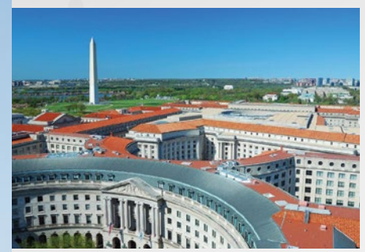
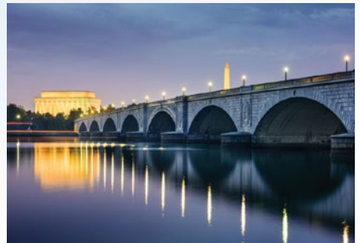
REGIONAL CENTER BUSINESS JOURNAL

April 2018

IN THIS ISSUE





A New Horizon for EB-5:
Getting Back to the Business of Job Creation

Friends, peers, colleagues:

Welcome to IIUSA's 11th Annual EB-5 Advocacy Conference! For over a decade now, this conference brings the EB-5 industry together in Washington, DC to get up to speed on the issues we face and how we can address them by working together. Each year, the focus of the conference changes with the times and this year is no different. With the EB-5 Regional Center Program extended through September 2018 and no likely legislative action until 2019 or beyond, a "new" horizon is before the EB-5 industry, and IIUSA is here to support you getting back to business.

While the EB-5 industry has endured uncertainty and turbulence over the last few years, we continue to grow and deliver on the promise of delivering much-needed investment capital for job-creating economic development projects all across the country. EB-5 has contributed over $22 billion in foreign direct investment to the U.S. economy since the Great Recession. An industry once divided on certain issues has found a way to come together to work towards securing a long-term reauthorization of the Program with much-needed reforms. It is now more important than ever that we build broad industry consensus on not only policy, but also on a strategy to address the challenges we face.

This year's conference is meant to not only bring attendees necessary and important updates on the legislative and regulatory status of the EB-5 industry, but also to provide pertinent educational opportunities and a platform to discuss our path forward. Although there are still many questions in the air about what the Program will look like long-term, there is business to be done, and it is imperative that the industry continues to seek education and for your industry trade association to provide it to you.

IIUSA is more than an Advocacy Association. It is an organization that provides unparalleled industry analyses, data-driven information, and continuing education opportunities from the industry's most experienced professionals. Ensuring we have an informed membership is as important as our advocacy efforts. As you will read herein (and hear about through the conference), IIUSA's work to support the EB-5 industry by educating and opening up new investor markets, developing ethical best practices, and providing our members with reliable business intelligence continues to be a top priority. With these tools, you, our members, are able to support U.S. job creation and community development thanks to EB-5 investment.

It continues to be my honor and privilege to lead the association and from my seat at the table – as messy as the process may be - the future of EB-5 is bright and resilient. On behalf of the entire IIUSA staff, Officers, and Board of Directors, thank you to our sponsors, supporters and you for being here! We hope you find the information and networking opportunities over the next three days to be valuable to your business and professional development. I look forward to learning a ton myself.

Sincerely yours in service,

Peter D. Joseph
IIUSA Executive Director

Letter from the Editor

Dear Readers:

IIUSA's first issue of the *Regional Center Business Journal* in 2018 comes at an important time for the industry. It's a time to grapple with the implications of another short-term reauthorization, political realities, and continuing program uncertainty.

This edition of the *Journal* is a reminder of how EB-5 capital continues to fuel the economy across the nation. The theme of this issue is "The New Horizon for EB-5," and we hope that the articles and in-depth analyses help to deepen understanding, drive business development for members, and cast a light on the future of the EB-5 Program. Among other topics, the Journal covers emerging EB-5 investor markets, industry best practices, financial considerations in an evolving market, recent litigation, economic impact analysis, and EB-5 advocacy efforts. For those attending the EB-5 Advocacy Conference, you will find this special edition of the Journal and the conference programming to be valuable education tools.

We thank all of the authors, editors, advertisers and creative minds behind the *Regional Center Business Journal*. It takes many hands to produce this first-class industry publication. As always, we welcome your articles and topic ideas for future editions.

Lincoln Stone
Stone Grzegorek & Gonzalez LLP
Chair, IIUSA Editorial Committee

IIUSA Editorial Committee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EB5 CAPITAL 10 YEARS YOUNG

Did you know?

EB5 CAPITAL™

EB5 Capital was founded by Angelique Brunner in ***2008*** and was first headquartered in her Capitol Hill apartment.

The Marriott Marquis in Washington, DC is the third project in **EB5 Capital's** history and is Marriott's ***4000th*** hotel.

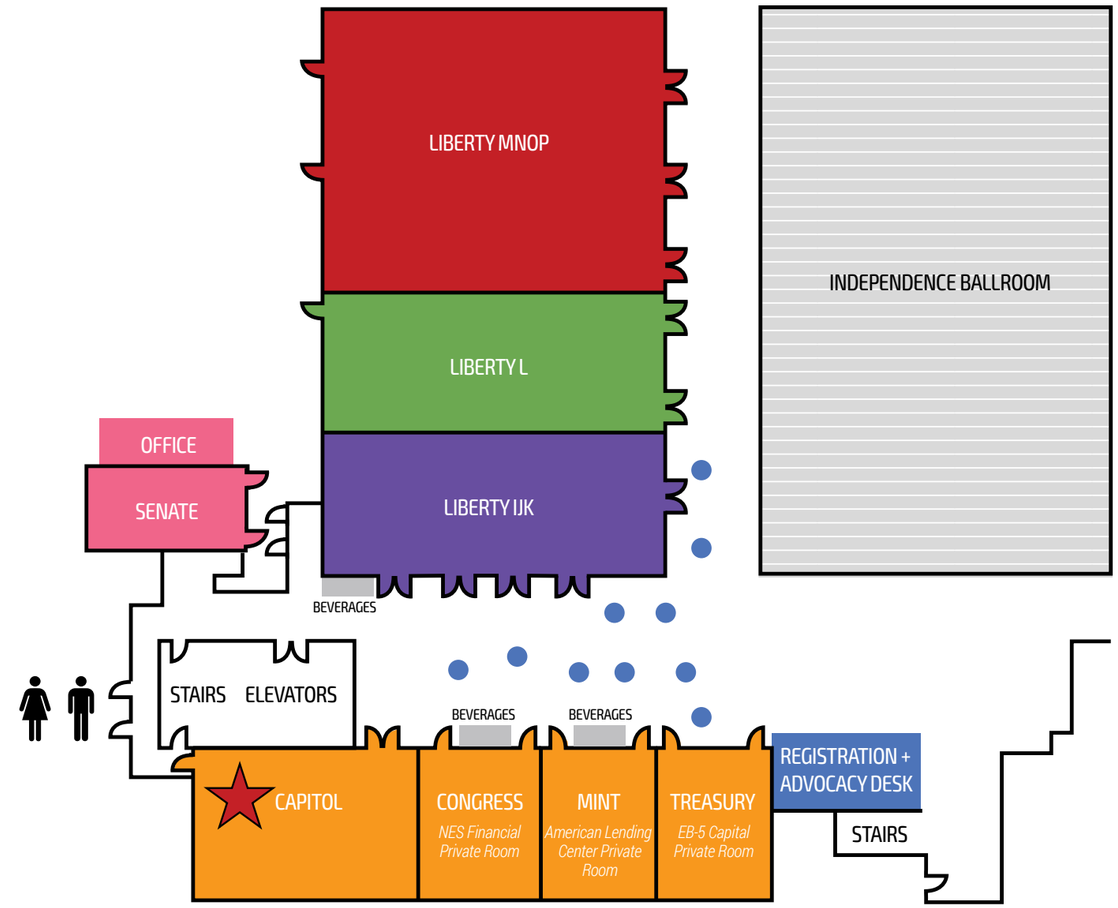
EB5 Capital's staff speaks ***15*** languages and has traveled to a total of ***104*** countries.

EB5 Capital's shortest capital raise took only ***16*** days.

With a new investor from Eritrea, **EB5 Capital** now serves clients from ***53*** countries.

Angelique Brunner, Founder & President
EB5 Capital

HOTEL MAP



- Tabletop Exhibits & Registration
- Membership Meeting & Welcome Luncheon
- Breakout Sessions Compliance & Investor Markets Tracks
- Breakout Sessions Policy & Finance Tracks
- Committee Meetings & Sponsor Rooms
- ★ International Partners Dinner

MOBILE APP

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Search "IIUSA" in the Apple Store or Google Play Store.

Or visit the app in your browser at **iiusa.org/mobileappDC**

- ★ Access panel presentation and other helpful resources
- ★ Explore helpful information and resources for the IIUSA Membership Meeting
- ★ Handy digital conference handbook
- ★ Comprehensive event schedule
- ★ Entire list of sponsors, exhibitors, speakers and attendees
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EB-5 NEW YORK STATE REGIONAL CENTER

BRONZE

50 YEARS Brownstein Hyatt Farber Schreck

NYCRC NEW YORK CITY REGIONAL CENTER

PINE STATE REGIONAL CENTER — A SUBSIDIARY OF ARKANSAS CAPITAL CORPORATION

eb5 investors

MONA SHAH & ASSOCIATES — ATTORNEYS AT LAW

REID & WISE

ATTENDEE BAG

PENG & WEBER 彭·韦移民律师事务所

HOTEL AMENITY

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FPP First Pathway partners — Immigration Through Investment

MEMBERSHIP MEETING

AMERICAN LIFE INCORPORATED

AAEB5.com Advantage America EB-5 Group

KEY CARD

TODD ASSOCIATES — Comprehensive Insurance & Risk Management Solutions

KEYNOTE LUNCHEON

Phillips Lytle LLP

MOBILE APP

WOLFSDORF ROSENTHAL LLP — IMMIGRATION ATTORNEYS

PHOTOBOOTH

GREYSTONE

WIFI

EXTELL New York Regional Center

2018 EB-5 ADVOCACY CONFERENCE HANDBOOK

Meet Our 2018 SPONSORS

American Lending Center, LLC (ALC), a USCIS designated regional center and a licensed non-bank lender founded by CEO John Shen in California in 2009, features nationwide EB-5 projects (1) qualified under US government loan programs such as the SBA 504 program and (2) contain a senior loan structure as the exclusive EB-5 investment vehicle. As of the end of 2017, having constantly expanded to 11 regional centers covering 17 US states and Washington DC, ALC has successfully financed a total of 70 projects nationwide through these US government loan programs. Its unique risk control approach in fully utilizing federal credit underwriting resources, in conjunction with its pioneering efforts in engaging third party fund managers to oversee EB-5 construction management, have resulted in a 100% success rate among all projects. Likewise, the immigration counsel and internal legal team of ALC have maintained an even more impressive approval rate of 100% for both I-526 and I-829 petitions for its EB-5 investors.

BofI Federal Bank (NASDAQ: BOFI) is a premier nationwide, technology-driven organization that has achieved top rankings for its financial strength and service excellence. In fact, Fortune Magazine has recognized BofI as one of the "100 Fastest Growing Companies". Their full spectrum of innovative, customizable financial services for both consumer and commercial clients raise them above the competition. BofI's team of experienced professionals can provide expert advice on the most complex transactions and tailor solutions based on clients' business objectives. BofI is committed to building long-lasting relationships with all EB-5 industry stakeholders, including regional centers, project developers and other service providers.

Phillips Lytle is a premier regional law firm recognized nationally for its legal excellence. Our Immigration attorneys are recognized for their expertise in the EB-5 Immigrant Investor visa area, with experience representing foreign nationals in obtaining EB-5 immigrant investor visas, and representing EB-5 regional centers with certification, compliance and exemplar project approvals.

GoodHope Investment Services is the wholly-owned subsidiary of CreditEase, a world leading FinTech conglomerate in China specializing in inclusive finance and wealth management. GoodHope is CreditEase's immigration finance arm and is a global leader in investment immigration advisory services. As a professional consulting agency committed to helping high-net-worth individuals achieve global asset allocation and wealth management, GoodHope offers a full range of products including real estate investment funds, tax planning and property investment services, provided by a talented team of international professionals with local expertise. GoodHope helps its clients achieve their financial goals, while protecting their capital through investment discipline and robust risk management.

Kurzban Kurzban Weinger Tetzeli and Pratt P.A. ("KKWT") is the leading law firm for complex EB-5 federal court litigation, including review of I-526/I-829 denials & mandamus. Ira J. Kurzban, is the author of the leading immigration law treatise, Kurzban's Immigration Law Sourcebook. KKWT represents I-829 investors in deportation proceedings, and provides consultation services to regional centers, projects, and investors. KKWT also works and consults with receivers in SEC EB5 actions.

Recognized as a leading EB-5 Immigrant Investment Regional Center, Golden Gate Global has successfully served more than 1,000 families over the last five years. GGG is a trusted partner in the EB-5 industry, offering an EB-5 investment platform at institutional-quality standards. Golden Gate Global is founded upon "client first" values, rigorous project selection criteria, and exceptional professionalism in service delivery. With clients from over 20 different countries, Golden Gate Global is proud to have made families' immigration dreams a reality all over the world.

Extell Development (Extell) is a nationally acclaimed real estate developer operating primarily in Manhattan. Since 2012, Extell New York Regional Center has raised nearly $600 million in EB-5 financing for construction of select world-class projects developed by Extell, with 570+ approved I-526 petitions and 50+ I-829 approvals received to date.

Meet Our 2018 SPONSORS

EB5 Capital raises funds from foreign investors who are seeking permanent residency in the United States through the federal EB-5 Immigrant Investor Program. With Regional Centers across the country -- most notably in Washington, D.C., California, and New York -- EB5 Capital operates in the top real estate markets in the U.S. EB5 Capital is proud to maintain a 100% I-526 and I-829 project approval rating from United States Citizenship and Immigration Services (USCIS) and has an impressive project portfolio consisting of hotels, mixed-use developments, senior housing facilities and multi-family residential buildings. EB5 Capital is one of the few firms in the industry to have taken investors through the full immigration and investment cycle (I-526, I-829, returns of funds).

NES Financial provides technology-enabled services for the efficient middle- and back-office administration of highly specialized financial transactions. Their technology-enabled solutions include EB-5 administration, 1031 exchanges, and private equity fund administration services. Many of the world's largest financial institutions and corporations rely on their proprietary technology, unparalleled expertise, and outstanding services to ensure the secure, transparent, and compliant management of funds while also lowering operational costs, reducing risk, and improving ROI. For more information, please visit www.nesfinancial.com.

FirstPathway Partners (FPP) helps foreign investors become U.S. Citizens through the DHS Immigrant Investor (EB-5) program. The partnership provides an investment vehicle that qualifies investors for a Green Card and Citizenship. FPP carefully vets projects for EB-5 suitability, risk, capital preservation and the facilitation of a Permanent Green Card. Our EB-5 project analysis and conservative underwriting methodology helps place investors in the best position for capital preservation. For over a decade FPP has assisted investors from 39 different countries through the program, raising millions in EB-5 funds for job creating enterprises. FPP is one of few regional centers to have obtained I-829 approval, and redeemed full investor capital contributions.

The New York City Regional Center (NYCRC) was approved by USCIS in 2008 to secure EB-5 investment for real estate and infrastructure projects within Brooklyn, Queens, Manhattan, and the Bronx. The NYCRC was the first EB-5 regional center approved in New York City and has helped provide over $1.5 billion of EB-5 capital for 21 economic development projects throughout the city. The NYCRC is proud of its track record of investor immigration approvals: • Over 1,600 I-829 Approvals • Over 4,650 Permanent Green Cards • Over 5,650 Conditional Green Cards • Over 2,500 I-526 Approvals • Total of $125 million of EB-5 loan proceeds repaid to 250 EB-5 investors in the initial two NYCRC offerings

Baker Tilly Capital, LLC 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, securities laws compliance, source of funds, pre-immigration tax planning and more. Connect with us: bakertillyeb5.com.

CMB Regional Centers is one of the oldest active regional centers within the EB-5 industry with over twenty years of experience. CMB is recognized as a pioneer in regional center operations. CMB was the first to rely solely upon indirect and induced job creation, and was the first to introduce the loan model. In March 2016 CMB set a new standard in transparency. Months earlier CMB had commissioned 3 rd party audits of all partnerships including total capital raised, I-526 and I-829 approvals, total number of limited partners and overall return of capital. Much in EB-5 has evolved and CMB's methodologies, initially viewed with skepticism, have become widely used throughout the industry.

Wilde & Associates, LLC is a boutique immigration law firm located just outside of Washington, D.C. focusing on employment-based and investment immigration. In addition to their stellar track record in both I-526 and I-829 filings with only 3 RFEs on Source of Fund on all the EB-5 cases since 2007, it is their exceptional, personal client service – clients' calls and emails are returned with 24 hours – that sets the firm apart from other law firms. The Firm is unique in the EB-5 world in that it only represents the investor side independent from any particular Regional Center, avoiding even an appearance of conflict.

2018 EB-5 ADVOCACY CONFERENCE HANDBOOK

Meet Our

2018 SPONSORS

LENNAR

Founded in 1954, Lennar (NYSE:LEN) is the largest and most respected home builder in the United States. Lennar International generates foreign direct investment in Lennar through home sales, the United States' EB-5 immigrant investor program, and by matching foreign capital with Lennar's varied real estate interests, including project level debt, equity and asset dispositions. Lennar has established one of the largest geographically diverse real estate portfolios in the United States, including for sale homes, for rent homes and other asset classes.

AAEB5.com Advantage America EB-5 Group

AAEB5 Group owns 6 Regional Centers in major cities around the U.S. We have a 100% I-526 approval track record for all of our projects.

TODD ASSOCIATES INC Comprehensive Insurance & Risk Management Solutions

Since 2010, Todd Associates, Inc. has offered liability insurance solutions to members of the EB-5 community.

PENG & WEBER 彭·韦移民律师事务所

Peng & Weber has a team of eight immigration lawyers handling all aspects of EB-5 from regional center and project set-up to high-volume investor filings.

WOLFSDORF ROSENTHAL LLP Immigration Attorneys

Wolfsdorf Rosenthal LLP is a full-service, top-rated immigration law firm with 30 years of experience providing exceptional quality global immigration and visa services.

50 YEARS | Brownstein Hyatt Farber Schreck

Brownstein Hyatt Farber Schreck is a law and lobbying firm, practicing in the areas of real estate, natural resources, public policy and corporate law and litigation. The firm has 250 attorneys and legislative consultants in offices across the western U.S., Atlantic City and in Washington, DC.

REID & WISE

Reid & Wise LLC, with offices in New York, Shanghai, and San Francisco, is a leading law firm providing premium legal services. We have a broad-based commercial litigation practice, including a track record of EB-5 litigation success, a sophisticated cross-border transactional practice, and an established practice handling business immigration issues.

PINE STATE REGIONAL CENTER A SUBSIDIARY OF ARKANSAS CAPITAL CORPORATION

Pine State Regional Center (PSRC) is a subsidiary of Arkansas Capital Corporation, a private non-profit economic development enterprise that has participated in more than $2 billion of financing over its 60-year life. PSRC works in partnership with government and private developers, with an emphasis on transactions in rural and underserved areas.

AMERICAN LIFE INCORPORATED

American Life Inc. real estate development specializing in EB5 investment program founded in 1996 by Henry Liebman. Mr. Liebman has more than 20 years experience in real estate law, immigration law and commercial real estate management and investment. To date ALI has completed 45+projects with 1.5+ billion in market value and have distributed over 40 million to investors in 2017.

EB-5 NEW YORK STATE REGIONAL CENTER

William (Bill) Gresser is the President of EB-5 New York State, LLC (founded in 2007). The Company has completed multiple EB-5 investment projects – from inception through I-924, I-526 and I-829 approval, Investor conditional and unconditional permanent residence, and full repayment of investors' $500,000 investment. Bill is the Vice President and Board Member of "Invest in USA." Bill works extensively on industry-wide lobbying efforts, speaks on advanced EB-5 topics and is often consulted on the effective use of EB-5 capital in job-creating projects. Bill earned his BA, MBA, and JD degrees, all with honors, from Georgetown University.

GREYSTONE

Greystone EB-5 has developed a Redeployment Program which allows redeployment by NCEs into Greystone's First Mortgage Bridge Loan Program, an actively managed private investment fund investing in a diversified portfolio of first mortgage loans collateralized by fully constructed, stabilized and cash flowing multifamily and healthcare properties. The program is designed to provide a safe and liquid redeployment solution.

MONA SHAH & ASSOCIATES ATTORNEYS AT LAW

Industry leaders, internationally renowned Top 25 EB-5 attorneys, MSA are published authors, adjunct professor, quoted in mainstream newspapers, news channels, host the first EB-5 podcast series with a worldwide audience. MSA have extensive experience in EB-5 financing, marketing, direct investments, formulating & strategizing projects. MSA have raised millions in investor capital.

SCHEDULE OF EVENTS

SUNDAY APRIL 22, 2018

TIME	MARRIOTT MARQUIS
12PM 1PM 2PM 3PM 4PM	Banquet Registration & Exhibit Setup Meeting Level 4 12:00 PM - 4:30 PM
5PM	Shuttle Bus Departs for Offsite Banquet *Busses Depart from Marriott to Dock 5: 4:50 PM, 5:45 PM, 6:30 PM* *Busses Depart from Dock 5 to Marriott: 10:00 PM, 10:30 PM, 11:00 PM*

EB-5 INDUSTRY ACHIEVEMENT BANQUET
APRIL 22, 2018 • WASHINGTON D.C.
IIUSA
A CELEBRATION OF EB-5 SUCCESS

TIME	DOCK 5 UNION MARKET - 309 5TH ST. NE, WASHINGTON, DC 20002
5PM 6PM 7PM	Welcome Reception Presented By: American Lending Center KK WT KURZBAN KURZBAN WEINGER TETZELI AND PRATT P.A.
8PM 9PM	Dinner & Award Ceremony
10PM 11PM	Networking Reception

SCHEDULE OF EVENTS

- Policy Breakouts
- Compliance Breakouts
- Finance Breakouts
- Investor Market Breakouts

MONDAY APRIL 23, 2018

IIUSA COMMITTEE MEETINGS LISTED BELOW ARE BY INVITE ONLY. IIUSA MEMBERS ARE ELIGIBLE TO SERVE ON COMMITTEES. EMAIL INFO@IIUSA.ORG FOR MORE INFO.

