

# REGIONAL CENTER BUSINESS JOURNAL

October 2018

## EB-5 CAPITAL INVESTMENT

\$25.7 Billion  
in EB-5 Capital  
since 2008!



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- ★ IIUSA Launches New Education Program
- ★ Is the Investment Truly at Risk? How Call Options Could Result in I-526 Petition Denials
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# Letter from the Editor

## DEAR READERS:

This edition of the Journal highlights the value IIUSA continues to deliver to its members, with education modules, networking events, and data analysis. The Journal also includes reviews of current immigration adjudication issues relating to the EB-5 investor's source and transfer of funds, and the structuring of the EB-5 investor's exit from the investment vehicle. Not to miss an emerging topic, the Journal features articles on opportunity zone investments, the litigation contesting how EB-5 visas are counted, and what a minimum price increase could mean for the industry. The editorial committee for the Journal expects you will enjoy these articles just as much as we did in working with the authors.

*Lincoln Stone*

## Lincoln Stone

Stone Grzegorek & Gonzalez LLP  
Chair, IIUSA Editorial Committee

## IIUSA Editorial Committee



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### NOTEBOOK

### ATTENDEE BAG

### KEY CARD

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### POWERPOINT





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eb5 investors  
Magazine



CanAm Enterprises  
EB-5 U.S. Immigration

*CanAm's long and established track record has earned it a well-deserved reputation of credibility and trust.*

1,800+

**Investors Repaid**  
Principal repaid in full to more than 1,800 investors in 34 projects, totaling \$870+ million



2,200+

**I-829 Approvals**  
Representing 7,000+ permanent green cards (includes family members)

4,500+

**I-526 Approvals**  
Representing 13,000+ conditional green cards (includes family members)



\$2.7  
BILLION

**EB-5  
Capital Raised**

30

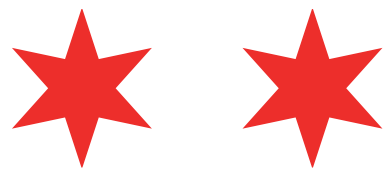
**Years of  
Experience**



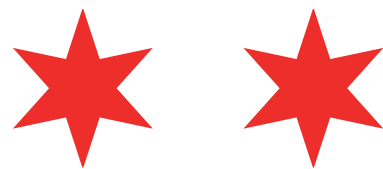
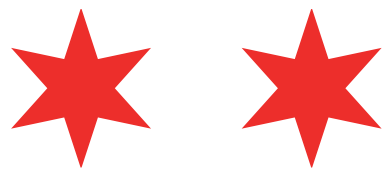
Past performance is not necessarily indicative of future performance.

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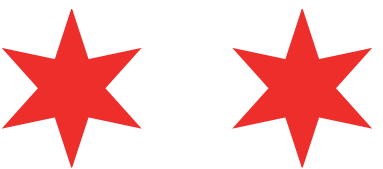




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# Meet Our 2018 SPONSORS



## CMB Regional Centers

CMB Regional Centers is one of the oldest active regional centers within the EB-5 industry with over twenty years of experience. CMB has over 5,200 investors from more than 94 countries, representing over \$2.8 billion in EB-5 investment funds within 68 partnerships. To date, CMB and its investors have seen over 4,500 I-526 approvals, over 1,000 I-829 approvals,

repayment of over \$600 million by CMB borrowers, and a return of capital to investors in 12 CMB EB-5 partnerships.

CMB is recognized as a pioneer in the EB-5 industry. CMB was the first regional center to rely solely upon indirect and induced job creation, and was the first to introduce the loan model. Additionally, in 2014 CMB commissioned independent third-party audits of all CMB EB-5 partnership financials according to GAAP and audits of CMB's track record (I-526 and I-829 approvals). CMB has commissioned the same audits in each year since, and will continue to do so going forward, thereby setting a standard in transparency for the EB-5 industry. Over the years, the EB-5 industry has continued to evolve and many of CMB's methodologies that it pioneered have become widely used throughout the industry.



William (Bill) Gresser is the President and founder of EB-5 New York State, LLC

(founded in 2007). Under Bill's leadership, EB5NYS has completed multiple EB-5 investment projects in which Investors and their families received US Green Cards and the full return of their investment. Bill is the Vice President of IIUSA, the industry's largest trade association. Bill works extensively on industry-wide lobbying efforts for the EB-5 program, regularly speaks on advanced EB-5 topics and consults on the use of EB-5 capital in job-creating projects. Bill earned his BA, MBA, and JD degrees, all with honors, from Georgetown University.



Baker Tilly Capital is a broker dealer member of FINRA that's authorized to offer EB-5 investments. We provide services throughout the life cycle of the EB-5 investment including business plan

writing, economic impact studies, source of funds, pre-immigration tax planning and more. Connect with us: bakertillyeb5.com.



CanAm Enterprises is a sponsor of immigration-linked investment funds in the United States located in New York City's financial district. With 30 years of experience, CanAm is dedicated to connecting foreign investors with qualifying investments. CanAm has financed 55 project loans and raised more than \$2.7 billion in EB-5 financing. CanAm manages seven USCIS-designated regional centers located in Philadelphia, Pennsylvania, Los Angeles, New York, Hawaii, Florida and Texas.



Your dream deserves our diligence.

EB5Deals is an experienced broker with an easy-to-use digital platform for investors to review and compare over 140 EB-5 qualified investments, including exemplar-approved options. We help immigration attorneys reduce liability by helping their clients invest in a suitable project for their immigration and financial needs.



Since 2008, FirstPathway Partners has assisted hundreds of immigrant investors through the EB-5 program, raising millions in funds for job creating enterprises.



Angelique Brunner, the company raises foreign capital through the EB-5 Immigrant Investor Program to invest in job-creating business ventures in the United States.



Related Companies is one of the most prominent privately owned real estate firms in the United States. Related is a fully integrated, highly diversified industry leader with experience in virtually every aspect of development, acquisitions, management, finance, marketing and sales, and has major offices and developments across the globe.



Corsello Capital Regional Center (CCRC) is a division of a bona fide capital firm, comprised of an executive team of investment bankers, lawyers, strategic business developers, EB-5 compliance and finance experts, led by our founder and Managing Partner, Kevin Corsello, a Harvard Business School graduate and alumni. We pride ourselves on adhering to the standards and integrity of the EB-5 program.



Industry leaders published, quoted authors, internationally renowned Top 25 EB-5 attorneys, with extensive experience in financing, marketing, direct investments and produce an international Podcast series



Peng & Weber are immigration lawyers for EB-5 regional centers, developers, and investors. Firm leaders, Elizabeth Peng and Cletus Weber, are nationally recognized in the EB-5 field.



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Civitas Capital Group is a different kind of alternative asset management firm, one devoted to creating opportunities that enrich people and communities by utilizing tools like EB-5.



Wolfsdorf Rosenthal LLP is a full-service, top-rated global immigration law firm with over 30 years of experience with offices in Los Angeles, New York and Shanghai.





# Meet Our 2018 SPONSORS



# SCHEDULE of Events



American Life, Inc. oversees the longest-established active EB-5 program. Founded in 1996, it has completed more than 45 hotel, office, and commercial property developments. Over 3,000

families have trusted American Life with their EB-5 investments.



The Plan Writers is an award winning business plan preparation service that helped hundreds of EB-5 investors and over 3,000+ visa holders since 2012.



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For more than 45 years, Chiesa Shahinian & Giantomasi has been respected for its in-depth insight, creative client solutions and

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Continental Regional Center is known as one of the few Regional Centers which is backed by a southern California developer that contributes sizeable equity into every project. Continental has been able to take advantage of its Southern California location by developing a special expertise in the health care field.



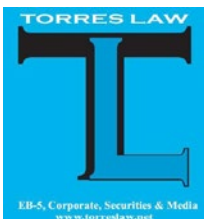
NES Financial is a Silicon Valley financial technology (FinTech) company providing technology-enabled solutions and services for the efficient back- and middle-office administration of complex financial transactions. NES Financial offers industry-leading fund administration, loan servicing, specialized EB-5 administration, and 1031 tax-deferred exchange services. For more information, visit [nesfinancial.com](http://nesfinancial.com).



Recognized as a leading EB-5 Regional Center, Golden Gate Global (3G) is a trusted partner in the EB-5 industry offering an investment platform at institutional quality standards. Since 2011, 3G has raised more than \$600 million in EB-5 funds, working to bring over 1,200 client families from over 25 different countries to live in the United States.



Fragomen is a leading global firm dedicated exclusively to immigration services. Fragomen's EB-5 professionals have extensive experience helping investors navigate complex EB-5 laws.



Torres Law is a South Florida law firm that concentrates on complex corporate and securities law matters. We counsel on a variety of securities offerings, joint ventures, mergers and acquisitions, financings, employment, licensing, distribution, franchising and company formation matters. We are trusted advisors to real estate investment firms, Regional Centers, real estate developers and project operators. Our EB-5 project experience includes, hotels, multifamily, mixed-use, assisted living and a variety of franchise concepts.



Klingner Jazayerli LLP is a comprehensive D.C.-based immigration law firm founded by Karla Klingner and Rana Jazayerli, who combined have more than 20 years of immigration law experience.



Kurzbach Kurzbach Tetzeli and Pratt P.A. is the leading law firm in complex immigration litigation in the United States, having successfully represented regional centers and investors in federal courts to review denials of 1-526 and/or 1-829.

NES Financial is a Silicon Valley financial technology (FinTech) company providing technology-enabled solutions and services for the efficient back- and middle-office

Recognized as a leading EB-5 Regional Center, Golden Gate Global (3G) is a trusted partner in the EB-5 industry offering an investment platform at institutional quality standards. Since 2011, 3G has raised more than \$600 million in EB-5 funds,

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Klingner Jazayerli LLP is a comprehensive D.C.-based immigration law firm founded by Karla Klingner and Rana Jazayerli, who combined have more than 20 years of immigration law experience.

Kurzbach Kurzbach Tetzeli and Pratt P.A. is the leading law firm in complex immigration litigation in the United States, having successfully represented regional centers and investors in federal courts to review denials of 1-526 and/or 1-829.

## MONDAY OCTOBER 29, 2018

TIME		BREAKOUT ROOM	MAIN ROOM
7AM	Registration & Exhibits 7:15AM - 5:00PM	<b>EB-5 Newcomer Session</b> <b>AN INTRODUCTION TO EB-5:</b> INVESTMENT, JOBS, AND CITIZENSHIP 8:00AM - 9:30AM	<b>OPENING REMARKS</b> 9:25AM - 9:30AM
8AM			<b>KEYNOTE SPEAKER:</b> Sarah M. Kendall, Chief, USCIS, Immigrant Investor Program Office (IPO), Washington, DC 9:30AM - 10:25AM
9AM			<b>NETWORKING BREAK</b> 10:25AM - 10:40AM
10AM			<b>LOOKING AHEAD:</b> Post-September 30th and the 116th Congress 10:40AM - 11:40AM
11AM		<b>CHOICES IN EB-5: EXAMINING DIRECT VS. REGIONAL CENTER OPPORTUNITIES FROM KEY PERSPECTIVES</b> 1:25PM - 2:25PM	<b>PENDING REGULATIONS AND OTHER ADMINISTRATIVE POLICY UPDATES:</b> Turning Uncertainty into Opportunity 11:45AM - 12:45PM
12PM			<b>LUNCH</b> (Included with Registration) 12:45PM - 1:25PM
1PM			<b>CAPITAL STACK TRENDS:</b> How to Find and Successfully Incorporate Non-EB-5 Funds 1:25PM - 2:25PM
2PM			<b>POST-SESSION DIALOGUE</b> 2:25PM - 2:55PM
3PM		<b>INSIGHTS FROM INVESTMENT REGULATIONS:</b> Sec Enforcement Actions—What We Know and Why It Matters 2:55PM - 3:55PM	<b>REGIONAL CENTER OPERATIONS:</b> Lessons Learned and Risk Mitigation in 2018 2:55PM - 3:55PM
4PM		<b>EB-5 SITE VISITS AND COMPLIANCE REVIEWS:</b> What They Mean for You and How to Prepare y our Regional Center, Project, and Employees 4:00PM - 5:00PM	<b>THE IDEAL EB-5 PROJECT:</b> Case Studies, Checking all the Boxes, and Making the Right Decisions for Success in Today's Market 4:00PM - 5:00PM
5PM		<b>MONDAY EVENING RECEPTION</b> SPONSORED BY  CMB Regional Centers	



# Your immigration counsel. Our investment diligence.

(There’s gotta be a Latin legal term for “awesome partnership,” right?)



As an immigration attorney, you’re great at what you do. But you shouldn’t have to handle the unnecessary responsibility — and unnecessary liability — of helping your clients choose a product to invest in. Let your immigration client become our investment client. Our analysts have conducted due diligence on approximately 150 EB-5 eligible offerings. We can offer your clients a simple, more effective way to review and compare a curated selection. It’s our proprietary Deal Platform. You and your clients will love it.



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AN EB-5 OFFERING IS AN INVESTMENT IN A PRIVATE PLACEMENT OF SECURITIES CREATED SPECIFICALLY FOR APPLICANTS TO THE UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES (“USCIS”) FIFTH PERMANENT WORKER VISA PREFERENCE (“EB-5 PROGRAM”) AND ARE SPECULATIVE INVESTMENTS INVOLVING A HIGH DEGREE OF RISK. INVESTORS MUST BE PREPARED TO BEAR THE ECONOMIC RISK OF SUCH AN INVESTMENT FOR A LONG PERIOD OF TIME AND BE ABLE TO WITHSTAND A TOTAL LOSS OF THEIR INVESTMENT. THERE IS NO GUARANTEE THAT AN INVESTOR’S EB-5 APPLICATION WILL BE APPROVED BY THE USCIS. SEE OFFERING DOCUMENTS FOR COMPLETE INFORMATION.

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## SCHEDULE of Events



TUESDAY OCTOBER 30, 2018			
TIME		BREAKOUT ROOM	MAIN ROOM
8AM	Registration & Exhibits 8:00AM - 5:00PM		<b>WHAT'S HAPPENING IN CHINA?</b> Investor Withdrawal Requests, Agent Marketing, and What it Means for the Market 8:30AM - 9:30AM
9AM			<b>CONVERSATION WITH THE KEYNOTE</b> Charles Oppenheim, Chief, Immigrant Visa Control & Reporting, U.S. Department of State, Washington, DC 9:35AM - 10:40AM
10AM			<b>NETWORKING BREAK</b> 10:40AM - 10:50AM
11AM		<b>INVESTOR MARKETS DISCUSSION:</b> Asia (Vietnam, India, and Beyond) 10:50AM - 11:50AM	<b>DISTRESSED &amp; TROUBLED PROJECTS:</b> How to Reverse Course and What it Means for Material Change 10:50AM - 11:50AM
12PM		<b>LUNCH</b> (Included with Registration) 11:50AM - 12:30PM	<b>LUNCH</b> (Included with Registration) 11:50AM - 12:30PM
1PM		<b>INVESTOR MARKET DISCUSSIONS:</b> The Americas (Brazil, Venezuela, Mexico, and Beyond) 12:30PM - 1:30PM	<b>SOURCE OF FUNDS ISSUES WITH CHINA, OTHER EB-5 INVESTOR MARKETS, AND THIRD-PARTY EXCHANGES</b> 12:30PM - 1:30PM
2PM		<b>INVESTOR MARKET DISCUSSIONS:</b> Europe and the Middle East 1:35PM - 2:35PM	<b>EB-5 QUOTA BACKLOG:</b> Legislative, Administrative, and Judicial Solutions 1:35PM - 2:35PM
3PM		<b>POST-SESSION DIALOGUE</b> 2:35PM - 2:55PM	<b>POST-SESSION DIALOGUE</b> 2:35PM - 2:55PM
4PM		<b>EB-5 FINANCING STRUCTURES:</b> What's Right for Me? 2:55PM - 3:55PM	<b>USCIS ADJUDICATIONS:</b> Trends, Response Strategies, and Implications for Investors Regarding Rfes, Noits, and Noids 2:55PM - 3:55PM
		<b>EB-5 LITIGATION AND WHAT IT MEANS:</b> Who is Suing Whom and Why it Matters 4:00PM - 5:00PM	<b>REDEPLOYING EB-5 INVESTMENTS:</b> A Roadmap to Help Navigate Securities Laws and USCIS Guidance 4:00PM - 5:00PM





# CMB REGIONAL CENTERS

5,200+  
EB-5 Participants



4,400+  
I-526 Approvals

Clients from  
90+ Countries

1,000+  
I-829 Approvals



## PANEL Descriptions



MONDAY OCTOBER 29, 2018

### AN INTRODUCTION TO EB-5: INVESTMENT, JOBS, AND CITIZENSHIP 8:00AM–9:30AM

An EB-5 investment is unlike any traditional investment. The panelists will cover how investment, job creation, immigration, U.S. permanent residence and citizenship, EB-5 program compliance, and other issues all intertwine. The process is challenging, but it can be done successfully and achieve the goals of all parties involved.

- What Is EB-5? The Oversight, Administration, and Regulation of the Program
- “The Best Laid Plans...”: What to Consider When Planning for Success
- Who Measures Success? And What Is Success for the Parties Involved?

**Joseph Martin Barnett (DL)**, *Wolfsdorf Rosenthal LLP, Santa Monica, CA*  
**Alex Brown**, *Impact DataSource, Austin, TX*  
**Matthew T. Galati**, *Green and Spiegel LLC, Philadelphia, PA*  
**Noreen Hogan**, *CMB Regional Centers, Rock Island, IL*

### OPENING REMARKS 9:25AM–9:30AM

**Aaron Grau**, *IIUSA Interim Executive Director*  
**Bernard P. Wolfsdorf**, *Conference Program Chair, Wolfsdorf Rosenthal LLP, Santa Monica, CA*

### KEYNOTE SPEAKER: 9:30AM–10:25AM

**Sarah M. Kendall**, *Chief, USCIS, Immigrant Investor Program Office (IPO), Washington, DC*

### LOOKING AHEAD: POST-SEPTEMBER 30TH AND THE 116TH CONGRESS 10:40AM–11:40AM

The panelists will consider the likelihood of legislative or administrative EB-5 program reform after September 30, 2018. Given the absence of congressional action, is USCIS likely to push ahead with its proposed EB-5 regulations? Will some stakeholders seek to stop enactment by way of judicial review? Will a potential Democratic majority in the House (and/or possibly the Senate) affect the likelihood for reform? Panelists will address these questions and more on how the government will affect the future of the EB-5 industry.

**Bill Gresser (DL)**, *IIUSA Vice President, EB-5 New York State Regional Center, Buffalo, NY*  
**Jon Baselice**, *U.S. Chamber of Commerce, Washington, DC*  
**George McElwee**, *Commonwealth Strategic Partners, Washington, DC*  
**Laura Foote Reiff**, *Greenburg Traurig LLP, Washington, DC*

### PENDING REGULATIONS AND OTHER ADMINISTRATIVE POLICY UPDATES: TURNING UNCERTAINTY INTO OPPORTUNITY 11:45AM–12:45PM

If adopted, the proposed USCIS EB-5 regulations without visa reform could severely impact the EB-5 industry. The panelists will discuss the current status of the regulations and the content, and the potential impact on investors, regional centers and developers. Is there a silver lining for the industry if the regulations are adopted? The panelists also will consider USCIS policy updates, including its recent guidance on “placeholder” filings.

**Adam Greene (DL)**, *EB-5 New York State Regional Center, New York, NY*  
**Carolyn S. Lee**, *Miller Mayer LLP, Ithaca, NY*  
**Joseph McCarthy**, *IIUSA Director, American Dream Fund, Huntington Beach, CA*  
**Leon Rodriguez**, *Seyfarth Shaw, Washington, DC*

### CAPITAL STACK TRENDS: HOW TO FIND AND SUCCESSFULLY INCORPORATE NON-EB-5 FUNDS 1:25PM–2:25PM

From New Market Tax Credits and Tax-Increment Financing to Tax Exempt Bonds, learn how to leverage federal, state, and municipal economic growth incentives with traditional bank financing and equity. When EB-5 capital becomes increasingly difficult or untimely to obtain, plan for shortfalls in EB-5 capital with last-minute sources for equity and bridge financing.

- How to Pair Capital Sources
- Updates on Current Lending Conditions
- Discover New and Traditional Economic Growth Incentives

**Steve Strnisha (DL)**, *IIUSA Secretary-Treasurer, Cleveland International Fund, Cleveland, OH*  
**Michael Fitzpatrick**, *Baker Tilly Capital, Madison, WI*  
**David Morris**, *DC Regional Center, Washington, DC*  
**Reid Thomas**, *NES Financial, San Jose, CA*

### REGIONAL CENTER OPERATIONS: LESSONS LEARNED AND RISK MITIGATION IN 2018 2:55PM–3:55PM

The EB-5 Regional Center Pilot Program was originally enacted in 1993. In the 25 years since, there have been numerous developments, with many of these changes happening recently. The panelists will present lessons learned from a regional center’s perspective, as well as how that knowledge will benefit a regional center in the years ahead.

