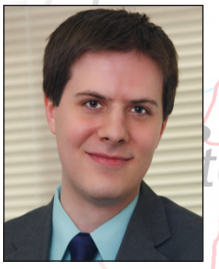
Stop in Wyoming on the Way to America:

The Use of Wyoming Trust Structures to Administer EB-5 Investment Funds Pending Removal of Conditions on Residence



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The EB-5 Immigrant Investor Program has enabled a steady influx of new investment in the U.S. economy while providing international investors with a pathway to permanent U.S. residency. However, the program's popularity, combined with a limited number of available visas, has resulted in a substantial backlog of visa applications. Many EB-5 investors now face a retrogression period, in which they must wait for an available visa, even after their EB-5 investment project has wrapped up. As the pool of EB-5 investors waiting to receive visas grows, so does the dollar value of funds invested in the U.S. which must remain "at risk" throughout the application period. This has raised the question of the most advantageous way to hold such funds prior to final approval of an investor's Form I-829 petition.

Wyoming trust structures provide an effective vehicle for holding and administering assets in connection with the EB-5 Immigrant Investor Program. After an EB-5 project is completed, the return on investment can be transferred to one or more trusts for the benefit of the investor's family which are administered by a Wyoming single-family private trust company. The result is a structure that maximizes investment flexibility and minimizes the expense and difficulty of regulatory oversight and mandatory federal or state registration. The trust assets—the return on investment—can then be invested and held "at risk" until the investor receives permanent resident status. Due to Wyoming's favorable trust laws, non-existent state income tax, and allowance of completely unregulated trust companies, this model provides a cost-effective approach to holding the proceeds of EB-5 investments while investors wait to receive their permanent green cards.

THE EB-5 PROGRAM AND THE RETROGRESSION PROBLEM

The EB-5 Program provides qualified investors with a path to permanent resident status in the United States. An investor makes a standard capital investment in a new commercial enterprise, which must generally create ten new full-time jobs per investor. If the investor makes a qualifying investment and completes the program, the investor and his or her family receive lawful permanent resident status in the United States.

As an overview, the EB-5 immigration process generally proceeds through the following steps:

1. **After transferring funds to the relevant investment project, the investor files a Form I-526 petition for conditional permanent residency with the United States Citizenship and Immigration Services (USCIS).**
2. **After USCIS approves the Form I-526 petition, the investor files a Form I-485 petition with USCIS (or Form DS-230 with the U.S. Department of State if the investor resides abroad).**
3. **After the Form I-526 is approved, the U.S. Department of State issues a conditional permanent resident visa ("temporary green card"), which allows the investor to reside in the U.S. for two years.**
4. **Within twenty-one to twenty-four months after receiving the conditional permanent resident visa, the investor files a Form I-829 application to convert from conditional to permanent resident status. This application must show that:**
   a. The required funds were placed "at risk" throughout the period of the petitioner's residence in the United States;
   b. The required amount of capital was made available to the business or businesses most closely responsible for creating the employment;
   c. This "at risk" investment was "sustained throughout" the period of the applicant's residence in the United States; and
   d. The investor created (or maintained, if applicable), or can be expected to create within a reasonable period of time, the requisite number of jobs.
5. **If the I-829 petition is approved, the investor receives unconditional permanent resident status (a "permanent green card") and the investor may permanently live and work in the U.S.**

The EB-5 Program allocates 10,000 visas per year to qualified individuals and their family members. In 2014, following an explosion of popularity in the EB-5 program, primarily

from investors seeking to emigrate from mainland China, the U.S. ran out of EB-5 visas. This has resulted in retrogression, whereby EB-5 Program investors now potentially wait several years between receiving approval of their I-526 petitions and approval of the Form I-829 application conferring permanent resident status. With no signs of an increase in the 10,000 visa cap, this backlog is expected to grow over time.

The investor's capital must be placed at risk and continuously maintained until the I-829 petition is approved. To be "at risk," the investor must have both a risk of loss and a chance for gain. Retrogression combined with the at risk requirement results in a challenge faced by an increasing number of investors: how to ensure capital remains at risk after an investment project is complete and paid returns but before an investor has received an available EB-5 visa. Although the investor need not show that the ten full-time jobs continue to exist when USCIS finally adjudicates the Form I-829, USCIS has issued a draft policy memorandum stating the investors' capital must nonetheless continuously remain at risk during retrogression.