TIME	FOYER	LIBERTY BALLROOM	LIBERTY IJK	LIBERTY L	CAPITOL	CONGRESS	TREASURY	MINT
8AM	NETWORKING BREAKFAST				PUBLIC RELATIONS COMMITTEE 8:00AM - 8:45AM	BANKING COMMITTEE 8:00AM - 8:45AM	INVESTOR MARKETS COMMITTEE 8:00AM - 8:45AM	EDITORIAL COMMITTEE 8:00AM - 8:45AM
					MEMBERSHIP COMMITTEE 8:45AM - 9:30AM	COMPLIANCE COMMITTEE 8:45AM - 9:30AM	PUBLIC POLICY COMMITTEE 8:45AM - 9:30AM	BEST PRACTICES COMMITTEE 8:45AM - 9:30AM
9AM		MEMBERSHIP MEETING 9:30AM - 12:00PM						
10AM		GUEST OF HONOR: Charlie Oppenheim, Chief, Visa Controls Office, U.S. Dept. of State 10:00AM - 10:30AM						
11AM		WELCOME LUNCHEON 12:00PM - 12:50PM						
12PM	REGISTRATION & EXHIBITS 8:00AM - 5:30PM							
1PM			BREAKOUT SESSION Path Forward Town Hall 1:00PM - 1:50PM	BREAKOUT SESSION Path Forward Town Hall 1:00PM - 1:50PM				
2PM			BREAKOUT SESSION EB-5 Regulations 2:00PM - 2:50PM	BREAKOUT SESSION Compliance in EB-5 Marketing: A Securities Industry Perspective 2:00PM - 2:50PM				
			NETWORKING BREAK 3:00PM - 3:30PM					
3PM			BREAKOUT SESSION EB-5 Economic Impact: Highlights of the Regional Center Program's Contribution Across the Country 3:30PM - 4:20PM	BREAKOUT SESSION Compliance Reviews and Site Visits: What Are They and What Do They Mean For Me? 3:30PM - 4:20PM				
4PM			BREAKOUT SESSION Received a NOID, NOIR, NOIT or RFE? It's Not the End of the World! 4:30PM - 5:20PM	BREAKOUT SESSION EB-5 in the Courts: Litigation and SEC Overnight and Enforcement 4:30PM - 5:20PM				
5PM								
6PM					INTERNATIONAL PARTNERS DINNER *By Invite Only 5:30PM - 7:30PM			
7PM								

2018 EB-5 ADVOCACY CONFERENCE HANDBOOK

SCHEDULE OF EVENTS

Policy Breakouts
Compliance Breakouts
Finance Breakouts
Investor Market Breakouts

TUESDAY APRIL 24, 2018

TIME	FOYER	LIBERTY IJK	LIBERTY L	CAPITOL
7AM	NETWORKING BREAKFAST 7:00AM - 8:00AM			
8AM		BREAKOUT SESSION Redeployment and Project Restructuring: How to Get it Right 8:00AM - 8:50AM	BREAKOUT SESSION What you Need to Know about Looking for Investors from... 8:00AM - 8:50AM	
9AM	REGISTRATION & EXHIBITS 8:00AM - 12:30PM	BREAKOUT SESSION Plan Ahead... Considerations for Successful Regional Center and NCE Operations 9:00AM - 9:50AM	BREAKOUT SESSION Navigating A Global EB-5 Investor Market 9:00AM - 9:50AM	
10AM		NETWORKING BREAK 10:00AM - 10:30AM		
11AM		BREAKOUT SESSION EB-5 Banking and How it Relates to Fast Changing Financial Dynamics 10:30AM - 11:20AM	BREAKOUT SESSION USCIS Processing Times & Practical Strategies for Investor Success 10:30AM - 11:20AM	
12PM		BREAKOUT SESSION Practical Strategies for Project Financing in Today's Complicated EB-5 Marketplace 11:30AM - 12:20PM	BREAKOUT SESSION Creative Solutions to EB-5 Visa Backlog: How Non-EB-5 Visas Can Help (or not) 11:30AM - 12:20PM	
1PM				LEADERSHIP LUNCH 1:00PM - 2:30PM *By Invite Only
2PM				BOARD MEETING 2:30PM - 4:30PM *By Invite Only

SPEAKER SCHEDULE

MONDAY APRIL 23, 2018

GUEST OF HONOR

Charles Oppenheim - *Chief of Visa Control - U.S. Department of State*

BREAKOUT SESSION TRACK 1 (POLICY)

BREAKOUT 1: PATH FORWARD TOWN HALL
1:00 PM - 1:50 PM

Peter Joseph *(Moderator) - Executive Director - Invest in The USA*
Hunter Bates - *Partner - Akin Gump*
Bob Kraft - *Founder & CEO - FirstPathway Partners*
Hans Rickhoff - *Senior Counsel - Akin Gump*

BREAKOUT 3: EB-5 REGULATIONS
2:00 PM - 2:50 PM

Adam Greene *(Moderator)- Managing Director - Live in America EB-5 Group*
Angel Brunner - *Founder & President - EB5 Capital*
Carolyn Lee - *Partner - Miller Mayer LLP*
Dawn Lurie, *Senior Counsel, Seyfarth Shaw LLP*
Joe McCarthy - *Principal & Co-Founder - American Dream Fund*

BREAKOUT 5: EB-5 ECONOMIC IMPACT: HIGHLIGHTS OF THE REGIONAL CENTER PROGRAM'S CONTRIBUTION ACROSS THE COUNTRY
3:30 PM - 4:20 PM

Lee Li *(Moderator) - Policy Analyst - Invest in The USA*
Jeff Carr - *President & Senior Economist - Economic & Policy Resources, Inc.*
Kyler James - *VP of Gov. Affairs & Chief Economist - CMB Regional Centers*

BREAKOUT 7:RECEIVED A NOID, NOIR, NOIT OR RFE? IT'S NOT THE END OF THE WORLD!
4:30 PM - 5:20 PM

Lincoln Stone *(Moderator) - Managing Partner - SSG Immigration*
Scott Barnhart - *President - Barnhart Economic Services*
Robert C. Divine, *Shareholder, Baker Donelson*
Rana Jazayerli - *Partner - Phillips Lytle LLP*

SPEAKER SCHEDULE

MONDAY APRIL 23, 2018

BREAKOUT SESSION TRACK 2 (COMPLIANCE)

BREAKOUT 2: PATH FORWARD TOWN HALL:
1:00 PM - 1:50 PM

Bill Gresser *(Moderator) - President & CEO - New York State Regional Center*
Ed Pagano - *Partner - Akin Gump*
Steve Strnisha - *CEO - Cleveland International Fund*

BREAKOUT 4: COMPLIANCE IN EB-5 MARKETING: A SECURITIES INDUSTRY PERSPECTIVE
2:00 PM - 2:50 PM

Mike Fitzpatrick *(Moderator) - Partner - Baker Tilly Capital, LLC*
Justin Blackhall -*Vice President, Finance Counsel- American Lending Center*
Mariza McKee - *Partner - Kutak Rock LLP*

BREAKOUT 6: COMPLIANCE REVIEWS AND SITE VISITS: WHAT ARE THEY AND WHAT DO YOU THEY MEAN FOR ME?
3:30 PM - 4:20 PM

Leon Rodriguez *(Moderator) - Partner - Seyfarth Shaw LLP*
Bill Gresser - *President & CEO - New York State Regional Center*
Kraig Schwigen - *President - CMB Regional Centers*
Kyle Walker - *Principal - Green Card Fund*

BREAKOUT 8: EB-5 IN THE COURTS: LITIGATION AND SEC OVERSIGHT & ENDORSEMENT
4:30 PM - 5:20 PM

Michael Homeier *(Moderator) - Founding Shareholder - Homeier Law*
Robert Cornish - *EB-5 Broker-Dealer Attorney - Wilson Elser*
John Pratt - *Managing Partner - KKWT P.A.*
Matthew Sava - *Partner - Reid & Weiss*

TUESDAY APRIL 24, 2018

BREAKOUT SESSION TRACK 3 (FINANCE)

BREAKOUT 9: REDEPLOYMENT AND PROJECT RESTRUCTURING: HOW TO GET IT RIGHT
8:00 AM - 8:50 AM

Reid Thomas *(Moderator) - EVP & General Manager- NES Financial*
Peyman Attari - *President & CEO - AISA*
Erika Banach - *Director - Extell New York Regional Center*
Joey Barnett - *Partner - Wolfsdorf Rosenthal LLP*
Allison Berman - *General Counsel - Greystone EB-5*

BREAKOUT 11: PLAN AHEAD... CONSIDERATIONS FOR SUCCESSFUL REGIONAL CENTER AND NCE OPERATIONS
9:00 AM - 9:50 AM

Mary King (Moderator) - *COO - New York City Regional Center*
David Appel - *Senior Partner - Marcum LLP*
Maggie Mullane - *Economist - Impact DataSource*
Scot O'Brien - *Managing Partner - Akerman LLP*
Dave Souders - *Commercial Insurance Broker - Todd & Associates, Inc.*

BREAKOUT 13: SPECIAL CONSIDERATION IN EB-5 BANKING AND HOW IT RELATES TO FAST CHANGING FINANCIAL DYNAMICS
10:30 AM - 11:20 AM

Robert Fine *(Moderator) - Senior Vice President - Customers Bank*
Robert Hasler - *Senior Vice President - BOFI Federal Bank*
Oleg Karaman - *Senior Managing Director - Sterling National Bank*
James Sozomenou - *Relationship Manager - Signature Bank*

BREAKOUT 15: PRACTICAL STRATEGIES FOR PROJECT FINANCING IN TODAY'S COMPLICATED EB-5 MARKETPLACE
11:30 AM - 12:20 PM

Dan Lundy *(Moderator) - Partner - Klasko Immigration Law*
Jonathan Bloch - *Shareholder - Brownstein Hyatt Farber Schreck*
Rush Deacon - *CEO - Pine State Regional Center, LLC*
John Shen - *CEO - American Lending Center*

BREAKOUT SESSION TRACK 4 (INVESTOR MARKETS)

BREAKOUT 10: WHAT YOU NEED TO KNOW ABOUT LOOKING FOR INVESTORS FROM...
8:00 AM - 8:50 AM

Irina Rostova *(Moderator) - Founding Partner - Rostova Westerman Law Group*
Eren Cicekdagi - *Director of Operations - Golden Gate Global*
Pankaj Joshi - *Managing Director - NYSA Capital, LLC*
Brandon Meyer - *Partner - Fakhoury Global*

BREAKOUT 12: NAVIGATING A GLOBAL EB-5 INVESTOR MARKET
9:00 AM - 9:50 AM

Mona Shah *(Moderator) - Managing Partner - Mona Shah & Associates*
Nima Korpivaara - *Partner - David Hirson & Partners*
Janak Mehta, *Director, FRR Shares & Securities Ltd.*
Darrell Sanders - *Asset Management - American Life, Inc.*
Cletus Weber - *Partner - Peng & Weber, PLLC*

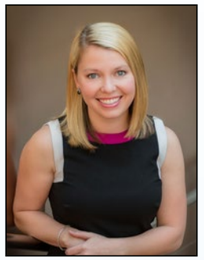
BREAKOUT 14: USCIS PROCESSING TIMES & PRACTICAL STRATEGIES FOR INVESTOR SUCCESS
10:30 AM - 11:20 AM

Michele Franchett *(Moderator)- Partner - Stone Grzegorek & Gonzalez LLP*
Christine Chen - *Executive Vice President - CanAm Enterprises*
Dan Wycklendt - *Executive Vice President - FirstPathway Partners*

BREAKOUT 16: CREATIVE SOLUTIONS TO EB-5 VISA BACKLOG: HOW NON-IMMIGRANT VISAS CAN HELP (OR NOT)
11:30 AM - 12:20 PM

David Andersson *(Moderator) - President - WORC Regional Centers*
Ed Beshara - *Managing Partner - Beshara Global Migration Law Firm*
Charles Foster - *Chairman - Foster LLP*
Jinhee Wilde - *Principal & Managing Attorney - Wilde & Associates*
Jenny Zhan - *President - Good Hope Investment Services*

The Wild and Complicated World of FOIA



ASHLEY SANISLO CASEY
ASSOCIATE DIRECTOR OF ADVOCACY, IIUSA

An underground library. A vault of over 23 million records spanning over 330,000 square feet[1], or about six football fields. Built into a cave to withstand natural and manmade disasters, this is the National Records Center (NRC) in Lee's Summit, Missouri. A repository for federal agencies, the NRC stores files for use by U.S. Citizenship & Immigration Services (USCIS), Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) and houses all immigrant records for individuals currently in the immigration process and the documents that will continue to track them throughout their lives in the U.S. This is not a digital server facility holding virtual files, it is a physical storage facility of actual files that grow every year, stacked in seemingly endless rows and columns. In 2014 there were some 55 million records with each record growing by 1/16 of an inch every year, plus new records coming in daily. The National Record Center's reasoning for not digitizing these records is that doing so would be far too expensive and labor intensive.

Since 2010, of behalf of our members, IIUSA has undertaken the task of submitting Freedom of Information Act (FOIA) requests to collect information on the EB-5 Regional Center Program from the U.S. government in order to better understand and inform the industry it represents. As the industry well knows, not much public information is available about the Program (that has not willingly been made available by Regional Centers) in order to protect the privacy and propriety of investors and businesses, so IIUSA relies on petitioning the government for the information which enables the organization to produce substantive and informative analytic data reports. It also uses this information to understand trends in the industry, collect project data that informs policy discussions and to help the association better serve its members by knowing and understanding all of the above as an aggregation of the conditions and progression of the EB-5 industry. IIUSA acts as the bridge between the public and private sectors, seeking information to inform and guide our industry.

Below is a chart that shows the history of IIUSA's FOIA requests since 2010. In 2017, IIUSA submitted 44 requests, the most of any year yet, and already this year the organization has submitted 15 requests [2]. As one can see, there are 42 requests "pending" currently, which means they were submitted to USCIS, but IIUSA is awaiting a response. 33 of those requests are from 2017, one is still pending from 2016. An additional 8 requests are in appeal, which means IIUSA received an insufficient response or a denial from USCIS and a formal appeal was made to argue for the release of the information we are seeking. While there are 125 "fulfilled" cases, that is, requests made that were successfully responded to, it does not reflect cases taken to the appeal level over the last seven years that were successfully fulfilled from this additional step.

Additionally, 16 FOIA requests from IIUSA have been denied over the last 7 years, resulting in no response data. Many of these were appealed only to be denied again. Others were denied for reasons such as "system availability." This denial response has been more common lately (the last 12 months or so). USCIS cites that, "the databases [needed] to query in order to conduct a reasonable search for records… are not available at this time due to system limitation."

USCIS's procedure for processing FOIA requests depends on the type of request made. For the information IIUSA seeks (non-Alien files), the requests are placed in Track Two of this category. According to the USCIS website, the current processing time for Track Two Non-A File requests is 121 days. However, the oldest pending request that IIUSA has in its database was submitted 529 days ago or over four times longer than the current processing time. The rest of the pending requests were

Continued On Page 25

YEAR	2010	2011	2012	2013	2014	2015	2016	2017	2018
REQUESTS MADE	1	1	12	35	16	24	43	44	15

TOTAL REQUESTS	PENDING	DENIED	IN APPEAL	FULFILLED
182	42	16	8	125

1 As of October 2014 http://fox4kc.com/2014/10/29/immigration-records-stored-underground-in-lees-summit-center-celebrates-15-years-of-operation/

2 As of March 12, 2018.

Continued From Page 22

submitted in February 2017 or later, with a majority of them well beyond the 121 days for processing stated on the USCIS website.

The information IIUSA seeks from its FOIA requests is often quite extensive, so a longer than normal processing time can be understood. However, many other requests, like a small list of recent Regional Center final termination notices, are far less arduous, one would think, to collect and disseminate; however, IIUSA has a pending case for such a request that is nearly 300 days in waiting. Additionally, due to the volume of requests IIUSA makes, it is imperative that staff is diligent in checking and tracking receipt notices from USCIS and logging the tracking numbers it provides. Many times through a regular internal audit of our FOIA records, it is found that a request was submitted several months prior and no receipt record or case control number was ever provided back from USCIS. This requires outreach to FOIA personnel who try to track down the original request communication and insert the request in the appropriate place in line for processing based on the original submission date. As one can see, there are a lot of moving parts to FOIA requests, and this is even before a response is received which must then be logged in IIUSA's database and of course analyzed for reporting.

It may (or may not) seem surprising that these requests, or subsequent communications of them, are lost somewhere along the way. But in a Kansas City news article from 2014[3], the intake and storing process of these immigrant records was described as the following:

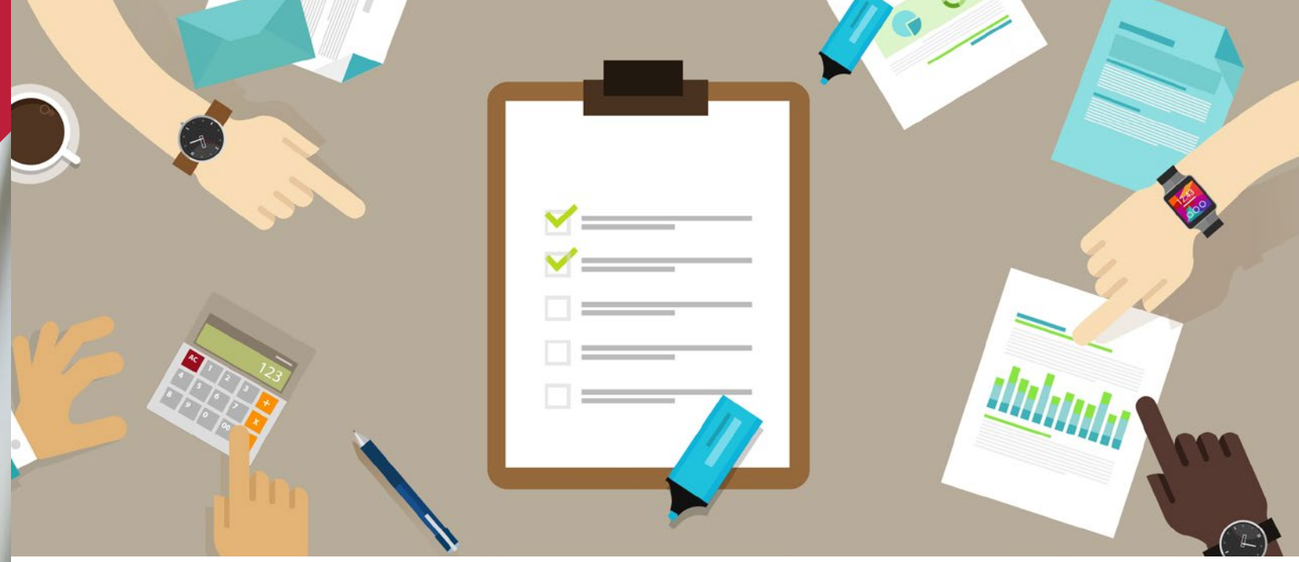
> *The files arrive on pallets by the truckload, are processed with bar codes and stored on shelves. The scanned codes for each file are logged into a computer with its location in the stacks, so it can be retrieved if needed. Files are not in alphabetical or numerical order.*

With millions of records to store and thousands of more new records coming in, it is, after all, not that surprising for requests to be inappropriately logged in their system, not responded to, or for it to take several months or even years to get a response, especially for the quantity and complexity of the requests IIUSA makes.

3 http://www.kansascity.com/news/local/community/816-north/article3558566.html

Without this data, IIUSA is unable to produce most of its analytical reports that are so critical to the intelligence of the EB-5 industry and our members' businesses. This includes insight on emerging investor markets, visa usage and demand, economic impact and so much more. Additionally, this data informs the policy discussions IIUSA has with other EB-5 stakeholders and legislators regarding reform and reauthorization of the Program. Since IIUSA relies on the data received through FOIA requests, it is imperative that it continue make these regular requests, despite long response times and frustrating back and forth communications with the FOIA office.

IIUSA encourages it members to utilize its member portal (member.iiusa.org) to explore data reports and raw data it receives through FOIA requests. Resources collected through FOIA are updated regularly, as we receive responses. IIUSA will continue to forge ahead with its FOIA requests, striving to learn and to provide relevant and important data about the EB-5 industry to our members and all EB-5 stakeholders.



March 2018 EB-5 Legislation in Review

NICOLE MERLENE
ASSOCIATE DIRECTOR OF PUBLIC POLICY, IIUSA

With the latest round of legislative negotiations leading up to an expiring authorization date for the EB-5 Regional Center Program (the "Program") behind us and resulting in another short-term extension through September 2018, let's take a moment to look back to inform ourselves as we look ahead.

For over three years, EB-5 industry stakeholders have worked with both Congressional and Judiciary Committee leadership to provide policy suggestions about how to make the necessary reforms to the Program, achieve long-term authorization, and break the cycle of short-term extensions. Last month for the first time since December 2015, there was a viable legislative vehicle for comprehensive reform and long-term reauthorization of the Program, namely the omnibus appropriations legislative package that Congress needed to pass to authorize federal spending under the renegotiated bipartisan budget deal passed earlier this year.

In parallel to this massive spending package coming together, EB-5 legislative reform efforts within Congress yielded a draft bill supported by the Republican majority in control of Congress, including Senators Grassley (Chair, Senate Judiciary Committee), Cornyn (Majority Whip), McConnell (Majority Leader), and Flake along with Representative Goodlatte (Chair, House Committee on the Judiciary). Unlike previous EB-5 legislative negotiations, industry stakeholders were limited to responding to negotiating offices in the midst of delicate talks on EB-5 reform. As the industry trade association with a broad and diverse national membership, IIUSA strongly advocated for its positions and provided constructive feedback and policy analysis to Congress and our members as the omnibus moved forward.

The process for IIUSA to respond to the proposed legislation began on March 8 when congressional negotiators sent the industry the first legislative draft text with a deadline of one day to respond with comments. That evening, IIUSA's government affairs team briefed IIUSA's Leadership (President's Advisory Council and Board of Directors) on the draft text. Meanwhile, IIUSA shared the draft text with the entire membership for comment. The next morning, IIUSA's Public Policy Committee met to conduct a deep dive into the legislative language and to provide additional feedback to shape IIUSA's response to negotiators.

Concurrently, IIUSA produced a new interactive mapping tool for members and congressional negotiators in a matter of hours, giving stakeholders an opportunity to understand the impact of the new proposed distressed urban and rural incentive areas. To close the week, IIUSA submitted a letter to negotiators with clarifications and suggestions that were largely incorporated in a subsequent draft.

After considering feedback from industry stakeholders, Congressional negotiators circulated an updated draft on March 14 that reflected much of the feedback provided by the EB-5 industry at large and other Congressional offices. Again, we were provided a day or so window to respond with whether we supported Congress moving forward with the draft text. For context, finalizing negotiations on omnibus "riders" have moving targets for deadlines as broader political dynamics around the spending package can influence the process, hence EB-5 negotiators interest in wrapping up these talks prior to the vehicle it would be attached to was finalized.

