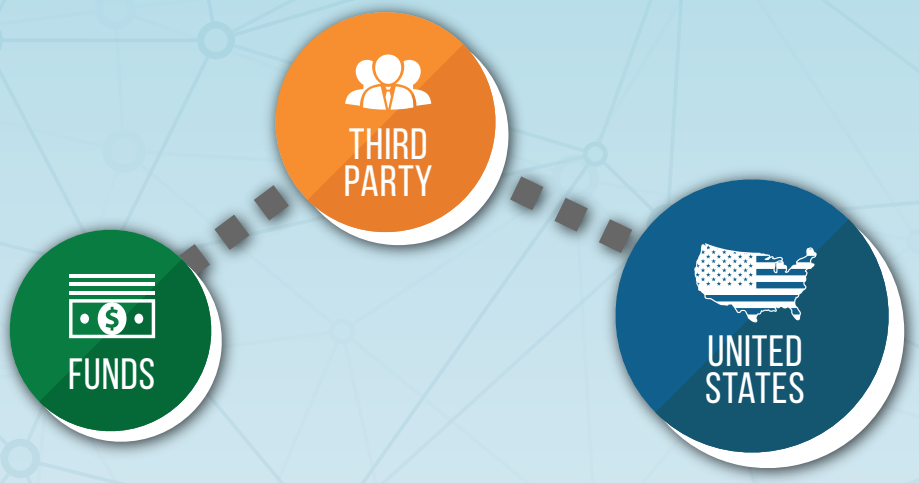
Third Party Currency Swaps: Considerations for RFEs



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Various countries have set internal currency controls that restrict the amount of foreign currency that can be purchased each year by an individual, including countries which originate a significant amount of EB-5 investors, such as Mainland China, Vietnam, India, and certain Middle Eastern and African nations. In some countries, it may be impossible or illegal to purchase U.S. dollars, and in others, the amount of U.S. dollars that can be purchased each year and transferred out of the country may be substantially restricted. Investors with funds in these countries must exchange their funds into U.S. dollars to make an EB-5 investment in the U.S.

As a result, it is common for EB-5 investors to enter into a private "currency swap," a contractual arrangement whereby the investor purchases U.S. dollars from a party holding that currency outside of the restricted country. Unlike currency transactions in an open market, these private transactions are oftentimes outside of a regulatory framework. However, without such private currency swaps, EB-5 investors may be unable to transfer funds to the U.S. given the currency restrictions in their country of citizenship.

For years, USCIS accepted "currency swaps" as an acceptable method for transferring funds to the U.S., perhaps implicitly recognizing that certain foreign countries have currency exchange rules that would prohibit foreign nationals from those countries from transferring funds to the U.S. for an EB-5 investment, even if their funds were acquired lawfully. Additionally, the U.S. does not have such currency restrictions, and consequently, violating a foreign currency rule does not translate into an equivalent offense under U.S. law. As a result, U.S. Citizenship and Immigration Services ("USCIS") did not generally examine the background of the other party providing the U.S. dollars in the currency swap. Recently however, USCIS has shifted their policy through adjudication of I-526 Petitions and, as part of their examination of the lawful source of funds of the investor, is examining the source of the U.S. dollars used by the other party in the currency swap.

The Lawful Source and Path of Funds Requirement

Under 8 CFR 204.6(j)(3), the I-526 Petition must contain evidence that the investment capital of the alien investor was lawfully acquired. The investor has a burden to show the exact source of the $500,000 capital invested into the new commercial enterprise. Through a precedent decision, USCIS also has an established policy that an EB-5 investment must consist of capital belonging to the investor. To establish the investor's ownership of the capital, the I-526 Petition must document "the path of the funds, such as by wire-transfer records" showing where the funds originated. An EB-5 petitioner must own the invested funds; evidence of the path of funds only documents the investor's ownership of the funds. Thus, from Matter of Soffici and Matter of Izummi came the "path of funds" requirement showing the transfers of the capital to the new commercial enterprise. Importantly, Matter of Soffici is silent on how USCIS should treat currency swaps, and thus, the interpretation has been left to USCIS through the adjudication of I-526 Petitions.

