

CHAPTER XIX OF THE REGULATIONS OF THE COMMISSIONER OF ECONOMIC DEVELOPMENT IS HEREBY AMENDED AS FOLLOWS:

Chapter XIX EXCELSIOR JOBS PROGRAM

Section 190.2 is being amended as follows:

§ 190.2 Definitions.

As used in this regulation, the following terms shall have the following meanings:

(a) "Agriculture" means both agricultural production (establishments performing the complete farm or ranch operation, such as farm owner-operators, tenant farm operators, and sharecroppers) and agricultural support (establishments that perform one or more activities associated with farm operation, such as soil preparation, planting, harvesting, and management on a contract or fee basis).

(b) "Applicant" means a business enterprise that is operating in New York State or is planning to operate in the State.

(c) "Application" means the form that the Department determines must be submitted by an applicant in order to be considered for acceptance into the Program.

(d) "Back office operations" means a business function that may include one or more of the

following activities: customer service, information technology and data processing, human resources, accounting and related administrative functions.

(e) "Benefit-cost ratio" means the following calculation: the numerator is the sum of (1) the value of all remuneration projected to be paid for all net new jobs during the period of participation in the program and (2) the value of capital investments to be made by the business enterprise during the period of anticipated participation in the Program, and the denominator is the amount of total tax credits that may be issued [will be used and refunded] pursuant to Article 17 of the Economic Development Law.

(f) "Business services", for the purposes of this regulation, shall only refer to the provision of professional services licensed by the state or by the courts of this state.

(g) "Certificate of eligibility" means the document issued by the Department to an applicant that has completed an application to be admitted into the Excelsior Jobs Program and has been accepted into the Program by the Department. Possession of a certificate of eligibility does not by itself guarantee eligibility to claim the tax credit.

(h) "Certificate of tax credit" means the document issued to a participant by the Department that entitles a participant to claim the tax credit pursuant to section 355 of the Economic Development Law. The certificate specifies the exact amount of each of the tax credit components and the taxable year in which such credit may be claimed. The certificate of tax credit shall be issued annually only after the Department has verified that the participant has

met all applicable eligibility criteria. The certificate may also include such information as the Commissioner deems necessary.

(i) “Commissioner” means Commissioner of the Department of Economic Development.

(j) “Department” means the Department of Economic Development.

(k) “Make products or develop technologies that are primarily aimed at reducing greenhouse gas emissions or supporting the use of clean energy in accordance with goals described in chapter one hundred six of the laws of two thousand nineteen” means the creation of products or the development of proven technologies that are commercialized or ready to be commercialized and moved into market and are aimed at reducing greenhouse gas emissions or supporting the deployment or adoption of clean energy.

[(k)] (l) "Distribution center" means a large scale facility involving processing, repackaging and/or movement of finished or semi-finished goods to retail locations or other end users across a multi-state area. “Retail locations” includes delivery of goods directly to consumers.

[(l)] (m) “Eligible real property taxes” has the same meaning as in section 15(e) of the Tax Law, provided that the definition in subdivision (e) shall be read as if it specifically referenced the Excelsior Jobs Program and participants in that program.

[(m)] (n) "Entertainment company" means a corporation, partnership, limited partnership, or other entity principally engaged in the production or post production of (i) motion pictures, which shall include feature-length films and television films, (ii) instructional videos, (iii) televised commercial advertisements, (iv) animated films or cartoons, (v) music videos, (vi) television programs, which shall include but not be limited to, television series, television pilots, and single television episodes, or (vii) programs primarily intended for radio broadcast. "Entertainment company shall not include an entity (i) "principally engaged in the live performance of events, including but not limited to, theatrical productions, concerts, circuses, and sporting events, (ii) principally engaged in the production of content intended primarily for industrial, corporate or institutional end-users, (iii) principally engaged in the production of fundraising films or programs, or (iv) engaged in the production of content for which records are required under section 2257 of title 18, United States code, to be maintained with respect to any performer in such production.

[(n)] (o) "Financial services data centers" or "financial services customer back office operations" means operations that manage the data or accounts of existing customers, or provide product or service information and support to customers of financial services companies, including banks, other lenders, securities and commodities brokers and dealers, investment banks, portfolio managers, trust offices, and insurance companies.