While imperfect, the six-year authorization included in the legislation would have

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provided certainty for the industry, giving stakeholders some room to breathe and a chance for their businesses to return to some sense of normalcy after years of uncertainty. Additionally, without legislation, looming regulations that will potentially increase investment amounts to $1.35M and $1.8M with no long-term authorization, made the decision on supporting the draft legislation a choice between difficult options. Based on the updated draft and knowing that any opportunity to continue shaping a final work product with further suggestions required support of the organization, IIUSA's Board of Directors voted overwhelmingly in support of moving the legislative process forward with the revised text and sent a letter stating such to Congress.

In the end, the compromise legislation needed to be approved by Senate Majority Leader Mitch McConnell, Speaker Paul Ryan, Senate Minority Leader Chuck Schumer, and House Minority Leader Nancy Pelosi as part of the overall omnibus package – which did not occur. This was due to various factors, including broader immigration politics within Congress that were also part of omnibus negotiations.

Now that you know how spring 2018 legislative negotiations unfolded, it is time to look ahead. With midterm elections fast approaching, opportunities for legislative reform are unlikely to arise again until 2019 at the earliest – meaning the EB-5 industry will be refocusing efforts to achieve stability in the regulatory, administrative, and litigation space. IIUSA will continue the fight for the long-term stability that the EB-5 Regional Center Program deserves as an engine of economic development with $22 billion of investments supporting hundreds of thousands of American jobs at stake. IIUSA's work to ensure continued authorization by Congress while finding solutions to pressing issues outside of the legislative process, and planting the seeds for legislative reform whenever possible, continues.

EDUCATION/RESEARCH

Latest Peer-Reviewed Study Shows Profound Impact of the EB-5 Regional Center Program on the U.S. Economy in FY2014 and FY2015

LEE LI
POLICY ANALYST, IIUSA

BACKGROUND The EB-5 Regional Center Program (the "Program") was created by Congress in 1992 with the intent of stimulating economic development across U.S. communities through capital investment by foreign entrepreneurs. A variety of economic impact studies have been conducted, both by academics and government agencies, to assess the Program's impact on the U.S. economy. In 2013, a peer-reviewed study by IMPLAN found that capital investment through the Program contributed over $2.6 billion to U.S. gross domestic product (GDP) and created or supported 33,000 American jobs during fiscal year (FY) 2010 and FY2011. [1] Furthermore, in January 2017, the U.S. Department of Commerce released its assessment on the investment and job creation impact of the EB-5 Program, concluding the Program accounted for almost 170,000 U.S. job creation between FY2012 and FY2013.[2]

In collaboration with IIUSA, in January 2018, Western Washington University Center for Economic Business Research (CEBR) published a peer-reviewed research (the "Study") that evaluates the Program's economic impact in FY2014 and FY2015 in terms of job creation, contributions to the U.S. GDP and tax revenues. Grounded by academic standard, the latest economic impact study not only provides key insights into the Program's growth over that two-year period, but also serves as an important tool for our advocacy effort, showing "EB-5 is working for you, for America."

1 Kay, David et al., IMPLAN, Economic Impacts of the EB-5 Immigration Program 2010-2011, June 2013.
2 Henry, David K. et al., U.S. Department of Commerce Economics and Statistics Administration Office of the Chief Economist, Estimating the Investment and job Creation Impact of the EB-5 Program, January 2017.

METHODOLOGY SUMMARY

Using a combination of data from the Form I-924As and IIUSA's proprietary EB-5 project database, CEBR selected EB-5 Regional Center projects that were active in FY2014 and FY2015, and complied a dataset that consists of the number of active EB-5 projects, the location and industry sector of each project in the data sample, and the amount of EB-5-related capital investment spending. Additionally, in order to evaluate the full ripple effect of investments, the research team also estimated EB-5 investors' household spending and the other related spending throughout the EB-5 immigration process (such as flight expenditures, moving expenses, legal service fees, and more). Once the dataset was prepared, CEBR utilized IMPLAN, a widely used and accepted economic input-output model, to estimate the direct, indirect, and induced economic outputs in terms of job creation, contribution to U.S. GDP, and contributions to federal, state and local tax revenues on national, state, and congressional district levels.

KEY FINDINGS

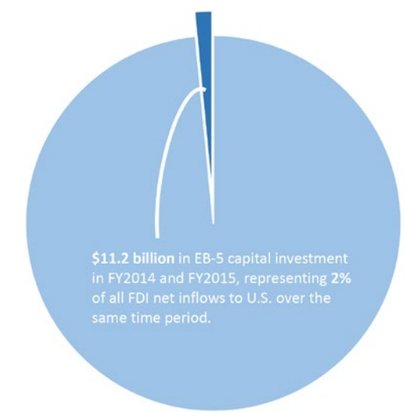
Among others, here are seven key findings from the Study of which every EB-5 stakeholder should be aware:

1. $11.2 billion in capital investment was generated through EB-5 Regional Center projects in FY2014 and FY2015.

Based on the data selection methodology above, the Study estimated that a total of 22,452 EB-5 investors invested in 355 Regional Center projects that were active in FY2014 and FY2015, generating an estimated $11.23 billion in EB-5 capital investment over that two-year period.

According to the World Bank, total foreign direct investment (FDI) net inflows to U.S. in 2014 and 2015 was $743.8 billion. That is, EB-5 capital investment accounted for approximately 2% of the total FDI net inflows to the U.S. economy over that two-year period.

FIGURE 1: EB-5 Capital Investment versus Total FDI Net Inflows to U.S., FY2014 and FY2015



Source: Quantitative Assessment of the EB-5 Program: Economic Impacts to the U.S. Economy

2. $7.7 Billion, or 69%, of all EB-5 capital was Invested in the construction sector; while the hospitality industry received the most EB-5 investment among all non-construction related industry sectors

The Study found that 69%, or $7.7 billion, of the total estimated EB-5 capital investment that was made through Regional Center projects that were active in FY2014 and FY2015 was invested in the construction-related sectors; while 31%, or $3.5 billion, was invested in non-construction industries, such as hotels and motels ($769 million), real estate ($404 million), wholesale trade ($332 million), architectural-related services ($296 million), schools ($221 million),

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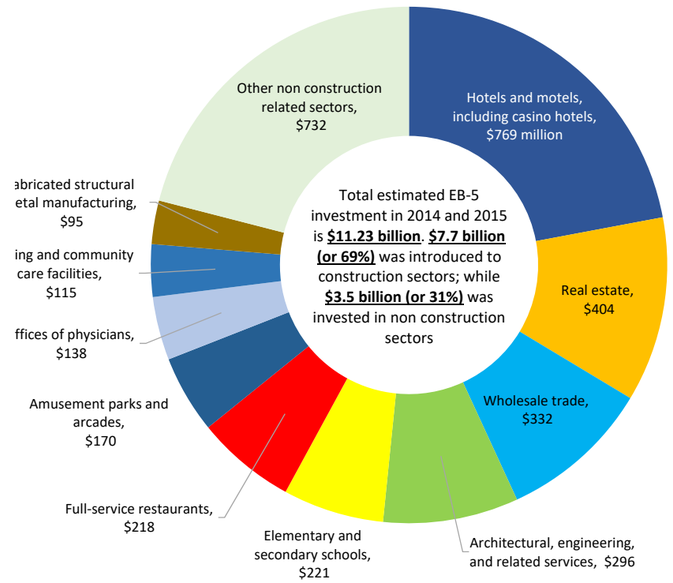
FIGURE 2: Estimated EB-5 Investment in Non-Construction-Related Sectors, in $Million, FY2014 and FY2015



Source: Quantitative Assessment of the EB-5 Program: Economic Impact & Contributions to the U.S. Economy, January 2018

TABLE 1: Economic Impact of all EB-5 Related Spending* (Regional Center Projects Only) by Industry, FY2014 and FY2015

Sorted by employment impacts

Industry	Expected Job Creation	Expected Contribution to U.S. GDP (in $million)
Construction	54,079	$8,009.72
Hospitality	23,305	$1,770.81
Retail	21,824	$2,936.05
Healthcare	20,558	$1,803.58
Professional Services	20,355	$2,274.60
Manufacturing	13,334	$5,838.87
Real Estate	8,129	$2,854.75
Finance	7,863	$1,937.31
Others	7,861	$1,055.14
Education	6,274	$412.13
Transportation	6,010	$1,003.61
Art & Sports	5,574	$449.61
Enginerring	4,127	$676.11
Agriculture	2,558	$297.44
Communication	2,314	$1,143.78
Mining	1,217	$363.25
Technology	795	$130.67
Energy	500	$605.08
Total	**206,676**	**$33,562.50**

*Note: The results include economic impacts associated with EB-5 investment through Regional Centers, Investor's household spending, and other immigration expenses.
Source: Quantitative Assessment of the EB-5 Program: Economic Impacts & Contributions to the U.S. Economy

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and more (illustrated by Figure 2).

3. Spending associated with the Program supported 207,000 American jobs in FY2014 and FY2015, accounting for 4% of total job growth across all private sectors in U.S. over that two-year period.[3]

The Study concluded that in FY2014 and FY2015 EB-5 capital investment alone created or supported over 184,700 jobs for U.S. workers. Furthermore, while all related immigration expenditures by EB-5 investors (such as required investment, household spending, and other immigration-related expenses) are taken into account, the Study found that approximately 207,000 U.S. jobs were supported in FY2014 and FY2015 by all related spending associated with the Program, representing roughly 4% of all private sector job growth in U.S. over the two-year period.

In addition, the Study also estimated that over 54,000 jobs were created for construction workers by the capital spending associated with the Program between FY2014 and FY2015. That accounts for approximately 8.5% of the job growth in the U.S. construction industry during that time.[4] Table 1 presents the number of expected job creation thanks to the spending associated with the Program by industry sector.

4. $33.6 billion was contributed to the U.S. economy by capital investment and related spending of the Program in FY2014 and FY2015.

3 U.S. Bureau of Labor Statistics (BLS) estimated 5.2 million jobs were increased in U.S. private sectors in 2014 and 2015.
4 BLS estimated the number of job growth in construction sector was 639,000 in 2014 and 2015.

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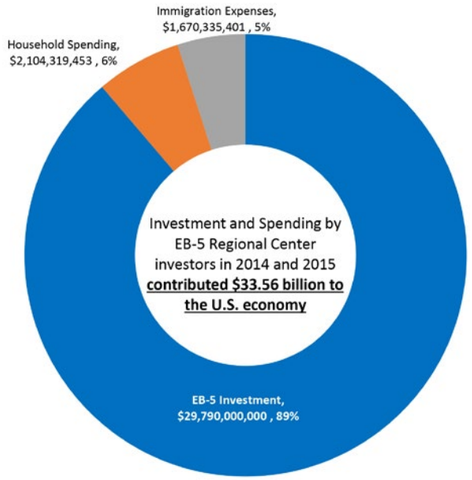
FIGURE 3: Contributions to U.S. GDP by the EB-5 Regional Center Investor Spending, FY2014 and FY2015



Source: Quantitative Assessment of the EB-5 Program: Economic Impact & Contributions to the U.S. Economy

Latest Peer-Reviewed Study Shows Profound Impact of the EB-5 Regional Center Program on the U.S. Economy in FY2014 and FY2015

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Analyzing the economic impact generated by the required capital investment and all other related spending by foreign entrepreneurs who invested in the EB-5 Regional Center projects in FY2014 and FY2015, the Study found that the Program contributed an estimated $33.6 billion to U.S. GDP during the two-year period. Moreover, the capital investment alone that was processed through EB-5 Regional Centers introduced $29.8 billion to U.S. economy between FY2014 and FY2015 (Figure 3).

5. The Program generated $4.2 billion in tax revenues for federal, state, and local governments between FY2014 and FY2015.

An estimated $2.7 billion in tax revenue for the federal government and $1.5 billion in tax revenues for state and local government across the country was generated by the spending associated with the Program in FY2014 and FY2015.

Although that only represented less than 0.05% of the total federal tax revenue collected over the two-year period,[5] the $2.7 billion contribution by the Program is equivalent to 634% of the total amount of appropriations that the federal government made for economic development programs though the U.S. Economic Development administration (EDA) between FY2014 and FY2015.[6] And most notably, the tax revenue generated by the EB-5 Program is all at no cost to the U.S. taxpayer.

6. The Program's economic Impact by state & congressional district – Supporting jobs and local economic development

The five states with the highest amount of EB-5 investment throEBugh Regional Centers during FY2014 and FY2015 were New York ($3.5 billion), California ($2.9 billion), Florida ($890 million), Washington ($883 million), and Texas ($819 million). As a result, states with the largest number of expected job creation over that two-year period by the EB-5 spending were seen in California (estimated 53,200 jobs), New York (48,200 jobs), Florida (20,300 jobs), Washington (14,700 jobs), and Texas (14,300 jobs). In addition, a total of 156 congressional districts in 33 states and District of Columbia received EB-5 capital investment in FY2014 and FY2015.

Figure 5 illustrates the EB-5 investment and job creation estimates by state.

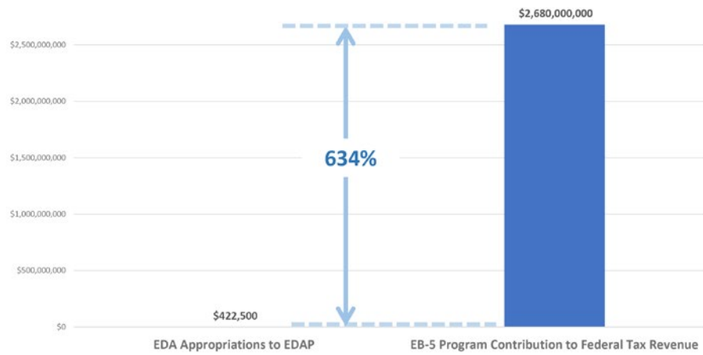
7. Government and academic studies showed the Program delivered consistent economic impacts to a variety of U.S. communities with a stable growth since FY2010

Table 2 summarizes the Program's capital investment and job creation effects found in government and academic studies of the EB-5 Program (including IMPLAN FY2010-2011, Department of Commerce FY2012-2013, CEBR FY2014-2015). As all the studies indicated, the amount of EB-5 investment through Regional Center projects showed an outstanding 540% growth in FY2014-2015 from FY2010-2011; while the number of U.S. job supported by the Program also presents an almost 530% increase over the six-year period.

**The full study and an interactive map can be found at www.iiusa.org*

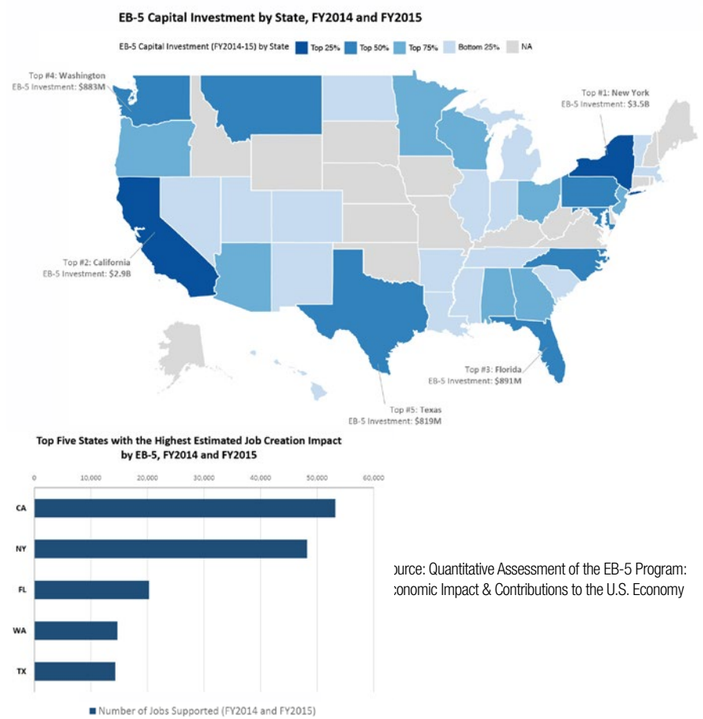
5 Office of Management and budget, Historical Tables, Table 1.3
6 Based on EDA's annual reports for FY2014 and FY2015, the agency appropriated $209,500 in FY2014 and $213,000 in FY2015 for the Economic Development Assistance Program (EDAP).

FIGURE 4: EB-5 Contribution to Federal Tax Revenue versus Federal Appropriations to Economic Development Assistance Program (EDAP), FY2014 and FY2015



Source: Quantitative Assessment of the EB-5 Program: Economic Impact & Contributions to the U.S. Economy

FIGURE 5: EB-5 Regional Center Program Investment & Job Creation Impact by Size, FY2014 and FY2015



ɔurce: Quantitative Assessment of the EB-5 Program: :onomic Impact & Contributions to the U.S. Economy

TABLE 2: Total Investment and Job Creation Impacts Found at Various EB-5 Economic Impact Studios, FY2010 and FY2015

Fiscal Years	2010-2011	2012-2013	2014-2015
EB-5 Capital Investment through Regional Centers (in $Million)	$1.75	$5.45	$11.23
Job Creation Impact	33,000	169,760*	207,000

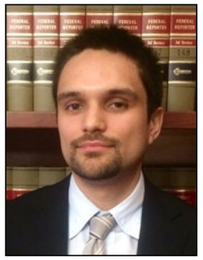
*The job creation in FY2012 and FY2013 included the contribution of non-EB-5 capital investment in Regional Center projects.

FEDERAL LITIGATION

The Knockout Punch to USCIS's Overbroad Policy on Redemption Agreements and Call Options?

IRA KURZBAN ESQ.
PARTNER, KURZBAN, KURZBAN, WEINGER, TETZELI AND PRATT P.A.

JOHN PRATT ESQ.
PARTNER, KURZBAN, KURZBAN, WEINGER, TETZELI AND PRATT P.A.



EDWARD RAMOS ESQ.
SENIOR ATTORNEY AT LAW,
KURZBAN, KURZBAN, WEINGER, TETZELI AND PRATT P.A.

If there is one thing you can count on in the EB-5 Program, it is that the rules will constantly change in unpredictable and often unfair ways. USCIS's policy on redemption rights is no exception.

It has long been the rule that a new commercial enterprise cannot promise to repay an investor's capital contribution or give the investor a right to demand repayment. According to the precedent decision Matter of Izummi, EB-5 applicants who are guaranteed repayment of their capital contributions have not made true investments. Rather, they have entered into mere "debt arrangements" that do not place their capital "at risk" as EB-5 regulations require.

Historically, USCIS applied Matter of Izummi to prohibit only arrangements which give an EB-5 investor the contractual right to receive back some (or all) of her capital contribution. Over the past several years, however, USCIS has expanded this policy to bar redemption rights given to the new commercial enterprise. These "call options," or "sell options" as they are sometimes known, appear in the new commercial enterprise's operating agreement or limited partnership agreement. They give the company the choice (but not the obligation) to pay EB-5 investors their original capital contributions plus profits once the investor's I-829 petition is approved. For years, "call options" of this kind were standard in many EB-5 offerings and USCIS approved investor petitions that contained them. It is no surprise, then, that USCIS's decision to start denying investor petitions with call options roiled the EB-5 industry.

Two major federal court victories may have put an end to this latest example of USCIS's overreach. A decision called Doe v. USCIS dealt the first blow. In Doe, a judge in the U.S. District Court for the District of Columbia rejected USCIS's reliance on a "call option" to deny EB-5 investors' I-526 petitions. USCIS denied the petitions on the theory that the call option was a "guaranteed return" and shielded the plaintiffs' investments from being "at risk." The Court rejected USCIS's arguments. It reasoned that the investments were being used for risky business activities (in that case, mining operations) and the call option gave them no guarantee that they would receive back any of their capital. As such, the "call option" did nothing to shield their

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investments from risk, and USCIS was wrong to conclude otherwise.

USCIS did not accept defeat in the face of Doe. Instead, it doubled down and shifted strategies. Rather than ground its prohibition on "call options" on the "at risk" requirement as it had in Doe, USCIS began relying on the regulatory definition of "invest." A longstanding regulation explains that a "contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the [investor] and the new commercial enterprise" will not count as a genuine EB-5 investment. USCIS latched onto this language to assert that call options are prohibited "debt arrangements." According to USCIS (including the AAO in several unpublished decisions), this subtle shift in reasoning distinguished Doe and allowed the agency to continue denying I-526 petitions that contain a call option consistent with Doe.

A second district court decision issued on February 7, 2018 may have dealt USCIS the knockout blow. In Chang v. USCIS, another judge in the U.S. District Court for the District of Columbia squarely rejected USCIS's "debt arrangement" rationale for denying investor petitions based on the existence of a call option[1]. The Court began with a careful analysis of the regulatory definition itself. It emphasized that "any other debt arrangement" must be interpreted with regard to the specific examples of debt arrangements included in the regulation. Each of these specific examples (notes, bonds, convertible debts, and obligations) provides "the creditor with a contractual right to receive a particular amount of money from the debtor." Thus, " any other debt arrangements" must also share this feature. But since call options give investors no contractual right to repayment, they cannot properly be considered "debt arrangements." The Court also noted that prohibited debt arrangements are made "in exchange for" an investor's capital contribution. This language suggests a quid pro quo in which the investor gets something of benefit (a promise of repayment) in exchange for her capital contribution. But a call option gives the investor no such benefit – "[r]ather, it is the company that benefits from both sides of the agreement: it has both the money and the right to return the money if it would prefer to have the investor's partnership interest back." For these reasons, call options are not "debt arrangements." Thus, as the Court put it, USCIS's broad interpretation of "any other debt arrangement" effectively rewrites the regulation to bar "'any arrangement we see as suspect.' This is not what the regulation says."

The Court also held that USCIS "unreasonably stretche[d] the rationale of Matter of Izummi" by relying on that decision to support its bar on call options. The Court endorsed a far narrower reading of Izummi than USCIS had argued for in court. Rather than barring all redemption provisions writ large, Izummi's holding embodied "the key trait that characterizes the debt arrangements the regulation prohibits: a contractual right to receive one's investment back at a particular time."

Even the "broadest language" in Izummi "underlines the distinction between sell and buy options that USCIS now attempts to blur." USCIS was therefore wrong to rely on Izummi to support its decisions. In the Court's words: "A call option alone does not a debt arrangement make."

What should EB-5 stakeholders do in light of Chang? Investors whose I-526 petitions have been denied based on a "call option" provision should consider challenging those decisions in federal district court. Under U.S. law, they have six years to file such an action – significantly longer than the deadlines that apply to administrative appeals or motions to reopen.