- Recent Policy Updates and Guidance from USCIS
- The Role of the U.S. Securities & Exchange Commission (SEC) in EB-5
- Fraud and Abuse in the EB-5 Program, and Tips to Avoid These Pitfalls

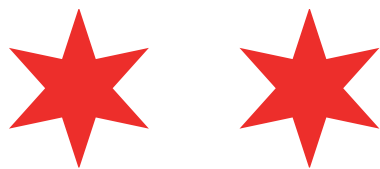
**Dave Souders (DL)**, *IIUSA Director, Todd & Associates, Beachwood, OH*  
**Mary King**, *New York City Regional Center, New York, NY*  
**Robert Kraft**, *IIUSA President, FirstPathway Partners, Milwaukee, WI*

### THE IDEAL EB-5 PROJECT: CASE STUDIES, CHECKING ALL THE BOXES, AND MAKING THE RIGHT DECISIONS FOR SUCCESS IN TODAY’S MARKET 4:00PM–5:00PM

Today’s EB-5 market looks much different than it did in the past, as investor preferences, risk profile, real estate market dynamics, and foreign exchange logistics change continuously. In an industry where independent data is scarce and news about failed projects are on the rise, it can be difficult to identify reliable EB-5 projects. Listen to our expert panelists to learn the fundamentals of due diligence when reviewing potential EB-5 projects.

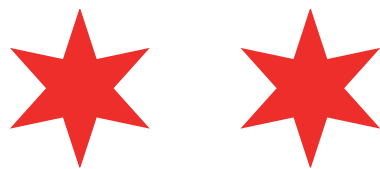
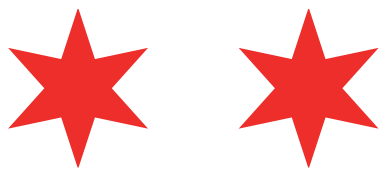
- Learning the Basics of Real Estate and EB-5 Due Diligence
- Understanding the State of the EB-5 Financing Industry
- Making Data-Driven Decisions in Immigration Investment





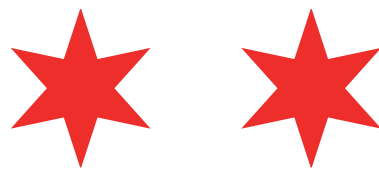
# PANEL

## Descriptions



# PANEL

## Descriptions



**Al Rattan (DL)**, *IIUSA Director, Continental Regional Center, Murrieta, CA*  
**Rupy Cheema**, *EB5 Diligence, Toronto, Canada*  
**Douglas D. Hauer**, *Mintz Levin, Boston, MA*  
**Patrick Hogan**, *IIUSA Director, CMB Regional Centers, Rock Island, IL*  
**Alexei Kondenkov**, *AXOS Bank, San Diego, CA*

### CHOICES IN EB-5: EXAMINING DIRECT VS. REGIONAL CENTER OPPORTUNITIES FROM KEY PERSPECTIVES 1:25PM–2:25PM

Investors considering the EB-5 program face a threshold issue of whether to opt for EB-5 regional center investment projects, or pursue direct EB-5 investments through a new commercial enterprise (NCE) in which they directly participate in management. In recent years, EB-5 investors have overwhelmingly favored EB-5 regional center investments. Nevertheless, direct EB-5 investments have remained attractive for reasons ranging from regulatory predictability to investors’ desire to carefully manage their business. Panelists will share insights on key perspectives that investors use to decide whether to pursue an EB-5 regional center or direct EB-5 investment.

- Regulatory Risk: Reliance on Regional Center Program Renewal and Other Features of Proposed Legislative and Regulatory Reform
- Project Design: What Works for a Regional Center May Not Work Under Direct EB-5
- Job Creation: Evidentiary Requirements for Successful Job Creation
- Management Control: Own and Manage Your Own Business vs. Rely on Regional Center Managers
- Return on Investment (ROI): Potential for Commercial Grade ROI vs. Low ROI
- Capital Risk: Cash Call Risk vs. Risks Related to Capital Stack
- Immigration Benefits and Risks: Matching Direct EB-5 with Temporary Visa Processes (Such as E-2)

**Ignacio A. Donoso (DL)**, *Conference Program Committee, I.A. Donoso & Associates LLC, Bethesda, MD*  
**Tammy Fox-Isicoff**, *Rifkin & Fox-Isicoff P.A. Miami, FL*  
**Edward C. Beshara**, *Conference Program Committee, Beshara PA, Maitland, FL*  
**Samuel Duggins Newbold**, *Barst Mukamel & Kleiner, New York, NY*

### INSIGHTS FROM INVESTMENT REGULATIONS: SEC ENFORCEMENT ACTIONS—WHAT WE KNOW AND WHY IT MATTERS 2:55PM–3:55PM

The Jay Clayton-led SEC may be more selective in bringing enforcement actions. However, there is no indication that EB-5 misappropriations and illegal brokering of EB-5 securities sales will not remain subject to SEC enforcement actions. The panelists will share insights from 2017–18 SEC enforcement actions involving immigration lawyers and EB-5 transaction parties.

**Ronald R. Fieldstone**, *Saul Ewing Arnstein & Lehr LLP, Miami, FL*  
**Catherine DeBono Holmes**, *Jeffer Mangels Butler & Mitchell, Manhattan Beach, CA*

**Scot O’Brien**, *Akerman LLP, Washington, DC*  
**Oswaldo F. Torres**, *Torres Law PA, Ft. Lauderdale, FL*  
**Clem Turner**, *Chiesa Shahinian & Giantomasi PC, New York, NY*

### EB-5 SITE VISITS & COMPLIANCE REVIEWS: WHAT THEY MEAN FOR YOU AND HOW TO PREPARE YOUR REGIONAL CENTER, PROJECT, AND EMPLOYEES 4:00PM–5:00PM

In 2017, the Immigrant Investor Program Office (IPO) Fraud Detection and National Security Directorate (FDNS) utilized the USCIS Administrative Site Visit and Verification Program to conduct 232 site visits and created a new Compliance Division that conducts regional center compliance reviews. The panelists will discuss the differences between USCIS site visits and compliance reviews, and share experiences from actual audits. Panelists will discuss how to prepare your regional centers, investors, and project sites. They also will provide tips to help avoid termination for failure to maintain regional center eligibility and secure I-829 approval.

- The Difference Between Site Visits and Compliance Reviews
- Preparing Your Regional Center, NCE, Job Creating Entity (JCE), and Tenants at Different Phases of the Project Life Cycle
- Site Visit Compliance for Loan and Equity Project Models
- Compliance Review Toolkit

**Kristal Jeanette Ozmun (DL)**, *Miller Mayer, LLP, Ithaca, NY*  
**Rafael Anchia**, *Civitas Capital, Dallas, TX*  
**Linda W. Lau**, *Global Law Group, Pasadena, CA*  
**Darrell Sanders**, *American Life Inc., Seattle, WA*

### DISTRESSED AND TROUBLED PROJECTS: HOW TO REVERSE COURSE AND WHAT IT MEANS FOR MATERIAL CHANGE 10:50 AM–11:50 AM

Capital investment projects sponsored by regional centers can be complex deals involving layers of financing, multiple developers, and the need for state and local regulatory approval or support (such as favorable tax treatment). What happens to EB-5 investors when planned financing fails, developers face disputes or misconduct, or state and local support evaporates? The panelists will provide insights into EB-5 regional center projects experiencing distress, and how EB-5 investors and regional centers can plan for solutions to these situations.

- Do’s and Don’ts: What Is Permitted for EB-5 Investors Seeking to Comply with the Sustainment and At-Risk Rules in Addition to the Material Change Policy?
- Negotiating with Senior Lenders and Developers
- Managing the Managers: EB-5 Investors and the Management of the New Commercial Enterprise
- Time Is of the Essence: Dealing with USCIS Timelines for Job Creation and Annual Reporting
- Unwinding: When to Unwind the Deal, and How NCE Capital Can Be Redirected to Another Project

**Eren Cicekdagi (DL)**, *IIUSA Director, Conference Program Committee, Golden Gate Global, San Francisco, CA*

**Robert C. Divine**, *IIUSA Vice President Emeritus, Baker Donelson, Chattanooga, TN*

**Rohit Kapuria**, *Saul Ewing Arnstein & Lehr, Miami, FL*

**Andrew F. O’Neill**, *Sidley Austin LLP, Chicago, IL*

**Lincoln Stone**, *Stone Grzegorek & Gonzalez LLP, Los Angeles, CA*

### SOURCE OF FUNDS ISSUES WITH CHINA, OTHER EB-5 INVESTOR MARKETS, AND THIRD-PARTY EXCHANGES 12:30 PM–1:30 PM

The source of the investor’s funds continues to be a central component in all EB-5 petitions. The panelists will discuss the latest trends and issues from recent USCIS adjudications, including RFEs and NOIDs on Chinese source of funds (SOF), as well as frequently asked questions by investors of other markets.

- SOF RFEs and NOIDs with China: Third-Party Value Exchange, Tax and Social Insurance Records, Mortgage Registration, and Inconsistencies from Prior Visa Applications
- India: How to Document Multiple Sources and Complicated Path of Funds
- Is It Advisable to Accept Gifts from Non-Family Members?
- South Korea: Is the Rent Deposit (“Key Money”) an Acceptable SOF?
- Taiwan: The American Institute in Taiwan’s Review on EB-5 SOF After I-526 Approval
- New Policy Memo (Straight Denials): Does It Impact EB-5 SOF Documentation?

**Anusree “Anu” Nair (DL)**, *Klasko Immigration Law Group, Philadelphia, PA*

**Jana Aristizabal**, *Marcum LLP, Ft. Lauderdale, Florida*

**June Cheng**, *Fredrickson & Byron P.A., Minneapolis, MN*

### EB-5 QUOTA BACKLOG: LEGISLATIVE, ADMINISTRATIVE, AND JUDICIAL SOLUTIONS 1:35 PM–2:35 PM

EB-5 quota backlogs already are a fact of life for two countries, and on the horizon for others. The panelists will discuss the present and future extent of these backlogs and any hope for addressing them. They also will explore other visa and permanent residence options instead of, or in addition to, EB-5.

- Projections for Quota Backlogs in Specific Countries
- Is There Any Hope for Solutions by Legislation, Litigation, or Attrition?
- Parameters for Minors as Investors to Avoid Age-Out Problems
- When Is EB-1 a Realistic Alternative?
- Is Third-Country Citizenship and an E-2 Visa a Realistic Option to Fill the Gap?

**Bernard P. Wolfsdorf (DL)**, *Conference Program Chair, Wolfsdorf Rosenthal LLP, Santa Monica, CA*

**Charles C. Foster**, *Foster Global, IIUSA Director, Houston, TX*

**David Hirson**, *David Hirson & Partners, LLP, Costa Mesa, CA*

**Kraig Schwigen**, *Conference Program Committee, CMB Regional Centers, Moline, IL*

### USCIS ADJUDICATIONS: TRENDS, RESPONSE STRATEGIES, AND IMPLICATIONS FOR INVESTORS REGARDING RFEs, NOITs, AND NOIDS 2:55 PM–3:55 PM

Panelists will provide an update on USCIS trends for both investor I-526 petitions and regional center I-924 applications, particularly with regard to Requests for Evidence (RFEs), Notices of Intent to Terminate (NOITs), and Notices of Intent to Deny (NOIDs). The panelists will provide insight “from the trenches” on effective approaches to address USCIS’ ever-shifting standards and concerns, including bridge financing, third-party swaps, and redemption.

**Michele A. Franchett (DL)**, *Stone Grzegorek & Gonzalez LLP, Los Angeles, CA*

**Chun Yun “Elizabeth” Peng**, *Peng & Weber PLLC, Mercer Island, WA*

**John Patrick Pratt**, *Kurzban, Kurzban, Weinger, Tetzeli & Pratt, Miami, FL*  
**Rebecca S. Singh**, *Mona Shah & Associates, New York, NY*

### REDEPLOYING EB-5 INVESTMENTS: A ROADMAP TO HELP NAVIGATE SECURITIES LAWS AND USCIS GUIDANCE 4:00 PM–5:00 PM

Redeployment of EB-5 investments implicates securities law issues that should be thoughtfully addressed upfront and continually throughout the process when structuring EB-5 financings. The panelists will provide a roadmap to help EB-5 stakeholders identify the common securities laws triggered in redeployment—i.e., investor consents and the Securities Act of 1933, the general partner/manager’s role and the Investment Advisers Act of 1940, and several other securities laws along the path to compliant redeployments.

**Mariza E. McKee (DL)**, *Conference Program Committee, Kutak Rock, Chicago, IL*

**Benjamin Cummings**, *Birch Capital, Wellesley, MA*

**Michael G. Homeier**, *Law Office of Michael G. Homeier PC, Sherman Oaks, CA*

**Rana Jazayerli**, *Klingner Jazayerli LLP, Washington, DC*

**Abteen Vaziri**, *Brevet Capital; IIUSA Director, New York, NY*

## TUESDAY OCTOBER 30, 2018

### WHAT’S HAPPENING IN CHINA? INVESTOR WITHDRAWAL REQUESTS, AGENT MARKETING, & WHAT IT MEANS FOR THE MARKET 8:30 AM–9:30 AM

Facing long EB-5 visa waiting lines, the Chinese market that previously supplied 80 percent of investors has rapidly decreased, putting capital raises in jeopardy. Chinese investors are concerned about age-out issues and frustrated that their investments are “at risk” for longer periods of time. Our panel of experts will discuss waiting line strategies, including short- and long-term visa options.

- Solutions to the EB-5 Visa Waiting Line
- Investor Drop-Out and “Age-Out” Issues
- “Sustaining” the Investment: Redeployment Concerns
- Ethical Issues
- Long-Term Strategic Planning

**Tom Rosenfeld (DL)**, *IIUSA Director Emeritus, CanAm Enterprises, New York, NY*

**David Chen**, *Visas Consulting Group, Shanghai, China*

**Robert P. Gaffney**, *Law Offices of Robert P. Gaffney, San Francisco, CA*

**Cletus M. Weber**, *IIUSA Director, Peng & Weber PLLC, Mercer Island, WA*

### CONVERSATION WITH THE KEYNOTE 9:35 AM–10:40 AM

**Charles Oppenheim**, *Chief, Immigrant Visa Control & Reporting, U.S. Department of State, Washington, DC*

**Robert C. Divine (DL)**, *IIUSA Vice President Emeritus, Baker Donelson, Chattanooga, TN*

**Cletus M. Weber**, *IIUSA Director, Peng & Weber PLLC, Mercer Island, WA*

**Bernard P. Wolfsdorf**, *Conference Program Chair, Wolfsdorf Rosenthal LLP, Santa Monica, CA*



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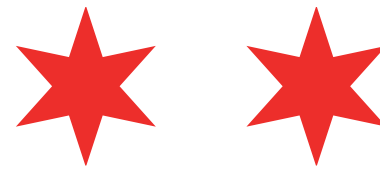
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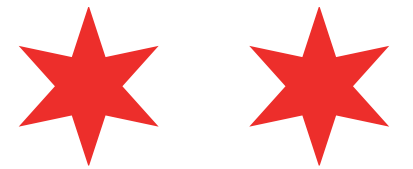
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## PANEL Descriptions



### INVESTOR MARKETS DISCUSSION: ASIA (VIETNAM, INDIA, AND BEYOND) 10:50 AM-11:50 AM

As Chinese EB-5 funding slows down, what are the emerging markets for EB-5 fundraising in Asia? The panelists will discuss specific markets where EB-5 issuers are focusing their efforts. Learn more about the EB-5 prospects of other popular (and lesser-known) Asian markets.

- Vietnam: Is It Similar to China 10 Years Ago, or a Market with Its Own Dynamics?
- India: Hotspot for the Next Wave of EB-5 Investors, or a Gateway to U.S.-Based H-1B Holders?
- Is South Korea Trending?
- Other Opportunities in the Asian Market: The Philippines, Singapore, and More

**Brandon Meyer (DL)**, *Fakhoury Global Immigration, San Francisco, CA*  
**David A. Enterline**, *WTW - Taipei Commercial Law Firm, Taipei, Taiwan*  
**Janak Mehta**, *FRR Immigration, Mumbai, India*  
**Jinhee K. Wilde**, *Wilde & Associates, Rockville, MD*

### INVESTOR MARKETS DISCUSSION: THE AMERICAS (BRAZIL, VENEZUELA, MEXICO, AND BEYOND) 12:30 PM-1:30 PM

Foreign national investors are now comparing the costs and timelines of pursuing an EB-5 visa through a regional center to alternative U.S. investor and work visas. The current administration's policies—e.g., the travel ban (affecting Venezuelans specifically), and the strict compliance with the intent to return on temporary visas—are making most immigration options more difficult. Ultimately, some foreign national investors consider EB-5 regional center projects as the most favorable option for entry into the United States. The panelists will discuss how these restrictive policies are affecting potential foreign national investors from North, South, and Central America.

- Due Diligence Questions: Either Immigration or Business/Investment Analysis
- The Comparison of Costs and Timelines for Alternative Visa Options
- Travel Ban 3.0: The Effect and Solutions
- Current USCIS and U.S. Consulate Policy: Strict Compliance with the Intent to Return as the Basis for Issuance of Temporary Work Visas
- What Is the Realistic End-Goal of the Foreign National Investor?

**Maria Casablanca (DL)**, *Akerman LLP, Miami, FL*  
**Victor A. Espinosa**, *Golden Gate Global, San Francisco, CA*  
**Gonzalo Lopez-Jordan**, *American Regional Center Group, Miami, FL*  
**Manuel Ortiz**, *Civitas Capital, Dallas, TX*

### INVESTOR MARKET DISCUSSIONS: EUROPE AND THE MIDDLE EAST 1:35 PM-2:35 PM

It is an often overlooked fact that many of the earliest investors in the EB-5 program came from Europe and the Middle East, and there has been a steady stream of investors from these regions since. The panelists will discuss issues related to these markets and areas developers should focus on when looking for investors from these countries.

- History of European EB-5 Investment
- Hubs: London and Dubai ... and Now Cyprus and Baden (Germany)? Why?

- The Middle East North Africa Region and Ex-Patriots
- Anomalies of Marketing in the Middle East
- Is It Worthwhile to Market in Regions with E-2 Treaties Such as Turkey or Egypt?
- Look for Agents or Focus on Business to Business?
- Source of Funds Issues

**Mona Shah (DL)**, *Conference Program Committee, Mona Shah & Associates, New York, NY*

**Reza Rahbaran**, *Rahbaran & Associates, PLLC, Miami, FL*

**Irina Rostova**, *Rostova Westerman Law Group, Fort Lauderdale, FL*

### EB-5 FINANCING STRUCTURES: WHAT'S RIGHT FOR ME? 2:55 PM-3:55 PM

In a complex time when High Volatility Commercial Real Estate requirements are impacting terms, term sheets fail the burden of proof, and impermissible guarantees are evolving, learn how preferred equity, a pledge of the borrower's ownership interest, and structuring loan terms for sustainment could benefit your project. Panelists will illuminate the interplay between complex business, financial, securities, and EB-5 requirements.

- Limited Circumstances Which Allow EB-5 to Replace Bridge Financing
- Flow of Funds for Bridge Loan Repayment
- Complex Multi-Layer Structures
- Mortgage Loan, Mezzanine Loan, Equity, and Preferred Equity: What Is the Relationship of EB-5 Funds to All Other Capital in the JCE?
- How Is the Typical Capital Stack Evolving?

**Richard Booth (DL)**, *Signature Bank, New York, NY*  
**Richard Fischer**, *Sterling National Bank, New York, NY*  
**Gary "Skip" Stern**, *CanAm Enterprises, Chicago, IL*

### EB-5 LITIGATION AND WHAT IT MEANS: WHO IS SUING WHOM AND WHY IT MATTERS 4:00 PM-5:00 PM

With legislation and liaison unlikely to address errors in USCIS legal interpretations and delays in adjudications, litigation is increasingly the best (or only) option. The panelists will review recent litigation trends and decisions and preview the expected issues to be litigated in the coming months and years. The panelists also will discuss suits against USCIS, as well as suits initiated by aggrieved investors.

- Review of Recent EB-5 Litigation in Federal Courts
- Preview of Likely Issues for Future Litigation
- Litigation Arising out of Regional Center Terminations
- Motion to Reopen, Appeal to the Administrative Appeals Office, or Federal Court: Which Is Best and When?
- When Is the Right Time to File for Mandamus?
- Litigation by Investors: Against USCIS, Regional Centers, and Developers (Respectively)

**H. Ronald Klasko (DL)**, *Conference Program Committee, Klasko Immigration Law Partners, Philadelphia, PA*

**Ira J. Kurzban**, *Kurzban, Kurzban, Weinger, Tetzeli & Pratt, Miami, FL*







✓ I-526 Approval    ✓ I-829 Approval    ✓ Redemption



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# IIUSA's Strength is its Potential



**AARON GRAU**  
IIUSA INTERIM EXECUTIVE DIRECTOR

Perhaps you read my introductory e-mail message as IIUSA's Interim Executive Director. Your warm welcomes and patient demeanors were encouraging. Thank you. More encouraging, however, is the depth and breadth of IIUSA's staff's and leadership's passion and capabilities. When I sent my e-mail, I earnestly acknowledged these assets.

As a 20+ year student of association management work I learned no association is immune to conflict, doubt, or worry. However, when its mission is clear, its mechanics are sound, and its professionals and leaders are smart and honest, healthy associations absorb and effectively address these challenges.

As an experienced association manager, I can tell you objectively that IIUSA's

mission is clear. Its mechanics are sound and its professionals and leaders are smart and honest. In fact, IIUSA leaves no room for improvement; but, it has the capacity, untapped potential, and foundation for exponential growth and even an expansion of the underlying federal Regional Center program. It is a matter of promoting its mission, leveraging its mechanics, and trusting its professionals and leadership.

