enterprise must demonstrate that the use of the required funds of all investors in the enterprise according to the plan will result in a total number of jobs created indirectly sufficient to allocate to each alien entrepreneur who uses the establishment of the new commercial enterprise as the basis for their petition the number of jobs necessary to meet the statutory requirements and clearly explain the arrangement that will be used to identify and allocate the total qualifying indirect jobs among the petitioners.

John Kessler inquired as to whether it is possible for pooled investment plans to contain alternative scenarios to ensure that a potential project will be able to continue in the event that not all petitions in a pooled investment are approved. For example, if 40 investors are approved then a golf school will be included in the resort enterprise. However, if only 30 investors are approved then a golf school will not be included but the plans for development of the resort will still go forward.

Bill Yates agreed to discuss this with INS officials and confirm that it is possible to submit a project plan that includes several scenarios based on the number of applicants approved.

With whom should a project developer communicate at INS to obtain information prior to or after the filing of a petition?

Bill agreed to designate a point of contact at the Texas Service Center for inquiries made after a petition is filed. Until a point of contact is established at the Texas Service Center, the group was instructed to contact Immigration Services Division directly at [REDACTED]

Is it possible to use promissory notes for the financing of an enterprise?

Promissory notes are acceptable provided that they are secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition are based are not used to secure any of the indebtedness. All capital should be valued at an arms length, fair market value in United States dollars. The requirements of and issues surrounding promissory notes are discussed in detail in the four Administrative Appeals Office precedent decisions that should be consulted in a specific case.

What is a proper structure for escrow accounts?

The regulations require that funds be committed to the new commercial enterprise at the time of the filing of the I-526. Accordingly, escrow accounts that do not irrevocably commit the funds at the time the agency approves the I-526 are not likely to be approved by the INS.

Are irrevocable letters of credit from U.S. banks permitted?

The INS has not specifically addressed this issue in the past. However, since the funds must actually be committed to the new commercial enterprise, it would not appear to be sufficient to just make those funds available to the new commercial enterprise/project developer. The funds should belong to the new commercial enterprise.

Would the INS be willing to provide regional training sessions on the program on an annual basis?

Yes, INS will provide regional training sessions on the EB-5 program utilizing the four INS Service Centers.

Would the INS be willing to establish an ombudsman's office available to applicants with questions concerning pending applications?

The INS will provide training and written guidelines on the EB-5 application and adjudication process but cannot provide specific assistance on particular applications. (Molly Lambert suggested that, utilizing guidance and training provided by the INS, the Agency of Commerce and Community Development address this issue for their constituents.)

Under what circumstances will the INS allow escrowed funds to be refunded to the immigrant investor should the project fail after the investor has received conditional permanent residence, but before the conditions are removed?

An essential requirement for obtaining an immigrant investor visa is the commitment of irrevocable funds to a new or expanding enterprise. If a clause is written into the business agreement which enable funds to be returned, the issue of irrevocability arises and an application is less likely to be approved initially.