As for investors whose petitions remain pending, time will tell how USCIS responds. As of this article's publication, it is not known whether the Government will appeal the Chang decision to the D.C. Circuit. And even if USCIS does not appeal, it remains possible that the agency could refuse to follow Chang in other cases before it. But if USCIS refuses to back down, investors and regional centers confronted with a "call option" issue now have powerful and highly persuasive authority on their side.

1 Full disclosure: our firm represented the plaintiffs in Chang v. USCIS.

A Private Affair: The Use of Arbitration Clauses in EB-5 Investments

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In the United States, litigation in courts is by its very nature a public exercise. Pleadings filed in U.S. courts are publicly available, which means attorneys, investors and the press may have access to potentially scurrilous allegations that not only can damage one's business reputation but also can invite additional litigation and regulatory scrutiny. Compounding matters, litigation in U.S. courts can be commenced with little expense, yet become time-consuming and costly as the parties proceed to resolution of their disputes.

These exposures are amplified in the context of actions involving EB-5 investments. The identities of litigants, who often have little understanding of the workings of the legal system in the United States and who may wish to remain anonymous, soon become public knowledge. Given the recent spotlight on the EB-5 program by the press in the United States, a garden-variety lawsuit of little merit can soon become fodder for stories in newspapers, magazines and television, all preserved for eternity on the internet. Participants in the EB-5 industry and investors alike have a common need to efficiently and privately resolve legal disputes.

Despite this alignment of interests, the EB-5 industry has been somewhat slow in employing arbitration as a means of resolving disputes. Unlike the practice of the majority in the alternative investment community, many EB-5 offering documents and attendant subscription documents omit the ability of the issuer to frame the mechanisms for dispute resolution at the outset. This oversight is unfortunate for industry participants and investors alike. The solution, of course, is to consider the placement of arbitration clauses in operative EB-5 investment documentation. Not only are arbitration clauses generally valid under the laws of the United States, they also make good business sense.

A BRIEF SYNOPSIS OF U.S. ARBITRATION LAW

Arbitration in the United States is generally governed by the Federal Arbitration Act of 1925 (FAA), 9 U.S.C. § 1 *et seq.*, which provides that written agreements to arbitrate disputes arising out of transactions in interstate commerce "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." This provision "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). Recognizing this federal policy, courts in the United States have consistently held that statutory claims may be the subject of an arbitration agreement and enforceable pursuant to the FAA. See, *e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-33 (1991); *Rodriguez de Ouijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 479-85 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 225-26 (1987) ("*McMahon*"). See also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628-640 (1985) ("*Mitsubishi*"). (statutory claims generally arbitrable). More importantly, Section 2 of the FAA commands that an agreement to arbitrate is valid, irrevocable and enforceable as *a matter of federal law. Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (emphasis added).

Consistent with strong policy favoring arbitration of disputes, courts in the United States also have recognized that arbitration is faster and less expensive than court-based litigation. Inherent in this policy is the term "revocation" in Section 2 of the FAA appearing in virtual lockstep with the term "enforceable." That is, absent grounds for "revocation," the

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enforcement of an arbitration agreement entails its immediate application to honor strong public policy concerns. See *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542-43 (1985) (even if Petitioners' rights to arbitration are not ultimately denied, delay in vindicating constitutional rights can amount to a deprivation of due process).

The United States Supreme Court in *Mitsubishi* affirmed that arbitration generally is a more efficient and streamlined process:

> [I]t is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies.

Mitsubishi, 473 U.S. at 633.

In *McMahon*, the Supreme Court noted the progression of its arbitration decisions since *Wilko v. Swan*, 346 U.S. 427 (1953), in which the Court had held that a predispute agreement to arbitrate could not be enforced to compel arbitration of a claim arising under § 12(2) of the Securities Act of 1933:

> It is difficult to reconcile *Wilko's* mistrust of the arbitral process with this Court's subsequent decisions involving the Arbitration Act.
>
> Indeed, most of the reasons given in *Wilko* have been rejected subsequently by the Court as a basis for holding claims to be non-arbitrable. In *Mitsubishi*, for example, we recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision. Likewise, we have concluded that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights.

McMahon, 482 U.S. at 232 (citations omitted).

Further, the expression of the United States Congress to provide for due process and the protection of contract rights is, as a matter of law, supreme over attempts in courts of equity to abrogate such rights. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274 (1995) (FAA "embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause") (citing *Perry v. Thomas,* 482 U. S. 483, 490 (1987)).

> Like any statutory directive, the [FAA's] mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue [citations omitted]. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history,' or from an inherent conflict between arbitration and the statute's underlying purposes.

McMahon, 482 U.S. at 226-27 (citations omitted).

Thus, assuming that one's arbitration clause is not outside the bounds of reason, there are few grounds upon which potential litigants may avoid an arbitration clause. Even class action relief may be abrogated through a properly drafted arbitration clause. In *DIRECTV, Inc. v. Imburgia,* 577 U. S. __ (2015), the United States Supreme Court held that a class action waiver contained in an arbitration clause was valid, even though the contract incorporated state law standards that would have voided the waiver at the time at which the contract was consummated. *DIRECTV* stands as the latest expression of strong policy in the United States toward enforcement of arbitration clauses, including those containing a waiver of class action proceedings in arbitration. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

CHOOSING A FORUM

Numerous forums offer compelling reasons for designation in an arbitration clause for use in an EB-5 securities offering. These reasons include the experience of one's counsel in the forum, the ability to select from a large pool of arbitrators and the ability to accommodate litigants who may not be from the United States. Another primary factor to consider may be the capacity of the forum to entertain requests for equitable relief.

Many businesses in the United States insist on the use of the arbitration facilities of the American Arbitration Association (AAA) (www.adr.org), which is one of the world's largest arbitration forums. Most litigators in the United States are familiar with the nuances of arbitration with the AAA, including rules concerning discovery. Depending on one's point of view, the filing fee for a commercial arbitration with AAA is either a governor of or a hindrance to, vexatious litigation, as the filing fee for a claim above $10 million is north of $14,000 (versus filing fees of less than $500 in courts). The AAA also maintains arbitrator rosters in virtually all states and in major metropolitan markets.

Likewise, JAMS (www.jamsadr.com) is based in the United States and has arbitrators in London and Toronto. JAMS frequently is used as an arbitration forum of choice by hedge fund managers and others in the alternative investment industry. JAMS imposes significant fees on litigants (sum certain of 12 percent of all arbitration forum costs and arbitrator fees imposed on each side), but unlike AAA, it has lower upfront filing costs.

Finally, the London Court of International Arbitration (LCIA) (www.lcia.org) is recognized as a sophisticated forum for the resolution of international disputes among private litigants and others. LCIA maintains a roster of arbitrators not only in the United States but also worldwide, including in China and India. Like JAMS, LCIA imposes significant fees on litigants, depending on the involvement of LCIA staff in case management and other factors.

Other arbitration forums that compete with AAA, JAMS and LCIA for designations in agreements among parties are not only experienced in the administration of complex litigation matters but also offer a relative level of predictability in the application of their rules and procedures. In particular, those funds utilizing a broker-dealer may, whether unknowingly or otherwise given the circumstances, be subject to the FINRA arbitration obligations of their broker-dealer.

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Whatever the case, industry participants should consider the characteristics of these forums and others in ultimately choosing a designation in fund offering documents. Each of the websites for these forums have standard arbitration clauses that may modified to suit specific needs of EB-5 securities offerings.

CHOOSING ARBITRATORS

One particularly helpful aspect of arbitration in the context of EB-5 is that industry participants can designate the number of arbitrators to hear matters and the qualifications of those arbitrators. In many cases, draftsmen will include specific characteristics of the arbitrators as a condition of being a candidate for an arbitration panel. The most common of these is the designation of a former judge as an arbitrator. In the EB-5 context, draftsmen can specifically designate that the arbitrators have experience in immigration law or have particular knowledge of the laws of a specific jurisdiction. Be aware, however, that arbitrators often charge fees akin to hourly fees of attorneys for their conduct of hearings and the disposition of motions. These fees are disclosed during the arbitrator selection process along with the experience of each of the candidates for the arbitration panel. While cost issues also may compel the draftsman not to designate more than one arbitrator to hear a case, the complexity of EB-5 and the litigation matters it has spawned should make the appointment of three arbitrators (not two due to the potential of a "tie") the rule rather than the exception.

LOCATIONS OF HEARINGS

Another excellent aspect of having an arbitration clause in EB-5 investments is the ability to designate the location of the hearings. While much of the litigation activity up until the hearing is done telephonically, designation of an arbitration location near one's headquarters or nearest to one's pool of investors may be prudent. Of particular note is that arbitrators do not necessarily have to apply the law of the jurisdiction in which they sit. For example, while a fund document may be governed by Delaware or New York law, the hearing of that matter may take place anywhere in the world so long as the arbitration clause (a) states that the arbitrators are to apply the law specifically designated in the arbitration clause and (b) has a permissive forum situs clause . This is particularly useful in EB-5 matters. Namely, EB-5 fund documents often invoke the laws of a state of the United States, while investors in that fund may be predominantly present in another country. Thus, a panel of arbitrators designated to have experience in New York or Delaware law can serve for hearings abroad if the arbitration clause provides accordingly. Clauses can also contain conditions on the language in which the proceedings will be conducted, including allocating costs and burdens of translation.

ASSESSMENT OF FEES AND COSTS

Yet another benefit of using an arbitration clause in an EB-5 securities offering is that the parties can specifically state that the prevailing party in the arbitration is entitled to recover costs and expenses from the other side. Akin to the "English Rule" of litigation, the judicious use of cost assessment clauses can act as a governor against abusive litigation tactics. As a matter of practice, the alternative investments industry uses such a clause, which of course causes the parties bringing the action to fully ascertain their litigation risks prior to proceeding.

LIMITATIONS ON DISCOVERY

Most major arbitration forums have specific guidelines and limitations on discovery. Of particular note, while most arbitrators provide for the production of documents, other burdensome discovery mechanisms such as interrogatories, requests for admissions and even depositions, are often not favored or available only under specific circumstances. Given that disputes in the EB-5 context will often involve multiple individual parties, the streamlining of discovery may provide a degree of litigation economy versus that of garden-variety court proceedings.

CONFIRMATION OF ARBITRATION AWARDS

An award in an arbitration proceeding is generally private and not available to the public unless it is not paid. Under the FAA, arbitration awards rendered in the United States may be "confirmed" and thereafter converted into a judgment through public filing in a federal court of competent jurisdiction if not paid. 9 U.S.C. § 9. There is little opportunity to appeal an arbitration award under the FAA, except for instances of gross arbitrator bias and misconduct. While extensive discussion of the grounds on which an arbitration award may be "vacated" is beyond the scope of this article, EB-5 industry participants should be aware that the burden to vacate an arbitration award is one of the highest civil burdens a litigant may face, and will require specific documentation and references to the record. Arbitrators do not have to give reasons for their award, unless the arbitration clause so states. *Montana Power Co. v. Federal Power Comm.*, 445 F.2d 739, 755 (D.C. Cir. 1970) (citing *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960)). Aggrieved litigants may well be tempted to test these high burdens, but at least one court in the United States has permitted a party to seek "arbitrage" damages where their arbitration award was appealed without reasonable basis. *Tucker Anthony v. Baird*, 12 F. Supp. 2d 23 (D.D.C. 1998). While many parties desire reasoned awards, most arbitration clauses do not compel arbitrators to render them. Whether reasoned awards are desired should be carefully considered, given the increased likelihood of having that award vacated by a court on behalf of a disgruntled litigant.

While awards from arbitrations that may take place abroad generally follow much of the jurisprudence derived from the FAA, the confirmation of such awards in courts in the United States is governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 3, and enforced by statute under the FAA. 9 U.S.C. §§ 203, 205. Parties who wish to designate foreign jurisdictions for the arbitration of disputes should take particular care to review the New York Convention and other international treaties to ensure that award confirmation is properly addressed in their arbitration clauses.

CONCLUSION

Industry participants and investors may resolve disputes efficiently in private in a manner specific to their needs by employing arbitration clauses in EB-5 investment documentation. The use of such arbitration clauses also may serve as a governor of vexatious litigation. These clauses need to be carefully drafted to address choice of law, choice of forum and the method by which disputes may be resolved. Rather than face public scrutiny and the burden of court proceedings, EB-5 industry participants and investors alike should strongly consider the use of arbitration to privately resolve disputes.

Grenada, E-2 Visas and the Two-Step Immigration Strategy

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The visa backlog for EB-5 investors from China seems to have birthed the immigration version of an alternative fuels industry with the promotion of immigration solutions for just about any scenario. If the visa backlog extends in the future to Vietnam, then to India, without Congress intervening with more visa numbers, this alternatives industry is likely to keep growing. With the specious promotion of "EB-6 visas" and "red cards", and the over-hyped touting of entrepreneur-like visas for the relatively passive investors who have filled most of the EB-5 quota, the immigrant investor industry has reason to be skeptical that these alternatives are sustainable. Skepticism should apply as well to the oft-promoted solution of investing to obtain a third country's citizenship (for example, Grenada) and then pairing that new third-country passport with another investment in the United States to obtain the E-2 visa. To be sure, this two-step US immigration plan is perfectly suited to some of our immigrant entrepreneur clients who aim to be active in US business, and US businesses promoting certain well-structured investment opportunities may raise capital with this strategy. But the pool of legitimately-qualified applicants may be relatively small for the reasons explained here.

The E-2 visa is for investors who are in the process of making a substantial investment in a US business that the investor owns or controls. (This is not to be confused with the E-1 visa for individuals seeking to work in and oversee a US business engaged in substantial bilateral trade.) One essential to the discussion of the E visa is that it requires an investment treaty between the United States and the country of the investor or trader's nationality. The United States does not have such treaties with all countries (see a listing of E-2 and E-1 treaty countries, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fees/treaty.html. Notable non-treaty countries include the BRIC countries Brazil, Russia, India and China, as well as Vietnam and Indonesia.

Enter, therefore, for US immigration purposes the relevance of the supply of third-country citizenship-by-investment programs of countries that have a bilateral treaty with the United States, like Grenada. Many factors, such as the mobility of visa-free travel and insurance against political instability, are driving the increasing interest in these citizenship programs as the end objective, https://www.cnn.com/travel/article/multiple-passports-citizenship/index.html; http://www.bbc.com/capital/story/20170530-why-citizenship-is-now-a-commodity. But this comment is limited to those BRIC investors and other non-treaty investors who are motivated by the primary goal of residing in the United States and have opted for the two-step strategy enabled by third-country citizenship.

Grenada citizenship is just one example of a third-country citizenship that fits into a two-step strategy. It is appealing because the total costs and eligibility requirements are not formidable and the processing time is swift. The eligibility requirements are available at the Grenada government website -- http://www.cbi.gov.gd. To summarize, the Grenada Citizenship by Investment Program, launched in 2013, offers two options for acquiring citizenship. The first option requires a minimum donation of $200,000 to the National Transformation Fund (NTF). The contribution is non-refundable. The second option involves acquiring real estate for a minimum $350,000 from a government-coordinated real estate project. The real estate investment must be held for a minimum

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of three years. The applicant is expected to coordinate with an approved marketing agent, and thereafter, the applicant uses a local agent registered with the Grenada government to file the initial application. The combined application, due diligence and processing fees are $8,000 per adult applicant, $4,000 for dependents under 18, and just $2,500 for applicants under 12 years old. The real estate option requires an additional filing fee of $50,000 for the applicant and up to three dependents, and another $25,000 for any other dependents.

The eligibility requirements are few. The applicant must be at least eighteen years old; must be in good health as represented in a medical exam certificate; must have no criminal record; and must prove the lawful source of the investment funds. Children under age 25 and parents over age 65 may be included as dependents.

Applications are processed within just a few months. The citizenship may be obtained without an interview and without ever stepping foot in Grenada. There is no requirement to demonstrate net worth. There is no requirement to prove education, work or management experience.

Among the many benefits of Grenada citizenship are the rights to reside or not reside in the island nation, and enhanced mobility with visa-free travel to more than 100 countries. For certain clients there also may be tax and estate planning benefits afforded by Grenada citizenship. In sum, Grenada citizenship and the application process have obvious appeal as a first step in the two-step US immigration strategy.

With the second step in this strategy, the investor would be preparing to file an application for E-2 visa. There are several substantive requirements. Apart from the applicant meeting the treaty requirement (which would be satisfied by the Grenada-United States treaty), the US business also must be considered a Grenada-owned entity, typically proven by evidence that at least 50% of the ownership of the US business is in the hands of citizens of Grenada. Foremost of the substantive investment and business requirements for the E-2 visa are – a substantial investment in the US business; the business cannot be a marginal one that provides only a minimal living for the investor and family; the applicant must control the business; and the applicant must develop and direct the business. Since the ultimate success of the two-step strategy depends on obtaining and maintaining the E-2 visa, each of these requirements merits further scrutiny.

There is no prescribed minimum investment threshold. An investment is "substantial" if it is sufficient to ensure the applicant's financial commitment to the success of the business. The lower the cost of establishing the business, the higher the investment by the investor should be as a percentage of the overall cost. Meaning, if the startup cost of the business is relatively low, the investor should be expected to invest 100% of that cost or close to 100%. Most of our E-2 visa clients over the decades have invested at least $500,000 in their US businesses. But for certain industries such as tech startups, we have successful experience with investments lower than $200,000 and even less than $100,000. Even though the definition of "substantial" will depend entirely on the kind of business and typical startup costs, it is rational to advise clients that immigration risks increase as the investment amount decreases. Like with the eligibility requirements for the EB-5 investor category, the E-2 visa applicant may be "in the process of investing" or may be applying based on a completed investment, the funds must be at risk of at least partial loss, and the applicant must demonstrate the lawful source of capital.

The E-2 visa will not be issued for the applicant who seeks to operate a marginal business. The marginality definition has changed over the years, but its current iteration entails proving that the enterprise will generate more than enough income to provide a minimal living for the investor and family. The projected future capacity to do so must be realizable within five years. Our experience is that a credible financial pro forma typically is sufficient for the US consular officer. However, scrutiny of marginality is likely to be greater when the applicant applies anew for an extension of the E-2 visa.

The final requirements we highlight may prove to be the steepest for certain E-2 visa applicants. The applicant must control the US business. This is demonstrated either by ownership of at least 50% of the business or through operational control, which typically is revealed in company agreements or bylaws. Also, the investor must persuade the US consular officer that the E-2 visa should be issued so that the applicant may develop and direct the business. This requirement also could be met with documentation, such as franchise agreements, contracts, and the like. The US business and its documentation are not the main challenge here; the possible investment targets that could serve as an E-2 visa vehicle for the applicant include many reputable US franchise operations for example, if the investment is properly structured to meet E-2 visa requirements. What makes the E-2 visa requirements particularly worrisome for the two-step immigration strategy is that notwithstanding the prepared documentation, the US consular officer could go beyond the prepared documentation to probe the credibility of the assertions that the applicant will be developing and directing the business. To this concern, while the 18-year old client may gain Grenada citizenship either as a dependent or as an independent investor, it is not immediately credible that the ordinary 18-year old without relevant training or prior experience will be developing and directing a US business. It is possible of course, but the applicant will be subject to intense scrutiny. Likewise, the middle-aged applicant with no relevant training or experience who may encounter no difficulty in satisfying the requirements for the EB-5 "immigrant entrepreneur" category, could face a credibility interrogation in qualifying for the E-2 visa. One plausible approach, for example, is the applicant's plan involves hiring and overseeing an on-site manager for the business. But these business plan details must be in place to merit approval of an E-2 visa application. Granted, the purpose of bilateral investment treaties is to encourage investment (which presumes issuance of the visa that enables the foreign investor to preside over and manage the business), still the E-2 visa applicant must be thoroughly prepared to convince the US consular officer of the bona fides of the case.

One source of our caution about presenting E-2 visa applications on behalf of clients who are undertaking the two-step strategy is the paucity of experience that US consular officers have with Grenada applicants. According to US Department of State statistics, for the entire FY2017 only one E visa was issued to an investor who applied based on Grenada citizenship. https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FY17NIVDetailTable.pdf

Also, considering the statistics available as of the date of this writing (May 25, 2018), for FY2018 it appears that not a single E-2 visa had

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been issued to an investor applying based on Grenada citizenship – not until February, when two E visa issuances were recorded.

https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics/monthly-nonimmigrant-visa-issuances.html

https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/MonthlyNIVIssuances/FEBRUARY%202018%20-%20NIV%20Issuances%20by%20Nationality%20and%20Visa%20Class.pdf

Consular officers are likely to be skeptical of these applications, particularly in terms of the investor's ability to "develop and direct" the US business. Note the US Consulate in Barbados is the presumptive locale for submitting the E-2 visa application by a Grenada citizen, although there may be other consulates worldwide that would accept a "third country" application. Many dozens or even hundreds of E-2 visas could be issued in the coming months for qualified applicants (we hope so!), but that is not yet the case.

Assuming the E-2 visa is issued to the investor, there are ongoing requirements. The business must be maintained, and the investor must continue to develop and direct the enterprise. Unlike US permanent residence, the E-2 visa could be revoked at any time upon a determination that the investor is not maintaining compliance with E-2 visa requirements. The reciprocity schedule with Grenada provides that the E-2 visa for Grenada citizens is issued in increments of five years. Thereafter the E-2 visa holder must apply for a new visa, and establish E-2 visa eligibility all over again. Since the visa governs only the foreign national's entry to the United States, an investor lacking confidence about continued compliance may choose to sit tight and not travel abroad. However, the E-2 visa holder is authorized to remain in the United States at any one time for no more than two years. Applications for extensions may be granted upon demonstrating eligibility for the E-2 visa, and in increments of up to two years each time.

The E-2 visa is a flexible solution for many clients who maintain substantial US investments, desire the considerable freedom to enter and work in the United States with minimal constraints, and possibly minimize tax consequences that otherwise flow from a US tax residence. Other notable benefits of the E-2 visa include E-2 visas for qualified dependents of the E-2 investor (spouse and children under age 21). The E-2 visa dependent children may attend K to 12th grade schools, as well as U.S. colleges and universities. Unlike the dependents of an EB-5 investor who have US permanent residence, upon turning age 21 the E-2 dependent must qualify for a visa independent of the E-2 visa principal. Dependent spouses of the E-2 principal may work without restriction in the United States upon obtaining valid work authorization after admission in E-2 status. Finally, the investment made to satisfy the E-2 visa requirements may also be used toward satisfying the minimum investment threshold of the EB-5 immigrant investor category if it is tangible property (not intellectual property) that is booked as equity investment capital (not a loan).