(p) "Green project" means a project deemed by the commissioner to make products or develop technologies that are primarily aimed at reducing greenhouse gas emissions or supporting the

use of clean energy in accordance with goals described in chapter one hundred six of the laws of two thousand nineteen. "Green project" shall include, but not be limited to, the manufacture or development of products or technologies or supply chain components primarily for renewable energy systems as defined in section sixty-six-p of the public service law, vehicles that use non-hydrocarbon fuels and produce zero or near zero emissions, heat pumps, energy efficiency, clean energy storage and other products that significantly reduce greenhouse gas emissions by minimizing the utilization of depletable resources or by improving industrial efficiency. "Green project" shall not include a project primarily composed of (1) necessarily local activities such as retail, building construction, or the installation, deployment or adoption of a clean energy product or technology at an end user's site, or (2) the production of products or development of technologies that would produce only marginal and incremental energy savings or environmental benefits ancillary to the core function of the product or technology.

[(o)] (q) "High value-added products" means durable goods requiring assembly by skilled technicians, automation, or other advanced technology.

(r) "Improving industrial efficiency" means achieving significant reductions in the greenhouse gas emissions associated with an industrial process, through a variety of potential measures aimed at reducing onsite energy consumption and/or converting fuel sources to zero and low-emission fuels where the resulting product does not have a significant negative impact on State's clean energy goals as set forth in chapter 106 of the laws of 2019 and as determined by the Department.

[(p)] (s) "Industry with significant potential for private sector growth and economic development in the State" means any industry where it can be demonstrated that employment in the industry could grow to any of the following: (1) four thousand or more in a metropolitan statistical area or to one-half of one percent of the employed population in the metropolitan statistical area; or (2) five hundred or more in a labor market area, or to one percent of the employed population in the labor market area; or (3) to a level that exceeds the percentage level that the industry employs on a national basis. Such demonstrated potential shall be on the basis of one or more key attributes of the metropolitan statistical area or labor market area that a business enterprise in the industry would consider essential in any decision to locate or expand within such metropolitan statistical area or labor market area. For a business in an industry that meets the criteria indicated above to be eligible as an applicant to the Program, the business enterprise must create at least three hundred net new jobs and make significant capital investments of at least \$30 million. Nothing in this section shall allow any business entity excluded under section 191.2(g) of this Title to become a participant in this Program

[(q)] (t) "Investment zone" shall mean an area within the state that had been designated under section 958(a)(i) and (d) of the General Municipal Law that was wholly contained within up to four distinct and separate contiguous areas as of the date immediately preceding the date the designation of such area expired pursuant to section 969 of the General Municipal Law. Investment zones are the designated distinct and separate contiguous areas of the municipality

that qualified for investment zone status as those areas existed on June twenty-nine two-thousand-and-ten.

[(r)] (u) "Life sciences" means agricultural biotechnology, biogenerics, bioinformatics, biomedical engineering, biopharmaceuticals, academic medical centers, biotechnology, chemical synthesis, chemistry technology, medical diagnostics, genomics, medical image analysis, marine biology, medical devices, medical nanotechnology, natural product pharmaceuticals, proteomics, regenerative medicine, RNA interference, stem cell research, medical and neurological clinical trials, health robotics and veterinary science.

[(s)] (v) "Life sciences company" means a business entity or an organization or institution that devotes the majority of its efforts in the various stages of research, development, technology transfer and commercialization related to any life sciences field.

[(t)] (w) "Manufacturing" means the process of working raw materials into products suitable for use or which gives new shapes, new quality or new combinations to matter which has already gone through some artificial process by the use of machinery, tools, appliances, or other similar equipment. "Manufacturing" does not include an operation that involves only the assembly of components, provided, however, the assembly of motor vehicles or other high value-added products shall be considered manufacturing.

[(u)] (x) "Music production" means the process of creating sound recordings of at least eight minutes, recorded in professional sound studios, intended for commercial release. "Music

production does not include recording of live concerts, or recordings that are primarily spoken word or wildlife or nature sounds, or produced for instructional use or advertising or promotional purposes.