In a standard loan to equity model, an investor makes an equity investment in a new commercial enterprise (NCE), which then makes loans to EB-5 projects. The EB-5 projects repay the loan principal, plus interest, to the NCE, which then distributes the investment plus return to the investor once the EB-5 process has completed and the investor receives permanent resident status. However, if an investor is subject to retrogression, the NCE cannot simply return the invested funds to the investor. Rather, the investment must remain sustained and at risk until the retrogression period ends. Simply holding the funds in the NCE's bank account or in escrow is insufficient. While the NCE itself could invest the funds to keep them at risk, this can create problems for the NCE, which might not be not registered with the Securities and Exchange Commission (SEC) as an investment adviser or investment company. It is therefore necessary to find a structure that can hold the repaid loan proceeds in a manner that will cause them to be treated as a sustained and at risk investment throughout the retrogression period.

THE WYOMING TRUST SOLUTION

Wyoming trusts and private trust companies provide a solution to the problem of how to hold the proceeds of EB-5 Program investments pending receipt of permanent residency status. Under this approach, investors settle trusts to hold such capital. These trusts are established under Wyoming law and primarily administered within the state. Wyoming trusts are especially advantageous to the investor due to the state's complete lack of a state income tax, as well as the availability of a full menu of modern trust tools and protections, including privacy, directed trusts, trust protectors, purpose trusts, asset protection tools, virtual representation, and flexible migration, modification, and decanting procedures.

Each investor's Wyoming trust or trusts would be administered by a newly created Wyoming single-family private trust company, which may generally operate without a charter or state banking oversight if it serves only members of a single family. The underlying trust would be funded with the loan proceeds received by the NCE from an EB-5 project. The beneficiaries of the trust would be the investor and his or her family members, who would receive their return on investment as trust distributions once their retrogression period has ended and the investor has obtained permanent resident status. (See Appendix.) The trust itself could possibly function as a liquidating trust, which would hold and invest the loan proceeds until they are ready to be distributed to the investor.

WYOMING SINGLE-FAMILY PRIVATE TRUST COMPANIES

Single-family private trust companies (PTCs) are corporations or limited liability companies that provides fiduciary services, such as acting as trustee for one or more related trusts. They provide a flexible means of administering family wealth while also providing the required nexus to take advantage of Wyoming's favorable trust laws.

Traditionally, trust companies have been viewed as acting like financial institutions and have therefore been required to obtain charters from the local banking authority before engaging in trust business. However, Wyoming is one of a small number of states that permit PTCs to operate without a charter or regulation by a banking authority. While Wyoming law has long permitted unregulated PTCs based on the Banking Commissioner's interpretation of the statutory definition of "trust business," the Wyoming Legislature amended the relevant statutes in 2015 to provide clear guidance to both regulated and unregulated PTCs. A corporation or limited liability company now qualifies to act as a PTC and need not register with the Wyoming Banking Commissioner if it provides fiduciary services only to members of a single family and "[d]oes not transact company business with, propose to act as a fiduciary for or solicit trust company business with the general public." The definition of "family member" is fairly broad and generally includes persons within the tenth degree of lineal kinship or ninth degree of collateral kinship from a designated common ancestor. This definition also includes a trust established and funded by a family member (i.e., a trust created by an investor and funded with the proceeds of the investor's investment in an NCE).

The process of forming a PTC is relatively fast and requires minimal regulatory compliance. After formation, an officer must execute a signed waiver acknowledging its status as a family trust company and that it is not subject to the requirements or oversight applicable to a chartered trust company, which must be delivered to the Banking Commissioner. For a fee, the Commissioner will provide a Letter of Assurance (essentially a no-action letter), which recognizes the company's family trust company status. The PTC is then free to provide fiduciary services (including making lawful fiduciary investments) to the relevant family. This will permit the PTC to invest funds and thereby keep them "at risk" during the EB-5 retrogression period. However, the PTC may not provide fiduciary services to the general public (i.e., to non-family members) and may not provide any banking business (i.e., accepting general deposits or issuing demand instruments).

PTCs have the option of voluntarily obtaining a charter from the Commissioner. Of course, establishing a chartered PTC will entail additional time, costs, and fees, as well as minimum capital requirements and mandatory examination, reporting, and oversight by the Commissioner. That said, the process does remain less stringent than a fully chartered public trust company. Some investors may opt for this model because they want a level of light regulation. Such state regulation may also be obtained in lieu of more stringent SEC investment adviser registration. However, as explained below, such state oversight will be unnecessary if the companies comply

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with the family office exception under the Investment Advisers Act. It is therefore likely that investors will have greater interest in the decreased costs and increased flexibility provided by truly unregulated PTCs.