Considering all of the above, the two-step strategy for US immigration presents as a welcome opportunity for certain investor clients. Not all interested candidates should be encouraged to pursue this route. Assuming proper due diligence is undertaken for both the Grenada and US-based investment opportunities, and properly-drafted documentation for the US business, entrepreneurs from Vietnam, Indonesia, and BRIC countries could within about six months obtain and commence enjoying the substantial benefits of the E-2 visa.

Independent Co-Management Services in EB-5 Projects

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For years the EB-5 industry has tolerated certain potential conflicts of interest. The lenders of investor funds may be affiliated with the borrower, for example, yet have an explicit right to waive or modify repayment terms. Or all the parties in a deal may be under common control, from the seller of land to the buyer, from the Regional Center to the builder, from the broker-dealer to the future business operator of a project.

Recently, in part perhaps because of stricter SEC enforcement actions, EB-5 promoters and migration agents are inquiring whether an independent co-manager could help protect investor interests in such cases. This article provides an overview of services an unaffiliated and regulated co-manager can provide.

A note of reassurance to begin. Nobody wants an outsider interfering with business decisions; and rest assured, nobody wants to exercise that role either. Supervising – and potentially second-guessing - the general partner's every move would be a full-time job, expensive to implement, and no way to run a business. The independent co-manager function is much more focused: an unaffiliated and regulated fiduciary with the ability to step in at selected "pressure points" of the venture, to monitor and ensure that specific pre-agreed procedures are respected. This is a hands-off approach that stays out of the way, and yet that can still assure investors and regulators that a good-faith effort is being made to manage conflicts of interest.

Importantly, as litigation becomes more common in a maturing EB-5 industry, involving a co-manager will do more than just signal that the deal sponsor is offering a gold-standard product; it also gains a licensed and insured potential co-defendant to share some of the liabilities in case the project goes wrong.

The following are 10 of perhaps the most typical "pressure points" we look at:

1) Subscription escrow release / Return of subscription funds. Typically, escrow release terms in current EB-5 deals depend mostly or entirely upon the approval of the NCE itself. This keeps things simple and limits responsibility for the bank and administrator, but if the NCE is not acting entirely in the interests of the investors, this approach defeats the purpose of having an escrow account in the first place. Imagine, if you were buying a house, and your money could be released from escrow anytime the seller reported that all conditions were met. You wouldn't feel completely protected, would you? The good news is that a co-manager can easily be inserted into nearly any escrow agreement, with the job of authorizing the release of funds not when the NCE says the release conditions have been met, but when they actually have. This is a minor administrative service that the escrow bank or administrator can offer as well.

2) Funds disbursement to the Project. It is still quite common for NCEs to release their EB-5 investors' money directly to a project entity (the JCE) either as soon as available or in a single lump-sum transfer as soon as the minimum closing amount has been reached. This is not the way real estate development is usually funded in arm's-length loans to investment projects, and it is vulnerable to fraud and abuse. The normal process is to have a construction consultant review the developer's invoices and expenditures, do a site visit to ensure that visible progress corresponds to what's being claimed, and then approve a construction draw. When the developer is ready to proceed to the next draw, the process is repeated. That said, even a construction consultant doesn't necessarily resolve conflicts of interest if the lender and borrower are under joint control. Including an independent co-manager with strong EB-5 awareness is critical to oversee the process and certify that the funds are in fact going into the project.

3) Keeping investors informed. The co-manager should normally reach out to investors, often by direct letter, just to make sure that they have been told exactly what the investor-protection role in the offering is (and isn't). This can go one step further, with the co-manager taking investor-reporting tasks off the deal sponsor's hands entirely. Investors tend to like this arrangement as it means that a neutral party, in addition to the manager itself, is keeping tabs on the project and letting them know about

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construction progress, job-creation, business plan implementation, etc. For the developer, communicating with investors is often a low priority chore once a project has been fully funded, so this service may be welcomed by all concerned.

4) Acting as a shareholder proxy in key votes. EB-5 investors are notoriously difficult to coordinate, whether to approve a special decision by the general partner or for other purposes. A sizeable project may involve a dozen languages and a wide range of investor experience and expectations. To help cope with this, a project could include a co-manager as an independent investor representative, who would be entitled to vote the EB-5 equity interests on specific issues for which investor approval is required. For the co-manager, this arrangement can involve a substantial time commitment, both up-front (to understand the offering and the project), and on a continuing basis (to understand the context of issues). The co-manager may still put critical decisions to an investor vote. It is also important to ensure the transparency of the proxy voting powers, and potentially their reversibility, so that individual investors know what they are agreeing to and can withdraw if necessary to represent their own rights.

5) Monitoring key operations. On a micro level, a co-manager can be tasked with monitoring any quantifiable parameter that may be of critical importance to the project, including construction spending, vacancy/occupancy rates, ADR & RevPAR, maintenance or marketing costs, manager salaries, etc. The challenge is to ensure that the information will be available and to agree on procedures for accessing it.

6) Approving change of loan terms. If an EB-5 project runs into purely short-term cash flow difficulty, it may be important for the NCE as lender to have wide negotiating powers, including the right to waive key loan terms. This is a business decision that any lender could find itself considering as an alternative to incurring the costs and risks of forcing a borrower into default and possible bankruptcy. However, as mentioned above, in EB-5 deals the NCE (the lender) and the JCE (the borrower) are often under joint control. This control doesn't have to be total or explicit in order to be effective. For instance, a regional center may be subject to strong influence by a developer simply due to the fact that the RC has no other sources of projects. In such a case, the problem is not just the obvious risk of bad-faith, but also that conflicted parties may simply find themselves unable to be objective. Such dilemmas are avoided if an independent co-manager can be tasked to approve, certify and/or communicate changes in loan terms.

7) Supervising a sinking-fund. Some EB-5 projects promise to set aside a certain percentage of available cash each year, to help fund the redemption of EB-5 investors at a later date. Sometimes the contributions to such sinking-funds must reach a specific total amount (such as the full redemption obligation) before the deal sponsor is allowed to take any cash for itself. An independent co-manager can monitor the relevant bank balances and report on them to investors, or can even be appointed as co-signatory on the account to ensure that it is used only for pre-agreed purposes.

8) Supervising NCE expenses. Many EB-5 investment vehicles anticipate covering "fund expenses" out of revenue before passing on the residual amount to investors. This is perfectly reasonable but can put the investor in a vulnerable position, especially when the NCE has a right to incur, and be compensated for, costs that may in part be under its own or its affiliate's control, such as salaries, allocated overheads, or even fees for related-party services. Here an independent co-manager can help provide comfort and a degree of protection, by reaching agreements with the NCE about the nature and level of expenses and the procedures to be followed in case expenses are higher than anticipated.

9) Managing redeployments, if necessary. Redeployment of NCE funds is an increasing concern – and one of the clearest instances when an independent co-manager may be essential. Generally speaking, companies without a license as Investment Advisers are not allowed to manage blind pools of investor funds on a commercial basis, so most NCEs are simply not legally entitled to redeploy their investors' money into new investments. Beyond this, there are numerous issues to consider, to ensure that the money is re-invested on a prudent and transparent basis, as well as on a basis likely to conform with USCIS requirements. An experienced co-manager, duly licensed, can step in to help with the redeployment in such cases, whether the funds are going into a new development project or into more liquid securities.

10) Termination and liquidation. Finally, all good things must come to an end, and eventually this also happens with EB-5 projects. There is no absolute need for an independent co-manager to assist with the liquidation process, but it can be helpful to have someone certify that the accounts were kept, assets valued, liabilities covered, reserves set aside, and funds distributed on a reasonable basis. Alternatively, the NCE may prefer for the co-manager to act as liquidator and to handle such details in full.

The objective in all these co-management roles is essentially the same: to provide some additional level of protection of EB-5 investors from fraud or abuse, yet without interfering in the General Partner's management of the business. The most effective way to do that is to identify the key "pressure points" in the project, where a neutral third party can make a difference.

CROWDFUNDING IN EB-5:

Securing Funding From the Immigrant Investor Crowd

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Crowdfunding persists as one of the hottest topics of the business investor financing and securities worlds, since its introduction via the JOBS Act ("Jump-start Our Business Startups") passed by Congress and signed into law by President Obama in 2012.*[1] Crowdfunding has revolutionized raising investor funding for small- and medium-sized businesses in every industry, from real estate development to manufacturing, agriculture to technology, energy to movies. Its use in EB-5 continues steady growth, offering the chance to expand marketability in a significantly constrained industry while potentially reducing sky-high fees.

What is "crowdfunding"? Simply, raising funding from a crowd. Initially, the idea was to raise small amounts per investor from a large number (a crowd) of investors. In order to reach large numbers of possible investors, the new technology of the internet is used (along with print, radio, and television) to publicly advertise an offered investment to complete strangers located locally, regionally, nationwide, and/or across the globe – and not only investors with whom the issuer or its brokers were already introduced. In addition to strangers, a business can reach out to its existing stable of social media connections, through Facebook, LinkedIn, Yelp, etc. And finally, funding could be accepted not only from accredited (wealthy) investors, but in many cases from less wealthy "unaccredited" or non-accredited investors (the pool or "crowd" of which dwarfs in sheer numbers the comparatively limited crowd of accredited investors).

The JOBS Act is actually a set of six acts, each with its own specifics and implementing regulations recently promulgated by the Securities and Exchange Commission ("SEC"), and all of them intended to make easier the funding of businesses, especially smaller ones. The three JOBS acts most relevant to business crowdfunding (including EB-5) all share the new permission to use broad public advertising (especially the internet) to raise money from investors without full formal registration, an outreach strategy previously denied businesses since the securities laws were first adopted over 80 years ago. Further, two of those three avenues allow pursuit of the huge new class of unaccredited investors that effectively has not previously been allowed to invest.

Briefly (and generally), the three key JOBS Act crowdfunding laws are the following:

- Title III, "Regulation Crowdfunding" ("Reg CF"), which allows both accredited and unaccredited investors to participate, for businesses seeking up to $1,070,000 maximum per year;
- Title IV, "Regulation A+", the "Mini-IPO" ("Initial Public Offering"), allowing raises of up to either $20 Million or $50 Million every 12 months from both unaccredited and accredited investors following SEC "qualification" of an issuer's proposed offering materials submitted, refined, and ultimately approved by SEC prior to commencement of the raise; and
- Title II, which added new "Rule 506(c)" to the long-standing Regulation D exemption, a new rule for offerings with no maximum that now allows public advertising, but only permits investment by accredited investors whose status as such is affirmatively verified.

How do these relate to the EB-5 industry?

Regulation CF. Practically, the Reg CF $1 Million ceiling is too low to be availed for the standard EB-5 regional center indirect project, almost all seeking funds in excess of that cap.

This does not necessarily mean end of story for all EB-5. A small project seeking one or two $500,000 investors that it hasn't already identified, could use this avenue to find them, through the public advertising allowed by Regulation CF (again, primarily via the internet). Since CF investors need not be accredited, low net income or a net worth no greater than, say, the investment amount may still permit the investment (assuming satisfaction of a 5-10% net worth/income

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1 As used here, "crowdfunding" relates to investment or equity crowdfunding, as opposed to charity, gift, or reward crowdfunding of the classic Kickstarter or Indiegogo variety that does not involve investing for an ownership stake.

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requirement or a ceiling, calculated for each investor). Launch time is fast, costs (including filing a Form C) are moderate, and Reg CF preempts state blue sky securities compliance, so for the right small EB-5 project, there is a definite opportunity. Flip side: there are ongoing business and financial reporting issues as well as portal participation complexities.

Practice Pointer: Involvement of experienced securities counsel to guide analysis whether Reg CF truly affords a cost-effective avenue for the particular small EB-5 project is essential.

Regulation D Rule 506(c) is the JOBS Act crowdfunding regulation already being increasingly utilized in EB-5. It uses the standard, tried-and-true Reg D exemption and rules, but with a major twist: instead of prohibiting public advertising as in "old Reg D" (now referred to as "Rule 506(b)"), using new Rule 506(c) expressly permits general solicitation of prospective investors. However, two significant additional requirements are mandated: while anyone (accredited or not) may be solicited, sales may only be made to investors who are in fact accredited; also, prior to accepting a subscription the issuer must take affirmative "reasonable steps to verify" accredited status (the old written questionnaire where investors "self-certify" they are accredited will explicitly not suffice).

These are the only new wrinkles (positive and negative) to Reg D required by the new Rule 506(c). Otherwise, Reg D operates as always. Total raise ceiling remains unlimited (except as impacted by other securities laws, such as the Investment Company Act of 1940), time to launch is very fast (relatively), transaction costs are low, SEC filing is light (Form D), no ongoing audits or financial reporting is required (though advisable), state qualification is preempted, and other than accredited status the only investor requirements are effectively those imposed by the EB-5 Program itself (the investment minimum whether TEA or not, and perhaps sometime soon, rural or other set-asides, etc.).

Practice Pointer: Unlike non-EB-5 Projects, which rarely use the Regulation S "foreign offering" exemption, most EB-5 offerings are structured to claim both the Reg D and Reg S exemptions simultaneously. If one exemption is lost, the other can function as a "fall-back" to maintain the exempted status of an EB-5 raise and avoid the dire consequences of conducting a non-exempt, unregistered offering. In a crowdfunded EB-5 offering, since both Reg S and Reg D Rule 506(c) allow public advertising, continuing to harmonize concurrent reliance on the two exemptions seems easy. However, the Reg S exemption not only limits investors to "non-US persons," but while it contains no apparent limit on advertising, does preclude "conditioning the US market," understood to include public advertising inside the United States. Since 506(c) allows public advertising, while Reg S allows advertising but only outside the USA, harmonizing the two requires complying with the more restrictive requirements. That means conducting targeted media advertising strictly overseas and limiting web content from access by US-based users (usually identifiable by US-based addresses).

Why bother? General advertising over the internet (especially) permits crowdfunding issuers to reach out to prospective investors without having to go through intermediaries such as brokers who require heavy fees as the price for their introductions to captive investors. It also permits issuers seeking large numbers of investors to reach large crowds of potential investors, and to target those who might be self-segregated by their expressed interest in certain types of investments: say, real estate versus movies, or EB-5 versus non-immigrant investing. Finally, social media over the internet enables businesses to create stables of fans, customers, users, business connections, admirers, and the like, many of whom might welcome an opportunity to invest financially in the business to which they are already socially connected, and thus form a readily-available and entirely independent (of middlemen) crowd of potential funders.

Practice Pointer: Some EB-5 issuers elect to use 506(c) even though they have no intention of pursuing investors directly on their own, and are willing to pay the placement fees associated with foreign brokers soliciting investors as usual. These issuers elect 506(c) compliance as an "insurance policy," in case inadvertent public advertising or general solicitation should occur in connection with their offering that would violate "old Reg D" (Rule 506(b))—because issuers who have not conducted timely accredited investor verification would be unable to retroactively claim reliance on 506(c) as a default or fall-back position (verification prior to subscription being an affirmative obligation to claiming the 506(c) exemption).

Given Reg D's unlimited offering size, and absence of formalities whether up-front or ongoing, EB-5 issuers are primarily using crowdfunding targeting immigrant investors through Rule 506(c). Just a small sampling of some of the crowdfunded EB-5 offerings on which our firm has worked include:

- A New York-based restaurant chain that has successfully obtained direct EB-5 investment for financing a number of its locations, typically with one or two investors per restaurant contributing toward a total budget of $1.5 million for each location, using 506(c) to reach investors through an internet crowdfunding platform established by an EB-5-experienced investment advisory firm.

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- A California Bay Area regional center that has crowdfunded three of its EB-5 investment opportunities, all multi-family residential and mixed-use projects raising from $7 Million to well over $50 Million, through a global 506(c) offering, or alternatively via Regulation S combined with California's "Blue Sky" (state securities) exemption afforded by that state's Corporations Code Section 25102(f).

- A Texas regional center raising over $100 Million for a mixed use development combining Rule 506(c) with a fall-back reliance on Regulation S (via a distinct companion offering) for investors unable or unwilling to verify accredited investor status as required by 506(c).

Regulation A+ offerings are called "Mini-IPOs" not only because the offering ceilings are significant (up to $20 or $50 Million in every 12-month period), but also because they require SEC pre-qualification of written offering and marketing materials through a back-and-forth process that can take weeks to complete. Such a time-consuming process, involving possibly rewriting offering materials until the agency is satisfied, can certainly result in longer timeframes and markedly higher cost, both up-front and ongoing. Periodic business and financial filing requirements are more burdensome, and there may be state compliance or else ongoing reporting obligations. On the other hand, the end result is a set of materials bearing the potentially great marketing advantage of having been vetted by SEC and therefore considered more credible and complete. An issuer who plans in advance may find the time delay needed to secure SEC qualification could be made to accommodate its EB-5 calendar, so the additional expense and delay could be well worth it where timing permits.

Practice Pointer: Since unlike Reg D, Reg A+ investors may be accredited or unaccredited, it appears potential EB-5 investors with $500,000 to invest but not $1 Million of net worth or otherwise sufficient income to meet accredited status could participate, however there are investor limits (10% net income or net worth for unaccrediteds) that complicate this. Consequently, a typical EB-5 project crowdfunding its raise using Reg A+ would need to carefully examine the particulars of those unaccredited investors it targets—or else accept accrediteds only, currently the typical practice in the EB-5 industry. This likely explains why my firm is only now seeing serious interest by EB-5 issuers in the benefits of using the Reg A+ crowdfunding avenue, while clients have been doing EB-5 via 506(c) for quite some time and on a strongly increasing trajectory.

Conclusion. Crowdfunding presents additional avenues for an increasing number of EB-5 issuers to reach many more investors, shorten offering timetables, and greatly reduce marketing expenses. Those avenues include complexities as well as advantages, so they present further trade-offs requiring a careful weighing of the balance of pluses versus minuses. For those issuers whose potential benefits exceed the drawbacks, crowdfunding can contribute to facilitating a more successful (faster and less costly) EB-5 offering and thus a more successful EB-5 project, without requiring huge additional investment in education, professional fees, or interaction with governmental personnel. This is no doubt the reason why increasing numbers of EB-5 issuers are including crowdfunding approaches in their project offerings. Issuers in the planning and structuring phases are strongly advised to consult with experienced securities crowdfunding counsel to thoroughly investigate whether those advantages can be realized on their own raises, as they have by an increasing crowd of their EB-5 industry colleagues.

Erosion of the Loan Model

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Since the EB-5 program's inception in 1990, the financing structures for EB-5 projects have evolved in sophistication and complexity. The shift to the EB-5 loan model (Loan Model) and the advent of "mega deals" largely contributed to the trend towards more complex structures.

The impetus for the transition to the Loan Model was likely based on at least two perceived benefits of a loan structure. First, because the usual green card process took about five years[1], structuring a loan between the new commercial enterprise (NCE) and the project's job creating entity (JCE) with a term of five years served to "marry" the financial expectations of the project developers and the investors' expected immigration timeline. As such, EB-5 investors could count on an "exit" from the investment (for which they typically receive little profit) shortly after green card approval. Second, EB-5 investors must have been attracted to the "safety" of a loan structure because now there would exist a contractual obligation to repay the EB-5 loan at maturity in priority over distributions on account of equity ownership. Also, the loan was often secured by the assets of the JCE and/or a pledge of the ownership interests in the JCE or its owner(s). Having a collateral package to further secure the loan, would of course add to the attractiveness of the Loan Model.

As the EB-5 industry matured, EB-5 investors became attracted to larger deals. Larger EB-5 projects introduced into the deal mix more sophisticated developers, migration agents and legal counsel, as well as more complex deal structures. This article explores how increased deal sophistication and complexity, including intercreditor agreements and structural subordination, have eroded the effectiveness and perceived benefits of the Loan Model.

EB-5 INVESTMENT STRUCTURES

Under the EB-5 program, each investor must invest either $500,000 in a project located within a targeted employment area (TEA) or $1 million in one outside a TEA. Regardless of TEA status, however, each investor's investment in the NCE must be in the form of equity, because debt arrangements are prohibited in the EB-5 program.[2]

Depending on the EB-5 project's structure, investors typically opt to invest directly into an NCE that aggregates investor funds for the purpose of making an investment in a JCE, often in the form of a secured or unsecured loan (EB-5 Loan). Alternatively, the NCE will sometimes use investor funds to make an equity investment (Equity Investment) directly into the JCE, which likely would include a preferred return equity element (Equity Model). In the Equity Model structure, the NCE becomes an equity owner in the JCE or, as discussed below, in a Mezz Company.[3]

DEBT VERSUS EQUITY MODELS

In the Loan Model, the EB-5 Loan from the NCE to the JCE can take the form of any debt arrangement, including a junior or senior loan. An increasingly common debt arrangement in the EB-5 context involves the NCE making a loan to the JCE's parent company or an intervening controlling entity (Mezz Company). This structure is sometimes referred to as a mezzanine structure and is common in both Loan Model and Equity Model deals (Mezz Structure).

In the Loan Model, the Mezz Structure plays an important role that should not be overlooked. Oftentimes, senior lenders to an EB-5 project will not permit the JCE to incur additional indebtedness, such as an EB-5 Loan. However, if the EB-5 Loan is made to a Mezz Company (Mezz Loan) and the Mezz Company uses the EB-5 Loan proceeds to make a capital contribution to the JCE, senior lenders will typically express less concern, although as will be discussed below, they will likely require an intercreditor agreement.

As noted, a project utilizing the Equity Model may also implement a Mezz Structure. For example, rather than the NCE making an Equity Investment in the JCE, the NCE may make the investment in a Mezz Company. Here, the Mezz Company would likewise ultimately contribute the Equity Investment proceeds to the JCE.

1 Generally, due to the longer waiting period of 8 years or more that mainland Chinese investors face because of visa backlog, many EB-5 deals allow for the usual 5-year EB-5 loan term to be extended for several additional years to accommodate the longer waiting period.

2 A debt arrangement on the part of the investor is specifically excluded from the definition of what would constitute a compliant contribution for the purposes of the EB-5 program. See 8 C.F.R. § 204.6(e).