[(v)] (y) "Net new jobs" means jobs created in this state that: (1) are new to the state, (2) have not been transferred from employment with another business located in this state including from a related person in this state or through an acquisition, merger, consolidation, or other reorganization of businesses or the acquisition of assets of another business, (3) are either full-time wage-paying jobs or equivalent to a full-time wage-paying job requiring at least thirty-five hours per week, [and] (4) are filled for more than six months[.] and (5) are in excess of the applicant's employment at the project location as of the date the applicant is admitted into the Excelsior Jobs Program, provided that applicant's employment in New York State during each of their benefit years exceeds its employment base which shall be calculated as the average of the applicant's employment in New York State for each of the four quarters immediately prior to the date set forth in the a certificate of eligibility, or, if the applicant was not in business in New York State during all four quarters, the employment base shall be calculated as the average of the applicant's employment in New York State for each of those quarters immediately prior to the date set forth in the certificate of eligibility in which the applicant was in business in New York State.

[(w)] (z) "New media" means the application of information technology to traditional communications outlets, particularly through interactive modes such as the Internet, including video games, web search portals, interactive web-based content, and interactive advertising.

"New Media" also includes the post production process for film and television projects which involves the following activities: picture, sound and music editing; rerecording and mixing; visual effects, graphic design, original scoring, animation and musical composition.

[(x)] (aa) "Participant" means a business entity that: (1) has completed an application prescribed by the Department to be admitted into the program; (2) has been issued a certificate of eligibility by the Department; (3) has demonstrated that it meets the eligibility criteria in section 353 and section 354(2) of the Economic Development Law as further defined in sections 191.1 and 191.2 of this Title; and (4) has been certified as a participant by the Commissioner.

[(y)] (ab) "Preliminary schedule of benefits" means the maximum aggregate amount of each component of the tax credit that a participant in the Program is eligible to receive pursuant to this regulation. The preliminary schedule of benefits shall indicate the annual amount of each component of the credit a participant may claim in each of its ten years of eligibility. The preliminary schedule of benefits shall be issued by the Department when the Department approves the application for admission into the Program. The Commissioner may amend that schedule, provided that the Commissioner complies with the credit caps in section 359 of the Economic Development Law.

[(z)] (ac) "Program" means the Excelsior Jobs Program.

[(aa)] (ad) "Qualified investment" means an investment in tangible property (including, a

building or a structural component of a building) owned by a business entity that: (1) is depreciable pursuant to section 167 of the Internal Revenue Code; (2) has a useful life of four years or more; (3) is acquired by purchase as defined in section 179(d) of the Internal Revenue Code; (4) has a situs in this state; and (5) is placed in service in the state on or after the date the certificate of eligibility is issued to the business entity.

[(ab)] (ae) "Regionally significant project" means (1) a manufacturer creating at least ten net new jobs in the state and making a significant capital investment in the state; (2) a business creating at least ten net new jobs in agriculture in the state and making a significant capital investment in the state; (3) a financial services firm or back office operation creating at least one hundred net new jobs in the state and making a significant capital investment in the state; (4) a distribution center creating at least one hundred net new jobs in the state and making a significant capital investment in the state; (5) a scientific research and development firm creating at least ten net new jobs in the state and making a significant capital investment in the state; (6) an entertainment company creating or obtaining at least two hundred net new jobs in the state and making significant capital investment in the state; (7) a life sciences company creating at least twenty net new jobs in the state and making significant capital investment in the state. Other businesses creating one hundred fifty or more net new jobs in the state and making a significant capital investment in the state also may be considered eligible as a regionally significant project by the Commissioner. In order to be a regionally significant project under this subdivision a business must export a substantial portion of its products or services outside of the state or outside of a metropolitan statistical area or county within the State.

[(ac)] (af) "Related person" means a "related person" pursuant to section 465(b)(3)(c) of the Internal Revenue Code.

[(ad)] (ag) "Remuneration" means wages and benefits paid to an employee by a participant in the program. Under no circumstances shall remuneration include mandated benefits including, but not limited to, Federal Insurance Contributions Act (FICA), Medicare tax, unemployment insurance or workers' compensation insurance.