If IIUSA capitalizes on these assets, it will reach beyond its potential. Given what I see, who I've met, and what I learned over the past 20 years and more recently the last two months, I have at least three suggestions about how to do it.

#### Develop New Audiences

No organization can be all things to all people. However, every organization must strive to connect with as many relevant audiences as possible. Not every audience demands the "care and feeding" others do, but a positive, honest, and supportive connection can earn trust, even reliance, and ultimately increase a group's political capital and maybe its revenue as well. I suggest there are two audiences on which IIUSA can immediately focus: new members and new decision makers.

**New Membership** - IIUSA must reach out to new membership audiences and set a specific place for them at the table; create new

lines of information and communication. In fact, IIUSA should consider new membership categories for local, state, and regional economic development authorities (Pittsburgh Sports and Exhibition Authority oversees 28 acres of undeveloped property in downtown.), universities (Many are focused on economic development of their communities.), and airport area chambers of commerce (All of which are consistently focused on new development and attracting business.)

**New Decision Makers** - Congressional leaders are invaluable, but few. The many more rank-and-file members, like an association when unified, are unstoppable. Unifying representatives and senators to support the EB-5 program and its Regional Centers takes patience and tenacity. Cultivating this audience must become an IIUSA priority. What states and congressional districts host EB-5 projects? How are they benefitting local economies? We know the answers to these questions, but don't assume Members of Congress do. They need to be shown, over and over again in new ways. They need to visit sites, talk to workers, and learn how projects work; their financing, the roles of investors, protections against abuse, etc. The more Members understand and appreciate what the program does for them and their districts, the more they will support

*Continued On Page 22*



*Continued From Page 21*

and promote it.

Similarly, the more local, state, and regional decision makers like mayors, county councils, and state legislators understand how EB-5 works and what it brings them and their constituency, the more they will be willing to join our chorus to federal law makers.

#### Strive for Unity, Not Unanimity

Associations demonstrate clarity and strength, achieve members' goals, become an asset to policy makers, and grow based on unity, not unanimity. An association's grand purpose is establishing a unified -not a unanimous-voice; a singular message (on any topic) cultivated and hammered out amidst like-minded peers, colleagues, and competitors.

Associations can be raucous. Exchanges can be distasteful and not everyone will get what they want. Associations often sound dissonant or feel combative and that is OK, even beneficial. Pick your analogy: platform, umbrella, tent. If an association's foundation is strong, its members will use it to debate, synchronize, and compromise until they proclaim a unified message or take collective action benefitting

the majority of industry stakeholders.

That unity is powerful and all associations **must** strive to secure it; protect it. Once in hand, the association can leverage its unity to accomplish just about anything, including favorable statutes and regulations, a burnished public image, eager participants and supporters, growth, and assured longevity.

Unanimity is a will-o-the-wisp. Chase it at your own peril. Unity comes from a hard work, earned trust, communications, and compromise. If you have it, everyone wins. If you waste time and resources cajoling your peers, justifying others' actions with double-speak, and worrying about how others may react, everyone fares much worse.

Above, I suggest expanding IIUSA's base and seeking new audiences. That makes unity harder to reach, but that much more powerful when assured. More importantly, IIUSA must also reach back out to old audiences its lost to reassure them of their place at IIUSA and make efforts to make it so.

#### Exude Authority & Expertise

I am not a huge Donna Summer fan, but she does have some great advice: *"Baby if you*

*got it -- You have got to flaunt it!"* IIUSA can and must aggressively promote its ability as a non-profit, industry-wide representative to speak without bias, educate without an agenda, and advocate without favoritism. No other organization world-wide is better or more appropriately positioned to articulate Regional Centers' best practices, instill investors' confidence, or provide policy maker's guidance than IIUSA.

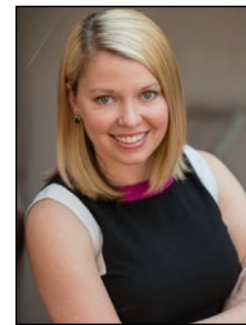
The association's growth will rely on its accepted authority and expertise as much as its growth will rely on its unity and the new (and old) audiences to which this confidence is imparted. If you got, you have to flaunt it...unapologetically; with consistency and decorum.

Managing an association and growing an association go hand in hand and when an association's mission is clear, its mechanics are sound, and its leaders are smart and honest, management simply needs to lift up these assets, focus them on growth, and get to work. I am grateful for the opportunity to manage IIUSA and I am eager to help it grow. ►



# IIUSA Launches New Education Program

## Introducing the EB-5 Basics Module



**ASHLEY SANISLO CASEY**  
IIUSA DIRECTOR OF EDUCATION &  
PROFESSIONAL DEVELOPMENT

In 2017, the IIUSA Best Practices Committee set out to develop an education program for IIUSA members and the EB-5 industry - no small task. Many ideas swirled and after lively and constructive conversations, the committee decided to approach the education program in two-steps. Since there has never been a formal education program for the industry, approaching the initial concept of one would have to be done carefully, thoughtfully, and methodically.

Instead of jumping right into creating a full-fledged education program, it was decided to first attempt a beginner's level course that would introduce the EB-5 Program to industry newcomers, but also act as a test subject for the idea of a full education program. The course would give industry newcomers a "crash course" and other brass tacks of the Program.

The intended "students" of the course are new employees at IIUSA member organizations to help these companies to quickly onboard new hires. Often, new employees are unfamiliar with EB-5, its history, terminology and how it works, so this course is designed to neatly package up all of that information into one place for quick and easy digestion, bringing the

user up to speed on the basics in as little as an hour!

IIUSA is excited to announce the official launch of the EB-5 Basics Module, a self-administered online course available to IIUSA members and their employees through IIUSA.org. The module will take students through four sections of introductory information with a 10-question quiz at the end of each section. The student must pass the quiz with an 80% grade before he/she can move on to the next section.

After successful completion of the course, the student will receive a digital certificate of completion to proudly display - A symbol of their fundamental knowledge of the EB-5 Program and of their organizations commitment to ensuring an educated staff.

The student can re-take the test(s) as many times as needed in order to pass, but the course is limited to one month of access. If the course is not completed after a month from initial access, the student will need to purchase a second round of access to make further attempts.

Topics addressed in the module include EB-5 terminology and acronyms, history of EB-5 (including legislative and regulatory history), TEAs, the EB-5 immigration process, regional center operations, economic methodologies, and much more.

The EB-5 Basics Module is available to IIUSA members and their employees for \$50.00 through the IIUSA Marketplace on [www.iiusa.org](http://www.iiusa.org). The course is intended to save our members time with onboarding by quickly educating new employees through a convenient online platform. The testing component ensures that the material is absorbed and the student has a grasp on the information.

Stay tuned for more exciting developments in IIUSA's emerging education program which will include a continuing education component for established EB-5 practitioners.

For questions on the EB-5 Basics Module, contact Director of Education & Professional Development Ashley Sanislo Casey at [ashley.casey@iiusa.org](mailto:ashley.casey@iiusa.org)

*A special thank you to the Best Practices Committee for its work in putting together the module and for countless hours spent writing and editing the content and quizzes. ►*





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# Is the Investment Truly at Risk?

## How Call Options Could Result in I-526 Petition Denials



**OZZIE TORRES**  
SHAREHOLDER, TORRES LAW PA

In an ever-changing EB-5 investor program wrought with complexities and USCIS surprises, there has always been an unwavering tenet: the investment must remain at-risk. Unfortunately, USCIS continued its practice of unilaterally changing the landscape of EB-5 by recently denying I-526 petitions involving call options based on its own interpretation of the at-risk requirement.

Most recently, an EB-5 investor named Jingru Zhao filed suit in a United States Federal District Court after the Administrative Appeals Office (AAO) upheld the denial of her I-526 petition based, in part, upon a call option provision contained in the new commercial enterprise's (NCE) limited partnership agreement. Call options like those described in Zhao's suit allow the NCE or developer to purchase or redeem an investor's interest in the NCE. Unfortunately, both USCIS and the AAO held that the call option in Zhao violated the EB-5 Program's at-risk requirement. Zhao's lawsuit remains pending as of the date of this writing.<sup>1</sup>

<sup>1</sup> Jingru Zhao v. U.S. Dep't of Homeland Sec., No. 18-1476

The AAO's decision in Zhao is emblematic of the at-risk conundrum facing investors and industry operators today. Previously, Matter of *Izummi* was heralded as the seminal case on "at-risk" investments because it provided guidance on how to navigate the at-risk requirement.

For example, *Izummi* clearly prohibits debt arrangements because there is no real risk of loss with respect to the investor's capital investment. Similarly, *Izummi* also prohibits put options – where an investor may opt to sell his or her interest in the NCE – because they allow an investor to dictate the return of his or her investment. USCIS believes put options negate the risk of loss because they are the functional equivalent of a prohibited debt arrangement. This is understandable.

Yet there remains a marked difference between the put options prohibited by *Izummi* and the call options used to justify recent I-526 denials such as Zhao. From a corporate law standpoint, call and put options function quite differently. Nevertheless, it seems USCIS and the AAO have mistakenly characterized call and put options as indistinguishable, which has led to USCIS' inconsistent adjudication of I-526 petitions.

However, at least two federal district court judges disagree with USCIS' narrow interpretation of call options. First, in *Doe v. USCIS*, investors contributed funds to finance several gold mining projects in Idaho.<sup>2</sup> The NCE's limited partnership agreement contained a call option that allowed the

(D.D.C. filed June 22, 2018).

<sup>2</sup> *Doe v. U.S. Citizenship & Immigration Services*, 239 F. Supp. 3d 297 (D.D.C. 2017).

general partner "to repurchase the interest of a Limited Partner for a purchase price of either (i) \$550,000 in cash, or (ii) 400 ounces of gold." Though I-526 petitions were initially denied by USCIS, the court ruled in favor of the investors and affirmed what many industry operators already knew: call options are notably different from put options because they do not guarantee an investor the return of his or her investment. Instead, it is the NCE – and not the individual investor – that has the right to end the investor's role in the NCE.

A second federal judge, this time in *Chang v. USCIS*, reached a similar conclusion.<sup>3</sup> In *Chang*, the NCE's limited partnership agreement contained a common call option provision that allowed the general partner to purchase a limited partner's interest "by paying such Limited Partner its (i) unpaid Preferred Return through the date of withdrawal and (ii) Unrecovered Capital Contribution" at any time after an investor's I-829 has been adjudicated." USCIS subsequently began denying petitions for failure to comply with the at-risk requirement based on what USCIS viewed as a tacit understanding that capital would be returned to investors at a certain point in time.

The court rejected this argument and instead limited USCIS's interpretation of *Izummi* by ruling that USCIS cannot simply infer that all call options indicate "a preconceived intent to unburden oneself of the investment in full as soon as possible." While *Izummi* does allow USCIS to conduct a holistic examination of project documents, *Chang* clearly reigns in

<sup>3</sup> *Chiayu Chang v. U.S. Citizenship & Immigration Services*, 289 F. Supp. 3d 177 (D.D.C. 2018).

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USCIS' authority to assume a call option's non-compliance absent concrete evidence of an arrangement that actually guarantees a return of capital

Despite the conflicting guidance from USCIS, compliant call options should in theory pass muster under *Izummi*. However, there are two critical components to consider when structuring call options in a manner that will survive at-risk scrutiny: (1) the option should **not** be exercised by the EB-5 investors themselves, which is to say that investors should have no control over the return of their own investments; and (2) the call option should be exercised for the fair market value of the interest in the NCE (and **not** a straight-forward promise to return the investor's capital contribution).

Both points are specifically tailored for compliance with *Izummi* because they preserve the investor's risk of loss and chance for gain. Importantly, it is the NCE that controls the exercise of the option and, depending upon when the option is exercised, the value of the interest could be worth significantly more or less than the amount of

the investor's contribution.

In theory, this complies with USCIS' interpretation of *Izummi* and other relevant case law because the value will fluctuate depending on the market conditions of the business at the time of the exercise. Additionally, investors have no control over their return of capital or their exit from the project and cannot be assured that the NCE will ever exercise its call option.

Despite the call option's apparent compliance with *Izummi*, some EB-5 securities attorneys have started to incorporate automatic redemption mechanisms as an alternative to the call option. These provisions provide for an investor's interest to be automatically cancelled or withdrawn once the NCE has sufficient cash flow (generally as a result of a repayment under the NCE's loan to the job creating entity) to make a distribution to the investor in an amount equal to the fair market value of his or her interest, which cannot occur until that investor's I-829 petition has been adjudicated (after the exhaustion of all appeal rights in the case of a denial).

Following the investor's receipt of the fair

market value of his or interest, the investor's interest will be automatically cancelled, and the investor will no longer be deemed a limited partner (or member, as applicable) of the NCE. Importantly, utilizing the automatic redemption mechanism as an exit strategy would seemingly comply with *Izummi* since it also preserves the critical call option components described above.

Ultimately, opposing views amongst USCIS and the federal courts have left EB-5 projects balancing inconsistent "at-risk" guidance with investors' expectations for a clean exit strategy. Regardless, it is critically important for EB-5 projects to incorporate compliant exit strategies since the failure to do so could make investors susceptible to a denial of their desired immigration benefit. Despite USCIS having created this conundrum, it is possible to navigate the common pitfalls associated with call options and eliminate some of the risks that have led to I-526 denials. As a result, it is now more important than ever to engage competent counsel to advise on the complexities regarding the EB-5 program's "at-risk" requirement and review the exit strategy contained in the project's offering documents. ■

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## Opportunity Zone Investments: A New Source of Capital for New and Existing EB-5 Projects



**REID THOMAS**  
EXECUTIVE VICE PRESIDENT, NES FINANCIAL

**E**B-5 capital raising has slowed due to visa backlogs, increasing the need for additional sources of capital for EB-5 projects.

Until the need for additional EB-5 Visa capacity is addressed, raising large amounts of EB-5 capital quickly will be a challenge. The growth in investor flow from countries other than China has been impressive, but there is a long way to go to make up for the slow-down in the Chinese market.

China reached the EB-5 visa capacity limit for the first time back in 2015 and has been in retrogression ever since. Chinese investor subscriptions dropped dramatically when the USCIS Ombudsman published its annual report in mid-2017, in which it stated that



**CATHERINE DEBONO HOLMES, ESQ.**  
PARTNER, JEFFER MANGEL BUTLER & MITCHELL

Chinese retrogression could result in waiting times that would exceed 10 years. This caused many EB-5 projects to fall short of their intended fund-raising levels.

Despite these challenges, the pending legislative reform originally scheduled for late March 2018 provided some reasons to be optimistic. The drafts of EB-5 reform legislation all included an increase in the EB-5 investment amount (which, other things being equal, would allow for fewer investors to achieve the desired EB-5 project raise), and some even proposed increased visa capacity. However, it now appears that legislation or regulations are not likely to provide any visa capacity-related relief for EB-5 project funding shortfalls in the near term. This reality has depressed Chinese investor inflows even



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further. While other countries are showing impressive growth, they aren't yet able to come close to making up the funding shortfall.

The net result is a significant decrease in EB-5 funding velocity across all projects. Competition for investors is intense, and the business development process to develop channels to source investors in emerging markets is complex and time-consuming. Meanwhile, the project funding demands of EB-5 projects already underway continue. So, where can EB-5 projects look for help to close their funding shortfall?

[Opportunity Zone financing may provide a new and substantial source of capital to meet EB-5 project funding shortfalls.](#)

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The Investing in Opportunity Act was signed into law on December 22, 2017 as part of the larger package of tax reform legislation. Under this new legislation, codified as sections 1400Z-1, and 1400Z-2 of the Internal Revenue Code, taxpayers with taxable gains on any form of investment (stock, property, etc.) who invest those gains within 180 days into a qualified Opportunity Zone Fund (sometimes referred to as an OZ Fund) have the opportunity to receive three significant federal tax benefits:

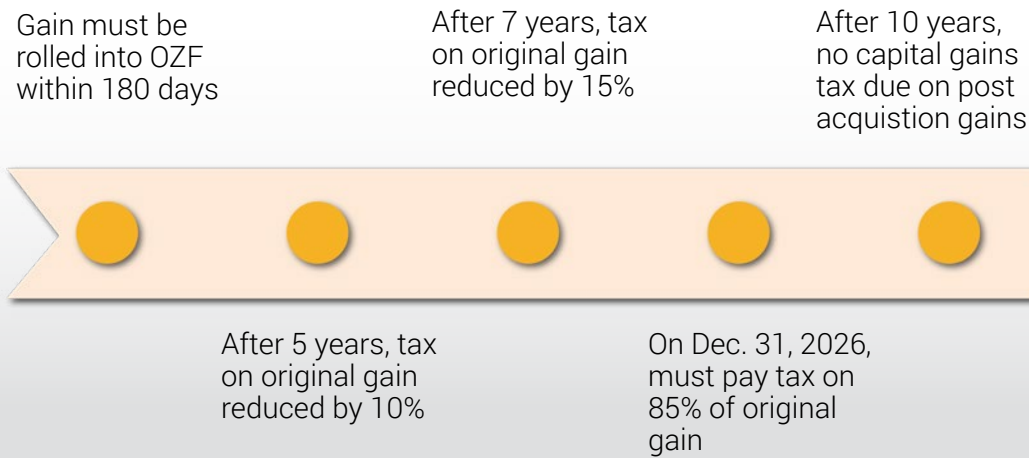
First, the investors receive a deferral of taxation on 100% of their taxable gains invested in an Opportunity Zone business until the earlier of the date that their investment in the OZ Fund is sold or December 31, 2026, at which time they are required to include their original deferred gain in their income;

Second, investors are also eligible to receive a 10% reduction of the taxable gains invested in the OZ Fund if their investment in the OZ Fund is held for at least 5 years, which increases to a 15% reduction if it is held for at least 7 years; and

Third, investors are not taxed on any capital gains realized upon the sale of their investment, which is due to the appreciation of their interest in the OZ Fund, if their investment in the qualified Opportunity Zone Fund is held for at least 10 years.

Here is an illustration of how these three tax benefits work in tandem:

The potential tax savings to taxpayers could



be substantial, which could ignite demand for new investments in the Opportunity Zones. For EB-5 project sponsors, the benefit is that Opportunity Zone investors will expect to receive a portion of their financial return from tax savings and may therefore be willing to accept lower cash distributions than other non-tax advantaged investors. This could lower the cost of capital to EB-5 project sponsors. Many EB-5 projects could be prime candidates for Opportunity Zone financing, which could fill the funding gap of these EB-5 projects caused by the downturn in the EB-5 financing market.

Opportunity Zone financing offers some advantages to EB-5 financing that are intended to result in rapid, large scale adoption of this new financing option.

The Opportunity Zone areas have already been designated and approved, and will remain qualified for 10 years, so it is easy to determine immediately whether an EB-5 project will qualify for Opportunity Zone financing. Investments can be made in an OZ Fund that:

Is structured as either a partnership (or presumably an LLC taxed as a partnership) or corporation;

Is formed for the purpose of investing in qualified Opportunity Zone property;

Holds at least 90% of its assets in qualified Opportunity Zone property; and

Invests directly in a qualified Opportunity Zone business property or indirectly through another partnership or corporation (which itself is not an OZ Fund).

Unlike EB-5 financing, Opportunity Zone investments do not need pre-approval by any government agency, so the cost and time needed to set up OZ Funds should be lower than EB-5 financing. Also, unlike EB-5 financing and other community development incentive programs, there is no cap on the number of investors who can invest in Opportunity Zones and receive the tax benefits of these investments, there is no cap on the amount of Opportunity Zone tax benefits that investors, either individually or collectively, may obtain, and there is no limit on the amount of capital that can be invested. According to an analysis done by Economic Innovation Group, a D.C.-based think tank, there are more than \$6 trillion dollars in unrealized capital gains currently held by U.S. households and corporations, so even a relatively small portion of the total potential pool of investors could lead to investment amounts that are many orders of magnitude larger than EB-5 financing.

There are still a number of unanswered questions regarding Opportunity Zones that are anticipated to be answered in several sets of regulations, the first of which is expected to be issued by the Internal Revenue Service by the end of 2018.

Among other questions are the following:

Can limited liability companies (LLCs) be used as well as partnerships and corporations, on the grounds that a multiple member LLC is always taxed as either a corporation or a partnership?

Can an Opportunity Zone business or business property be sold prior to the end of the required time periods if the capital is reinvested in another Opportunity Zone business or business property?

Can the Opportunity Zone business property be refinanced and the proceeds in excess of the taxpayers' basis be distributed to investors before the end of the required time periods?

These questions have all been posed to the IRS, and

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it is anticipated that the IRS regulations will address these issues. In the meantime, EB-5 project sponsors should analyze their existing and proposed projects now to determine if their projects will meet the basic requirements for OZ Funds, and if so consider how best to take advantage of this new market opportunity to finance these projects.

How EB-5 project sponsors can decide if Opportunity Zone financing can be used for their EB-5 projects.

**First, is the EB-5 project located in an Opportunity Zone?** State Governors were given the responsibility of identifying the low-income areas in their states to be designated as Opportunity Zones. Initial submissions were provided in March and by the end of June 2018, the IRS published a list of 8,700 approved Opportunity Zones, which are designated by census tracts. The entire list of approved Opportunity Zones can be found at: <https://www.cdfifund.gov/Pages/Opportunity-Zones.aspx>.