3 Importantly, in the Equity Model individual investors have no personal investment in (and therefore no direct ownership or control over) the JCE. Deals can be structured where individual investors own an equity interest in a project in which the NCE also functions as the JCE. However, since the advent of the Loan Model and Equity Model, such deals appear less common, although there may be a resurgence of such deals given the legislative uncertainties haunting the Regional Center program

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While each structure can be tailored to achieve the project's desired objectives, investors often do not fully understand the nuances, similarities and differences, and weakness of each structure or the impact on the investors themselves. For example, under the Loan Model (as with most loans), the borrower is required to repay the loan to the NCE at a specified maturity date. The loan is often secured by a first or second mortgage on the property or by some other form of security interest, such as a pledge of ownership interests of the JCE or the Mezz Company. The Equity Model, on the other hand, will generally include a redemption date feature providing for the redemption (i.e., repayment) of the Equity Investment at a specified date. The redemption feature operates like the maturity date provision of a loan. Similarly, the terms of the Equity Investment would likely require that the JCE or Mezz Company (as applicable) make preferred return distributions on the Equity Investment to the NCE. Those preferred equity distributions are akin to the interest payable under the Loan Model.

While the Loan Model and Equity Model may be structured to achieve similar economic objectives, the Equity Model's greatest drawback is its subordination to all loan indebtedness and all other secured and unsecured creditor claims. As such, in a bankruptcy or other liquidation scenario, available or free cash must first be used to satisfy creditor claims before any distributions can be made to equity holders. And since the Equity Model is premised upon the NCE having an equity ownership in the JCE, the NCE will generally be subordinated to the JCE's bona fide creditors (as well as those of any Mezz Company). The Equity Model would thus appear to be less desirable than the Loan Model and for seemingly very good reasons. However, despite the Loan Model having the advantages of being typically collateralized and enjoying payment priority over equity investments, the effectiveness of the Loan Model may be significantly eroded by the senior lender's requirement that the parties enter into an intercreditor agreement and by the structural subordination that results from the Mezz Structure.

INTERCREDITOR AGREEMENTS

In projects where the NCE is granted a security interest, senior lenders may require the NCE to enter into an "intercreditor" agreement to avoid impairing or exposing those senior lenders' own collateral to claims or to litigation. These agreements restrict the NCE's rights as a secured party in a several significant ways. First, they typically require the NCE to affirm that the EB-5 Loan obligations and any collateral securing such loan are subordinated to the senior loan and its collateral.

Second, intercreditor agreements often include standstill provisions that restrict the NCE's ability to foreclose on its collateral or otherwise exercise remedies available under the EB-5 loan documents. In an EB-5 Loan where the collateral is a pledge of the ownership interests in the JCE, in some cases intercreditor agreements require that any person or entity that forecloses on the pledge (and that would succeed to the ownership interest in the JCE) maintain substantial minimum asset thresholds and/or possess significant experience in managing or developing projects similar projects. Such a restriction could pose a significant barrier to an NCE ability's to effectively seize its collateral if it is unable to meet either of such criteria, especially if, as is common, the NCE is a relatively new entity with few assets or other resources and little or no experience in real estate development (or whatever is the JCE's business). Despite its draconian nature, from the senior lender's perspective such a provision makes sense. After all, the senior lender would be interested in knowing that any substitute party has the experience necessary to complete or run the project and is not so financially weak as to potentially also imperil the project because it lacks the resources to fund shortfalls.

Additionally, intercreditor agreements may also restrict the NCE's right to receive payments of principal or interest under the EB-5 Loan. In such event, intercreditor agreements require the NCE to either hold loan repayment proceeds (and sometimes interest) in trust for the benefit of the senior lender. Such restrictions can remain in effect until the senior loan is repaid in full, during which time the NCE does not actually receive proceeds from the repayment of its own loan, which obviously introduces additional repayment risk, difficulty funding NCE payment of expenses (in particular to foreign brokers and migration agents), and may cause significant delays for investors' exit strategies.

STRUCTURAL SUBORDINATION

Structural subordination also serves to erode the effectiveness of the Loan Model using a Mezz Structure. In the Mezz Structure, the NCE never becomes a direct creditor of the JCE because the EB-5 Loan is made to a Mezz Company and no direct collateral of the JCE is typically pledged as security for the EB-5 Loan. In a bankruptcy or liquidation scenario, the creditors of the JCE come first, and their claims must be satisfied before any cash flow can be made available for distribution to equity owners. Thus, a properly structured Mezz Structure deal permits excess or free cash flow to be upstreamed to the Mezz Company to allow it to make the required interest payments to the NCE under the EB-5 Loan, but in a bankruptcy or liquidation scenario, the NCE will not receive repayment under its loan until all of the JCE's creditors have been paid and remaining assets, if any, are available for distribution to the Mezz Company. Even though the NCE likely received a pledge of the JCE's ownership interests, the Mezz Structure itself causes the NCE's loan to be structurally subordinated to the JCE's debt, meaning any collateral securing the Mezz Loan is essentially relegated to the same low priority as an equity investment in the JCE (and thus wholly dependent on the project's cash flow).

Structural subordination also impacts Equity Model projects, even where distribution mechanics appear to prioritize distributions to the NCE. This is because it is uncommon to see the NCE receive distributions prior to the JCE satisfying obligations to creditors and those other equity owners that are senior in priority. Consequently, structural subordination can have the effect of limiting cash available for distribution to the NCE.

Even though the Loan Model ostensibly provides investors greater protection by means of a security interest granted to the NCE, if the NCE's loan is structurally subordinated in a Mezz Structure or subject to an intercreditor agreement, the JCE's loans will remain senior in priority, and distributions from the JCE to the Mezz Company or NCE will likely be severely restricted. In such event, the Loan Model may not be much better than the Equity Model in a liquidation scenario. Thus, any investor considering funding into a Mezz Structure deal should recognize that the Loan Model may not by itself provide the perceived comfort sought in the debt arrangement promised by the Loan Model.

Risks for Regional Centers and Project Principals in Accepting "Politically Exposed Persons" (PEPs) as Investors

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As lawmakers focus increasingly on compliance and integrity in the EB-5 Program, regional centers and principals of EB-5 projects or EB-5 funding entities should implement policies and controls to prevent the acceptance of funds that could include proceeds from money laundering or corruption. One compliance measure that regional centers, issuers in transactions and recipients of EB-5 capital may take is to implement risk-based screenings for applicants that are politically exposed persons (PEPs). Such screens would allow potential investors to invest in a project sponsored by or affiliated with a regional center only if heightened due diligence can be performed, and after any potential corruption issues discovered therein have been resolved. This is an important issue for EB-5 regional centers as efforts to raise capital continue across borders, especially in countries where corruption is reported to be commonplace such as Vietnam, India, Brazil, Turkey and Venezuela.

WHAT IS A PEP?

Generally, PEPs are individuals who pose a perceived higher risk for money laundering because of their prominent position or influence. The term is used commonly in the banking context, where financial institutions and broker-dealers are required to comply with anti-money laundering (AML) laws that mandate having risk-based screens in place to identify PEPs. The term PEP has also gained traction globally in efforts to develop standards to combat money laundering and the financing of terrorism. The term does not refer exclusively to a politician or political figure.

A PEP may be a current or former foreign government or military official, a senior executive of a foreign government-owned corporation, a government minister or official, or a family member (e.g., parents, siblings, spouse, children, and in-laws) or close associate of any such individual. Other examples include judicial officials, Heads of State, or senior politicians or important political party officials, as well as their family members and close associates.

PEPs are not barred from participating in the EB-5 program, but they must be carefully screened as they are considered more likely to pose risks of money laundering of proceeds from corruption and/or other illegal activities. In other words, enhanced due diligence may be required with individuals who are potentially PEPs. In general, the issuer in an EB-5 transaction or a broker-dealer representing the issuer would ensure that such due diligence is completed. This due diligence is not automatically performed by a bank or escrow agent.

PEP SCREENING SHOULD BE PART OF A BROADER EB-5 COMPLIANCE PROGRAM

Before transacting business with a potential PEP, a regional center, funding entity selling securities to EB-5 investors, or an EB-5 project principal should undertake due diligence to understand the risks of accepting such an investor. This process can be outsourced to a broker-dealer, a qualified anti-corruption lawyer or compliance professional, or other vendor with expertise in AML and fraud detection. Depending on the circumstances, potential resources include global accounting and investigative firms with regional expertise

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in a specific geography, and local vendors capable of providing investigative, research, and analytical services and due diligence reports. The due diligence should not be performed by any party with a financial interest in the investment being accepted, but should be undertaken by a disinterested and qualified party who has experience with anti-corruption investigations.

The breadth and focus of due diligence efforts necessary for a particular investor who may be a PEP depend heavily on the facts and circumstances surrounding the investment and source of funds. For any potential investor who may be deemed to be a PEP, a regional center, issuer or project principal should review a report on that individual that highlights any "red flags," even if the source of the investor's funds for an EB-5 investment are purportedly from a lawful source. These "red flags" could include negative press or media attention, unexplained or inexplicably complex routing or origin of investment funds, use of secrecy vehicles or havens, consulting or import/export arrangements without legitimate business purposes, potential indicators of tax or currency control evasion, or facts that a prospective investor did not initially disclose such as a close familial tie to a government official. A regional center, issuer or project principal should engage counsel to review the risk level of allowing the individual to become an investor in the offering.

In any case involving a potential PEP, the recipient of EB-5 proceeds should secure a detailed report about the investor's background, along with advice from qualified securities, anti-corruption and banking counsel on the risks that would be assumed by accepting the investor into a regional center EB-5 offering. In some prospective investment scenarios, economic sanctions should be reviewed. These compliance steps should be documented and retained in the event of a government investigation. In an EB-5 transaction where a regional center controls an EB-5 funding vehicle such as a limited partnership or LLC, the regional center should retain this documentation. Where a regional center has an affiliation with a project but is expressly not an issuer from a securities law standpoint in an EB-5 transaction, the regional center's principals should secure confirmation that the issuer has taken sufficient compliance steps to prevent ineligible PEPs from investing in an offering.

RISKS AND CONSEQUENCES OF ACCEPTING FUNDS FROM A PEP

Having undetected or unscreened PEPs in a deal can expose an EB-5 regional center to invasive investigations, enforcement proceedings and costly litigation, such as forfeiture proceedings. This may result in reputational harm to a regional center, delays in closing and settlement of investment transactions, penalties and, in some circumstances, criminal exposure, in addition to legal fees. The risk level to a regional center is amplified when, after an investment is transacted and an EB-5 investor has wired funds to an escrow account or project, a regional center discovers that an EB-5 investment was acquired with funds that are traceable to unlawful activities. In such a case, funds may not simply be returned to the investor. Securities and banking law counsel should be consulted on the appropriate steps to take, which could in certain scenarios include turning the funds over to a court for an interpleader proceeding. Accepting funds from a PEP who is not qualified to become an investor can have consequences and result in costly litigation.

For example, in 2015 the United States District Court in the Eastern District of Pennsylvania (Philadelphia) ordered a default judgment against an interest in a limited partnership connected with an EB-5 investment. *See United States of America v. A Limited Partnership Interest Held in the Name of or for the Benefit of Sang Ah Park in the Philadelphia U.S. Immigration Fund, No. 2:15-CV-00814-AB ("U.S. vs. Philadelphia US Immigration Fund").* The action was brought by the Criminal Division of the United States Department of Justice (DOJ), which sought forfeiture. In this case, the EB-5 investor was the daughter-in-law of former President Chun Doo-hwan of Korea (President Chun), who had made an investment into a regional center project with funds traceable to corruption proceeds. The entire $500,000 investment was ordered forfeited.

While the actual issuer of an investment in an EB-5 transaction faces the most serious consequences of accepting funds from an investor who is a problematic PEP, parties in an EB-5 transaction who later receive proceeds sourced by a PEP may face exposure in litigation. Specifically, a regional center that has only a contractual affiliation with a project, as well as an ultimate recipient of EB-5 funds such as a developer, could be named as relief defendants in litigation. Such parties could also face reputational harm from negative media, scrutiny by government agencies and entanglement in criminal investigations. Therefore, all recipients of EB-5 capital and a regional center in an EB-5 transaction should take steps to ensure that a sufficient compliance process is in place before accepting subscriptions from investors.

REGIONAL CENTERS CAN MITIGATE THE RISKS AND AVOID BUSINESS WITH PERSONS WHO ARE POLITICALLY EXPOSED

As we move into an era of more compliance, regional centers will need to insulate their offerings from actions similar to *U.S. vs. Philadelphia US Immigration Fund*. One basic step is ensuring that investor questionnaires in the subscription process adequately prompt investors to disclose material information on their family background.

We should presume that the Securities and Exchange Commission (SEC), the U.S. Department of Justice (DOJ), law enforcement agencies and other regulatory bodies would take a broad and inclusive definition of who may potentially be politically exposed. But not all PEPs present the same level of risk to parties in a regional center EB-5 transaction. The degree of risk is related to geographic location and the level of corruption in a specific country or industry, as well as to the position and influence of the individual.

Regional centers that raise funds without a broker-dealer have a higher risk of accepting funds from PEPs without any due diligence from a third-party. Why? Because broker-dealers must have AML programs under FINRA, Treasury and SEC rules. Issuers of EB-5 securities that do not have an affiliation with a broker-dealer should consider creating their own AML program that includes a process for identifying investors who may be deemed PEPs. Broadly, AML programs may include a system of internal policies, procedures and controls; a designated compliance officer with day-to-day oversight over the AML program; an ongoing employee training program; and/or an independent audit function to test the AML program. Having a robust AML program in place now is also a strong approach to preparing for any EB-5 integrity measures that lawmakers may introduce in connection with extending the EB-5 Program.

Combating Construction Fraud To Protect EB-5 Investors:

The Need for Proper, Industry-Wide Construction Integrity Monitoring

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In April 2016, the SEC cast a shadow over the EB-5 industry when it announced one of the largest fraud cases in the program's history. The Commission charged Jay Peak, a Vermont-based ski resort, with fraud and froze its assets based on the misuse of more than $200 million of the $350 million solicited from foreign investors under the EB-5 program. Of the $200 million, $50 million was spent on personal expenses—including the purchase of a luxury condominium. Notably, aside from the charges brought by the Commission against the owner and CEO of the ski resort, a Jay Peak investor is suing the State of Vermont for its negligent oversight of the EB-5 program.

The effect of fraud within the EB-5 program can be far reaching. The Jay Peak scandal decimated the dreams of more than 700 foreign investors, kept hundreds of American jobs from being created under the EB-5 program, and sent contractors into bankruptcy. As a result, reputations within the EB-5 industry were crushed. Indeed, in the wake of Jay Peak, the reputation of Vermont's EB-5 industry was so damaged that state officials considered ending Vermont's involvement with the program.

Jay Peak, unfortunately, was not an isolated instance of fraud, with EB-5 construction fraud continuing to make headlines across the United States and abroad. Among the scandals that have plagued the industry are those involving the Chicago Convention Center, Path America, and the Florida Gateway Regional Center. Often, these scandals involved the misdirection and misappropriation of funds, abandoned projects, substitution of materials, wage and hour violations, and the failure to meet required benchmarks.

Unsurprisingly, these public scandals have resulted in foreign investors and the agents who represent them becoming wary of EB-5 projects. With growing wait times for access to the United States faced by Mainland Chinese investors, foreign investors are concerned about anything that might cause greater delays in the EB-5 process. Eager to minimize that risk, investors may be more responsive to regional center operators and developers who offer transparency into their projects.

Nevertheless, many regional center operators currently undertake limited efforts to demonstrate their transparency and trustworthiness to overseas agents and their investor clients. Specifically, many industry stakeholders have historically held themselves out as conducting background checks and providing construction monitoring with respect to the projects they market, while providing only a low-level employment background screen or an on-site camera allowing investors to view the construction site remotely. However, a robust diligence process requires thorough and proper background checks of regional center operators, developers, and contractors. Additionally, because the investors' capital and dreams are at risk long past the initial due diligence process, a structured method for ongoing monitoring and project oversight is essential.

Moreover, it appears that some agents accept at face value claims by regional center operators and developers that they provide sufficient diligence and construction oversight, without further inquiry. As noted by Roy Carrasquillo, a partner in Cozen O'Connor's EB-5 practice group, although the immigration aspect of the EB-5 program is subject to extensive monitoring, "the construction and development aspect of the system has lacked sufficient scrutiny thus far." Without sufficient oversight, Carrasquillo believes that the door is left open for the developer to "use funds inappropriately."[1] Despite the availability of proper, robust, and reasonably cost-effective solutions, the measures

1 https://www.constructiondive.com/news/development-boon-or-fraud-risk-inside-the-controversial-eb-5-immigrant-inv/433852/

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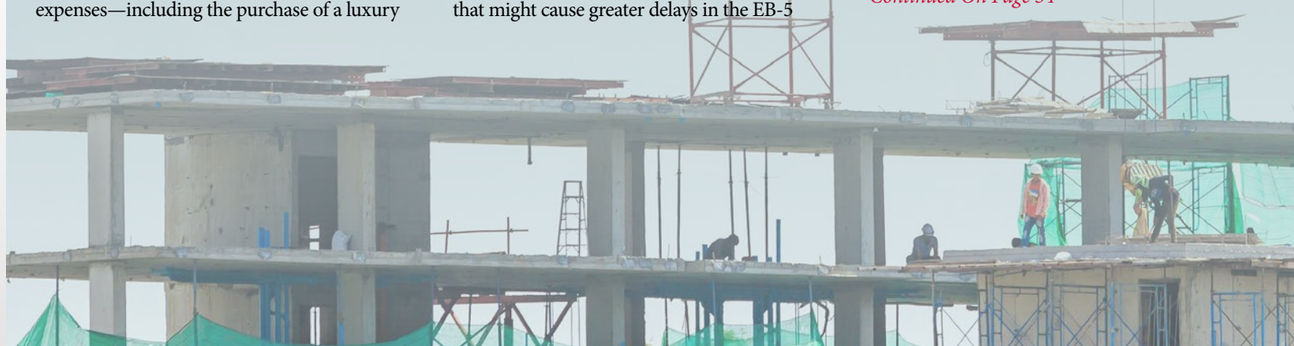

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currently proffered by many regional center operators and developers are inadequate to ensure project integrity.

So what can be done to provide greater transparency and integrity? With pending legislation that will eventually force operators and developers into action, regional center operators and developers should respond proactively by including greater integrity measures in their projects. Doing so will effectively set these operators and developers apart from their competitors by demonstrating a genuine desire to protect their integrity and ensure transparency. An increasingly popular option in accomplishing this among both public and private sector entities is the use of construction integrity monitors, engaged by state and local developers for more than 20 years with great success.[2]

Integrity monitors are engaged to detect and prevent fraud, waste, and other unethical behaviors in the first instance—often before they become public or cause reputational damage. Thus, integrity monitors can help send a valuable message to foreign investors and agents: that the regional center operators and developers care to maintain their integrity, and are not merely concerned with meeting the minimum regulatory requirements to maintain operations. Beyond these benefits, an integrity monitor can save hundreds of thousands of dollars through fraud prevention as well as in litigation fees resulting from alleged fraudulent activity.

Importantly, integrity monitors are third-parties, known for their skills and integrity, who are completely independent of the projects, developers, and regional centers. As EB-5 veterans know, all too often, the developer, NCE, and regional center are affiliated—or, worse yet, one and the same. As observed by Ronald R. Fieldstone, a Partner with Saul Ewing Arnstein & Lehr LLP, nearly all EB-5 fraud cases involved a funds user who was also responsible for monitoring fund disbursement. Fieldstone believes that "[t]here must be independence in the process whereby a competent party unaffiliated with the developer/JCE is monitoring the process to insure integrity, in much the same manner as an institutional lender would oversee a construction loan." He noted that the majority of regional centers and general partners or managers of the NCE simply lack the expertise to provide this oversight. Because of this, he encourages they seek the help of independent third parties who have experience with such oversight and can mitigate the risk of fraud.

The EB-5 industry needs trusted, independent, third-party professionals to provide true integrity diligence. Such diligence includes incorporating proper techniques and tested measures in background due diligence and construction integrity monitoring that go beyond a mere superficial review. Accordingly, a construction monitor must review the project details, focus on contractual and legal compliance, and work to detect waste, or even fraud.

As a best practice, a properly designed construction integrity monitorship should include the following four aspects of integrity oversight:

(1) a preliminary contract document review that includes examining the construction contract plans, checking the reasonableness of the project schedule and budget, and flagging areas of risk;

(2) scheduled monthly on-site reviews of the actual construction and the current financial status of the project to prevent typical frauds and keep investors aware of project status, as well as a thorough review of Draw Requests to analyze overall billing and supporting documentation;

(3) unscheduled monthly site inspections to deter fraudulent activities on the job site and include oversight of a variety of construction issues that are susceptible and historically tied to fraud; and

(4) quarterly construction progress reports that summarize all monitoring tasks performed during that quarter in addition to any recommendations for improvement or identified weaknesses.

Ultimately, enhanced integrity measures, such as in-depth background investigations and proper, independent construction integrity monitoring, will serve all EB-5 stakeholders. Such integrity measures may better protect investors against fraud and deceptive construction practices that can delay or destroy their immigration dreams, while agents, regional centers, and developers may also benefit by better safeguarding their reputations. Regional centers and developers will also enjoy greater protection against financial and reputational risk, while also allowing for a distinct marketing advantage.

Considering the cost-benefit balance, regional centers and developers should consider employing deeper integrity measures, including monitors in the right instance. Providing this level of transparency to investors and agents would allow the EB-5 industry, as a whole, to develop a stronger reputation for proactive self-regulation, enhanced integrity, and greater transparency to investors. Now is the time to embrace these practices.

2 See, for example, the description of the New York City Integrity Monitor, run by the City Department of Investigation, at https://www1.nyc.gov/site/doi/about/integrity-monitor-program.page

EB-5 Bridge Financing: A Study of Market-Driven Applications & Definitions

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In this article we explore the evolution of bridge financing in EB-5 projects and the role the United States and Citizenship and Immigration Services ("USCIS") has played in defining the acceptable parameters and uses for the EB-5 industry. We will trace the USCIS' position since it officially stated in its May 30, 2013 EB-5 Policy Memorandum that projects could use bridge financing and still be credited with job creation. From there we present a modified definition along with an analytical framework to bridge the understanding between policy and application, so we can explore the current parameters of what USCIS considers acceptable bridge financing for the purposes of job creation[1].