PTCs created to hold investment proceeds during retrogression will be structured according to IRS Notice 2008-63 as well as to ensure compliance with the EB-5 Program's "at risk" requirements. Most notably, the NCE (or a limited liability company wholly owned and managed by the NCE) will be a member of the PTC's board of directors and could then direct the PTC to hire a bond manager or other money manager to make investment decisions regarding the trust assets—the return on investment. The PTC's organizational documents would be drafted to prohibit removal of the NCE (or its LLC) from the PTC structure until a final decision is made on the investor's I-829 petition, as well as to ensure the NCE's role constitutes sufficient custody and control over the EB-5 Program proceeds to ensure that the assets are considered "at risk" during the retrogression period. The NCE's role on the board of the PTC—the trustee—should obviate any concerns of USCIS as to custody and control for "at risk" purposes.

SECURITIES REGISTRATION ISSUES

A Wyoming trust company structure can potentially eliminate the need for mandatory registration with and regulation by the SEC.

Investment Adviser Registration

Unless an exception applies, the Investment Advisers Act (IAA) requires SEC registration by any individual or entity acting as an "investment adviser." An "investment adviser" includes any person "who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." With very narrow exceptions, this definition would appear to apply to many types of trustees that provide advice regarding investments, including trustees of trusts holding "at risk" assets during the pendency of an investor's retrogression period.

PTCs should be able to avoid mandatory IAA registration under the family office exception to the IAA's definition of "investment adviser." To qualify as a "family office," a trust company must (1) provide investment advisory services only to "family clients"; (2) be wholly owned by family clients and controlled by "family members" or "family entities"; and (3) not hold itself forth to the public as an investment adviser. SEC rules define "family client" fairly broadly, including ten generations of lineal descendants from a common ancestor, current and former spouses and spouse equivalents, key employees, and certain organizations, entities, estates, and trusts created by family clients.

Care must be taken to ensure that such a company provides services to and is owned and controlled by permissible persons and does not advertise itself or provide services to non-family clients. As an alternative if a particular trust company does not qualify for this exception, accepting light regulation by the Wyoming Banking Commissioner as a chartered family trust company should allow the trust company to avoid SEC regulation under the IAA. However, in most single-family situations, it is difficult to structure a PTC to fall within the family office exception.

Investment Company Registration

The SEC also regulates investment companies under the Investment Company Act of 1940 (ICA). An "investment company" is an "issuer" that

(A) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities;

(B) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; or

(C) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

An "issuer" is someone "who issues or proposes to issue any security, or has outstanding any security which it has issued." Unless an exception applies, an investment company is subject to mandatory registration with and regulation by the SEC. Such regulation can be quite burdensome.

A PTC that provides fiduciary services to a family and invests "at risk" assets will not have to register as an investment company if it does not issue or propose to issue securities. ICA registration may be implicated, however, if a PTC seeks to create or administer a pooled investment vehicle. For example, a trust company may create a common trust fund in which individual family trusts may purchase units. That fund would then be able to make investments that might otherwise be unavailable to individual family trusts, such as in private equity funds and hedge funds. Such vehicles may qualify the trust company as an investment company, thereby requiring an exemption or no-action letter from the SEC to avoid mandatory registration.

Family office pooled investment vehicles typically seek exemption from the ICA under one of two exemptions. The first is under Section 3(c)(1) of the ICA, which excludes from the definition of "investment company" an issuer whose "outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities." Such a company will be treated as an "investment company" only for the purpose of certain limitations on an investment company's ability to acquire securities in other investment companies.

The second common exception is under Section 3(c)(7) of the ICA, which excludes from the definition of "investment company" an issuer, "the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are qualified purchasers, and which is not making and does not at that time propose to make a public offering of such securities." "Qualified purchasers" include persons who have significant investments, including individuals and certain companies and trusts with at least $5 million in investments.

Section 3(c)(3) of the ICA provides a specific exemption for common trust funds, though the exception is available to a trust company only if the company receives some form of state charter and oversight. Under this exemption, a common trust fund or similar fund maintained by a bank for collective investment and reinvestment of moneys contributed to the bank in its capacity as trustee is not an investment company if:

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(A) such fund is employed by the bank solely as an aid to the administration of trusts, estates, or other accounts created and maintained for a fiduciary purpose;

(B) except in connection with the ordinary advertising of the bank's fiduciary services, interests in such fund are not—