Almost all EB-5 projects are located in a Targeted Employment Area ("TEA"), based on unemployment rates at the census tract level, with most projects requiring a combination of census tracts to meet the necessary unemployment rate requirements. It is possible that an EB-5 project location in a TEA could also be in an Opportunity Zone. However, there is no mathematical aggregation that can be done with Opportunity Zones, such as can be done for TEAs. Opportunity Zones are much more transparent than TEAs as the Opportunity Zone designation is valid for 10 years (no need to obtain a renewal each year like with EB-5 TEAs), and no aggregation or combining is allowed. In short, Opportunity Zones are set for 10 years and there is no wiggle room or creativity that can be employed such as with TEAs – either your project falls within an Opportunity Zone or it doesn't.

**Second, does the EB-5 project meet the requirements of a "Qualified Opportunity Zone Business Property"?** To be eligible, the EB-5 project has to consist of tangible property used in a trade or business of the OZ Fund which: (i) was acquired by purchase after December 31, 2017, (ii) is not put into use until after the EB-5 project owner's purchase of the property or the property is "substantially improved" by the EB-5 project owner, which requires that the costs of constructing,

renovating or expanding the property during any 30-month period beginning after the date of the acquisition of the property must exceed the adjusted basis of the property at the start of the 30-month period. This requirement is analogous to the EB-5 program requirement that funds be invested in a business that will create new jobs, either because it will be newly-built or it will be constructed, renovated or expanded. For existing EB-5 projects that acquired their property before December 31, 2017, there may be a possibility of transferring a portion of the property to a new entity to be funded with OZ Fund investments as a means of meeting this requirement. Thus, many EB-5 projects, including some existing EB-5 projects, could potentially be eligible as "Qualified Opportunity Zone Business Property." The key is that the EB-5 project (or at least that portion of the property that is financed with Opportunity Zone investments) must be purchased after December 31, 2017 and the OZ Funds must invest in the EB-5 project before it is constructed, renovated or expanded or put into service.

**Third, is the EB-5 project intended to be held for at least five years, and possibly over 7 years?** This is important because Opportunity Zone investors are required to retain their investment for at least 5 years to obtain any reduction in the taxable gain deferred through their original investment in the OZ Fund, and they are required to pay the tax owed on the amount of the deferred gain when their interest in the OZ Fund is sold. It is possible that future IRS regulations will allow an OZ Fund to sell one or more of its original OZ properties before the 5- and 7-year dates and reinvest the proceeds by acquiring other OZ properties, but we do not yet know if that will be approved in the IRS regulations. The basic rule for Opportunity Zone investors is that if they hold their interest a qualifying OZ Fund for at least 5 years, the investor gets a 10% reduction in taxable gain originally invested in the OZ Fund, and if the investment is held for at least 7 years, the investor gets a 15% reduction in taxable gain originally invested in the OZ Fund. Further, these 5- and 7-year holding periods must occur prior to December 31, 2026, the date on which the deferred gain is recognized and becomes taxable gain. As discussed previously, this is one of the three key benefits investors will be hoping to achieve by making their investment in a qualified Opportunity Zone Fund.

**Fourth, is there a possibility that the EB-5**

**project could be held for at least 10 years and realize significant capital appreciation during that time period?** If so, this could qualify eligible investors for the third tax benefit under the Opportunity Zone program, which is the ability to exclude 100% of the capital appreciation on the Opportunity Zone investment when they sell their interests in the OZ Fund. This benefit is available only if the investor holds a qualified OZ investment for the entire 10 years – there is no partial or pro-rated tax reduction on the gain from the Opportunity Zone investment for holding the investment less than 10 years. It is possible that future IRS regulations will allow an OZ Fund to sell one or more of its original OZ business or business properties before the 10-year date and reinvest the proceeds by acquiring other OZ businesses or business properties, without affecting the investor's qualification for this tax benefit, but we do not yet know if that will be approved in the IRS regulations.

How EB-5 project sponsors can position their projects to attract Opportunity Zone investment capital.

**First, is there a possibility of adding Opportunity Zone capital to an existing EB-5 project to fill an EB-5 funding shortfall?** If the EB-5 project meets the four criteria described above, the project owner/Fund could create a new class of limited partnership interests (or membership interests if the IRS concludes that investments may be held through LLCs, which we anticipate will be the case), to be sold to Opportunity Zone investors. Even if the EB-5 project property was acquired by the EB-5 project owner on or before December 31, 2017, it may be possible to sell a portion of the project to a new project owner in order to utilize new OZ Fund investments after that date for the EB-5 project, so long as the new project owner agrees to construct its portion of the EB-5 project in accordance with the existing EB-5 business plan. The new class of investment established for purchase by OZ Funds would have a different rate of return than offered to other equity investors, and possibly reinvestment requirements to retain the eligibility of this class of investors for their tax benefits. Given the compelling tax benefits for OZ Fund investors and the economic benefits for the EB-5 project, it's worth navigating these rules to attract and facilitate investments from this potentially huge new market.

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## OPPORTUNITY ZONE INVESTMENTS: A NEW SOURCE OF CAPITAL FOR NEW AND EXISTING EB-5 PROJECTS

*Continued From Page 29*

Adding OZ Fund investors could benefit both EB-5 project sponsors and EB-5 investors by funding a capital shortfall with equity capital that is designed for a long-term holding period. This is especially helpful to EB-5 investors who are caught in the EB-5 visa backlog, because they also are expected to have a long-term holding period in order to qualify for their visa. In addition, the OZ Fund investors are not required to meet any job creation requirements in order to claim their tax benefits, so the EB-5 investors could retain all of the jobs for the project, while the OZ Fund investors could retain all of their tax benefits.

**Second, is there a possibility that new projects could be funded using Opportunity Zone capital?** EB-5 project sponsors working on new projects could design their ownership structure to be qualified to meet Opportunity Zone requirements, as well as EB-5 investment requirements, so that the project can attract both types of investors simultaneously. This would allow EB-5 project sponsors to tap both US and non-US investment markets. The Opportunity Zone portion of the financing would be required to be equity financing, but

the EB-5 financing could still be either debt or equity.

**Third, consider how best to market Opportunity Zone investments soon to eligible investors.** Investors interested in the Opportunity Zone investment tax benefits are required to invest in an OZ Fund within 180 days of realizing their taxable gains. This means they will need to act quickly, and they will be looking for the best quality investments that meet the Opportunity Zone criteria and that will have the best chance for long-term capital appreciation over their anticipated 10 year holding period. EB-5 projects that qualify will have the benefit of already having market studies, EB-5 offering documents (that will require modification but can be repurposed to save time and cost), and possibly even other sources of existing financing. These advantages will help EB-5 project sponsors to move quickly into the market for these new investors.

**Fourth, consult qualified securities and tax counsel and expert third parties to structure and market your Opportunity Zone eligible investments.**

Opportunity Zone financing is in its start-up phase, which means there are substantial risks and rewards for moving quickly into this new capital market. EB-5 project sponsors may be some of the best positioned new entrants into this new market, and they should act soon to determine the eligibility of their projects for Opportunity Zone investment. Those who do qualify should engage expert advisers to structure the Opportunity Zone investment for compliance with IRC sections 1400Z-1 and -2, and to commence marketing the availability of their projects to eligible investors.

The potential for new investors seeking qualified Opportunity Zone investments is substantial, and those EB-5 project sponsors with projects located in one of the designated Opportunity Zones will be well positioned to attract this new capital to their projects. This new capital may fill the shortfall in EB-5 financing caused by the visa delays affecting the EB-5 investment market in China. EB-5 project sponsors should act soon to determine if their projects will meet the criteria for this new capital market and take the steps necessary to add Opportunity Zone financing to their projects. ▶

# Regional Center Compliance Reviews



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**T**he USCIS Immigrant Investor Program Office (“IPO”)

has commenced its long-anticipated program of regional center “audits,” now designated by IPO as “Compliance Reviews.” This form of oversight is targeted at regional centers and is distinct from the “Site Visit” program that involves unannounced visits to locations of job-creating businesses that have received EB-5 investor capital. IPO has signaled its intention to conduct a Compliance Review of every USCIS-designated regional center. This article provides an overview of the Compliance Review process as experienced by us in a few client matters. Admittedly, our experiences with Compliance Review could be part of a trial phase conducted by IPO prior to its broader launch of a program to review all regional centers, so the process may evolve as is suggested by certain aspects of our experiences to date. Nevertheless, we expect this general information will prove useful to regional centers as they prepare for a Compliance Review and further refine their internal practices to ensure compliance.

### The IPO Team

IPO has dedicated a specific team

for Compliance Review. Whereas in IPO’s Site Visit program investigators from the USCIS Fraud Detection and National Security unit are dispatched to the sites of EB-5 job-creating businesses, the “Compliance Division” within IPO administers the Compliance Review program. By all appearances, the Compliance Division is a small team of professionals with training and experience in auditing, forensic accounting, and compliance work. They are knowledgeable and cordial. The overall impression made during our experiences is the members of the Compliance Division are more attuned to eliciting information about organizational processes than say, for example, the facts underlying a particular I-924 application filed by a regional center or a certain I-526 petition filed by an EB-5 investor.

### Process Overview

IPO commences the Compliance Review process by issuing a written Notice of Compliance Review (“Notice”). According to this Notice, the information sought in the Compliance Review is “used to assess” the regional center’s “compliance with applicable laws and authorities”, with citations to the EB-5 statutes, regulations and Policy Manual.

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## U.S. IMMIGRANT INVESTOR PROGRAM

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According to the Notice:

A compliance review verifies the information provided by designated regional centers in applications and annual certifications and compliance with applicable laws and authorities to ensure continued eligibility for the regional center designation. The process includes, for example, researching information in government systems, reviewing commercial and public records, and reviewing evidence that accompanies regional center applications and certifications. It also includes obtaining information, on a consensual basis, through compliance review data requests and onsite assessment, as well as the review of such information.

In our experiences with clients having multiple regional centers, the Notice may relate to a single regional center or to more than one regional center owned by the client.

#### Data Request

The Notice is accompanied by a specific “Data Request” that requires a detailed, written response from the regional center. IPO envisions the response to include a cover letter, written answers to specific questions with attribution of the source of each response, and production of related documents. IPO may require the written response within just 15 days of the date of the Notice, although in our experiences requests for a brief extension for submitting the written response to the Data Request have been readily granted. The process has the “feel” but not necessarily all the formalities of providing responses to interrogatories and a request for production of documents in the discovery process of a civil litigation matter. Meanwhile, questions regarding the Data Request may be directed to a dedicated e-mail address for the Compliance Division.

The Data Request covers four general topical areas. Within each topical area, the Data Request seeks specific information intended to prepare the

Compliance Review team in advance of the Onsite Assessment. The questions seek to verify information provided to USCIS in the regional center’s I-924 and I-924A filings, from inception to the present. The four topic areas are:

- (1) Regional Center Organizational Structure: These questions focus on identifying the managing entities and their principals; the roles and responsibilities of management personnel; the structure, ownership, control, and status of all active and inactive new commercial enterprises (“NCE”) and job creating enterprises (“JCE”).
- (2) Regional Center Management and Oversight: These questions focus on investor due diligence screening procedures; developer/project due diligence procedures; accounting, oversight and reporting processes in connection with regional center service agreements or public-private partnerships; international marketing materials, marketing strategies, and marketing relationships; materials and reports provided to investors; subscription and administrative fee collection procedures; management fee arrangements; recordkeeping procedures; redeployment procedures; and investment redemption procedures following I-829 petition approval.
- (3) Job Creation: These questions seek documentary evidence to verify the data reported on a selected I-924A Annual Report, including investor-specific data to verify reported I-526 and I-829 petition approvals and aggregate EB-5 investment during the reported time period, including account statements verifying the reported figures.
- (4) Financial Management: These questions request documentation regarding the flow of funds from EB-5 investors and through to the JCE, for each NCE named in the annual report being audited, including escrow account administration, NCE bank accounts, disbursement of investment funds to each JCE, and verification of use of EB-5 funds.

#### Onsite Assessment

As explained in the Notice, after the

regional center submits a response to the Data Request, the IPO will contact the regional center’s counsel with proposed dates for the Onsite Assessment, to take place at the regional center’s principal place of business with “all major parties” present, including counsel if desired. During the Onsite Assessment, the regional center is expected to “immediately provide any readily available documentation and information that the review team requests to verify information provided in the [I-924] application(s) or [I-924A] certification(s).” The Onsite Assessment may be conducted over several days, as necessary.

IPO is likely to request that the regional center provide a “walk-through” of its “internal control procedures and accounting processes [utilized in] the administration, monitoring and oversight of EB-5 capital investment activities and the allocation of resulting jobs,” describing them in detail “from start to finish.” Significantly, IPO adds:

Note that an “internal control” is a process for assuring achievement of an organization’s objectives in operational effectiveness and efficiency, reliable financial reporting, and compliance with laws, regulations and policies. A broad concept, an internal control also relates to organizational risk identification and mitigation measures.

This “walk-through” is not necessarily scripted by IPO, and thus, there may be very different approaches adopted by regional centers as they consider how best to present information in the Onsite Assessment. Also, the IPO approach to the Onsite Assessment might be quite fluid, and IPO may have a keen interest in learning more about a particular area of compliance that perhaps was not signaled in the Data Request. IPO, for instance, might delve deeper into the subscription process, how investor files and data are managed, how communications with investors are handled, and how the use of EB-5 capital is tracked.

Prior to the conclusion of the Onsite Assessment, IPO might identify certain additional documentation that it wants copied or transmitted for purposes of

*Continued On Page 33*

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further review. Ultimately, the regional center should anticipate receiving a “close out” letter relating to the Compliance Review.

#### Thoughts on Compliance Review and Termination

Notices issued by IPO frame the Compliance Review as verification of information presented in Forms I-924 and I-924A. IPO states the purpose of the review is to “assess [the regional center’s] compliance with applicable laws and authorities requiring designated regional centers to continue to serve the purpose of promoting economic growth.” It is clear from IPO’s use of this language that IPO intends to use adverse findings from a Compliance Review to support a regional center termination process. It is not clear, however, whether the “close out” letter the process envisions, wherein IPO may state “no further action is required at this time”, is one with a certain lifespan: Could a regional center be subjected to more than one Compliance Review within just a few years? Or, in the alternative, would the final step of an unfavorable Compliance Review be the delivery of a Notice of Intent to Terminate the regional center designation? It’s too early to say.

#### Regional Centers and Robust Compliance Programs

The emphasis placed on review of “internal controls” evidences IPO’s expectation that regional centers will implement a robust compliance program designed to minimize the possibility of misuse and diversion of investor funds as well as unlawful or non-compliant business activity. Common features of effective compliance programs for any organization include:

- Specific compliance standards, policies and procedures
- Demonstrable commitment to compliance at the executive level of the organization
- Criteria for excluding/debarring individuals from

the organization

- Communications and training regarding compliance procedures
- Monitoring and auditing to ensure ongoing compliance
- Consistent internal enforcement of standards
- Procedures for reporting wrongdoing

When considering how these common features get tailored to the EB-5 industry and regional centers in particular, clearly an effective compliance program must involve policies and procedures for exercising due diligence to prevent and detect unlawful conduct such as money laundering and diversion of investor funds as well as to ensure compliance with EB-5 requirements for the use of EB-5 capital and job creation. Just as important is an organizational culture that encourages ethical conduct and a commitment to legal compliance. Actual compliance that is fitted to a particular organization must allow for the fact not all regional centers are alike

-- Some are integrated within large organizations, and others are quite thin in terms of personnel. Some regional centers establish NCEs that operate as a lender and thus conduct substantial due diligence prior to lending, other regional centers are of the regional center-developer type with common ownership for the NCE and JCE, and then other regional centers are “renting” the use of their regional center banner and may have very little or no involvement in the raising and investment of EB-5 capital. Regional center compliance may require very different pathways for these differently-situated regional centers in the new era of Compliance Review. ▀







# INVESTMENT AMOUNT INCREASES FOR THE U.S. EB-5 VISA:

## The Likely Economic Consequences in Today's Marketplace

*Continued From Page 34*

U.S. and many other areas around the globe where competition exists, supply and demand are largely of the text book variety. That is, the supply schedule of the good is sloped upward to the right, implying more of a good is supplied by producers at higher prices, and the demand schedule is sloped downward to the right, implying less of a good is demanded at higher prices. In this situation, prices and quantities adjust to economic conditions to arrive at an equilibrium price where quantity demanded equals quantity supplied. Unlike textbook illustrations, however, most understand that the intersection of supply and demand is a range or area in the chart rather than any precise price and quantity.

The quantity demanded for a good or service is a movement along the curve, whereas a shift in the curve occurs as a result of a change in one of the determinants of demand, aside from price and quantity. The determinants of demand are the following, with the expected effect on demand denoted either positive (+) or negative (-). Demand is a function of its own price (-), consumer incomes (+), the prices of substitute goods (+), prices of complement goods (-), consumer tastes and preferences (+ or -), price expectations of the good at some future point (+), and population (+). Likewise, the supply of a typical good (not the EB-5 visa, as its supply is fixed by the U.S. government) depends on the price of the good supplied (+), the costs of production (-), the prices of related goods (+ or -), available technology used in production (+), price expectations (-), and production capacity of the good in the economy (+).

While the price of the good or service and consumer income are among the most important determinants of total demand, it is the price and availability of close substitutes that determines consumer responsiveness, i.e., quantity demanded, to changes in its price. This responsiveness in both demand and supply is known as the price elasticity of demand or supply and is defined as the percentage change in quantity supplied or demanded to a percentage change in price. Elasticity of demand, and similarly for supply, determines the steepness of the two curves, which in turn determines how large a response in quantity demanded or quantity

supplied there is from a change in price. The fewer the number of close substitutes, the more of a necessity that the product is, such as energy or a life-saving medicine, the more inelastic its demand (see D1 in Figure 1), the steeper is its demand curve and the less responsive quantity demanded is to a change in price, implying price can increase a great deal and demand will not change much. When demand is inelastic, increases in price generally increase total revenue, represented by the box  $P \times Q$  with a small loss in revenue from  $Q^*$  to  $Q_1$  and a large gain in revenue from the movement from  $P_1$  to  $P_2$ . On the other hand, for goods with highly elastic demand (D2), there is a large response in quantity demanded to changes in price from  $Q^*$  to  $Q_2$  with corresponding large loss in revenue. The number of producers, available spare capacity, production time, available substitutes, etc., determine the elasticity of supply. For products with a small number of producers, small capacity, little time for production, etc., such as rare wines or flu vaccine in a given flu year, the supply response is very inelastic to price (S1) shown in Figure 2, while products with the opposite characteristics, i.e., responsive supply, are elastic (S2).

To fully understand the supply/demand characteristics in the EB-5 market, one needs to realize that this market is highly restrictive and not at all subject to competitive forces, especially on the supply side. The supply of visas is fixed by the U.S. government, and hence perfectly inelastic. Moreover, the demand for the visa is subject to an intense regulatory burden that must be paid for by the investor, but

with uneven outcomes for similar expenses. The IIUSA data show that over the years 1992-2017 18.94% of all EB-5 adjudications resulted in denials, and more recently, 15.38% have been denied since 2013. While this regulatory burden raises the effective price of the visa, it also distorts this price because the expected value of getting one is now lower, i.e., an 80-85% chance of getting one, plus 15-20% chance of not getting one. The result of this supply/demand situation is that one can never know what the true current equilibrium price for the EB-5 visa is unless supply is allowed to vary freely. With unfettered supply and demand, the equilibrium price could be higher than or well below \$500,000.

[The Recent Past and Current Status of the](#)  
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FIGURE 1:

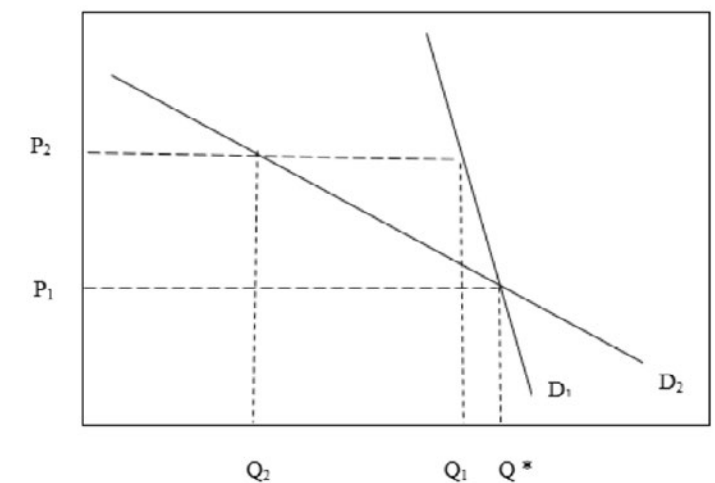
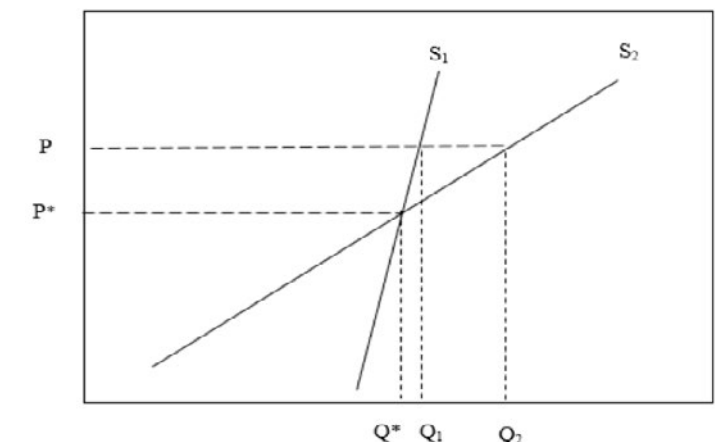


FIGURE 2:



starts with the fact that the current EB-5 market is in a state where quantity demanded exceeds quantity supplied due to strong demand and a government enforced restricted supply that has resulted in an EB-5 cap that has been reached annually since 2014. The article then addresses the effects of retrogression (backlogs in visa availability), which has severely reduced (especially Chinese) demand for EB-5 visas, resulting in the possibility that in 2018 the market may experience an excess supply situation, and the potential effects of increasing the investment amounts to levels proposed above. Finally, it briefly discusses the effects of an alternative interpretation of the visa quota, wherein the 9,940 EB-5 visas available annually<sup>1</sup> would be allocable to investors alone, excluding accompanying family members.