A MODIFIED DEFINITION & ANALYTICAL FRAMEWORK:

While the general definition of bridge financing is largely unchanged since the May 30, 2013 EB-5 policy memorandum,[2] here's a modified definition that may be a useful way of understanding USCIS' intent/adjudication:

> *Generally, the JCE can use EB-5 funds to repay the JCE's short-term or temporary funding that is necessary for completion of a project. This is true regardless of when the JCE contemplated the need for bridge financing at the beginning of project development. While not clearly defined, absent any other compelling factors, USCIS has referenced 1-2 years as an acceptable "short-term" to be approximately 1-2 years.*

As we will further explore below, while bridge financing was adopted by USCIS as a pragmatic solution to allow projects to overcome unexpected delays and obstacles, the general definition provided by USCIS is best analyzed in conjunction with how the EB-5 market

1 For simplicity's sake, below, we use the term Job Creating Entity ("JCE") to refer to the entity that is ultimately responsible for receiving/using the EB-5 funds for project development and job creation. It may be the developer, an affiliate of the developer, or the Special Purpose Entity formed to build/own a particular project. However, this distinction is critical because it will ultimately decide whether a project's temporary or short-term financing will be eligible for replacement with EB-5 funds.

2 The current definition can be found at USCIS Policy Manual, Volume 6, Part G – Investors, Chapter 2(D)(1) -- "Eligibility Requirements" – Section D.1. "Bridge Financing" (August 23, 2017) (available at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartG-Chapter2.html#S-D).

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applies adjudication standards to real life situations.

A. WHAT IS THE "NEXUS" TO THE PROJECT

As a preliminary matter, perhaps most importantly for bridge financing to be acceptable, the "short-term" financing that is being repaid with EB-5 funds must have been spent on expenditures related or necessary to the project for the EB-5 investors to receive credit for job creation. In other words, complete this sentence. "But-for this funding, the project could not have been completed because_____." Two factors to consider are: (1) where the supposed bridge financing fits into the project's overall capital stack; and (2) when was it necessary.

On one end of the spectrum, a short-term loan to pay for construction costs in advance of the EB-5 loan closing is uncontroversial. On the other hand, USCIS and the Immigrant Investor Program Office ("IPO") has specifically rejected (including during the recent November 2017 EB-5 Stakeholders Teleconference in New York) the use of EB-5 funds to buyout developer/owner equity when it appears that it was not contemplated as a short-term contribution or to pay down permanent financing. This makes sense if we look at it from an economic policy standpoint. The first situation has a direct nexus to the project's development and thus creates economic benefits to the surrounding community. The second situation provides no economic benefit or jobs to the community because of a lack of project-related nexus and EB-5 is being used to facilitate a paper transfer of wealth or to refinance and help lower the cost of capital for a project.

Any understanding of bridge financing will thus depend on the facts or circumstances and the underlying terms, which should always be explained by the JCE.

While USCIS has stated that there is no specific memorialization needed to qualify bridge financing, as a best practice it is advisable that the bridge financing be disclosed to both USCIS and the EB-5 investors whenever possible. If bridge financing was contemplated before the EB-5 offering went to market, the business plan and offering documents should include descriptions and disclosures of the funding being replaced. If the bridge financing occurred after the project went to market, at a minimum the JCE should provide the bridge financing documents to both the NCE and EB-5 investors and a statement explaining the circumstances and need for the short-term financing and the project-related nexus.

B. EB-5 FUNDS MAY ONLY BE USED (1) BY THE JCE (2) TO REPAY THE JCE'S BRIDGE FINANCING

It is critical to understand that even if it is a necessary project cost, EB-5 funds can only be used by the JCE to repay the JCE's bridge financing.

The two key questions to keep in mind are: (1) Which entity is repaying bridge financing? (2) Which entity is legally obligated to repay the bridge funds? While seemingly straightforward, this is an issue that can easily be overlooked that brings devastating consequences.

Recently we conducted a peer review of a project with affiliated entities. A parent company (not the JCE), takes out $3 million from a revolving line of credit to help purchase land necessary for completion of the project. But-for the land, another buyer would purchase the land. EB-5 funds are then used to repay the $3 million line of credit. Is this acceptable?

- Potentially risky, because the bridge financing belongs to the parent company instead of the JCE. This is a common pitfall in projects with affiliated entities. Here, it is likely that this would be categorized as both short-term financing and necessary to the project. However, it could be denied because the bridge financing that is being repaid is not the JCE's—it is the parent company. Note it would be acceptable if the JCE first sought a short-term loan from the parent company to purchase the land and then the JCE repaid with EB-5 funds

In another similar situation, the parent company took out a bridge loan on behalf of the JCE, who then uses it for project-related hard construction costs. The NCE raises EB-5 funds and then pays off the bridge loan. Is this ok?

- No. While the bridge loan may have otherwise qualified for repayment with EB-5 funds, the case would be denied if the NCE paid off the bridge loan directly. For EB-5 investments to qualify as fully at-risk, all EB-5 capital contributions raised by the NCE must be made fully available to the JCE before it can be used on the project. Here, it would have been acceptable if the NCE had simply issued the entire amount of the EB-5 loan to the JCE before the JCE repaid the bridge loan.

The above distinctions must be understood because both scenarios could easily have been avoided with simple planning.

C. WHAT IS "SHORT-TERM" OR "TEMPORARY" FINANCING?

Aside from a project-related nexus, pay careful attention to the underlying terms of the bridge facility being repaid. To paraphrase an adage, if it looks, smells, and acts like a permanent loan, then it will likely get adjudicated (and denied) like one as well absent a compelling credible explanation. Substance—not labels—matter.

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EB-5 Bridge Financing: A Study of Market-Driven Applications & Definitions

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The simple reality is that there is no such thing as a standard short-term or temporary financing arrangement. Thus, it is critical to analyze and explain the underlying substance and nature of the short-term financing arrangement. For example, during the recent November 2017 EB-5 Stakeholders Teleconference mentioned above, it was remarked that there are multiple exotic flavors of short-term financing in the world of real estate development. Sometimes bridge financing terms run for 3 years or longer. This may be true, but then the analysis cannot end there. It is necessary for a project to explain the need and context.

Consider this scenario: A project costs $120 million and acquires $20 million in debt that is set to mature in 5 years. The project is set to be completed within 5 years. Could this qualify as "short-term" financing eligible for repayment of EB-5 funds?

The answer is "perhaps" depending on the underlying terms; the difference can be like night and day:

- On one hand, if the $20 million loan was acquired from an institutional lender at standard market rates, then this probably would be rejected as an attempted refinancing of long-term debt with EB-5 funds.
- On the other hand, it would be much different if the JCE raised $20 million by issuing preferred shares in itself, and the underlying terms include economic incentives or restrictions to accelerate repayment of the preferred equity, such as punitive escalator clauses that double the preferred return unless the JCE buys out the preferred shareholders within two years.

As illustrated above, the answer is fact-dependent and not always straightforward. This is compounded by the fact that in the world of finance, you can find an endless menu of creative options for whatever your heart desires.

Other factors that may trigger scrutiny because they resemble permanent financing (and thus need careful explanation) are loans that comprise a large amount of the capital stack and maturity dates that are over two years or coincide with project completion. Thus, when a JCE anticipates USCIS may question whether the bridge financing's terms qualify as temporary, it may be advisable to provide an explanation of why it qualifies as "temporary" to preempt a Request For Evidence or Denial. Another option, if possible, is to include provisions in the documents memorializing the bridge financing that state that the funds have been issued in contemplation of repayment by EB-5 funds.

D. EB-5 FUNDS CAN BE USED TO REPAY SHORT-TERM EQUITY? SO I CAN BUY MYSELF OUT RIGHT? (NOT SO FAST)

One final area that causes confusion is what constitutes acceptable "short-term equity" for replacement with EB-5 funds. While USCIS has yet to issue clear guidance on this issue, when a developer or project asks whether their equity may qualify as "short-term," we typically advise them to proceed with caution because it will likely invite increased scrutiny from both USCIS and the EB-5 investors.

A specific situation that would be an acceptable example of "short-term equity" is when the developer is the JCE and raises funds to purchase land by issuing preferred equity in itself. Say the preferred shares include restrictions that block any development of the project before they are retired and also include a put option that kicks in after X years that doubles the preferred return. While the JCE was able to purchase the land, it is clear from the underlying terms that they have every economic incentive to retire the preferred shares as soon as possible.[3]

On the other hand, say a JCE that provides $20 million in land for project development and later claims it was short-term equity to be replaced with EB-5 funds may run into problems with both USCIS and the EB-5 market. Absent a compelling or credible explanation, in most scenarios USCIS would likely reject this as a creatively disguised early cash out of the JCE's own equity. Moreover, at a minimum, it should be disclosed in the EB-5 and offering documents that the JCE intends to replace their short-term equity with EB-5 funds. If there is no other equity in the project, this could be self-defeating for marketing purposes and completely turn away agents or investors.

While it requires a fact-based analysis based on the project, practically speaking, absent a compelling or credible reason, in most instances if the JCE is attempting to replace short-term equity it will likely be difficult unless it is the equity of other shareholders in the JCE, rather than the JCE itself (e.g., project owner or developer), unless it can be established that the equity was contemplated as short-term or temporary.

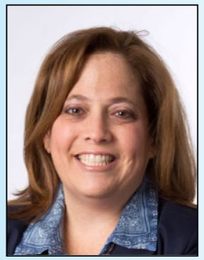
CLOSING THOUGHTS

While the above is based on our experience advising projects across the U.S., it is neither gospel nor is it static. Like any market-driven definition, the only guarantee is that the parameters of what is acceptable bridge financing will continue to evolve as the EB-5 industry incorporates it into its projects and USCIS issues further guidance to shapes its application. However, the above framework will hopefully allow our industry to understand not only the past five years, but to adapt together as it continues to change over the next five.

3 Preferred equity comes in many flavors and can easily be the subject of its own article. However, for another real-life (albeit non-EB-5 example) of preferred equity that would likely qualify under this criteria, see Vornado's stake in Jared Kushner's 666 Fifth Avenue: https://therealdeal.com/2017/09/20/behind-kushners-record-deal-for-666-fifth-an-unusual-appraisal/

BEST PRACTICES FOR REDEPLOYMENT

WRITTEN ON BEHALF OF THE IIUSA BEST PRACTICES COMMITTEE



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Since the United States Citizenship and Immigration Services (USCIS) released a revised Volume 6 of its Policy Manual on June 14, 2017 (USCIS Policy Manual), industry participants have opined on the topic of redeployment and issues surrounding redeployment of investor capital to keep funds "at risk." Unfortunately, during the six months since the release of the USCIS Policy Manual, no clear answers have emerged from the USCIS regarding the rules or processes governing redeployment of investor capital by the new commercial enterprise (NCE) during the sustainment period before adjudication of a foreign investor's I-829 Petition. In spite of pleas from stakeholders concerned about the enormous implications, USCIS has largely been silent about the increased risks to investors and the practical impact that redeployment will have on other areas of law such as corporate and securities (specifically how corporate and securities attorneys implement redeployment in their offering materials and governing documents). Accordingly, this article is comprised mostly of questions rather than answers.

By way of a brief background, the EB-5 Program allows foreign investors to obtain U.S. permanent residency if (i) they invest $1,000,000 into a NCE (or $500,000 if the NCE principally does business in a "targeted employment area") and (ii) their investment created a minimum of ten full-time jobs over a two-year period. However, the EB-5 Program's growing popularity with foreign individuals, combined with limited resources and fixed annual visa approval numbers, has substantially affected review times by the USCIS of foreign investors' petitions pursuing permanent residency. In fact, the USCIS announced that the agency received over 14,000 petitions (I-526 Petition) from foreign investors in fiscal years 2015 and 2016, which is approximately 3.5 times the annual average from the inception of the EB-5 Program. FY2017 applications dropped to approximately 12,000, which is still double FY2012 filings. This drop may be in part due to the program's popularity, but also may be due to the concern over the program's long-term availability and viability. With only 10,000 visas issued each year to foreign investors and their spouse and qualifying children, a serious backlog in visa availability has emerged for foreign investors from certain countries seeking U.S. permanent residency. Chinese nationals in particular seem the most affected by the backlog in visa availability and may experience wait times of ten to twelve years before they can move forward in the permanent residency process after the submission of their I-526 Petition. This extreme delay caused by current legislation and the backlog in visa availability can also jeopardize the foreign investor's status. This jeopardy is created when the investment amount is no longer "at risk" as the foreign investor's funds become available for return following the approval of their I-526 Petition, but before they are able to file an I-829 petition to remove the conditions of their conditional permanent residency.

According to Part G of the USCIS Policy Manual, a foreign investor is required to invest his or her own capital, and that capital must be "at risk" for the "sustainment period," which commences on the date that the investor receives conditional permanent resident status and ends two years later. While there is no black and white definition of "at risk" in the regulations, according to the USCIS Policy Manual, there must be both a risk of loss of that capital and a chance for gain or profit from enterprise. The Policy Manual goes on to say, "further deployment of an investor's capital may be used to meet the capital at risk requirement under certain circumstances."

This guidance, however, still leaves room for interpretation as to what business activities are actually taken. For projects structured under a "loan model" with a fixed maturity date, the funds that are repaid to the NCE upon the maturity date may no longer be considered "at risk," and accordingly, many NCEs have started redeploying the EB-5 funds into other projects in an attempt

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to keep the funds "at risk." Unfortunately, the USCIS has not specifically addressed this situation and many players within the EB-5 industry question what impact this practice may have on foreign investors' permanent residency petitions once the USCIS gets around to reviewing and adjudicating the petitions. As an industry, it is critical that we continue to request dialogue with the USCIS on this area and, perhaps more importantly, ensure that the agency understands the implications of its policy statements.

The EB-5 Program's "at risk" requirement following job creation has created much confusion throughout the industry regarding what type of project may be utilized for the redeployment of foreign investors' funds. According to Chapter 2(A)(2) of the USCIS Policy Manual, before the required ten jobs are created per investment, "the full amount of the investment must be made available to business(es) most closely responsible for creating the employment upon which the I-526 Petition is based." Once the job creation requirement has been met, the capital remains "at risk" if it is used in a manner related to engagement in commerce (in other words, the exchange of goods or services)." Does this allow the funds to be redeployed in any project that simply stimulates commerce, or could it also include redeployment into passive investment vehicles such as publicly traded stocks, bonds, mutual funds, hedge funds, and/or private equity funds? The USCIS has been asked these questions repeatedly and responded only by making vague comments to stakeholders and referencing Chapter 2(A)(2) of the USCIS Policy Manual, specifically that the "deployment must be made within the scope of the NCE's ongoing business." Here again, there has been little guidance on what counts as being within the "scope of the NCE's ongoing business." Would the USCIS consider it within the "scope of the NCE's ongoing business" if the new project was associated with the same parent company, or if it was is in the same industry or one that was extremely similar to the initial project? Most importantly, if the requisite ten jobs have already been created in the designated targeted employment area, should the redeployed funds have to be funneled into a project located in the same targeted employment area, should any more jobs have to be created, and ultimately, should the "within the scope of the NCE's ongoing business" requirement even apply? One would think that once the job creation has occurred and the EB-5 Program's ultimate goal has been accomplished, the only remaining requirement would be that the EB-5 funds remain "at risk" until the end of the sustainment period. To further confuse market participants, the USCIS has also hinted at other acceptable redeployment situations. According to Chapter 2(A)(2) of the USCIS Policy Manual, a NCE is "permitted to further deploy capital into certain new issue municipal bonds (i.e. infrastructure spending) as long as the investments into such bonds are within the scope of the NCE." However, this position seems to unfairly give preferential treatment to the government. Unfortunately, the USCIS hasn't yet answered these critical questions and EB-5 players are urging that new regulations be issued to address these ambiguities so developers and sponsors understand how foreign investors' funds can be redeployed and utilized appropriately without fear of an eventual denial of their investors' permanent residency petitions.

While the intentionally vague policies regarding how funds can be redeployed properly raise many questions, the potential answers have a ripple effect into the areas of corporate and securities law. Specifically, foreign investors should be informed and disclosures should be made in any securities offering materials to which a foreign investor becomes subject. Because wait times weren't as lengthy as they are today, it is unlikely that older governing documents contemplate redeployment situations. Even if redeployment provisions are present in those governing documents, questions remain as to whether the NCE's manager or the foreign investor would be responsible for selecting the new project for the redeployed funds, and if the USCIS would require foreign investors' consent if it was not required under the operating agreement as it may be deemed a "material change" in their investment, requiring notification to the USCIS. If the NCE's manager selected the redeployment situation, securities law issues may arise if it is considered investment advice and the NCE's manager is involved in an investment advisory business, potentially requiring that the NCE's manager be a registered investment adviser under federal or state securities laws. It is also possible that redeployment could be considered a separate investment decision requiring new disclosures and offering materials. Many are questioning whether the NCE's governing documents or the regulations should govern acceptable redeployment situations at all, and whether the governing documents should determine what type of redeployment is within the "scope of the NCE's ongoing business." For example, should the NCE's business purpose provide guidance on proper business/commerce that EB-5 funds may be redeployed into, if it is even specific enough, or will the USCIS adjudicator ignore such disclosures and defer to the vague regulations while reviewing the foreign investor's permanent residency petition? Industry stakeholders argue that the governing documents should indicate what is within the "scope of the NCE's ongoing business" since that is the agreement that the investor entered into and was filed with the I-526 Petition. In addition, how does the USCIS react to an amendment to a NCE's governing document that widens the redeployment possibilities and thus expands the scope of the NCE's ongoing business? According to Chapter 4(c) of the USCIS Policy Manual, the agency takes the position that organizational documents may be amended to remove liquidation provisions in order to allow a NCE to continue to operate through the immigrant investor's period of conditional permanent residence. This position seems to allow for amendments to governing documents to allow for redeployment situations and lasting interests in the new commercial enterprise for the immigrant investor, without triggering a material change in the NCE's ongoing business. Lastly, depending on the specific Investment Company Act exemption that the NCE is relying on to avoid required registration as an "investment company" under securities laws, projects that receive redeployed EB-5 investments would also need to confirm they fall within an Investment Company Act exemption to ensure securities compliance.

When contemplating revisions to the regulations, other considerations and overlapping areas of law must be taken into account to allow for increased investment transparency and the future success of the EB-5 Program. The introduction of independent third parties to monitor redeployment activities may be useful to ensure compliance with necessary requirements under corporate and securities documents and USCIS regulations, as well as greater investor protection and more successful projects. Another possibility for redeployment could include a specific amount of the redeployed funds to be set aside for local infrastructure and/or government projects, or emergency relief in areas that have sustained damage. While EB-5 professionals, investors and industry leaders are awaiting more permanent measures to ensure the EB-5 Program's continued success and, as a result, increased job creation throughout the United States, it is clear that the policies must be sufficiently clarified on the issue of redeployment since regulations are likely to take much longer to be approved and released.

IIUSA Hosts Largest Global Banquet Series Event to Date in One of Industry's Fastest Growing Marketplaces...

Mumbai, India

MCKENZIE PENTON
ASSOCIATE DIRECTOR, EVENTS & INDUSTRY ENGAGEMENT, IIUSA

Earlier this year, IIUSA hosted the first Global Banquet Series event of 2018 in Mumbai, India. It was the second such Banquet that IIUSA has hosted in India over the past year and we were able to build upon the success of the first event while capitalizing on growing local market knowledge to achieve the most successful IIUSA Global Banquet to-date.

Held at the conclusion on the Global Investment Immigration Summit, the banquet brought together IIUSA members, international service providers and investors for a night of networking, business development and educational presentations (and a few cocktails) in one of the fastest growing EB-5 investor markets. With conference attendees appetites whetted, attendees were eager to learn more about the EB-5 Program, and IIUSA was more than happy to provide Banquet attendees with crucial updates on EB-5 hot topics, including legislative and regulatory reform, processing trends and investor market updates. Furthermore, a question and answer session enabled service providers and investors to engage with our panel of leading industry experts.

With over 150attendees (90+ of whom were from India), the Banquet was the best attended Banquet IIUSA has ever hosted. It served to further emphasize the growing interest in EB-5 from Indian investors as well as the acceleration of investor market diversification over the past few years. The event size, and more importantly attendee exuberance, was a testament to the emergence of India as a premier EB-5 market and we were excited to once again connect our members with investors and service providers from throughout the country.

It is now more important than ever for IIUSA to bring together industry stakeholders together at overseas events and more importantly to ensure that the

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EB-5 marketplace is well informed due to continued market diversification. India is a rapidly growing market and investor enthusiasm may be unmatched; however, it is a young market that naturally has a lot of questions and IIUSA was happy to once again provide attendees with at least some answers.

India Twice in One Year?

With the EB-5 Market in China continuing to stagnate due to the visa backlog and ever-growing processing times (not to mention a looming cutoff date on the horizon for Vietnam), EB-5 stakeholders have recognized the importance of exploring new investor markets and India ranks right at the top of many Regional Centers and service providers lists.

With over 350 I-526 fillings in FY 2016 According to U.S. Citizenship and Immigration Services (USCIS) data, there were over 350 I-526 filings in FY2016 from Indian investors. This ranked India as the third largest investor market behind Mainland-China and Vietnam. In fact, the Indian market experienced a nearly 50% year-over-year (YoY) growth in I-526 filings between FY2015 and FY2016. While the data is not yet available for FY2017, India is almost assured to have continued this growth trend and is poised to emerge as an essential EB-5 market for years to come.

THANK YOU TO OUR BANQUET SPONSORS & PARTNERS

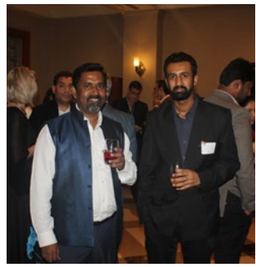
IIUSA was honored once again this year to have the support of the Small and Medium Business Development Chamber of India (SME Chamber). The SME Chamber was crucial in convening leading industry service providers and investors from India for the event and continuing to develop the EB-5 marketplace locally. A special thank you is also due to BLS Media who organized a wonderful Global Investment Immigration Summit highlighting investment programs from around the world. IIUSA was proud to be able to conclude the programming for the Summit and to take attendees on a deep dive into the EB-5 Program.

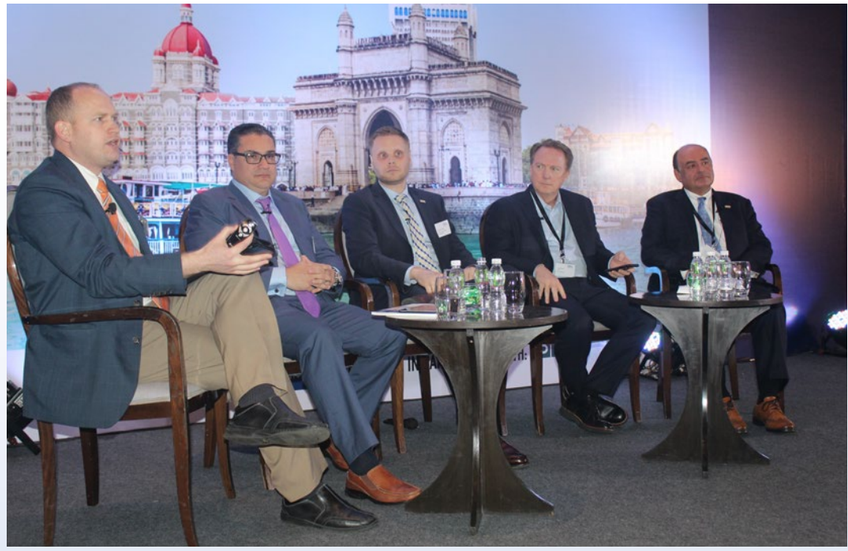
We would also like to extend a special thank you to all the sponsors of this year's event the Law Offices of Robert Abedi, American Regional Center Group, CMB Regional Centers, FirstPathway Partners and New York City Regional Center. With their support and participation, not only was IIUSA able to bring the EB-5 industry together on a global scale, but we were also able to deliver timely updates and education on important industry topics to international stakeholders.