[(ae)] (ah) "Research and development expenditures" mean the expenses of the business entity that are qualified research expenses under the federal research and development credit under section 41 of the Internal Revenue Code and are attributable to activities conducted in the state. If the federal research and development credit has expired, then the research and development expenditures shall be calculated as if the federal research and development credit structure and definition in effect in federal tax year two thousand nine were still in effect.

[(af)] (ai) "Scientific research and development" means conducting research and experimental development in the physical, engineering, and life sciences, including but not limited to agriculture, electronics, environmental, biology, botany, biotechnology, computers, chemistry, food, fisheries, forests, geology, health, mathematics, medicine, oceanography, pharmacy, physics, veterinary, and other allied subjects. For the purposes of this article, scientific research and development does not include medical or veterinary laboratory testing facilities.

[(ag)] (aj) "Significant capital investment" means a project which will be either a newly constructed facility or a newly constructed addition to, expansion of or improvement of a facility, consisting of tangible personal property and other tangible property, including buildings and structural components of buildings, that are depreciable pursuant to section one hundred sixty-seven of the internal revenue code, have a useful life of four years or more, are acquired by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code, and that is equal to or exceeds (a) one million dollars for a manufacturer; (b) two hundred fifty thousand dollars for an agriculture business; (c) three million dollars for a financial services firm or back office operation; (d) fifteen million dollars for a distribution center; (e) three million dollars for a scientific research and development firm; or (f) three million dollars for other businesses.

[(ah)] (ak) "Software development" means the creation of coded computer instructions or production or post production of video games, as defined in subdivision one-a of section six hundred eleven of the general business law, other than those embedded and used exclusively in advertising, promotional websites or microsites, and also includes new media.

[(ai)] (al) "Smart growth" means the sensible, planned, efficient growth that integrates economic development and job creation with community quality-of-life by preserving and enhancing the built and natural environments. Smart growth encourages growth in developed areas with existing infrastructure to sustain it, particularly municipal centers, downtowns, urban cores, historic districts and older first-tier suburbs.

Section 191.2 is being amended as follows:

§ 191.2 Eligibility criteria.

(a) To be a participant in the program, an applicant must be operating predominantly in a strategic industry and meet the respective job requirements for strategic industries or be a regionally significant project. When determining whether an applicant is operating predominantly in a strategic industry, or as a regionally significant project, the commissioner will examine the nature of the business activity at the location for the proposed project and will make eligibility determinations based on such activity.

(b) Strategic industries shall consist of the following:

(1) financial services data center or a financial services back office operation;

(2) manufacturing;

(3) software development;

(4) scientific research and development;

(5) agriculture;

(6) the creation or expansion of back office operations in the State;

(7) distribution center;

(8) entertainment;

(9) music production;

(10) life sciences; [or]

(11) an industry with significant potential for private-sector economic growth and development in this State[.]; or

(12) a company operating in one of the industries listed in paragraphs (2) through (5) of this subdivision and engaging in a green project as defined in subdivision p of section 190.2 above.

(c) Job requirements for strategic industries. Notwithstanding subdivision (g) of this section, a business entity operating predominantly in manufacturing must create at least five net new jobs; a business entity operating predominately in agriculture must create at least five net new jobs; a business entity operating predominantly as a financial service data center or financial services customer back office operation must create at least twenty-five net new jobs; a business entity operating predominantly in scientific research and development must create at least five net new jobs; a business entity operating predominantly in software development must create at least five net new jobs; a business entity creating or expanding back office operations must create at least t w e n t y - f i v e net new jobs or a business entity operating predominantly as a distribution center in the state must create at least fifty net new jobs; a business entity operating predominantly as an entertainment company must create or obtain at least one hundred net new jobs; a business entity operating predominantly in music production must create at least five net new jobs; or a business entity operating predominately as a life sciences company must create at least five net new jobs.