### A Basic Explanation of Supply and Demand and Elasticity

In most markets for goods and services in the 1 Describing the "annual quota" as 9,940 EB-5 visas assumes the statutorily prescribed maximum of 7.1% of the worldwide total of 140,000 employment-based immigrants annually; the actual number of visas available during any given year fluctuates based on visa usage in other classifications. Thus, it is also accurate to describe the annual EB-5 quota as approximating 10,000 visas.

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**SCOTT W. BARNHART, PHD**

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**I**ntroduction: Recent proposals for increasing the minimum investment amount for the U.S. EB-5 visa from the current \$500,000 and \$1,000,000 amounts for TEA and non-TEA projects, respectively, have been the subject of much debate. Proposed legislation by Senators Grassley or Cornyn would raise the minimum investment amounts to \$800,000 and \$1,000,000, or \$800,000 and \$925,000, while the proposal from the Department of Homeland Security would raise them to \$1,350,000 and \$1,800,000. The proposals stem mainly from the perceived need to adjust the investment amount for inflation, as the current amounts have not been adjusted since the program's inception, some 28 years ago. It should also be noted that all of the proposals above impose such high hurdles to qualify for the lower TEA amount that in effect the higher investment amounts above seem as a practical matter more likely to become the market standard.

Some in the industry argue that raising the investment amounts will reduce the number of I-526 petition submissions but may increase the total capital coming to the U.S. due to the larger minimum amount and the inelasticity of demand for the EB-5 visa (see definition below). Thus, more EB-5 capital may result from fewer investors, thereby increasing the job buffer for projects (as long as job requirements don't increase) and reducing the administrative burden as fewer I-526 petitions are being processed. Others, particularly immigration agents from countries with emerging markets for EB-5, argue that substantial investment amount increases will eviscerate an already fragile (if not significantly declining) market for employment-based visas, where retrogression has severely reduced demand.

Addressing these issues, this article reviews the concepts of supply and demand and elasticity, i.e., the responsiveness of quantity demanded or supplied to a change in price. The article uses these concepts to analyze the past and current supply/demand conditions in the market for EB-5 visas, and the likely consequences of the proposed investment amount (price) increases. The discussion



FIGURE 3: Total I-526 Receipts and Adjudications: Fiscal Year 1992-2017

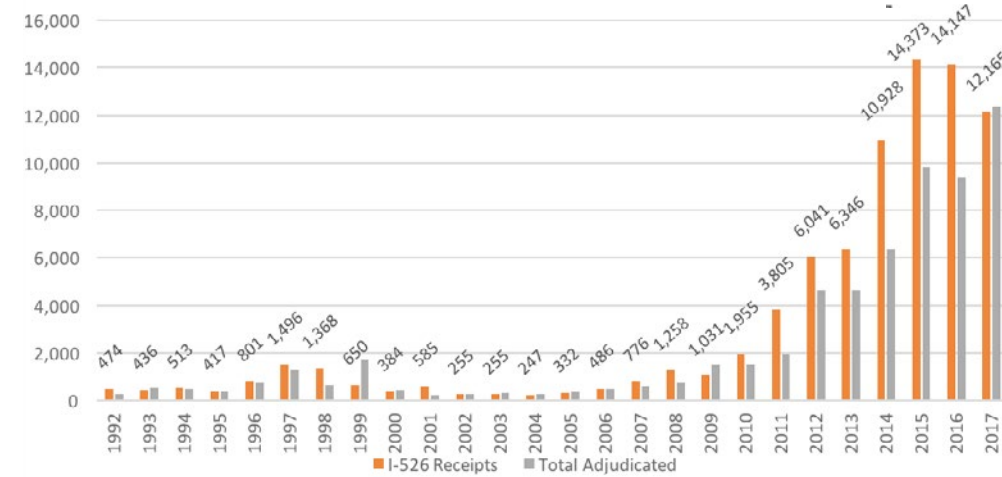
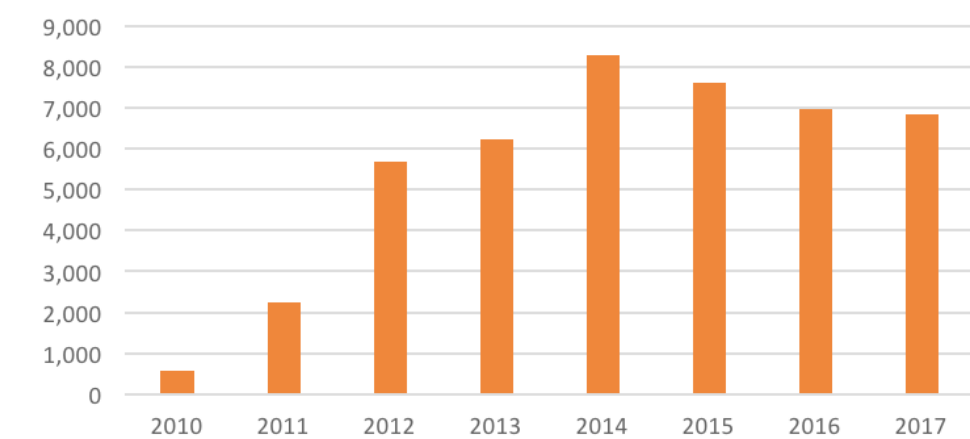


FIGURE 4: Total 5th Preference Visas Issues to Mainland China



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#### Supply/Demand Situation for the U.S. EB-5 Visa

Given the current state of the EB-5 visa backlog, many might think they already know the current supply/demand situation and perhaps the elasticities of supply and demand for the visa as well. I think most would agree that the supply of EB-5 visas is inelastic given that the number of visas is capped each year, Congress apparently has little desire nor means to “produce” more of them, and the U.S. Department of State seems unlikely to change the current interpretation of the applicable statute to count investors only (and not family members) against the annual quota. The elasticity of demand for the EB-5 visa is another matter, as there have been no

adjustments to the investment amount since the program's inception, so it is unclear how responsive quantity demanded is to price changes. Some consider the EB-5 visa as a luxury good, defined as a good whose demand increases more in response to a percentage change in income relative to what occurs for normal goods. That said, luxury goods still are characterized as being more price elastic than price inelastic. Moreover, the EB-5 visa is not a necessity for life like the medicines described above. Finally, although there is no exact substitute for a U.S. visa, a number of other countries, such as Canada and Australia offer similar visas, and some Caribbean islands offer visas in exchange for purchases of real estate. In the absence of more knowledge, I conclude that the demand for the EB-5 visa is probably relatively inelastic, but not

perfectly inelastic, which implies smaller changes in quantity demanded to a change in price than for elastic demand.

Although the visa backlog seems as if it has been present for a long time to industry participants, it is actually a relatively recent phenomenon. The backlog is a result of individual countries hitting their respective per-country limit of 7% of all worldwide visas (both family-based and employment-based). Data from IIUSA shown in Figure 3 charts the number of I-526 petitions received and adjudicated by USCIS from 1992-2017. Although these figures are indicative of visa demand, they are not the pertinent data that determine the backlog, these data are visas issued. That said, two items are worth noting: 1) Prior to 2014 demand was clearly not as large as it has been since; 2) There has been a noticeable decline in I-526 receipts since 2015, presumably due to a number of reasons including retrogression for Chinese investors, the higher cost of EB-5 capital, and availability of cheaper capital from other sources in the U.S. Figure 4 verifies this fact, illustrating that the total number of 5th preference visas issued to China mainland born residents, obtained from Annual Reports from the U.S. Department of State Visa Office, has declined since 2014. In addition, the Visa Bulletin indicates that in May of 2015 a cutoff date was issued for Mainland China residents, signaling the beginning of the current backlog.

Thus, the data indicate that in the years prior to 2015 no per country limit for Mainland China had been reached and no shortage of visas existed. Thus, the investment price prior to 2014 could in fact be considered too high, not too low, as shown by the demand curve for 2013 in Figure 5. This is an excess supply situation where if the investment amount was free to fluctuate it could have been well below the \$500,000 amount shown in the Figure where the 2013 demand curve intersects the vertical supply curve. However, demand for the visa continued to be strong thereafter and the situation quickly reversed in 2014 and beyond through at least 2017. The result is a market that at least for this period was in a classic excess demand situation where the current \$500,000 investment amount is too

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low to clear the market. Thus, the clearing price in an unregulated market prior to 2013 would have been well below \$500,000, while in more recent years it would be well above. It is this excess demand that some cite as the reason the investment amount should be raised. In Figure 5, the quantity demanded has exceeded the capped supply for a number of years now shown as a shift in demand to 2014-2017.

At the recent IIUSA conference of April 22-24, 2018 Charlie Oppenheim, Chief of the Visa Controls Office at the U.S. Department of State announced that wait times could be as long as 15 years for immigrants from China and 2-6

FIGURE 5:

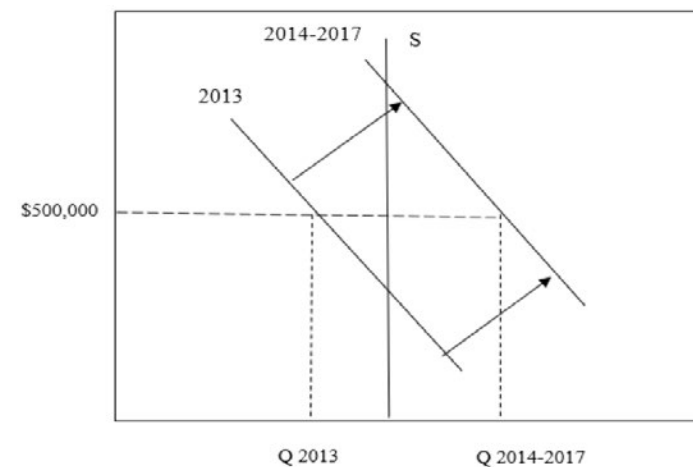
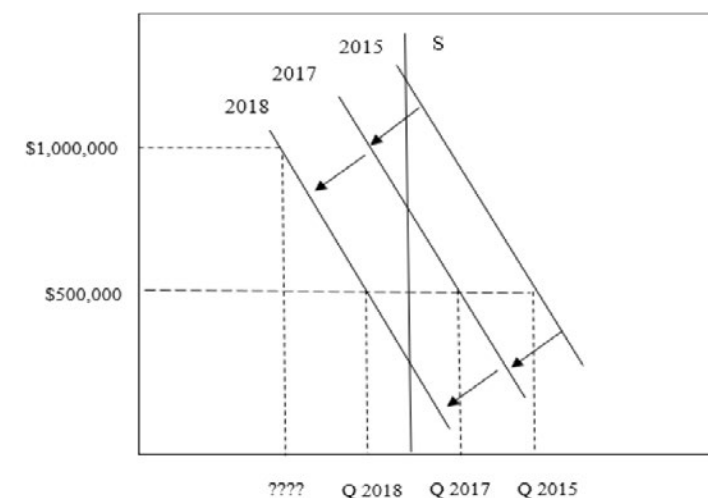


FIGURE 6:



years for other countries. It is apparent to most in this industry that due to the excessively long wait times for Chinese investors, the demand for the EB-5 visa has declined dramatically from previous levels. The latest data through the end 2017 confirm this trend, and it not likely to change soon unless Congress changes the current law to allow more EB-5 visas, or to not count investor families, both of which seem unlikely in the short run. Therefore, we must assume that retrogression remains a fixture in the industry that is severely reducing Chinese demand. The situation is illustrated in Figure 6, where from the high in 2015, there has been a shift in the demand schedule to the left in 2017, which is still an excess demand situation. Moreover, although data for the entire 2018 fiscal year are not yet

available, the first two quarters of data from IIUSA show 4,469 I-526 submissions, down 27% from the same two quarters of 2017 when 6,126 submissions were received. Annualizing this amount by simply doubling it, although fraught with potential error, results in an estimated total for 2018 of 8,938. If these estimates closely approximate the actual 2018 visa data, I-526 submissions and visa demand are in a downward trajectory starting in 2015, implying more leftward shifts in the demand, which would again result in an excess supply situation at the current \$500,000 level. What is the likely effect of investment price increases beyond current levels? Even if the demand for the EB-5 visa is more inelastic than I assume, the effects will be to

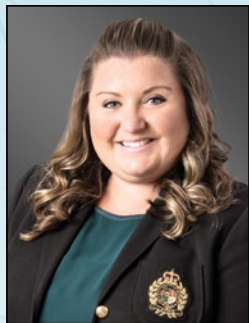
diminish significantly the quantity demanded of the EB-5 visa. Due to the more stringent criteria proposed for the TEA investment level amounts, wherein few projects will qualify for lower levels, the effective investment amount in current proposals will likely be \$900,000-\$1,800,000, representing a doubling or more of the current price. Price increases of this proportion will move the quantity demanded upward to the left along the 2018 demand curve, while at the same time this curve is shifting to the left due to retrogression. This situation is also illustrated in Figure 6 where the demand has fallen in 2018 while also faced with a new higher investment amount of \$1,000,000 or more. As drawn in the diagram, the new total revenue box created from the difference in price from \$500,000 to \$1,000,000 is larger than that lost from the reduction in investors from Q 2018 to the new number that is currently unknown, showing that total revenues from EB-5 capital has in fact increased even with a much smaller number of investors. However, this increase in revenues is by no means a certain outcome. By contrast, if demand is more elastic than drawn there could be a much larger decrease in quantity demanded and total EB-5 capital could well decline. Either way, there will be a much smaller number of investors being processed, leading to less retrogression, and less administrative work for both USCIS and regional centers. While this is a positive effect, it also diminishes greatly the service provider income the industry has supported with larger numbers of investors.

Finally, what is the likely effect of the proposed alternative interpretation of the visa cap that would include only investors? One must conclude that retrogression effects would be reduced, and this would increase the demand for the EB-5 visa by Chinese investors, at least to some extent, even with higher investment amounts. Whether the reduction in quantity demanded from the higher investment amount would outweigh the increased demand for the visa, however, is an open question.

The author would like to thank Susan Pilcher and Bernie Wolfsdorf for their helpful comments in drafting this article. ■



# 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. ▀

# Analyzing the Recent Trend of EB-5 Expedited Processing



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Time is of the essence, especially in EB-5 petition and application processing. Despite the Immigrant Investor Program Office’s (“IPO’s”) increase in staff and the re-organization of its adjudication teams for more efficient processing in recent years, EB-5 adjudications remain undeservedly long. According to USCIS’ September 3, 2018 website screenshot, it takes an average of about 20-26 months for I-526 adjudications, and 19.5-25.5 months for I-924 adjudications. One potential way to speed up EB-5 adjudications is to request “expedited processing” by USCIS.

#### Is Expedited Processing for Soon-To-Be Backlogged Countries Helpful?

Expedited processing is of particular interest these days for Indian, and some South Korean, and possibly for Taiwan and Brazilian nationals looking to receive Form I-526 approvals before the U.S. Department of State (“DOS”) imposes a Final Action Date (i.e. a Visa Bulletin cutoff date), which DOS has informally projected will occur by the Summer of 2019. There is a

possibility that, through expedited processing, an EB-5 beneficiary could slide through to immigrant visa processing before a Final Action Date falls in FY 2019. Individuals lawfully in the U.S. may also be able adjust status and get work and travel authorization during this time. For this reason, the possibility of expedited processing of an I-526 or I-924 has become a powerful marketing tool. It is therefore critical for immigrant investors, regional centers, and U.S. developers to understand how to qualify for such a benefit.

#### Expedite Criteria

USCIS has established national expedite criteria for all petitions and applications and will review all expedite requests on a case-by-case basis. Granted at USCIS’ sole and absolute discretion, there is no such thing as a “guaranteed expedite” in U.S. immigration law. The burden is on the petitioner to demonstrate that one or more of the following expedite criteria have been met:

- Severe financial loss to company or person;
- Emergency situation;
- Humanitarian reasons;
- A non-profit organization whose request is in furtherance of the cultural and social interests of the United States;
- Department of Defense or national interest situation;
- USCIS error; or
- Compelling interest of USCIS

There are two keys to success with an expedite request: providing credible, objective data in support of the national expedite criterion claimed to be met, and pulling on the heartstrings of a USCIS adjudicator. Both strategies should be used to demonstrate the devastating effects that would occur to an EB-5 project or investor without the expedited processing. Letters of support from U.S. Representatives or Senators, interested state or federal agencies, and/or local economic development entities, can help establish a “national interest situation.” Treating the expedite request as seriously as any other immigration filing with USCIS and establishing a solid record upon which USCIS can base its approval is essential. A detailed discussion of the severe financial loss, or the national interest being served, is necessary to create a “feel good” story for USCIS to approve the expedite request.

When considering what is a “compelling interest of USCIS,” it may be beneficial to consider factors set forth in the non-precedent decision of Matter of Mississippi Phosphate (AAU July 21, 1992) regarding national goals for EB-2 National Interest Waiver applications, such as improving wages and working conditions of U.S. workers; improving education and training programs for U.S. children and underqualified workers; improving health care; providing more affordable housing for young and/or older, poorer U.S. residents; or improving the environment of the U.S. and making more productive use of natural resources.

It may be also advantageous to consider strategies for expedite requests submitted to USCIS for other U.S. immigration petitions and applications. For example, it can be common for U.S. companies sponsoring artists with extraordinary ability to request expedited processing on O-1 visa extensions when an upcoming tour event is scheduled shortly in the future, and the artists’ presence is necessary for a show. Here, the severe financial loss to the U.S. company and its promoters and advertisers can be shown through the prospect of lost revenue; lost non-refundable deposits to secure a venue; and even the losses associated with the companies’ goodwill and reputation. Likewise, a family-based petition or travel document application may be expedited to visit a seriously ill, close family relative before they pass away. Evidence in support can include hospital records or a doctor’s letter on the relative’s deteriorating health condition.

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On the other hand, expedite requests may not be viable or appropriate for typical pressures, issues, or harms that are common to every immigrant investor or EB-5 project due to extended adjudication processing times. This is even true for “direct” EB-5 investors who may need to be in the U.S. or obtain employment authorization to manage a new commercial enterprise supporting the I-526 petition. Many EB-5 related expedite requests appear to be based on assertions of “severe financial loss to a company or to an individual.” However, USCIS will not grant an expedite request based on hardship resulting from “self-imposed financing arrangements,” such as escrow or other agreements which specify that EB-5 capital may not be released until I-526 approval. Nevertheless, it can be possible to obtain expedited immigrant visa interviews for foreign nationals with children who would otherwise “age out.” Expedite requests are routinely denied without compelling evidence in support of USCIS’ official criteria.

No Promises

There is a big difference between “Premium Processing” and “Expedited Processing”. Under a premium processing service, USCIS guarantees 15 calendar day processing for certain employment-based petitions and applications. Premium Processing is not currently available for the EB-5 category. On the other hand, with an expedited processing request, the petitioner merely asks that USCIS adjudicate an immigration petition more quickly, and unlike Premium Processing, there is no requirement or standard for how quickly USCIS must act, either on the request itself or after granting expedited handling.

Additionally, USCIS is not required to approve an expedite request for an investor, even if USCIS had previously approved the expedite request made by either the regional center affiliated with that investor, or another immigrant investor in the same EB-5 project. Expedited processing of an I-924 application does not automatically entitle the investors to expedited handling of their I-526 petitions, although such treatment should be requested in an I-924 expedite request. Although anecdotes related to expedited processing for EB-5 cases appear to indicate that IPO has approved I-526 petitions in as few as nine (9) days after an expedite request is approved, or more typically within sixty (60) to one hundred twenty (120) days after filing, caution is advised: approvals of expedite requests merely get the case in front of IPO officer quicker; it will not speed up the

time of the actual adjudication. Additionally, many times, an IPO officer team of two (2) to three (3) individuals adjudicates the I-526 petitions associated with the same EB-5 project, and approvals can come in bundles, despite differences in filing dates. Regional centers and immigration attorneys should be conservative in making any representations or guarantees regarding the timing, applicability, and likely impact of an expedite request.

Making the Expedite Request

There are multiple ways to request expedited processing. For new EB-5 applications, the request can be submitted to USCIS with the Form I-526, Form I-829, or Form I-924 paper application. Note, however, that USCIS receives thousands of EB-5 petitions every fiscal quarter, and it is critical that employees working the in-take room can easily distinguish between cases that are to be processed normally and those associated with an expedite request. It is suggested that an expedite request be submitted as a separate package with a bright cover page and its own exhibit list, fastened to the EB-5 application. Additionally, once a receipt notice is received, attorneys should follow up with IPO via email to notify the office that an expedite request has been included with the application. Finally, attorneys are wise to diligently (but also reasonably) inquire with IPO about the status of the expedite request to ensure it isn’t lost among all the files.