To all of our partners, sponsors and of course attendees, thank you once again for making the 2018 IIUSA Global Banquet Series Mumbai a great success. Through your support, dedication and engagement, we were able to produce a first-rate event and continue the Indian marketplace development that will be critical to EB-5 industry success in the coming years.

ABOUT THE GLOBAL BANQUET SERIES

The IIUSA Global Banquet was established in 2017 in an effort to bring IIUSA members, investors and international service providers together in the EB-5 markets that matter most. Since last year, IIUSA has hosted banquets in Vietnam, Shenzhen, Beijing, and Mumbai and we look forward to continuing to expand the IIUSA global network over the course of the next year and beyond.





IIUSA MEMBERSHIP COMMITTEE CORNER

IIUSA Events Bring Together Members across the Globe

LAURA KELLY
MARKETING DIRECTOR, NES FINANCIAL

VICTOR ESPINOSA
SENIOR DIRECTOR GLOBAL BUSINESS DEVELOPMENT, GOLDEN GATE GLOBAL

As members of IIUSA and the IIUSA Membership Committee, it is was an enriching experience to attend IIUSA's 2017 slate of events. IIUSA events are one of the many value adds that IIUSA brings to the table that ensures members and non-members alike have the information they need to succeed in an ever-changing EB-5 marketplace. For us, attending events not only ensures that we are up to date on the latest EB-5 news and insight, but also that that we are able to highlight our expertise and industry know-how by participating on panels, exhibiting or sponsoring or even just by participating in the myriad of networking opportunities.

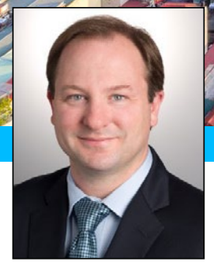
Last year, IIUSA hosted two well-attended national events: the 10th Annual EB-5 Advocacy Conference in Washington, DC and the 7th EB-5 Industry Forum in Miami, FL. The Advocacy Conference was a great success and focused on advocating for the EB-5 Program, promoting industry success and driving business development. The conference brought the industry up to speed on IIUSA's current EB-5 advocacy efforts. Additionally, by attending this conference, members were exposed to other members that reside in DC and surrounding states. This is useful from a business development perspective but also to be able to exchange ideas and best practices.

The Industry Forum focused on education and business development on a global scale. As the EB-5 market is continuously changing, the Latin American market has experienced an uptick in interest in EB-5. This conference brought together many EB-5 developers and stakeholders that focus most of their efforts on the Latin American market. It was very useful to speak with those developers and attorneys that have a higher investor load from Latin America and compare best practices. The conferences always celebrate members' milestones, be it on the investor side or the project side. Attending IIUSA conferences brings the EB-5 community together and adds value to your organization.

In addition to going to all the domestic IIUSA Conferences, the organization hosted four international banquets last year in markets that included China, Vietnam, and India. These banquets brought together IIUSA members from around the globe for evenings of networking, business development, and education. We found them to be extremely beneficial for our businesses and brand-building efforts outside the U.S. The settings and intimacy of the dinner receptions were particularly valuable in terms of networking – from meeting new people in the industry to strengthening existing relationships overseas. Moreover, the presentations and speakers were top-notch and informative, covering a wide array of timely and essential EB-5 topics for all stakeholders in the Program.

IIUSA continues to plan events for the industry in 2018. Already hosting two overseas events this year in India and China, IIUSA and the Membership Committee look forward to welcoming the EB-5 industry to Washington, DC from April 22-24 for the 11th Annual EB-5 Advocacy Conference.

Update on Vietnam:
A Surging EB-5 Market



BRANDON MEYER
PARTNER, FAKHOURY GLOBAL IMMIGRATION

In less than five years, the EB-5 market in Vietnam has grown from single-digits a year volume to become the world's second largest source of EB-5 investors. Some industry observers believe that Vietnam has overtaken China as the largest source country for EB-5 investors, given that China market volume may have declined anywhere between 70-90% by some estimates.[1] While USCIS has yet to publish statistics on the number of new I-526 petitions filed by Vietnamese investors during Fiscal Year 2017, there is no doubt that the 2017 calendar year was the best ever for sourcing EB-5 investors from Vietnam. Credible estimates for the number of new I-526's filed during the calendar year 2017 vary between 275-400, with my personal assessment putting the number at approximately 300.

Yet, even with the rapid five-year growth of the Vietnam market, simple mathematics dictate that Vietnam (90 million people) can never hope to replace the volume that China (1.3 billion people) used to generate. Furthermore, despite that explosive growth, the EB-5 market in Vietnam faces many challenges, leaving the overall market at a crossroads.

While Vietnam has rapidly shifted from an EB-5 non-entity to the second-largest market behind the People's Republic of China, the market is still relatively immature. EB-5 issuers and practitioners should not make the assumption that doing EB-5 business in Vietnam is the same as China based on the superficialities that the two countries are neighbors and have similar "migration brokerage" agency models. Issuers and practitioners will quickly find out that many of the migration brokers are new to the industry (and also run their agency "on the side") and lack efficiency, if not professionalism in their EB-5 approach.

Many migration brokers are simply chasing a "quick buck" and will offer many projects concurrently and/or quickly add or drop projects based on ancillary concerns, which leads to confusion within the Vietnam market and frustration among issuers. With the twin issues of brokers being new to the industry and operating their EB-5 business as a sideline activity, issuers and practitioners are learning that without their systematic and perpetual involvement in the agency's sales process many agencies are unable to "close" clients. Put another way, many agencies simply cannot close clients once the issuer and/or attorney leaves Vietnam. Additionally, prospective clients will often need several meetings with the issuer and/or attorney before making the decision to go forward.

This means that the only way to succeed in Vietnam is by spending significant amounts of time on the ground. However, issuers and practitioners accustomed to the comparatively efficient way EB-5 business is done in China (do four seminars in four different cities over two weekends, return to the US and wait for investors to flood in) are beginning to openly question whether the Vietnam market is really worth the relative time, expense, and effort. Following a similar itinerary in Vietnam will likely yield no positive results. Quality issuers and practitioners exiting or scaling back their footprint in Vietnam because of frustration with the comparative inefficiencies of the country's EB-5 business environment would be tragic.

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1 Statistical analysis of EB-5 trends is always fraught with risk for two reasons: 1) the concept of "EB-5 math," which requires one to deflate or inflate statistics depending on the need ("come do a seminar in Mauritania with us. We have 500 interested investors lined up!); and, 2) the time lag between what disparate members of the EB-5 community are seeing in their practice and when actual filing trends show up in published reports.

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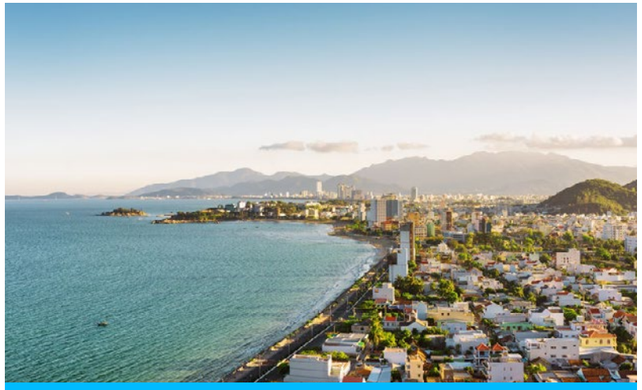
Conversely, given the perfect storm of the overall organic growth of the Vietnam market, the proliferation of EB-5 projects, and the collapse of the China market, agents have been absolutely overwhelmed by the number of projects and service providers seeking to enter the Vietnam market. Most agencies lack the bandwidth to perform adequate project due diligence, let alone deal with the volume of EB-5 related e-mails from the United States. This makes it very difficult for agents to select projects that they feel fully comfortable in supporting.

Potential investors also find themselves overwhelmed by the volume of EB-5 projects and general program information. This state of information overload often leads to confusion, with the end result being that many potential investors do not move forward with EB-5. Thus, the Vietnam EB-5 market is at a crossroads: it could mature and strengthen, or it could die a victim of its own success.



In addition, four market conditions are fueling the headwinds plaguing the Vietnam market and preventing it from reaching its potential:

1) Uncertainty over the future of the Regional Center program. Few people in Vietnam take the looming expiration of the existing Regional Center program and possible regulatory changes seriously, and after 10 temporary program extensions since September 30, 2015, this is a logical and defensible viewpoint. However, the phenomenon of political paralysis in the United States that leads to the Regional Center program surviving on this never-ending series of temporary extensions, gives potential investors in Vietnam an even greater excuse to procrastinate in moving forward. Again, this is a logical and defensible viewpoint. The thought process is: if the deadline keeps getting extended, obviously the deadline means nothing, there is no deadline, so what's the rush?

2) The inevitable increase in the minimum investment amount may depress overall investor interest, although I am optimistic that an increase will not deeply depress volume.

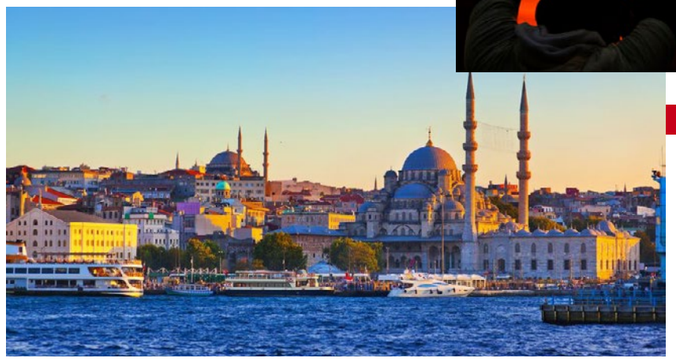
3) The Department of State has issued informal guidance to expect the imposition of cut-off dates for Vietnamese nationals. Thus, the dreaded retrogression issue that has effectively killed the China EB-5 market is expected to rear its ugly head imminently in an upcoming publication of the Visa Bulletin. Vietnam may be hit with a "Final Action Date" somewhere in the July 2014 range, exactly the same as China. Once the latest allotment of 10,000 visas for FY19 becomes available October 1, 2018, it is anticipated that the Final Action Date will be set somewhere in the late 2015 or early 2016 range. I believe that retrogression will have a significant negative impact on the market, as it gives potential investors another excuse for inaction. Others who are active in Vietnam disagree, and believe that the introduction of cutoff dates will actually spur the growing army of EB-5 fence sitters in Vietnam to finally move forward.

4) The alphabet soup of E-2's, EB-3's and L-1's is causing greater indigestion within the Vietnam market. A growing number of agencies and part-timers in Vietnam are chasing the easy money at the end of a rainbow – with no real understanding of how the process works – have begun marketing E-2's, EB-3's, and L-1's as quicker, cheaper and easier paths to the United States in comparison to EB-5. I fear the intensity of these marketing efforts will increase once retrogression and an increased minimum investment amount both become unshakeable realities. And once the mirage of E-2's, EB-3's and L-1's being "easier" than EB-5 is exposed, the credibility of Vietnamese agencies, and by extension all United States project developers and service providers, will take a serious hit.

CONCLUSION

Vietnam can exist as a nice, supplemental niche EB-5 market, but only as long as people are willing to spend a disproportionate amount of time cultivating this market relative to other markets. The numerous challenges to the industry highlighted above, however – if not properly addressed – threaten to forestall the overall maturation of the market. Vietnam risks returning to being an EB-5 also-ran once the China market recovers (it will eventually, simple math and the internal political and economic risk factors within China are not improving) and the India market continues its rapid growth. The party may end just as it was really getting started.

EB-5 Investments in Turkey



EREN CICEKDAGI
MANAGING DIRECTOR, GOLDEN GATE GLOBAL

Turkey is traditionally known as the bridge between Europe and Asia, and this is true – both geographically and economically. Today, the immigration and investment landscape in Turkey is a two-way street, as it remains an attractive destination for investors and tourists, and at the same time is among the countries experiencing high rates of "brain drain" due to outbound immigration. Recent political instabilities, the perception of a stricter government, and doubts about what the future holds for the next generation are among the negative factors driving a considerable portion of the population to explore opportunities to migrate and grow their families elsewhere. At the same time, opportunities for education, employment, and property acquisition abroad are key factors that attract Turks to seek alternative futures in other countries, with European countries being the traditionally and culturally preferred option.

i. Immigration trends in Turkey

Similar to Middle Eastern investment immigration markets, many Turks view investment immigration not as a planned migration option, but as an escape hatch, to be accessed if the political environment worsens or Middle Eastern unrest significantly affects their daily lives. "Golden Visa" programs in Portugal, Spain, Greece, and Malta have been particularly popular, as these programs do not require the immigrant investor to move and begin the residency upon approval. Another attractive path for outbound immigration has been through the 1973 Turkish European Community Association Agreement Visa, governed by the 1963 Ankara Agreement which, (among other rights) allows Turkish citizens to incorporate and run their own businesses, and obtain residency permits in the United Kingdom. Given Turks' unique immigration drivers, EB-5 and immigrating to the United States was thus a foreign concept to most of them, which is reflected in the small number of I-526 petitions filed by Turkish nationals in the years leading up to 2016.

Today's millennial generation in Eastern Europe and the Middle East however, grew up with strong American cultural influences, and compared to the generations before them are more interested in sending their children to school or to pursue employment in the U.S. For Turks wanting to spend limited amounts of time in the United States B-1/B-2 visitor visas remain an option, and the slow processing times for visa issuance following the October 2017 diplomatic dispute at the U.S. Embassy in Istanbul are resolving. H1-B, E-2, L-1, O-1 and other EB categories are also valid and widely used options, leaving EB-5 – as it should be – as the option of last resort when all other avenues have been exhausted.

ii. Turkish investor profile and source of funds

Looking for investments in Turkey is, in the world of EB-5, a newer market. There is no "typical" EB-5 investor anywhere in the world, and that is the case for Turkey as well. In my experience however, the Turkish investor is often very well-educated (many having received their higher education in the U.S., U.K. or continental Europe), a white-collar professional, a small to mid-size business owner, or a graduate student coming from a wealthy family. Unlike India or China, Turkey has not experienced rapidly increasing real estate values, and thus does not have a large "property millionaire" class. Nor does Turkey have outbound remittance restrictions to complicate the path of funds (although note that banks typically ask for a copy of the subscription agreement as proof of the underlying investment.) And Turkey is not on the Treasury Department's Office of Foreign Asset Control list of sanctioned countries, so escrow transactions are typically not an issue.

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A common source-of-funds challenge for Turkish investors occurs when the investor uses funds from the sale of a long-held property, where title-deed documents and tax records do not match the actual sales amount – an irregular practice that was endemic in Turkey until the last decade. Another recurring issue pertains to taxes. Turkey and the U.S. reached an agreement in 1996 to prevent double taxation, but wealthy Turks still prefer to shelter their Turkish assets from the U.S. tax system. It is therefore advisable at the outset to consult with a qualified overseas or inbound tax consultant, wealth manager, or law firm with a solid U.S.—Turkey tax practice to address such questions.

iii. Conversion and Preference in Projects

The process of converting a prospective investor in Turkey to actual investor is typically slow, and culturally it is not uncommon for a prospective investor to require many visits and due diligence calls, adding up to somewhere between two to six months to close. As is often the case with investors from India, the Middle East, or Europe, Turkish investors ask questions that are very technical, and require attention from the underwriting team of the Regional Center and/or the developer to explain the mechanics behind the offering documents.

Turkish investors are much more familiar with the coastal U.S. cities than the heartland; New York City, San Francisco, Los Angeles, and Miami are usually the preferred locations for both second home purchases and EB-5 investments. Typically, big developers or sponsors attract investors to review the offering, however they will not invest if they do not understand or approve of the deal structure, regardless of the stakeholders or location of the project. In my experience, the investment returns are lower on the prospect's list of EB-5 investment priorities, and secure deals (rather than returns) drive the decision-making process.

iv. Referral Landscape

The organizations in Turkey most closely resembling the migration agents in China are the international real estate agencies, which sell properties in the U.S. As there is often a natural transition from home purchase to investment immigration, these groups have a relevant and captive client base, but they do not possess much expertise in immigration nor a thorough understanding of the transactional/offering documents. Other popular investor referral sources are wealth managers, reputable law firms, and tax advisors, as high-net-worth individuals tend to have more confidence in dealing with such vetted groups. Likewise, many Turkish high-net-worth individuals can speak English, but it is a significant plus for them to be able to converse with sophisticated native Turkish speakers when conducting project due diligence, or working through their source-of-funds issues.

Given its population and motivating factors, Turkey certainly is an exciting market for EB-5, but successfully accessing it requires a serious investment of both time and resources. In the years to come – contingent upon potential legislative changes of course – we expect Turkey to rapidly climb the ranks of the top 10 EB-5 countries.

EB-5 HISTORY

October - December

The feature This Date in EB-5 History serves to highlight EB-5 Program milestones and chang¬es, key pieces of legislation, pub¬lishing dates of U.S. Citizenship and Immigration Services (USCIS) memos, IIUSA achieve¬ments 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.iiusa.org

APRIL

- April 28, 2015 – Senate Judiciary Committee holds hearing on DHS oversight. Secretary Johnson is asked about EB-5 and protocols to reduce agency preferential treatment.
- April 10, 2015 – IIUSA launches its first economic impact interactive map

MAY

- May 1, 2014 – IIUSA forms the Association Building, Banking, Compliance and Technology Committees
- May 8, 2012 – USCIS issues guidance on EB-5 adjudications involving tenant occupancy

JUNE

- June 17, 2009 – USCIS issues the Neufield memo on job creation issues
- June 1 2014 – Initiative for a Competitive Inner City (ICIC) publishes its report on the economic impact of EB-5 in inner cities, "Increasing Economic Opportunities in Distressed Urban Communities with EB-5"

JULY

- July 11, 2015 – National Association of Counties (NACo) passes permanent resolution in support of EB-5 for second year in a row
- July 12, 2017 – IIUSA's interactive TEA policy mapping tool reaches over 1,000 views

AUGUST

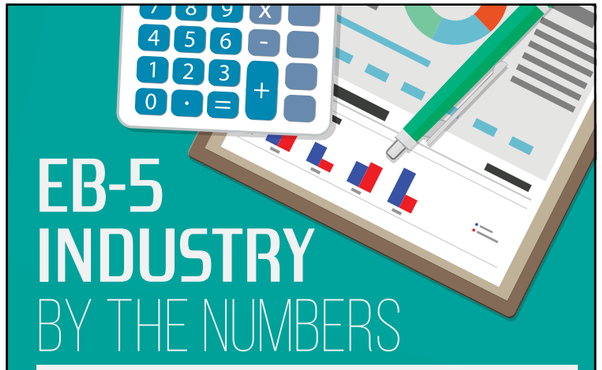
- August 11-12, 2011 – IIUSA hosts the inaugural EB-5 International Investment and Economic Development Forum in Seattle, WA
- August 23, 2017 – IIUSA Board of Directors adopts the new Code of Conduct recommended by the Compliance Committee

SEPTEMBER

- September 28, 2012 – EB-5 gets a three year extension to September 30, 2015
- September 8-11, 2013 – IIUSA leads first trade mission to Xiamen, China for CIFIT

2018 INDUSTRY EVENTS

- **5/8-5/9:** EB5Investors.com: 2018 EB-5 & Global Programs Expo (Beijing, China)
- **5/9/-5/11:** AILA Bangkok District Chapter APAC (Hong Kong/Guangzhou)
- **6/4-6/6: IMC:** The Investment Migration Forum 2018 (Geneva, Switzerland)
- **6/20-6/21:** SelectUSA: 2018 Investment Summit (Washington, DC)
- **6/21-6/22:** BLS Media: Global Investment Immigration Summit (London, UK)
- **6/26-6/28:** Global Migration & Overseas Wealth Management SEA (Singapore)
- **7/23-7/24:** EB5Investors.com: 2018 EB-5 Conference (Los Angeles, CA)
- **9/7-9/8:** EB5Investors.com: 2018 EB-5 & Global Programs Expo (Ho Chi Minh City, Vietnam)
- **10/25-10/26:** Investment Immigration Summit ASEAN (Bangkok, Thailand)
- **10/29-10/30:** Investment Immigration Summit East Asia (Hong Kong, SAR)
- **11/1-11/2:** BLS Media: Citizenship Expo (Abu Dhabi, UAE)



EB-5 INDUSTRY BY THE NUMBERS

07/22/14: The U.S. Department of State-Bureau of Consular Affairs released its revised visa bulletin for the month of April revealing a cutoff date of July 22, 2014 for applicants from Mainland-China.

150+ India: The IIUSA Global Banquet Series Mumbai on February 28, 2018 brought together over 150 members of international industry stakeholders for a night of networking, business development and educational panels.

2,500+: The RCBJ has an online and in-print distribution list that reaches thousands of industry stakeholders. The RCBJ is distributed at in-person IIUSA events, in addition to being hosted on IIUSA.org which has hundreds of unique page views each month.

Key Points from the IIUSA Peer Reviewed Economic Impact Study

In collaboration with IIUSA, in January 2018, Western Washington University Center for Economic Business Research (CEBR) published a peer-reviewed research (the "Study") that evaluates the Program's economic impact in FY2014 and FY2015 in terms of job creation, contributions to the U.S. GDP and tax revenues.

$11.2 Billion: The study estimated that a total of 22,452 EB-5 investors invested in 355 regional centers projects that were active in FY2014-FY2015 generating an estimated $11.23 billion in capital investment over the two year period.

$7.7 billion: or 69% of all EB-5 capital investment made through regional center projects that were active in FY2014-FY2015 was invested in the construction related sector.

207,000: Jobs were created or supported by EB-5 capital investment between FY2014-FY2015.

$4.2 billion: The EB-5 program generated an estimated $4.2 billion in tax revenue between FY2014-FY2015.