(d) A business entity operating predominantly in one of the strategic industries referenced in paragraphs 1-7 and 10-11 of subdivision (b) of this section but which does not meet the job requirements of subdivision (c) of this section must have at least twenty-five full-time job equivalents unless such business is a business entity operating predominantly in manufacturing then it must have at least [ten] five full-time job equivalents and must demonstrate that its benefit-cost ratio is at least ten to one.

(e) A business entity must be in substantial compliance with all worker protection and environmental laws and regulations.

(f) A business entity may not owe past due state or local taxes; provided, however, in the case of a tax certiorari proceeding a business entity would not be considered in arrears until a final decision is made with respect to such proceeding.

(g) A not-for-profit business entity, a business entity whose primary function is the provision of services including personal services, business services, or the provision of utilities, a business entity engaged predominantly in the retail or entertainment industry, other than a business operating as an entertainment company and other than a business entity engaged in music production, and a business entity engaged in the generation or distribution of electricity, the distribution of natural gas, or the production of steam associated with the generation of electricity is not eligible to participate in the program.

(h) A business entity must demonstrate that it has satisfied the job requirements for strategic industries indicated in section 191.2(c) of this regulation. A business entity certified as a regionally significant project must demonstrate that it is a regionally significant project as defined in section 190.2(a)[b]e) of this regulation and satisfies the job and investment requirements therein.

Section 193.1 is being amended as follows:

§ 193.1 Calculation of tax credits.

(a) The department shall calculate the amount of each tax credit component for which the participant is eligible pursuant to section 355 of the Economic Development Law. The amount of each component shall be separately stated on the certificate of tax credit.

(b) Excelsior Jobs Program Credit Component.

A participant in the program shall be eligible to claim a credit for each net new job it creates in New York State. In a project that is not a green project, [T]the amount of such credit per job shall be equal to the product of gross wages and up to 6.85 percent. In a green project, the amount of such credit per job shall be equal to the product of the gross wages paid and up to 7.5 percent.

(c) Excelsior Investment Tax Credit Component.

A participant in the program shall be eligible to claim a credit on qualified investments. In a project that is not a green project, [T]the credit shall be equal to two percent of the cost or other basis for Federal income tax purposes of the qualified investment. In a green project, the credit shall be equal to five percent of the cost or other basis for federal income tax purposes of the qualified investment. A participant may not claim both the Excelsior Investment Tax Credit Component and the investment tax credit set forth in section 210-B(1[2]), section 606(a), the

former section 1456(i), or section 1511(q) of the Tax Law for the same property in any taxable year, except that a participant may claim both the excelsior investment tax credit component and the investment tax credit for research and development property. In addition, a taxpayer who or which is qualified to claim the Excelsior Investment Tax Credit Component and is also qualified to claim the Brownfield Tangible Property Credit component under section 21 of the Tax Law may claim either the Excelsior Investment Tax Credit Component or such tangible property credit component, but not both with regard to a particular piece of property. The Excelsior Investment Tax Credit Component may not be claimed until a participant has received a certificate of tax credit, provided that qualified investments made on or after the issuance of the certificate of eligibility but before the issuance of the certificate of tax credit to the participant, may be claimed in the first taxable year for which the participant is allowed to claim the credit. Expenses incurred prior to the date the certificate of eligibility is issued are not eligible to be included in the calculation of the credit.

(d) Excelsior Research and Development Tax Credit Component.

A participant in the program shall be eligible to claim a credit equal to 50 percent of the portion of the participant's Federal research and development tax credit that relates to the participant's research and development expenditures in New York State during the taxable year, provided, however, if not a green project, the excelsior research and development tax credit shall not exceed six percent of the qualified research and development expenditures attributable to activities conducted in New York State, or, if a green project, the excelsior research and development tax credit shall not exceed eight percent of the research and development expenditures attributable to activities conducted in New York state. If the Federal research

and development credit has expired, then the research and development expenditures relating to the Federal research and development credit shall be calculated as if the Federal research and development credit structure and definition in effect in 2009 were still in effect. Notwithstanding any other provision of this chapter to the contrary, research and development expenditures in this State, including salary or wage expenses for jobs related to research and development activities in this State, may be used as a basis for the excelsior research and development tax credit component and the qualified emerging technology company facilities, operations and training credit under the tax law.