For a pending EB-5 application or petition, an immigrant investor or Regional Center may write the Immigrant Investor Program Office at USCIS.ImmigrantInvestorProgram@uscis.dhs.gov, and include supporting evidence to demonstrate that at least one of the expedite criteria has been met.

In the event a Form I-526 or Form I-924 is denied, there is an avenue to file an appeal with the Administrative Appeals Office (“AAO”) within thirty (30) days of the denial. The AAO generally processes appeals in the order received but will review expedite requests on a case-by-case basis under the same criteria set forth by USCIS. To request expedited processing, the applicant is to mail or fax a written request to AAO, clearly stating on the cover letter that it is an “EXPEDITE REQUEST,” and including supporting evidence to demonstrate that at least one of the expedite criteria has been met. It also appears that expedited processing requests to the AAO can be made by contacting, via phone at 1-800-375-5283, the USCIS Contact Center, which will take the “service request” and forward it to the AAO. When making an

expedited processing request by phone, it will be necessary to state concisely the grounds for the requested expedite, so the request will progress beyond the call center screening stage.

Recent EB-5 Expedites

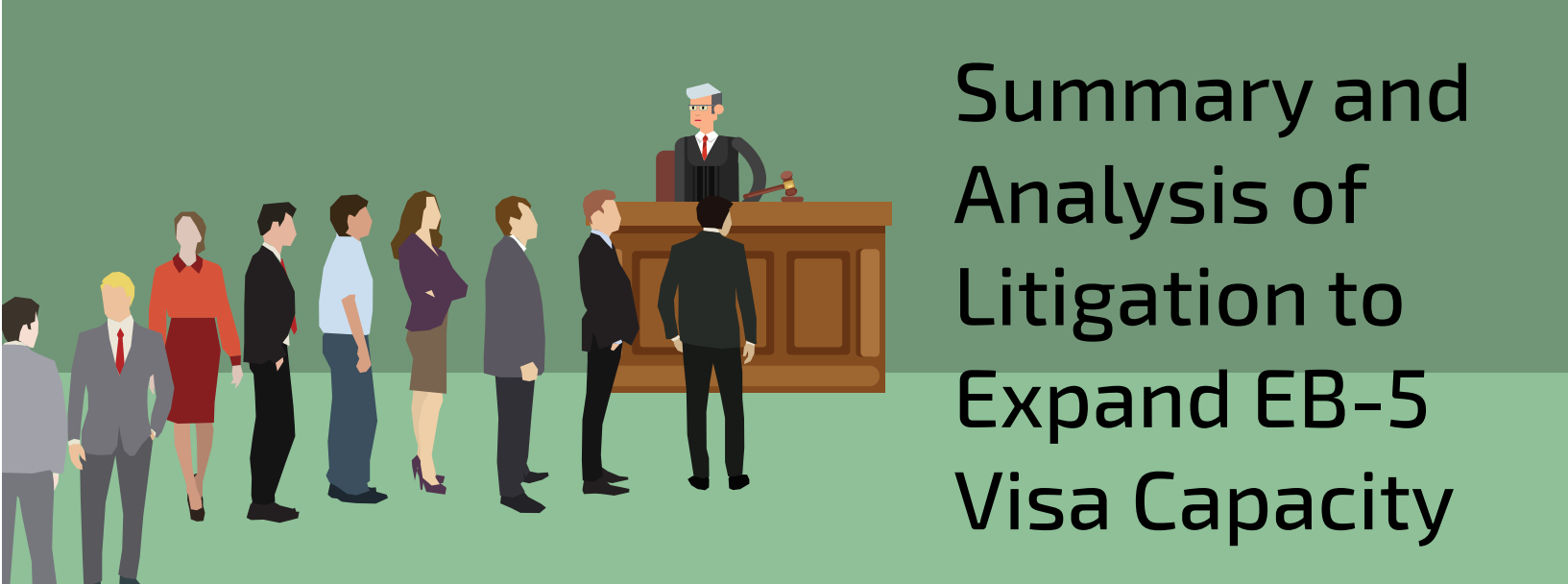
In the past couple of months, a couple of regional centers have seized the opportunity created by the impending EB-5 visa backlogs to market their previously-expedited project approvals. These successfully expedited projects are in geographic locations with substantially higher rates of enduring unemployment than required under current TEA definitions and have been found by USCIS to be “in the national interest.”

Support for applications for expedited processing include information related to the severe financial losses for a company if construction deadlines for the EB-5 project were not met for previously-scheduled, high-level international events, as well as the advancement of U.S. Small Business Administration goals to increase woman- or minority-owned businesses. This expedite request was also based on furtherance of the economic goals of the EB-5 Program and the establishment of a self-sustaining economic entity that would create and support the growth of other local businesses that enhances the development and well-being of the EB-5 project’s geographic area.

In another case, a regional center was able to demonstrate the significant benefit the EB-5 project would bring to an island community, such as improving public transportation utilities and increasing access to health care in rural or disadvantaged communities, through written support by relevant local and federal government agencies. It appears that political support from both parties can go a long way in convincing USCIS of the EB-5 project’s “national interest.”

Final Word

An EB-5 project’s qualification for expedited processing can be a key consideration for prospective investors when making an EB-5 investment decision. The EB-5 industry will likely see an increase in expedite requests due to the burdensome I-526 Petition waiting times and EB-5 visa backlogs. However, as expedited handling is viewed as a truly exceptional benefit, it is unlikely to be available to the vast majority of applicants, but instead reserved for the rare few who are able to differentiate themselves from the pack for exceptional reasons USCIS finds particularly compelling under the circumstances. ■



# Summary and Analysis of Litigation to Expand EB-5 Visa Capacity



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On July 25, 2018, Kurzban, Kurzban, Weinger, Tetzeli & Pratt, P.A. filed a lawsuit against the United States challenging the way the U.S. Government counts EB-5 visas.<sup>1</sup> The suit can have profound consequences. If successful, the visa backlog disappears. Even without winning, the suit has the potential to galvanize stakeholders to find other solutions to the crushing EB-5 visa backlog.

Background.

While a part of the fabric in the other U.S. immigrant categories, a visa backlog in the EB-5 category is relatively new. The EB-5 program historically suffered from underuse since its creation in 1990. From FY2008 to FY2011, the average number of visas issued annually totaled only 2,752.<sup>2</sup> FY2012 marked a pivot point where visa

1 Wang v. Pompeo, No. 1:18-cv-01732-TSC (D.D.C. filed July 25, 2018).  
2 See L Li, Regional Center Business Journal, Vol. 5, Issue 3 (October 2017) at <https://iiusa.org/blog/wp-content/uploads/2017/12/Navigating-EB-5-Visa-Usage-Statistics2C-A-Historical-and-Current-Perspective.pdf>; see also U.S. State Department reports at <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/immigrant-visa-statistics.html>.]

demand took a quantum leap to 7,641.<sup>3</sup>

Then FY2015 marked the beginning of a new era of EB-5 backlogs. The May 2015 Visa Bulletin, the monthly report of visa availability issued by the U.S. State Department, established a final action date of May 2013 for EB-5 visa applications.<sup>4</sup> This meant that for the first time in EB-5 program history, there were more visa applications than budgeted, a phenomenon the State Department calls visa “oversubscription.”

Enter another watershed moment at the end of FY2015. With the introduction of Senate bill S. 1501 in June 2015 and the possibility of investment amounts going up to \$1.2 million starting October 1, 2015,<sup>5</sup> investors rushed to invest at the \$500,000 level. During the months of July through September 2015, USCIS received 6,725 I-526 petitions, nearly the combined total of the prior 9 months’ filings.<sup>6</sup> With another “deadline” marked to the expiration of a federal budget continuing resolution in December 2015, USCIS received another 6000+ petitions in 1Q FY 2016.<sup>7</sup> At the end

3 Id. The number of EB-5 visas issued as reported by the U.S. State Department reflects I-526 petitions filed at a prior point in time, later approved, and then processed by the U.S. State Department for each family member based on foreign state chargeability, category, and priority date. Accordingly, the leap to 7,641 visas being issued in FY 2012 probably reflects the leap in I-526 petitions filed in FY 2011 based on then-USCIS processing times.  
4 See <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2015/visa-bulletin-for-may-2015.html>.  
5 The U.S. Government’s fiscal year begins October 1 and ends the following September 30.  
6 See [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526\\_performancedata\\_fy2015\\_qtr4.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_performancedata_fy2015_qtr4.pdf).  
7 See [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526\\_performancedata\\_fy2016\\_qtr4.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_performancedata_fy2016_qtr4.pdf).

of FY 2016, USCIS had over 20,000 I-526 petitions pending, nearly triple the number of pendings petitions just three years earlier.<sup>8</sup>

Analyzing these FY 2016 statistics, the USCIS Ombudsman reported in its Annual Report 2017 to Congress that “EB-5 immigrant visas remain immediately available to nationals of all countries except China, whose nationals will likely wait 10 years or longer for their EB-5 immigrant visas due to oversubscription, absent an increase in or recalculation of the annual quota.”<sup>9</sup> Despite this dampening report, investors, a majority still Chinese,<sup>10</sup> continued to file petitions in spikes timed to continuing resolution expirations through Q3 FY2017.<sup>11</sup> These surges in I-526 petition filings through 3Q 2017 continued to feed the increasing EB-5 visa backlog.

Q1 FY2018 then marked a turning point for Chinese investor demand. For the first time in at least three years, Chinese demand fell below rest of world demand for I-526 petitions. By the end of Q2 FY2018, Chinese I-526 demand was significantly below rest of world.<sup>12</sup> There is no sign that the Chinese investor demand will revive without a sea change, particularly given the more recent report of a potential 15-plus year wait for an

8 Id.  
9 See [https://www.dhs.gov/sites/default/files/publications/DHS%20Annual%20Report%202017\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/DHS%20Annual%20Report%202017_0.pdf).  
10 See, e.g., data presented by NES Financial during its Webinar, “EB-5 Capital: New Capital. New Needs” on July 19, 2018. Information at <https://nesfinancial.com/event/eb-5-capital-new-needs-new-sources-webinar/> (“NES Data”).  
11 See [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526\\_performancedata\\_fy2017\\_qtr4.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_performancedata_fy2017_qtr4.pdf).  
12 See NES Data, supra note 10.

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EB-5 visa.

The report is consistent with other expert estimates based on current assumptions. At the end of Q2 FY2018, there were 22,607 I-526 petitions pending with USCIS.<sup>13</sup> Based on the author’s estimates derived from the Q2 2018 I-526 approval rate and an assumption of two derivatives per investor, this pending inventory of petitions alone represents approximately 6.3 raw years of future EB-5 visa usage. This wait would be added to the visa applications represented by the prior 27,714 I-526 approvals from FY2015 to Q2 2018, representing approximately 8.4 raw years worth of visa applications.

Need for Visa Numbers Remedy.

The numbers story has two different plotlines at the moment. The story of Chinese investors who have already invested and whose children will age out is one of great and immediate distress on a human level. However, there is another story of a surging visa demand in other markets now finding some sun. Vietnam, India, Brazil, and South Korea are proving solid though much smaller markets by comparison to China. Current investor demand for new I-526 petitions is on pace with the “normal heydays” of FY2013 and FY2014.<sup>14</sup>

So does the availability of EB-5 capital from other investor markets actually contradict what feels obvious - a sense that there is a severe visa unavailability problem?

Yes, in the short term. By operation of the per country caps, even though tens of thousands of Chinese investors and family members are in the EB-5 visa backlog, investors from other countries with less than 700 visa applicants do not need to wait.

But backlogs are coming for these emerging markets. We already have oversubscription for Vietnam, and backlogs are predicted starting the middle of 2019 for India, Brazil, and South Korea.<sup>15</sup> Moreover, it only takes

13 See [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526\\_performancedata\\_fy2018\\_qtr2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_performancedata_fy2018_qtr2.pdf).  
14 The combined quarterly average of I-526 petitions filed in FY2013 and FY2014 is 2,159. See <https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-526-immigrant-petition-alien-entrepreneur>.  
15 See American Immigration Lawyers Association (AILA) Practice Alert: EB-5 Visa Waiting Lines at <https://www.aila.org/>

232 investors, or more likely much less, to cause oversubscription because derivatives are counted. That amounts to \$116 million or less per country per year (assuming investment at the \$500,000 level), over which visa backlogs start to accumulate under the current counting method.<sup>16</sup> For each “normal” year of I-526 petitions filed based on the 3-year average of FY2012, FY2013 and FY2014, there will be a visa wait of 1.3 raw years under the current visa allocation method.

The backlog we have in China and Vietnam and soon for other markets is caused by the State Department’s counting method of including derivative spouses and children to principal investors against the annual EB-5 visa quota of 9,940. But what if this counting method is contrary to the law?

Derivatives Litigation.

A bold claim pending before the D.C. District Court states that State Department method is wrong. The plaintiffs are thirteen Chinese investor families including investors and their derivatives as well as one regional center, American Lending Center LLC. Representing the plaintiffs, Ira Kurzban, John Pratt and their colleagues argue that the Government has been miscounting all along by counting derivatives of principal investors against the annual quota (the “Counting Policy”). Remedies sought include enjoining or stopping the Government from counting derivatives in the EB-5 category and allowing those children who have aged out as a result of the County Policy to rejoin their parents.

What is the lawsuit’s potential upside? The plaintiffs’ outside expert, David J. Bier of the Cato Institute,<sup>17</sup> concludes that if the State Department had been counting correctly, there would be no visa backlog today.

The arguments are based on plain meaning interpretation of INA section 203(b)(5), legislative history of the EB-5 category’s

[infonet/practice-alert-eb-5-visa-waiting-lines](https://www.infonet.com/practice-alert-eb-5-visa-waiting-lines).  
16 For FY2012, FY2013 and FY2014, the average annual petitions filed is 7,779. I am using a multiplier of 3 for the investor and 2 derivatives to estimate the number of visas issued under the current U.S. State Department counting method here and throughout this article.  
17 In the author’s humble opinion, Mr. Bier is subject matter expert without peer in the Immigration and Nationality Act’s treatment of derivatives. See Mr. Bier’s summary of his appearance and expert testimony with links to the full text of his affidavit and motion papers at <https://www.cato.org/publications/public-comments/expert-affidavit-eb-5-investors-wang-v-pompeo>.

creation, and a historical analysis of the Immigration and Nationality Act (INA)’s quota framework as related to derivatives. The complaint sets out in detail the harm created by the Counting Policy including its impact on each family’s lives. The families include children who have already “aged out” and children who will likely age out.

The complaint can be summarized in one of its opening paragraphs:

*This lawsuit challenges an unlawful Government policy that is undercutting the EB-5 Program’s growth and the economic benefits to the U.S. economy that result. Specifically, although Congress intended that the EB-5 visa numbers it set aside be used for qualifying investors, the Department of State has systematically diluted this visa pool by individually counting the spouses and children of investors against the EB-5 quota. This “Counting Policy” unlawfully erodes the number of visas available for actual investors, prolongs wait times, separates immigrant families, and undermines the U.S. economy.*

Plain Meaning and Legislative History.

The leading argument in the lawsuit is that the plain language of the EB-5 statute “unambiguously provides that the 7.1% of employment-based visas which ‘shall be made available’” under INA s. 203(b)(5) are allocated to investors only. The plaintiffs argue that “[n]othing in the language of the EB-5 statute authorizes the [State] Department to reduce the allocation of EB-5 visas for investors by expending visa numbers on an investor’s spouse or child.”

Congress did not intend derivatives to be counted against the 7.1%, which is all reserved for investors, themselves, the argument goes. Instead, derivatives are afforded status under INA section 203(d). Section 203(d) provides that derivatives must be accorded “the same status and the same order of consideration” as the principal investor. This plain language, the plaintiffs argue, means that when a visa becomes available to an EB-5 investor, the spouse and children are put in the same shoes and

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same visa number slot as the principal, and thereby may immigrate at any time. But this does not happen when the final action date on the Visa Bulletin retrogresses, or slides back, before the derivatives immigrate. In that situation, currently, derivatives must wait until their priority dates are current again and therefore are not accorded the same order of consideration as the principal.<sup>18</sup>

Further evidence of Congressional intent to only count EB-5 investor principals abound. The most compelling relates to the 3,000 visas set aside for targeted employment area (TEA) investments. INA section 203(B)(5)(B)(i) provides that “[n]ot less than 3,000...[be] made available...for qualified immigrants who invest in a new commercial enterprise...which will create employment in a targeted employment area.” (emphasis added). There is no indication, the plaintiffs argue, that Congress intended for all 9,940 to be used up by the 3,000 TEA set aside visas. Alas, that is precisely what occurs by the State Department’s counting method.

The plaintiffs also bring in uncontested legislative history, contemporaneous with the EB-5 program’s creation. The plaintiffs’ memorandum quotes Senator Paul Simon (D-IL) who stated, “We have an investor program that will permit up to 10,000 people to make investments here, to come to this country and create jobs;”<sup>19</sup> Senator Edward Kennedy (D-MA) stated that “10,000 employment generating visas are provided for investors who invest in enterprises, especially in depressed or rural or urban areas, which create a minimum of 10 new jobs for Americans.” Finally, Representative Lamar Smith (R-TX) stated about the EB-5 Program:

*[T]his particular provision of the immigration bill is actually the only provision of the immigration bill that is absolutely guaranteed to create jobs and produce revenue for the U.S. Government. In fact, if these 10,000 investor visas are taken advantage of, it will create a minimum of 100,000 jobs in the United States, and it will generate a revenue of up to \$10 billion*

18 See Wang v. Pompeo, supra note 1, Plaintiffs’ Motion for Preliminary Injunction at page 23.  
19 136 Cong. Rec. 35,616 et seq.(1990).

*[ . . . ] This provision, of course, says that 10,000 investors may come into the country if they are going to start a business that will employ at least a minimum of 10 employees. That is where the figure comes from of 100,000 guaranteed jobs.<sup>20</sup>*

In giving effect to laws as in contracts, the intent of the drafters is paramount. The legislative intent is clear from these records: Congress meant to admit 10,000 investors under the EB-5 program.<sup>21</sup>

Conclusion.

The plaintiffs’ arguments are compelling on the merits. The Government responded, but dismissed the key argument centered around clear legislative intent and plain meaning.<sup>22</sup> The response focused instead of decades of State Department custom and a thin construction of the INA that does not survive the plaintiffs’ fuller statutory analysis.<sup>23</sup> The crux of the argument the

20 Id.  
21 See the AILA White Paper: Solutions to the EB-5 Visa Waiting Line finding the relevant legislative history at <https://www.aila.org/infonet/white-paper-solutions-to-the-eb-5-visa-waiting>.  
22 See Mr. Bier’s criticism of the Government’s response at [https://twitter.com/david\\_j\\_bier/status/1034538695771213824?lang=en](https://twitter.com/david_j_bier/status/1034538695771213824?lang=en) with accompanying statutory exegesis and links to the Government’s reply.  
23 Nor does it survive the Cato Institute’s withering and incisive scrutiny. See Mr. Bier’s blog reacting to the Government’s reply at <https://www.cato.org/blog/governments-poor-defense-counting-derivatives-against-immigration-quotas>.

Government misses is that quotas apply to principals only under the INA. Derivatives are accorded status under a completely separate paragraph not subject to the quota, INA section 203(d).

While professional bettor may hesitate putting his life savings on the odds of winning the lawsuit, there is hope in an example from decades past. In 1968, the Government began wrongfully charging or counting Cuban refugees against the quota and continued the practice for eight years. In 1976, a suit was filed challenging the Government’s counting policy. The plaintiffs won that case, resulting in a recapture of 145,000 visas wrongfully charged to Cubans and thereby depleting available visas.<sup>24</sup>

The similarities are striking and the EB-5 lawsuit’s counsel are Olympians. The suit’s real purpose, though, is serving as a clarion call above the alarm. ▶

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24 See Silva v. Bell, 1978 U.S. Dist. LEXIS 15038 and at <https://www.clearinghouse.net/chDocs/public/IM-IL-0009-0002.pdf>. Credit to Mr. Bier for finding this case.





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MANAGING DIRECTOR, BREVET CAPITAL MANAGEMENT,  
IIUSA DIRECTOR

One of the first questions that EB-5 investors are coached into asking regional center operators is whether the project operator has any I-526 approvals, I-829 approvals, or any project paybacks. These lines of questioning are somewhat unfair, and their answers are potentially misleading given that many newer regional centers have not been around long enough to have reached the point of I-829 approvals, and hence project paybacks. For most EB-5 investors, the most important criteria in evaluating an EB-5 investment is approval of their I-526 petition and ultimately securing conditional and permanent residency for themselves and their families. The second criteria is the likelihood of receiving a return of their capital. While investors seek out and hire the top immigration attorneys and select projects with a past history of I-526 and I-829 approval in order to maximize the likelihood of securing the first objective, the majority of investors seek little to no outside counsel in evaluating the second. Selecting a project with an exemplar petition approval record and hiring a competent attorney only decreases the risk of not attaining the first criteria, but does nothing for the second criteria. Why are investors not hiring professional money managers to manage their EB-5 real estate investors? Why is there not enough emphasis on this point by the industry? Securing *both* permanent residency and a return of investors'

funds should be the goal for all EB-5 investors. In addition to evaluating project performance and hiring top immigration attorneys, investors should be as focused on hiring professional money managers to oversee investment strategy in order to achieve the best results from EB-5 investment.

