OFAC, Escrow Agreements and the Value of Patience:
A Look at Investments from Iran

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The exponential increase in the number of investors seeking green cards through use of the EB-5 investment program over the last decade has created thousands of jobs for U.S. workers, injected billions of dollars into the U.S. economy, and led to the construction of key commercial enterprises that provide valuable services and accommodations all over the United States. The increased impact of the EB-5 program on the U.S. economy, however, has also led to rising scrutiny of the program by the U.S. government. The rising popularity of EB-5 investment has also seen increasing numbers of reports of fraud and other abuses of the program resulting in numerous enforcement actions by the SEC and other government bodies across the United States.

In navigating the increasingly complex regulatory environment of the EB-5 Regional Center program, attorneys, investors and regional centers must all be vigilant in ensuring their compliance with all statutes, regulations and rules that impact EB-5 investment at the federal and state level. EB-5 investment that is sourced from countries and individuals subject to sanctions by the U.S. Department of Treasury Office of Foreign Asset Control (OFAC) face additional obstacles. And while investors from these nations are not precluded from seeking U.S. immigration via EB-5 investment, the parties to these transactions must take additional steps to ensure that the transfer of funds and the investment itself is and remains authorized by OFAC. Any failure to comply with OFAC's rules and regulations can result in the denial of an investor's petition, claims of attorney malpractice, and fines or other penalties to the Regional Center, escrow agent, and the new commercial enterprise. Investors and regional centers must therefore ensure that the initial transfer of EB-5 investment funds does not run afoul of OFAC sanctions. But the parties' compliance obligations do not end with the transfer of the investor's funds. Questions remain as to what the parties' obligations are with regards to funds originating from a sanctioned nation if a green card no longer becomes an option for the investor. A close examination of the opportunities and potential pitfalls that arise with investments sourced from Iran provides insight into best practices for all parties to an EB-5 transaction when funds are sourced from a country that is subject to sanctions.

OFAC Licensing Requirements

Investors seeking a green card through the EB-5 program must demonstrate the lawful source of the funds for their investment, which means that for immigration eligibility nationals from certain countries that are subject to U.S. sanctions may require a license from OFAC in order to transfer funds to a U.S. business. OFAC administers comprehensive sanctions, which are imposed on a country as a whole, as well as targeted sanctions against specific entities or individuals. These sanctions target specific economic activities and sectors, and it is important at the outset to determine if a given transaction is sanctionable under OFAC rules and regulations.

Before funds are transferred from a sanctioned country, the parties to the transfer must first determine whether the transaction requires authorization from OFAC, and if so, what type of authorization is required. In some cases, OFAC's regulations include a general license which authorizes the transfer of funds. If the country's OFAC program does not include a general license, it may be necessary to apply for a specific license to permit the transaction. Where a specific license is required, a written request must be filed with OFAC to permit a person or entity to engage in the transaction identifying the applicant, the relevant

Continued On Page 33

Continued From Page 32

sanction program, the proposed transaction and regulation under which it is prohibited, all parties involved in the transaction, and all proposed movement of funds that will occur with the transaction. Because it can take several months to receive a decision on a request for a specific license, practitioners should conduct a thorough analysis as to the necessity of such a license as soon as possible when communicating with a potential EB-5 investor from a sanctioned country.

OFAC General Licenses and Additional Due Diligence

When a transaction is authorized under a general license, additional steps must still be taken to ensure the transaction does not violate OFAC sanctions. Both Regional Centers and attorneys must ensure that no party in the transaction is on the Specially Designated Nationals ("SDN") List, which includes the names of individuals and companies that are owned, controlled by, or are acting for or on behalf of targeted countries. This list is regularly updated by OFAC, and can be searched via a tool on the OFAC website.[1] In addition, EB-5 applicants should be advised that their personal funds and investments must be transferred out of the sanctioned country before they become a U.S. person. Once investors have secured conditional permanent residency, they are deemed to be U.S. persons, and business or other financial ties to their country of origin may subject them to OFAC sanctions. In most cases, these investors will require a license in order to transfer their personal funds as well.

OFAC's General License for Iranian Investors and Ensuring the Lawful Source of Funds

On October 22, 2012, OFAC issued a General License which authorizes U.S. persons and businesses to engage in providing financial services to Iran in connection with individual EB-5 petitions. This general license significantly reduces processing times for Iranian investors who no longer must wait for a specific license from OFAC in order to proceed. However, Iranian investors still face substantial hurdles as well as additional uncertainties arising from OFAC's regulations. The brief lifting of certain sanctions on Iran following the U.S. entry into the Iranian Nuclear Deal, followed by the subsequent withdrawal from the deal by President Trump brings to light additional challenges that Iranian Investors and other investors touched by sanctions may face going forward. Investors and Regional Centers alike must not only take additional steps at the outset of the EB-5 process, but must make every effort to maintain compliance with OFAC regulations throughout the process.