(i) advertised; or

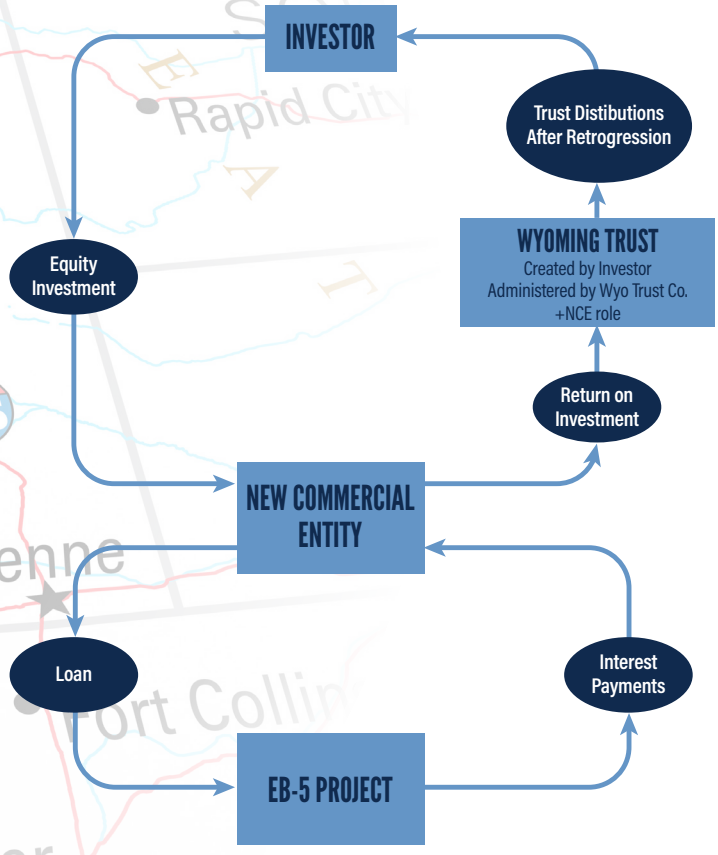
(ii) offered for sale to the general public; and

(C) fees and expenses charged by such fund are not in contravention of fiduciary principles established under applicable Federal or State law.

A "bank" includes a trust company,

> *whether incorporated or not, doing business under the laws of any State . . . , a substantial portion of the business of which consists of . . . exercising fiduciary powers similar to those permitted to national banks . . . , and which is supervised and examined by State or Federal authority having supervision over banks, and which is not operated for the purpose of evading the provisions of this subchapter.*

A Wyoming PTC would generally appear to meet this definition only if it voluntarily received a charter from the Wyoming Banking Commissioner. Additionally, there is a factual question of whether the company is "operated for the purpose of evading the provision of this subchapter." The SEC has stated that it will not issue no-action letters on this question to non-depository trust companies that are not wholly owned subsidiaries of a bank. However, it appears unlikely that a state regulated trust company that invests assets as part of its fiduciary services to trust clients would be viewed as operated for the purpose of evading the statute. We have been unable to find an example of a similarly situated trust company running afoul of this rule. Of course, the biggest difficulty with this rule is that many single-family PTCs will not want to accept the expense and oversight of voluntarily obtaining a charter.



Notwithstanding the foregoing, there is sufficient guidance from the SEC indicating that a trust structure cannot be used as a simple "conduit" through which an allocation to an investment company is facilitated. To this end, the actual investment of trust assets for EB-5 investors subject to retrogression are strongly suggested to mirror the exemptions provided for limited purpose or liquidating trusts under Section 7 of the ICA. No-action guidance provided by SEC concentrates on three factors to determine potential exemption, which are (a) limited purpose, (b) limited duration and (c) non-transferability.

In order to satisfy the limited purpose factor, the sole objective and purpose of the entity must be to liquidate assets and distribute the proceeds to the beneficial owners. In doing so, the entity must not hold itself out as an investment company or conduct a trade or business. If proceeds are held by the entity for any period of time, the entity must invest such proceeds only in temporary short-¬term investments in investment¬-grade or similar securities. Further, the time limitation factor requires that the entity liquidate its assets and dissolve within a reasonable period of time in light of the entity's assets and any other relevant factors. For example, a PTC can provide compliant investments for a trust for the benefit of an EB-5 investor in retrogression through retention of an institutional bond manager who can handle the assets in a separately managed account of individual, investment grade (A+ or above) liquid bond holdings (not mutual funds) of the same duration as the expected retrogression period of the EB-5 investor. In those instances where the retrogression period is uncertain, portfolio allocation concerning the duration of fixed-income securities can also be addressed accordingly. Such limitations on investment policies and the like can and should be memorialized in relevant trust formation documentation.

CONCLUSION

The specifics of any structure require analysis pertaining to compliance with applicable state and federal law, including immigration and securities law issues. While the authors are not aware of their use in the EB-5 arena at present, Wyoming trusts administered by Wyoming single-family PTCs may provide a solution to the problem of how to hold "at risk" funds for EB-5 investors in meaningful investments after their EB-5 projects have ended, but before they have been granted permanent resident status. For sponsors of EB-5 investments and their investors, a stop in Wyoming during retrogression on the way to citizenship may prove both prudent and profitable. ■