Today there are more than 1,100 regional centers, and less than 10% of them existed even 5-7 years ago. Given that the EB-5 project cycle can often take 8 years or more, the vast majority of them have not had enough time in the business to have completed an entire cycle. One look at the statistics posted by the United States Citizenship and Immigration Services (USCIS) for fiscal year 2017 shows that roughly 89% of all the I-526 applications and close to 80% of all I-829 applications adjudicated in that year were approved. Those percentages are fairly good. And while many agents in China and elsewhere focus on these approval ratings as if they are some sort of stamp of approval on a project's viability, the truth is that the USCIS is not approving EB-5 projects based on their viability as projects or the ability of the projects to pay back investors. At the I-526 stage the USCIS is looking at the projects to evaluate if they meet the very broad statutory requirements for approval of the immigrant petition. These criteria essentially focus on job creation, TEA designation, and other technicalities such as a comprehensive business plan, and the investor's source of funds for the investment. At the I-829 stage the USCIS is verifying that the project dollars were spent, and the project created the required number of jobs.

Approval of the I-526 and I-829 criteria may give investors the false sense of security that the USCIS is evaluating the viability of these projects, but that could not be further from the truth. Investors hire the top attorneys in the business to ensure that they meet these I-526 technicalities, and in some cases, investors evaluate many law firms to choose only the best—ones that boast 100% approval rates

and over 1,000 I-526 and I-829 approvals under their belt. Neither the USCIS nor the immigration attorneys, however are required or qualified to evaluate the investment itself. Therefore while investors, and placement agents do quite a bit of homework on selecting the right attorneys and projects that have been exemplar approved, they are performing virtually no research on what projects are most likely be able to pay them back their investment. An 89% and an 80% approval rate of the immigrant petitions is a good result, but it gives zero insight into the investors' ability to get their principal investment back at the end of the EB-5 process.

Much of this is the result of lack of underwriting ability by EB-5 regional center operators and immigration attorneys not being properly equipped in giving advice in real estate and finance. Other reasons are the complexity of real estate capital structures in the United States and development procedures in other countries being completely different.

In fact, while the rate of immigrant petition approvals may be relatively high, the rate at which investors are securing a return of their investment appears to be disturbingly low. Although there are not exact figures as to the total amount of dollars that have been invested through the EB-5 program since its inception in 1993, a few unverified reports indicate that the total amount is between \$27 billion and \$30 billion over the last 25 years. It is true that some of the EB-5 funds that have been raised are not yet due for a payback, but relatively speaking there have been very few projects that have returned investors' funds. Some projects are years overdue on payment deadlines according to their loan documents. Those projects that have paid back investors, which have been few and far between, have been sure to widely advertise this feat. One regional center that has been around for over 30 years boasts having paid back 23 projects' investors totaling

*Continued On Page 47*

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over \$860 million. While there are no public databases with published data on this topic, and the USCIS does not publish repayment statistics, assuming that \$10 billion out of the \$27-30 billion of the EB-5 project funds raised are not due for repayment yet, one can estimate with a fair amount of certainty that the total amount of repaid funds is under \$1 billion. This would imply that the amount of funds invested in projects that have been paid back is in the 5% range. This data clearly shows that the biggest risk for EB-5 investors is therefore not the regional centers' ability to get them their green cards, but the regional center's ability to repay the investment. Even the reputable regional center with 23 paybacks discussed above currently has reports that one of their projects with a few hundred investors already invested may ultimately never break ground. As the famous securities law disclosures from most broker dealer e-mails state: "past performance is not an indication of future results." Why are EB-5 investors and agents so obsessed with past performance when the securities regulators are telling investors that past performance should not be relied on?

The answer is a bit complicated. Part of the reason is because EB-5 regional centers and fundraisers have traditionally been real estate developers and marketing specialists, and not sophisticated financial institutions like the investment banks on Wall Street that manage assets for high net worth clients. The risk to investors of not receiving their capital back is a result of various factors which include: numerous project failures in the form of Ponzi schemes, outright frauds, projects that have been underwritten poorly or have been in non-traditional assets classes that banks do not lend to (which makes them very difficult to refinance), and other shortcomings that have become favorite topics for headline financial news over the past few years. For EB-5 investors, to lose their EB-5 investment does not just have financial consequences. It can lead to immigration consequences as well. This is why fiduciary duties to EB-5 investors should be adhered to with a much greater degree, and "[n]ot honesty alone, but the punctilio of an honor the most sensitive" should be the standard of conduct for these project operator fiduciaries.<sup>1</sup> However, the lack of expertise that can be provided by professional financial

<sup>1</sup> Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928)

## Hiring Professional Money Managers to Lower and Diversify Project Risk Should be a Must for Investors

The other potential answer is that the portfolio model of investment has been more difficult to get approved by the USCIS for reasons that I will explain, and that has deterred others from adopting this model. From an investment viewpoint, single project failure should be all the reason more why investors should look at diversifying in an EB-5 portfolio fund. Historically however, there have been numerous attempts at projects in a portfolio model that have been denied, and relatively few that have actually been approved. More recently, however, this trend may be shifting as more portfolio models have been receiving approvals. The USCIS does not allow the pooling of jobs but does allow the pooling of assets in an EB-5 portfolio fund, and this has been the differentiating factor between the portfolio models that have been approved by the USCIS and the ones that have been rejected. Now that the USCIS has approved portfolio models, this could be the future of the industry, reversing the trend of such low percentages of estimated returns of investor capital.

Diversifying is the best way to lower project risk, as we have seen that even project operators with perfect project success rates and project payback rates can have a blowup. One example of a portfolio fund model is an EB-5 fund based out of Florida that was the first successful fund in getting approval from the USCIS. The way they got approved was by pooling investors' funds together in order to diversify investors' risks, but requiring investors to pick one project for job creation purposes. What that means is that, for the purposes of meeting the investors' job creation requirements in the immigration context, I-526 petition and I-829 petition success are still reliant on the completion of one project, but the investors' return on their investment and capital at risk can be diversified across a pool of investments.

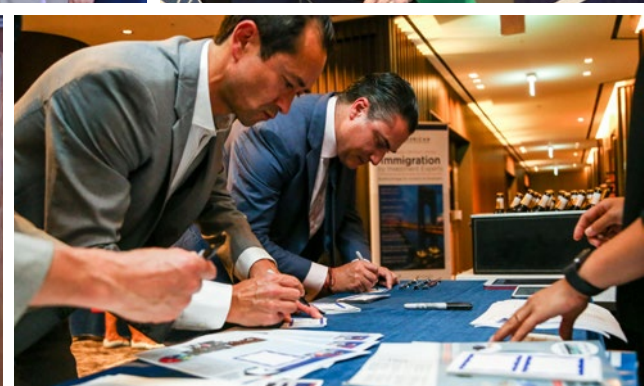
Under portfolio theory, the less correlation that investments in a portfolio have to each other the less variance that the portfolio will have. What this means is that a portfolio of all technology stocks or all energy stocks will theoretically have a higher variance than one that has less correlation by having stocks from different industry sectors. This can also be mimicked in an EB-5 portfolio fund. Such EB-5 portfolio funds theoretically can help minimize investors' variance by the number of investments in the portfolio. They may also lower the variance by having different asset classes in the portfolio

and assets in different geographic locations across the United States. The less homogenous the projects, the less variance that the portfolio will have according to *Modern Portfolio Theory*. Asset classes such as hotels, apartments, condos, office buildings, and retail outlets all perform differently in different parts of the real estate cycle. Also, different regions in the United States can be affected differently by regional downturns or natural disasters. Imagine having a portfolio of EB-5 projects that are all located in Puerto Rico or New Orleans where all such projects could be affected by a single tropical storm or hurricane or any other geographic event. Having a well-balanced portfolio of EB-5 projects that lowers investors variance by the number of investments, asset classes, and geographies can conceptually lower an EB-5 investor's variance, and hence investment risk. The way money managers have reduced, and diversified investment risk has always been by diversifying and lowering the investment variance.

Implementing a successful Portfolio Model in the context of EB-5 investment is a highly complex strategy with the potential to yield key financial returns at the end of the EB-5 project cycle. This is why more emphasis should be placed by investors on hiring professional money managers for their EB-5 investments. In the EB-5 marketplace where almost all projects get approved for job creation by the USCIS, regardless of their safety or viability, the industry's focus has been on good attorneys, exemplar approvals and hence green card approvals, instead of return of their capital. Although getting green card approval is very important, it should be just as important for the industry to focus on taking steps to make sure EB-5 investors can receive their investment back. Where the industry has 89% initial green card application approvals but less than a 5% payback rate, one can see that emphasis is lacking in one of the two important investment criteria by the investors. The industry has always focused on trusting the top immigration attorneys for the first category, but the industry has never focused on trusting the top money managers for the latter category. We hope that more of the industry begin focusing on the last point. By giving more trust to professional attorneys and professional money managers, there should be no reason why both categories cannot achieve a greater than a 90% success rate.







# IIUSA Banquets in Ho Chi Minh City & Seoul Deliver Industry Education and Business Development to Two of EB-5's Largest Markets



**MCKENZIE PENTON**  
IIUSA DIRECTOR OF EVENTS AND  
BUSINESS DEVELOPMENT

Last month, IIUSA staff hit the road for events in Ho Chi Minh City, Vietnam and Seoul, South Korea. The events were part of IIUSA's annual Global Banquet Series calendar and brought together hundreds of the leading EB-5 professionals from around the globe for evenings filled with business development, education, networking – and yes, even a little fun!.

Launched in 2017, the IIUSA Global Banquet Series is a core component of IIUSA's mission of ensuring strong and well informed EB-5 investor markets around the globe. To date, IIUSA has hosted events in China, India, Vietnam and South Korea. Looking ahead

to the remainder of 2018 and 2019, we are excited to continue our track record partnering with top tier events in other investor markets around the world.

As the EB-5 universe continues to evolve, and at times become more complex for its stakeholders, IIUSA, as the only non-profit trade association for the industry, will continue to produce high-quality data reports, expert analyses and most importantly be on the ground in investor markets to answer any and all questions international stakeholders may have.

## Vietnam: Challenges & Opportunity

The banquet in Ho Chi Minh City marked IIUSA's second event in Vietnam and we were honored to welcome past attendees as well as new guests to an evening of networking and business development at the historic Hotel Saigon in the heart of the city's financial district.

With over 80 attendees representing EB-5 regional centers, immigration firms, foreign intermediaries and more, the event was certainly one of the most diverse and engaging events to date for the IIUSA Global Banquet Series. Furthermore, **with representatives from 18 of Vietnam's largest migration**

**agencies, the event was a testament to both the growth of the EB-5 investor market in Vietnam as well as to the commitment of local service providers.**

The event, the first large-scale industry event in Vietnam since the market reached its annual per country cap of the EB-5 visa category, not only addressed the challenges that the market is facing, but it also highlighted the opportunities for the EB-5 market in Vietnam in the years to come. Our expert panel led by Leon Rodriquez (Partner, Seyfarth Shaw) delved into the many complexities that EB-5 is currently facing including legislative and regulatory changes, growing visa backlog and other issues ensuring all of our guests left the event educated and well informed.

## IIUSA Hosts Long Overdue First Event in Korea!

Coming on the heels of a successful event in Ho Chi Minh City, IIUSA was proud to bring the Global Banquet Series to Korea for the first time. Once again, the banquet delivered on its promise of first class business development and education as well as diverse networking opportunities. As one of the largest and oldest EB-5 markets, Korea was the perfect

*Continued on Page 49*

## IIUSA BANQUETS IN HO CHI MINH CITY & SEOUL DELIVER INDUSTRY EDUCATION AND BUSINESS DEVELOPMENT TO TWO OF EB-5'S LARGEST MARKETS

*Continued From Page 48*

destination for the IIUSA Global Banquet Series as we continue to look to connect our members to markets around the globe. With over 100 attendees, many of whom were representatives of local agencies, the event was a hands down success for the association and local industry alike.

We were honored to partner with the Korean Emigration Association (KEA) for this year's banquet. KEA, a membership organization for the top emigration firms throughout Korea, was the perfect partner for IIUSA as we look to drive local engagement and we were privileged to have their support. KEA attendees from over 20 migration agencies (a majority of all active in EB-5) attended the banquet, marking it as one of IIUSA's most successful events to date. KEA Chairman Mr. Ahn and Vice-Chairman Ms. Hong both presented to attendees highlighting both their

and KEA's wealth of local market knowledge.

A key mission of the IIUSA Global Banquet Series is to educate local industry stakeholders to ensure that they have the most up-to-date and accurate information on the EB-5 Program at their disposal. With many of the agents in attendance having been involved in the EB-5 Program since its inception in 1992, it was often IIUSA staff and members who were being educated by the local industry experts!

Nevertheless, our expert panel of EB-5 professionals, led by discussion leader Jinhee Wilde of Wilde & Associates, further elucidated some of the hottest topics in the industry, including legislative & regulatory reform, increasing backlogs and processing trends and local market insights.

## Welcome New IIUSA Members

IIUSA events, research and business development services could not be accomplished without the support of our international members from around the globe. Now totaling over 40 organizations, IIUSA has international members working in India, China, Taiwan, Switzerland, the UEA and of course Korea & Vietnam. It is through the

hard work of our members in investor markets around the world that the industry is able to continue to grow and have a bright future.

International member engagement cannot be overstated and we were honored to recognize the contributions of our members in Korea and Vietnam during our Banquets. Representatives from Korea-based members: Bether Capital, DaeYang Immigration Corporation, Kookim Emigration Corporation and Club Emigration as well as Vietnam-based members: USCIS Group and Total Visa Consultancy Limited all were on hand to participate in the event and to accept their membership certificates recognizing their support of the association and commitment to industry development in Korea and Vietnam.

## Thank you to Our Banquet Sponsors & Partners

The IIUSA Global Banquet Series is nothing if not a testament to the educational and convening power of the industry's one and only trade association. However, we know that these events would not be possible without the invaluable support and expertise of each and every one of our sponsors. To that end, we would like to extend a special thank you to all of the sponsors at the two events who stepped up to support the work of IIUSA and present themselves as the industry leaders that they are.

*Continued on Page 50*



*Photos from top left to bottom right:*

1. Expert EB-5 panel discusses challenges and opportunity for the EB-5 Market in Vietnam
2. New IIUSA Member DaeYang Immigration Corporation receives their IIUSA member certificate. IIUSA was pleased to welcome four new members on board.
3. Chairman of the Korean Emigration Association, Mr. Ahn, welcomes attendees to the first event IIUSA Banquet in South Korea
4. IIUSA Policy Analyst Lee Li delivers critical EB-5 data report on Vietnamese market.
5. Attendees enjoy premier networking and business development time during the Banquet cocktail reception in South Korea.



IIUSA BANQUETS IN HO CHI MINH CITY & SEOUL DELIVER INDUSTRY  
EDUCATION AND BUSINESS DEVELOPMENT TO TWO OF EB-5'S LARGEST MARKETS



Photos left to right:

1,2. Attendees enjoy premier networking and business development time during the Banquet cocktail reception in South Korea

3. Attendees enjoy a banquet dinner and listen to a presentation from one of IIUSA's distinguished banquet sponsors.

Continued From Page 49

See you at the Next IIUSA International Event!

Looking ahead to the remainder of 2018 and early 2019, IIUSA will continue to bring our Global Banquet Series and member-exclusive events to the EB-5 investors markets that matter most. To that end, we are pleased to announce

that the next scheduled events on our calendar will take us to Dubai, UEA and Mumbai, India in February 2019. You can learn more about both of these events by visiting the event page (event page URL). If you are interested in discussing sponsorships in greater, detail feel free to contact me directly at mckenzie.penton@iiousa.org or give us a call at (202) 795-9667. ■



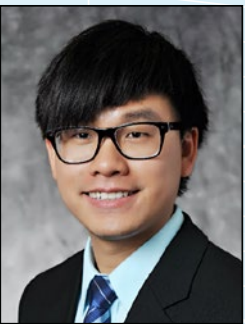
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Latest updates on government and public affairs related to the EB-5 Regional Center Program, including legislation, regulatory reforms, policy deliberations and more.
- ★ **BLOG POSTS (DAILY)**  
Sign up for daily email updates from IIUSA's blog, featuring the latest updates on the EB-5 Industry.
- ★ **INDUSTRY REPORTS (WEEKLY)**  
Weekly update on the latest EB-5 news and developments for industry stakeholders.
- ★ **ADVOCACY E-NEWSLETTERS AND ALERTS (MONTHLY)**  
Latest updates on government and public affairs related to the EB-5 Regional Center Program, including legislation, regulatory reforms, policy deliberations and more.
- ★ **REGIONAL CENTER BUSINESS JOURNAL (QUARTERLY)**  
Hard copy of IIUSA's Regional Center Business Journal – the EB-5 Industry's premier publication featuring the latest legislative updates, industry trends, quantitative analyses of program statistics and international markets.
- ★ **CHINA E-NEWSLETTERS (QUARTERLY)**  
Updates sent to the world's largest EB-5 investor market featuring the latest EB-5 industry hot topics. This e-Newsletter is in Chinese.

Analyzing Form I-526 Statistics by Investor's  
Country of Chargeability for Fiscal Year 2017:  
What is New and What it Tells Us?



LEE LI  
IIUSA POLICY ANALYST

Utilizing the “bitter sweet” machine of the Freedom of Information Act (“FOIA”), IIUSA recently expanded its data library with the latest addition of statistics of Form I-526 (Immigrant Petition by Alien Entrepreneur) by investor's country of chargeability for fiscal year (FY) 2017. This analysis on the latest I-526 data aims to illustrate the newest trends and developments among the top EB-5 investor markets in FY2017, helping IIUSA members to identify new opportunities in the EB-5 marketplace. In addition, it also showed the increasingly significant impact of the EB-5 visa backlog on the number of new EB-5 investors per year, hindering the EB-5 Program's capacity of raising investment from qualifying foreign entrepreneurs to support economic development in the U.S. With that, here are the key insights from the latest I-526 statistics analysis:

FORM I-526  
FILINGS: RANKINGS,  
NUMBERS, AND  
GROWTH RATES

We found that the number of I-526 filings from China experienced a 20% decline from FY2016 to approximately 8,770 in FY2017. Although China remained by far the largest EB-5 investor

market, the I-526 filings from Chinese investors showed a 20% annual decrease for two consecutive years since the peak in FY2015, illustrated by Table 1.

In contrast, I-526 filings from India and Vietnam continued to grow year-over-year to respectively 587 and 523 in FY2017, an all-time high for these two markets. Additionally, based on the total number of I-526 petitions filed, India surpassed Vietnam in FY2017 and became the second largest EB-5 investor market for the first time.

Furthermore, EB-5 investors from South Korea accounted for a total of 215 I-526 filings in FY2017, a 38% growth year-over-year. Approximately 182 I-526 petitions were filed by investors from Taiwan and 136 filed from Brazil in FY2017. In addition, the statistics indicated that the total number of I-526 filings from all other 163 countries of chargeability (“ROW, rest of the world”) declined

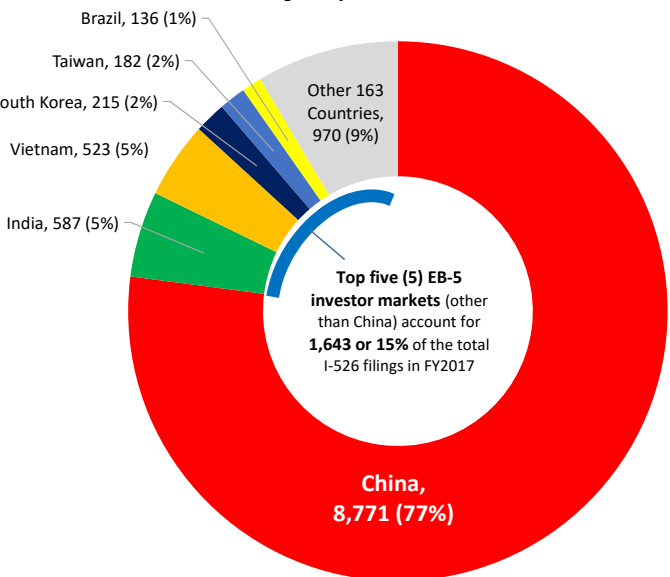
year-over-year by 5% from FY2016 to a total of 970 petitions in FY2017.