Types of Currency Swaps

There are three common types of currency swaps utilized by EB-5 investors: (1) a private transaction with an individual known to the investor without compensation, (2) a private transaction with a company acting as a licensed money exchanger, and (3) a private transaction with a third party company or individual who is not licensed, but who agrees to exchange the U.S. dollars for a fee.

In the first example, it is common for an EB-5 investor to contract with a personal friend or family member that already possesses

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U.S. dollars outside of the restricted country. The EB-5 investor transfers local currency to the friend in the home country and once received, the friend transfers U.S. dollars outside the home country to the investor, either directly into the EB-5 escrow account for the benefit of the investor or to a bank account owned by the investor outside of the home country. Generally, these are private arrangements between the investor and a personal acquaintance, completed without a fee for service, and entered into only once by the parties. The transaction is evidenced by the contractual agreement and the wire transfer documents to show the tracing of funds.

In the second example, an EB-5 investor enters into a contractual arrangement with a licensed money exchanger. The licensed money exchanger is generally licensed and regulated in a third country, outside both the U.S. and the restricted, home country. For example, there are a number of licensed money exchange houses in Singapore, Hong Kong, and Australia that assist in currency swaps for EB-5 investors from Mainland China and Vietnam. The EB-5 investor transfers local currency to a representative of the currency exchange house operating within the restricted country. Once the local currency is received by the local agent, the licensed money exchanger abroad transfers U.S. dollars to the investor, either directly into the EB-5 escrow account or to an account owned by the investor outside of the restricted, home country. The transaction is evidenced by the contractual agreement, the license of the money exchanger in the third country, and the wire transfer documents to show the transfer from the licensed agent.

In the third example, an EB-5 investor may engage in a "hawala" style exchange with an unlicensed third party – either be a person or a company – that holds U.S. dollars outside of the restricted country. Again, the investor passes local currency to the other party in the home country, and once received, that party then transfers U.S. dollars to the investor outside of the restricted country. Here, the other party may not personally know the investor, but was found by the investor through an informal network of currency operators in the restricted country. This is common in countries throughout the Middle East, Asia and Africa where licensed exchange houses may not exist.

USCIS' Adjudicatory Standards for Currency Swaps

After years of accepting currency swaps, , USCIS has started to question the source of the U.S. dollars used in the currency swap through requests for evidence ("RFEs") on I-526 petitions, despite issuing no formal written policy on the subject. The content of the RFE is templated and generally asks the investor either to prove: (1) the source of funds for the U.S. dollars used by the third party in the currency exchange; or (2) that the third party is a licensed currency exchange agent. Generally, the RFE acknowledges the EB-5 investor's investment in the new commercial enterprise but goes on to require the source of the third party's capital to engage in a currency swap. The RFEs are not insurmountable to overcome with the correct documentation, as discussed below. These additional documents should also be included in new I-526 petition filings to prevent the issuance of an RFE on this matter in the future.

If the investor entered into a private arrangement with an individual acquaintance, the first example mentioned above, USCIS now requests information on the source of the U.S. dollars utilized in the currency swap with the investor. This is common for investors in Mainland China, who contract with an acquaintance or family member who has U.S. dollars outside of Mainland China to exchange with the EB-5 investor. Generally, the other party must show (1) how he or she earned the U.S. dollars in the other country; or (2) how he or she earned the funds inside the restricted country, but then transferred U.S. dollars outside of the restricted country.