Transferring the Funds

From inception, transactions involving the movement of money from Iran to the United States face complications, which arise due to the fact that no banking relationship exists between the United States and Iran. Many investors may wish to use the Hawala or sarrafi system, which is a remittance system in Iran that facilitates funds transfers outside of the standard banking system. In general, these transactions involve the Iranian investor transferring funds to a hawaladar (hawala dealer) in Iran, who then arranges with a third party for the transfer of unrelated funds to the desired destination in the United States. The funds in Iran are then disposed of according to the third party's preference. Such transactions are problematic both for demonstrating a lawful source of funds and for reasons related to OFAC regulation. First, hawala transfers are seldom documented sufficiently to trace a path of funds, and there can be questions regarding the source of the third-party funds. Second, and more significantly, depending upon the parties involved, these transactions may be deemed illegal as money laundering. Furthermore, the convoluted path of funds may result in funds having contact with institutions or persons who are on the SDN list, and therefore outside the scope of the general license. Investors and attorneys must be diligent in ensuring that funds are transferred by a reputable sarrafi, and that funds are transferred through a third country financial institution as the intermediary.

Monitoring Against Non-compliance and the Why Funds Should Remain in Escrow

Upon the OFAC compliant transfer of EB-5 investment funds to the United States, it becomes simple for the parties to these transactions to assume that they have successfully complied with OFAC regulations, and move on through the EB-5 investment and application process without worry. But practitioners, regional centers and investors must all be aware that the obligation to maintain compliance with OFAC remains throughout the life cycle of an EB-5 transaction. With increasing processing times, investors' funds remain committed for years before they may become a U.S. person—if indeed their applications are successful and they ever become a U.S. person at all. Parties must continue to evaluate their compliance with OFAC policies and regulations in a constantly shifting climate.

On May 8, 2018, President Trump announced that the United States would withdraw from the Iran Joint Comprehensive Plan of Action (JCPOA), which had been signed on July 14, 2015. Following this withdrawal, the U.S. sanctions against Iran that had been lifted or waived under the agreement have gone back into effect, or what is referred to as "snapback." In the wake of this withdrawal, hundreds of individuals and entities who were removed from the SDN list were placed back on it, and numerous additions have been made to the list in the intervening months.

The impact of snapback is most keenly felt by U.S. owned businesses and subsidiaries abroad. While the U.S. was party to the agreement, OFAC issued General License H, which authorized most financial and other activities that related to Iran for non-U.S. entities owned or controlled by U.S. persons, as well as some limited actions on the part of U.S. parent companies to facilitate these transactions. Following the U.S. withdrawal from the agreement, OFAC revoked General License H, and authorized a 180-day wind down period for activities lawfully undertaken under General License H, which ended on November 4, 2018. OFAC has explicitly stated that, regardless of whether activity is undertaken pursuant to a contract entered into before General License H was revoked, such activity became sanctionable on or after November 5, 2018.[2]

While the re-imposition of sanctions and the subsequent revocation of General License H may not impact the EB-5 industry directly, it should serve as an example and a reminder to regional centers and U.S. attorneys of how changes to existing OFAC regulations and policies as well as the imposition of new ones can cause U.S. persons and entities to run afoul of OFAC at any stage in the lifecycle of a transaction. As the snapback of Iranian

1 Significantly, while OFAC takes the position that funds are not considered to be associated with a bank on the SDN list for purposes of EB-5 investment once the funds have been transferred to a non-SDN bank, however, USCIS has taken the position through Requests for Evidence (RFE) and Notices of Intent to Deny (NOID) that such funds may not have come from a "lawful source."

2 See "Frequently Asked Questions Related to the "Snap-back" of Iranian sanctions in November, 2018," https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_iran.aspx#630 (Accessed March 16, 2019).

Continued On Page 34

Continued From Page 33

sanctions and the revocation of General License H reveal, the legality of a transaction at its inception does not shield U.S. persons from sanctions in the future should that activity become sanctionable in the future. Just as due diligence requires that practitioners, legal representatives and financial institutions must determine that no party to the EB-5 transaction is on the SDN list at the time that the funds are transferred, so too they must continue to ensure that all parties with an interest in the investment do not land on the SDN list in the future.

One can see numerous eventualities that could ultimately subject U.S. parties to an EB-5 transaction to sanctions or lead to other OFAC-related problems in the EB-5 lifecycle, however well-intentioned at the outset. The investor's Iranian financial institution that transferred the initial investment, or the investors themselves, could be added to the SDN list. Worsening relations between the U.S. and Iranian government could lead OFAC to revoke the general license that permits transactions facilitating EB-5 investment. Furthermore, parties must seriously question what their individual obligations are in the event that the investor is ultimately unable to secure a green card, whether by choice or due to other factors. In evaluating these risks, it is clear that the safest means to avoid running afoul of OFAC regulations when accepting EB-5 investment from Iranian nationals, or from other nationals of nations subject to sanctions, is to hold these funds in escrow until the investor has received his or her green card.