I-526 FILING GLOBAL MARKET SHARES

As illustrated by Figure 1, the number of I-526 petitions filed by investors from China accounted for 77% of I-526 filings worldwide in FY2017. However, China's market share of I-526 filings was under 80% for the first

Continued On Page 52

FIGURE 1: Global Market Shares of I-526 Filings in FY2017, Top Countries of Chargeability



1a Note: Margin of error: +/- 6.4%.  
1a Source: U.S. Citizenship and Immigration Services (IIUSA Obtained via FOIA)

TABLE 1: Rankings of I-526 Filings & Growth Rates by Investor's Country of Chargeability (FY2015-FY2017)

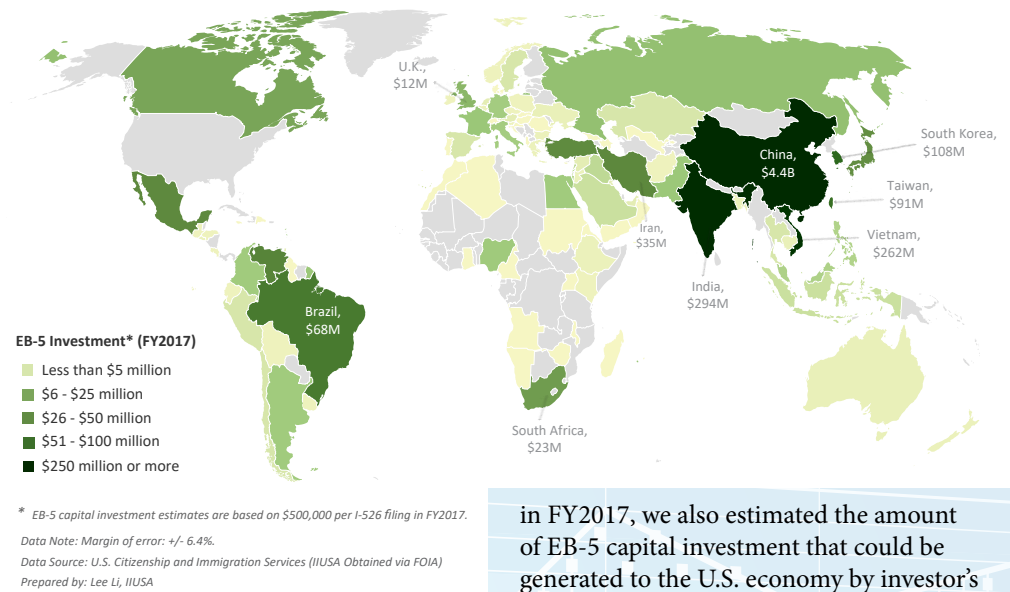
Ranking	FY2015				FY2016				FY2017			
	Country of Visa Chargeability (COC)	I-526 Filings (Number)	(YoY Growth)		Country of Visa Chargeability (COC)	I-526 Filings (Number)	(YoY Growth)		Country of Visa Chargeability (COC)	I-526 Filings (Number)	(YoY Growth)	
1	China	13,530	39.2%		China	10,948	-19.1%		China	8,771	-19.9%	
2	Vietnam	289	127.6%		Vietnam	404	39.8%		India	587	65.8%	
3	India	239	102.5%		India	354	48.1%		Vietnam	523	29.5%	
4	Brazil	229	108.2%		South Korea	156	-6.6%		South Korea	215	37.8%	
5	Taiwan	170	60.4%		Brazil	151	-34.1%		Taiwan	182	27.3%	
6	South Korea	167	68.7%		Taiwan	143	-15.9%		Brazil	136	-9.9%	
	Others 163 COCs	1,181	62.9%		Others 163 CoCs	1,025	-13.2%		Others 163 CoCs	970	-5.4%	
	Worldwide Total	15,805	44.5%		Worldwide Total	13,181	-16.6%		Worldwide Total	11,384	-13.6%	

Data Note: Margin of error: +/- 6.4%.  
Data Source: U.S. Citizenship and Immigration Services (IIUSA Obtained via FOIA)  
Prepared by: Lee Li, IIUSA



Analyzing Form I-526 Statistics by Investor's Country of Chargeability for Fiscal Year 2017:  
What is New and What it Tells Us?

MAP 1: EB-5 Capital Investment by Country of Chargeability (FY2017)



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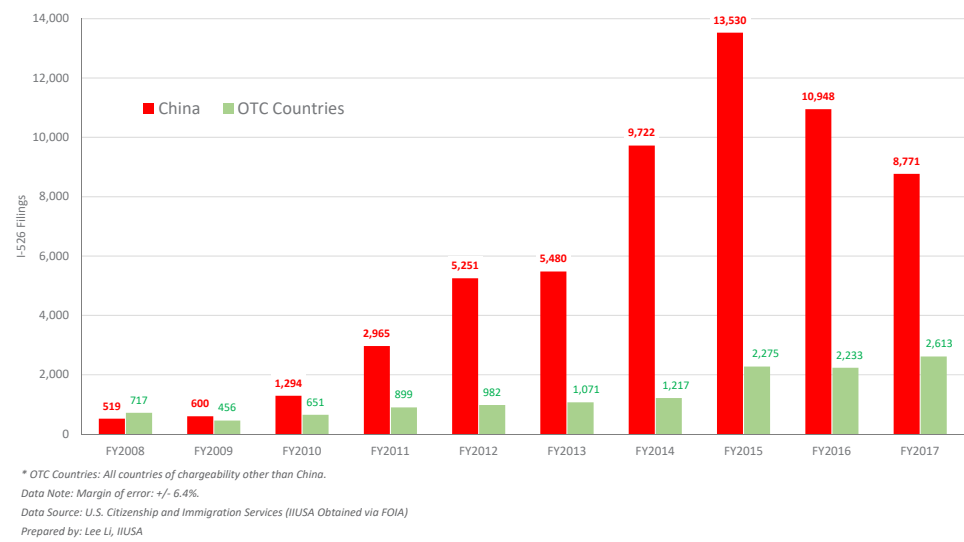
time since FY2012, declining for a third consecutive year from its peak 89% in FY2014.

The market shares of I-526 filings from India and Vietnam both increased to 5% in FY2017. Overall, China, India, Vietnam, South Korea, Taiwan, and Brazil remained as the six largest EB-5 investor markets since FY2015, accounting for more than 90% of the worldwide I-526 filings annually between FY2015 and FY2017.

EB-5 INVESTMENT WORLDWIDE IN FY2017

Based on the number of I-526 petitions filed

FIGURE 2: I-526 Filings by Fiscal Year, China versus OTC Countries\* Total (FY2008-2017)



investor market in Europe in FY2017 was the United Kingdom thanks to its investors' \$12 million in EB-5 investment.

THE DECLINE IN CHINA VERSUS THE GROWTH IN OTHER COUNTRIES

As Figure 2 illustrates, I-526 filings by investors from China reached an all-time high in FY2015 with over 13,500 per year and started to decline by more than 2,000 petitions annually ever since, largely due to the increasingly severe visa backlog issue as well as the longer visa waiting time for Chinese applicants. Although the total number of I-526 filings from all countries of chargeability other than China ("OTC countries") has been increasing since FY2015, the incremental growth of the new EB-5 investors from OTC countries did not offset the significant decline of the EB-5 demand in China that is mostly caused by the visa backlog. In fact, the data shows that I-526 filings from OTC countries increased by only 340 petitions from FY2015 to FY2017; while the decrease of I-526 filings from China was over 4,750 petitions during the same time period. As a result, the total number of new investors who invested in the U.S. through the EB-5 Program declined by more than 15% from FY2015 to FY2017, making it increasingly challenging for the EB-5 industry to raise much needed capital investment to fund economic deployment projects and support job creation in U.S. communities.

TOP FIVE EB-5 INVESTOR MARKETS OTHER THAN CHINA

Figure 3 presents the annual I-526 filings in FY2016 and FY2017 from the five largest EB-5 OTC countries in FY2017 (India, Vietnam, South Korea, Taiwan, and Brazil). In addition, over the two-year period, approximately 941 I-526 petitions were filed by Indian investors (not including family derivatives); while this number for Vietnamese investors was 927 during the same period. Additionally, South Korea, Taiwan, and Brazil accounted for respectively 371, 325, and 287 I-526 filings in FY2016 and FY2017. With the per-country caps on the annual EB-5 visa allocation, it is important to note the total number of I-526 filings from OTC countries since it will affect the annual availability of EB-5 visas to Chinese applicants who are already waiting in line for their green cards.

Continued On Page 53

Analyzing Form I-526 Statistics by Investor's Country of Chargeability for Fiscal Year 2017:  
What is New and What it Tells Us?

FIGURE 3: I-526 Filings by Fiscal Year, Top OTC Countries\* (FY2016-FY2017 & Total)

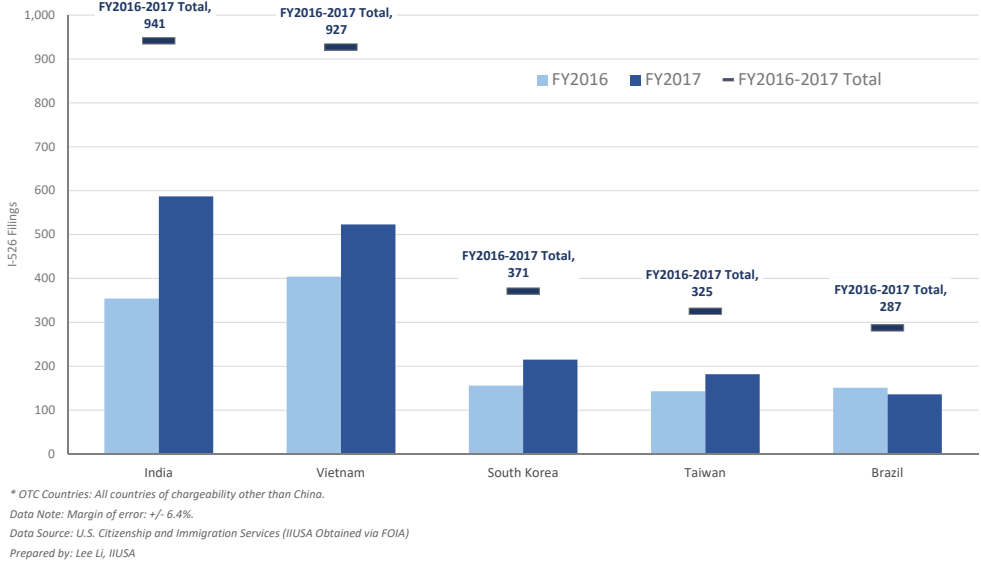


FIGURE 4: Top Eight Countries of Chargeability with Highest Growth Rates in I-526 Filings, FY2016-2017

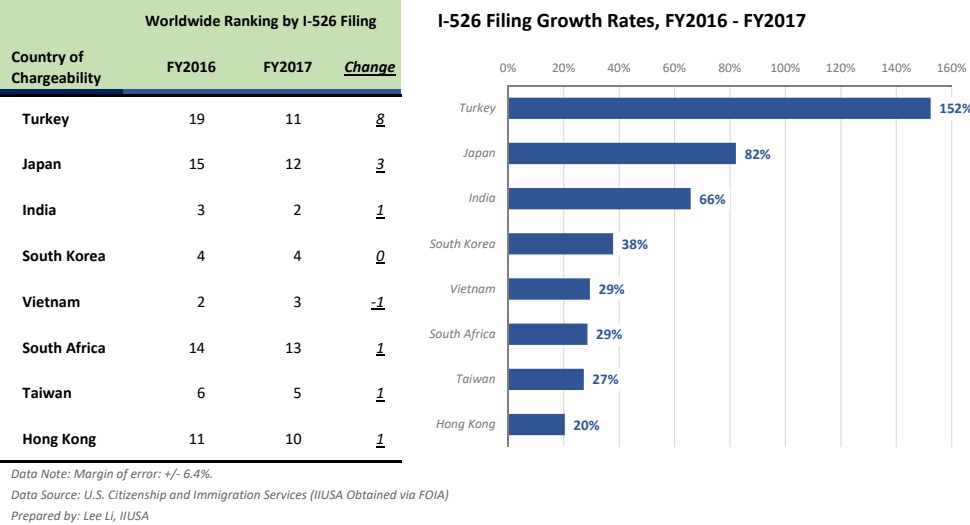
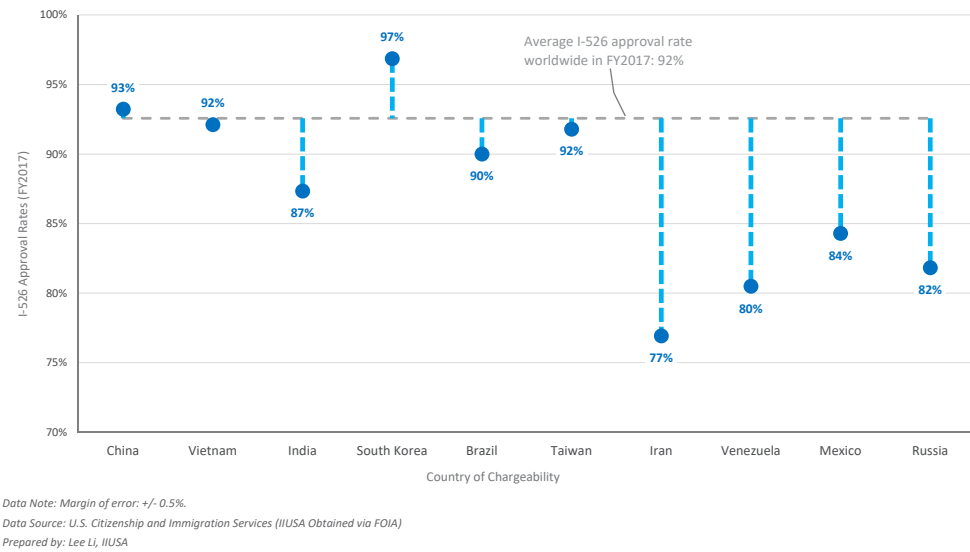


FIGURE 5: Average Approval Rates of I-526 Petitions, FY2017, Top 10 Countries of Chargeability



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INVESTOR MARKETS WITH HIGHEST GROWTH IN FY2017

In addition to the top EB-5 investor markets (such as India, Vietnam, South Korea, and Taiwan), we found that Turkey, Japan, South Africa, and Hong Kong also experienced the highest growth in I-526 filings from FY2016 to FY2017. As Figure 4 shows, the number of I-526 petitions filed by Turkish investors increased by over 150% between FY2016 and FY2017, the highest growth among all countries of chargeability. I-526 filings from Japan in FY2017 also increased by 82% from the last fiscal year; while I-526 petitions submitted from Hong Kong grew by 20% year-over-year.

AVERAGE APPROVAL RATES OF I-526 PETITIONS BY COUNTRY OF CHARGEABILITY

The latest statistics also shed some light on the average approval rates of I-526 petitions in FY2017 by petitioner's country of chargeability. As visualized by Figure 5, on average, the approval rate of I-526 petitions filed by investors from China, Vietnam, and Taiwan was 92% in FY2017, the same as the worldwide average level. The analysis also indicated that petitioners from South Korea had the highest average approval rate of 97% in FY2017, while Indian investors had an 87% average approval rate, the lowest level among the top six EB-5 investor markets. Furthermore, the average I-526 approval rates for petitioners from Iran, Russia, Venezuela, and Mexico was between 77% (Iran) and 84% (Mexico), all lower than the worldwide average in FY2017.

ESTIMATED EB-5 VISA APPLICANTS QUEUE – CHINA

According to the U.S. Department of State, the EB-5 Final Action Dates for Chinese visa applicants on the Visa Bulletin only advanced by two months (from June 15, 2014 to August 15, 2014) in the entire FY2018. The slow movement on the visa waiting time for China could be partially because of the growing demand of EB-5 visas from the OTC countries, causing less EB-5 visas to be available annually to the Chinese applicants. On the other hand, over 9,720 I-526 petitions were filed by Chinese investors in FY2014, a significant growth of 77% from FY2013,

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Analyzing Form I-526 Statistics by Investor's Country of Chargeability for Fiscal Year 2017:  
What is New and What it Tells Us?

Continued From Page 53

which could be another crucial factor that contributed to the limited movement of the EB-5 Final Action Date for China in FY2018.

Looking ahead, using the I-526 filing statistics from China, we can estimate the number of Chinese visa applicants with a priority date between FY2015 and FY2017 in the EB-5 visa applicants queue. In essence, multiplying the number of I-526 filings by the average approval rate of Chinese petitioners (83% in FY2015 and FY2016; 93% in FY2017) could give us the estimated I-526 approvals by fiscal year for Chinese investors between FY2015 and FY2017. Then we multiplied the I-526 approval numbers by average family derivatives per principle investor from China (the ratio is 2.8 visas per I-526 petition) to get the estimated number of Chinese visa applicants in the queue. Additionally, we added a 10% attrition rate to our estimates of visa applicants in order to account for the no shows at visa interviews as well as the withdrawals and denials of visa applications.

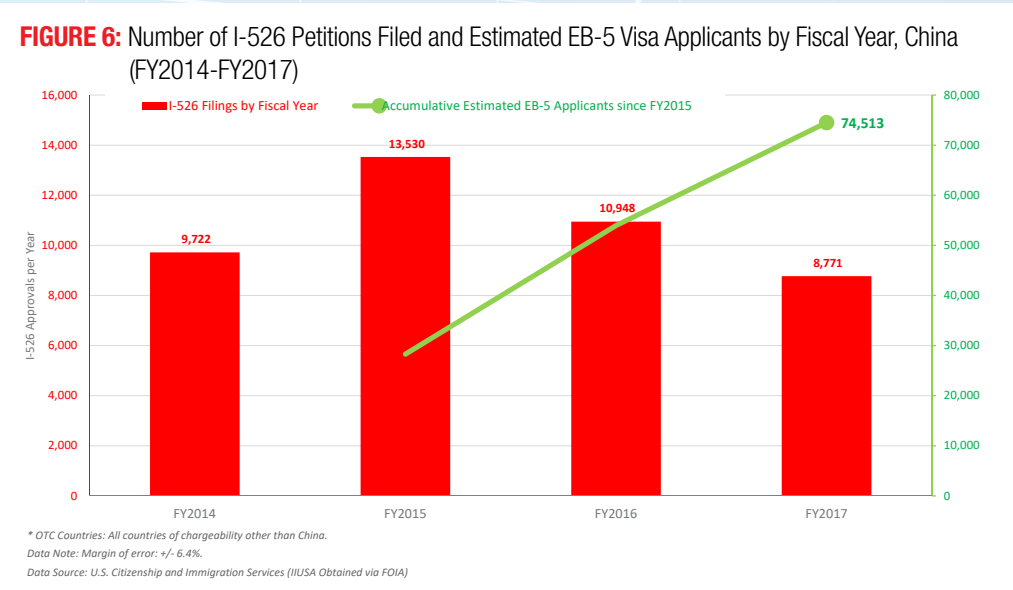
The result is presented by Figure 6. The analysis indicates that the number of visa applicants from China with a priority date between FY2015 and FY2017 (October 1, 2014 to September 30, 2017) could be

approximately 74,513. Furthermore, given the fact that 13,530 I-526 petitions were filed in FY2015 by Chinese investors, it could take an even longer time for the EB-5 Final Action Dates to move from October 1, 2014 to September 30, 2015 for the Chinese applicants. The visa backlog issue could be more severe in the next fiscal year under the status quo.

Not only did the analysis of I-526 statistics for FY2017 generate practical insights of the

latest on EB-5 investor markets, but it also illustrates challenges facing the entire EB-5 industry. IIUSA will continue to develop comprehensive research and quantitative analyses to help our members make educated decisions for their EB-5 business and to inform key industry stakeholders of fact-grounded reports to facilitate meaningful policy discussions.

For questions on EB-5 statistics and research, contact Lee Li at [lee.li@iiousa.org](mailto:lee.li@iiousa.org)



EB-5  
HISTORY

October -  
December

The feature This Date in EB-5 History serves to highlight EB-5 Program milestones and changes, key pieces of legislation, publishing dates of U.S. Citizenship and Immigration Services (USCIS) memos, IIUSA achievements and important industry events that have occurred over the past two decades. To access the memos, be sure to visit the IIUSA Member Portal.

[member.iiousa.org](http://member.iiousa.org)

OCTOBER

- October 9, 2010 - IIUSA Public Relations Committee holds its first meeting
- October 30, 2012 - USCIS implements Tenant-Occupancy Methodology
- October 22-24, 2014 - IIUSA hosts the 4th Annual EB-5 Market Exchange in San Francisco, CA

NOVEMBER

- November 9, 2011 - USCIS holds an EB-5 stakeholder call with then Director Alejandro Mayorkas
- November 12, 2013 - IIUSA Editorial Committee holds its first meeting

DECEMBER

- December 18, 2009 - IIUSA publishes a white paper on best practices in economic methodologies
- December 6, 2012 - IIUSA launches the first iteration of its Regional Center member map on [iiousa.org](http://iiousa.org)



INDUSTRY EVENTS

2018

- Oct 29-30:** AILA & IIUSA EB-5 Industry Forum (Chicago, IL)
- Oct 29-30:** Investment Immigration Summit (Hong Kong)
- Nov 1-2:** BLS Media Citizenship Expo (Abu Dhabi, UAE)
- Nov 1-3:** 31<sup>st</sup> Annual AILA California Chapter Conference (San Diego)
- Nov 4-6:** 12<sup>th</sup> Annual Global Residence and Citizenship Conference (Dubai, UAE)
- Nov 7-9:** CDFA National Development Finance Summit (Dallas, TX)

2019

- Feb 20-22:** Investment Immigration Summit Mumbai & IIUSA Global Banquet Series (Mumbai, IN)
- Feb 24-26:** Investment Immigration Summit MENA & IIUSA Global Banquet Series (Dubai, UAE)

EB-5  
INDUSTRY  
BY THE NUMBERS

**12/7/18:** The EB-5 Regional Center Program received a short term extension until December 7, 2018 after President Trump signed a continuing resolution providing funding to agencies not included on the full-year appropriations bill.

**300+** EB-5 stakeholders attended the 2018 IIUSA Banquet Series in investor markets including India, Vietnam and South Korea. The Global Banquet Series is the premier business development and educational event on the international EB-5 event calendar connecting IIUSA members with investors and international service providers in the markets that matter most.

**20+** Migration agencies attended the IIUSA Global Banquet Series event in Seoul, South Korea on September 13, 2018. The agencies represented a majority of all active in the EB-5 industry.

**\$11.2B:** in capital investment was generated through EB-5 Regional Center projects in FY2014 and FY2015, accounting for 2% of the total foreign direct investment (FDI) net inflows to U.S. between 2014 and 2015.



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– J.C., Actual EB-5 Investor, 2017

**For more information contact**

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