For example, USCIS requests employment records for the other party, bank statements showing all transfers of the other party, and tax returns of the other party to show those U.S. dollars also were lawfully earned. Attorneys have reported that failure to show such evidence in response to an RFE, particularly when the other party refuses to turn over his or her personal information, leads to denials of the I-526 Petition by USCIS. At a minimum, USCIS requires the third party to submit evidence of his or her employment. If funds are earned inside the restricted country and then were transferred to another country, such as Hong Kong for example, USCIS also requires bank statements showing how the other party exchanged local currency into U.S. dollars and transferred funds to Hong Kong. Generally, if the friend or family member is cooperative in this process and provides employment records and bank statements showing accumulation of lawfully earned funds outside of the restricted country, then USCIS approves the I-526 Petition.

In the case of the second example listed above, where the EB-5 investor entered into a contractual relationship with a party that holds a currency exchange license in a country outside the U.S. and the restricted home country, generally the EB-5 investor can overcome questions from USCIS by showing that the exchange house is operating as a licensed currency exchange agent. Exchange houses in Hong Kong, Singapore and Australia are subject to licensure requirements in those countries and undergo anti-money laundering ("AML") requirements from the regulatory bodies in those countries similar to those AML standards found in the U.S. Satisfying USCIS' inquiries in the RFE generally requires providing (1) the contract with the exchange house, (2) the license of the exchange house in the third country, (3)the relevant wire transfers to the local representative and (4) then the exchange house to the investor's bank account. This is the case even when the investor's funds never leave the home country; the exchange house uses its own U.S. dollars in the third country to exchange with the EB-5 investor and transfers that money on behalf of the investor to the U.S. Showing such a license has been satisfactory to USCIS to approve the I-526 Petition, i.e. the license by the appropriate regulatory body is accepted in lieu of sourcing the exchange house's funds.

Finally, in the third example above, where the investor has entered into a contractual "hawala" type of exchange with either an individual or a company, this investor probably has the toughest burden and hurdle for I-526 Petition approval. Informal

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exchange networks in Asia, the Middle East, and Africa provide exchange services, but generally cannot provide either the source of the funds used in the exchange nor a license to operate as a currency exchange house, though it may be possible that the informal exchange house has a local business license to operate as a "currency exchanger," which may be accepted by USCIS. It also may be possible that a company that has U.S. dollars and that knows the investor has contracted in the currency swap and is willing provide business records regarding the origin of its U.S. dollars to the investor. In those cases, showing the local license or the proof of the company's U.S. dollars can overcome an RFE. However, in the absence of showing the lawful source of funds used in the exchange or any currency exchange license, USCIS will likely deny the I-526 Petition for failure to show the full "path of funds." The investor is in the worst position when he or she used such an informal network and the other party cannot provide a license or the source of funds.

USCIS has been denying these I-526 Petitions and will likely continue to do so.

Moving Forward with Currency Swaps

Importantly, requiring the sourcing of the U.S. dollars used by the other party in the currency swap is contrary to the statute, the regulations and the standard of proof in an EB-5 case. This policy by USCIS requires that the investor not only document the source of his or her $500,000 capital, but also another $500,000 used by the other party in the exchange, thereby requiring the EB-5 investor to prove $1,000,000 in lawfully earned capital, even where the project is located in a targeted employment area that only requires a $500,000 investment. This is beyond what is required in the statute the regulations and the preponderance of the evidence standard, which makes this policy by USCIS ultra vires. Nonetheless, USCIS continues to require this evidence and denies cases for failure to show the source of the funds used in the currency swap.

Even though USCIS' policy is contrary to statute and regulation, as a practical matter, attorneys should be advising clients of this USCIS adjudicatory standard. EB-5 investors contracting for a currency swap should understand that either the third party must provide the source of the U.S. dollars or the license of the exchange house utilized in the currency swap transaction. The investors must understand the risks of I-526 Petition denial up front who engage in such transactions. For EB-5 new commercial enterprises and issuers, it is important to understand the source and path of funds generally for its investors' cases. Denials of I-526 Petitions can negatively impact the issuer and the EB-5 project, and issuers may be liable for refunds of capital to investors under the relevant corporate documents prepared by the issuer. Issuers must educate themselves on currency restrictions in the countries where they seek investors, and understand how investors from those countries transfer funds to the U.S.