The Importance of Long-Term Escrow Agreements

Escrow agreements have become a standard feature of nearly every regional center EB-5 investment. For most investors, there is an obvious preference for escrow agreements which condition the release of funds on approval of the investor's Form I-526. However, as processing times have increased over the last decade, such arrangements present obvious problems for regional center projects seeking to raise capital for large-scale projects in a hurry. Thus escrow agreements have evolved to take into account both the investors' interests as well as the business necessities involved in the projects themselves. The three most common arrangements include conditioning the release of funds :(1) on the I-526 filing; (2) on the I-526 approval; or (3) on both the filing and the approval in stages. When dealing with investments from Iranian investors, or funds originating from other sanctioned nations, however, the EB-5 escrow agreement should condition release of the funds strictly on approval of the I-526, or even on the investor securing the green card, in order to ensure all parties' ability to consistently maintain compliance with OFAC regulations.

By holding Iranian investments in escrow until the investor has secured his or her green card, the parties to the transaction are able to fully trace and monitor the funds throughout the period when the risk of non-compliance with OFAC regulations remains. If, for example, the investor or the financial institution were to be suddenly listed on the SDN list, the financial institution holding the funds could take immediate steps to secure the funds in compliance with OFAC, and the regional center project would not be in the position of having accepted funds from an individual or entity on the SDN list.

In setting up an EB-5 transaction with nationals from Iran, the parties must also consider the obligations of U.S. persons and entities with regards to the funds in the event that the investor does not receive a green card. Much has been said about the ability of U.S. persons to **accept** these funds as part of the EB-5 application process, but the obligations of the parties to the transaction in the event that the application is denied or withdrawn should also be carefully considered.

31 C.F.R. § 560.505(c)(1) authorizes U.S. citizens to export financial services to citizens of Iran "in connection with an individual's application for…an immigrant visa under category EB-5." However, the regulation expressly states that paragraph (c)(1) "does not authorize [t]he exportation of financial services by U.S. persons other than in connection with funds used in pursuit of an E-2 or EB-5 visa." This language, when read together with the subsequent paragraph (c)(2), would seem to prohibit further transactions by U.S. persons with the investor's funds where the investor's visa has been denied or the application has been withdrawn, with one exception. Paragraph (c)(2) of the regulation authorizes U.S. persons to transfer the investor's funds back to Iran or a third country in **lump sum**, and provided that the funds **were held in escrow** while the application was pending.

Financial institutions and regional centers then have compelling reasons to ensure that funds are held in escrow during the pendency of an Iranian investor's green card application. As highlighted above, the language of the regulation appears on its face to prohibit any transactions involving the investor's funds once those transactions are no longer in pursuit of an EB-5 green card. Regional Centers may be prohibited from engaging in activities required by their contract with the investor, such as providing any return on the investment. As we have seen from the snapback of sanctions on Iran in recent months, a contract that was lawfully entered into is no protection against OFAC sanctions if the activity undertaken pursuant to that contract is sanctionable at the time that it occurs. This can expose U.S. persons not only to OFAC sanctions, but to legal liability for breach of contract. Even avoiding this outcome becomes difficult if funds are not held in escrow, because regional centers and financial institutions are unable to take advantage of paragraph (c)(2) and return the investors' funds if they have not been held in escrow. Parties to the transaction will find themselves in the position of having to apply for specific licenses in order to return invested funds. If even a portion of the funds have been released upon the filing of Form I-526, the funds still cannot be returned pursuant to the general license because they will not be in a "lump sum." By holding the investor's funds in escrow for the duration of the pendency of his or her green card applications, all parties to an EB-5 transaction involving invested funds from sanctioned nations can ensure their ability to comply with OFAC regulations at every stage in the transaction.

Conclusion

With the imposition of President Trump's travel ban, EB-5 applicants from Iran, Iraq, Libya, Somalia, Sudan, and Syria now face increased processing times as well as additional scrutiny of both USCIS and the Department of State during the consular process. As a result, these investors are confronted with numerous risks that may impact their petitions including developer default or other problems with the project. Changing circumstances in their own lives may also induce investors to withdraw their petitions prior to securing a green card. When EB-5 investment is sourced from nations subject to sanctions, all parties must take additional steps to ensure compliance with OFAC, and maintain constant vigilance in order to ensure that compliance continues. By holding funds in escrow until investors receive their green cards, U.S. parties to the EB-5 transaction may find their patience is well rewarded.