



**CATHERINE D. HOLMES**

**PARTNER & CHAIR OF CAPITAL INVESTMENT LAW GROUP,  
JEFFER MANGELS BUTLER & MITCHELL LLP**

All real estate development projects are subject to risks that the developer or project owner will not complete a project or will not meet operating projections, but the Covid-19 pandemic has substantially increased the number of real estate development projects and operating real estate businesses that are now experiencing severe financial distress. In particular, many hotels, restaurants and retail operations throughout the United States have been forced to radically reduce their operations since March 2020, or to close completely. In addition, a number of residential condominiums, multifamily rental and mixed-use real estate development projects have experienced delays in financing and construction, or delays of sales or rental of residential units in projects that have been completed. Among the many real estate related businesses affected by these conditions are projects funded with EB-5 financing (referred to here as “EB-5 Projects”).

The issues faced by new commercial enterprises (“NCEs”) with loans to or equity investments in EB-5 Projects that are in default are particularly challenging for two reasons. First, most NCE loans or equity investments on EB-5 Projects are subordinated to senior creditors, which require an analysis of what legal remedies are available to an NCE under all of the financing documents to which the NCE is a party, including agreements with the owner of the EB-5 Project (the “EB-5 Project Owner”) and agreements with the senior lenders. Second, an NCE must analyze the effect of

# An Analysis and Protocol for Determining Legal Remedies for EB-5 Investments in Distressed Projects

any action it may take that might negatively impact the eligibility of its investors (“EB-5 Investors”) for permanent residence under the EB-5 program. An NCE confronted with the problem of a defaulting EB-5 Project Owner must determine what remedies are available to the NCE and what the effects on the NCE and the EB-5 Investors will be if a senior lender exercises its remedies against the EB-5 Project Owner.

This article summarizes the types of remedies available to an NCE in the event of a default by an EB-5 Project Owner on a loan or equity investment made by an NCE, the effect of foreclosure actions taken by senior lenders on EB-5 Projects, and the immigration issues that will arise in connection with a potential foreclosure or sale of an EB-5 Project in distress. Based upon the analysis of those issues, this article suggests a protocol for NCEs to use in analyzing potential remedies and outcomes to preserve as best as possible the visa eligibility and financial investment of its EB-5 Investors.<sup>1</sup>

## A. Legal remedies available to an NCE depending upon type of investment.

The remedies available to an NCE upon a default by the EB-5 Project Owner will be primarily determined by the terms of the EB-5 financing documents. Different remedies will apply depending upon whether the EB-5 investment is: (a) a loan secured by a senior mortgage on the EB-5 Project, (b) a loan secured by a junior mortgage on the EB-5 Project, (c) a loan secured by a pledge of membership interests in the EB-5 Project Owner<sup>2</sup>; (d) an unsecured loan; or

<sup>1</sup> This article applies primarily to NCEs whose projects are based upon direct and indirect job creation, rather than to direct investments in which only direct jobs are counted. However, many of the same principles discussed in this article will also apply to an analysis of issues for EB-5 investors with direct investments in job creating entities (“JCEs”).

<sup>2</sup> An NCE may also have a loan secured by a pledge of membership interests in an entity that is in the chain of ownership of the EB-5 Project Owner, which will involve the same issues as those discussed in this article. For the sake of brevity, this article does

(e) an equity investment in the EB-5 Project Owner.<sup>3</sup> The remedies available for each type of EB-5 financing are summarized below:

**EB-5 Loan Secured by First Lien Mortgage on EB-5 Project.** Most EB-5 Loans are not secured by first lien mortgages, but there are some that are, and it is helpful to understand the remedies that are available to a senior lender for NCEs that hold junior mortgages, unsecured loans, or equity investments. An NCE (or any other senior lender) with a first lien mortgage securing a loan to an EB-5 Project Owner has the right to foreclose on the EB-5 Project and either acquire the ownership itself or sell the EB-5 Project to a third-party bidder in a foreclosure sale. The foreclosure rules vary by state and must be strictly followed in order for the NCE to have a valid foreclosure sale. Therefore, the NCE must hire a local foreclosure expert to conduct the sale.<sup>4</sup> The general foreclosure procedure is that the NCE holding a senior mortgage can “credit bid” up to the full amount of the NCE’s loan, meaning the NCE is not required to pay any cash for this amount, and if there are no other bidders at the foreclosure sale in excess of the credit bid, the NCE will acquire the ownership of the EB-5 Project. If a third party bids more than the NCE at a foreclosure sale, the third party must pay cash at the foreclosure sale for the full amount of the foreclosure bid, which will result in the NCE receiving full repayment of all amounts owed on its loan. Any cash proceeds from the foreclosure sale in excess of the purchase price paid upon foreclosure

not discuss every variation of pledge that the NCE may have, but refers to pledges of membership interests of EB-5 Project Owner.

<sup>3</sup> An NCE may also have an equity interest in an entity in the chain of ownership of the EB-5 Project Owner, which will involve the same issues as those discussed in this article. For the sake of brevity, this article does not discuss every variation of equity interest that an NCE may have, but refers to equity interests in an EB-5 Project Owner.

<sup>4</sup> NCEs must consult with local counsel in the state where the EB-5 Project is located in order to determine if there are any current restrictions on foreclosure actions due to Covid-19 executive orders issued by some state governors.

*Continued On Page 26*

*Continued From Page 25*

will be paid to the EB-5 Project Owner, who will be required to pay its other creditors to the extent of those excess proceeds.

*Importantly, upon a foreclosure sale, the NCE or third-party purchaser will acquire the EB-5 Project free and clear of all obligations for any other junior debt or unsecured debt of the EB-5 Project Owner.*

### **EB-5 Loan Secured by Junior Lien**

**Mortgage on EB-5 Project.** An NCE with a junior lien mortgage also has the contractual right to foreclose on an EB-5 Project (subject to any restrictions under any intercreditor agreement between the NCE and the senior lender, as described in the next paragraph), but the senior lender holding the senior mortgage on the EB-5 Project has the first right to bring a foreclosure action on the property and “credit bid” the full amount of the senior loan.<sup>5</sup> Assuming that the senior lender brought a foreclosure action against the EB-5 Project Owner, if there were proceeds from a foreclosure sale to a third party in excess of the amount owed to the senior lender, those excess proceeds would first be paid to the NCE holding the junior lien on the EB-5 Project. However, if the excess proceeds were not enough to fully repay the NCE loan, the NCE’s junior lien would be extinguished in the foreclosure sale, and the NCE would have no additional rights under its junior lien. In the event the proceeds of the foreclosure sale by the senior lender did not fully repay the NCE’s loan, the NCE would still have a right to obtain a monetary judgement against the EB-5 Project Owner that could be satisfied with other assets of the EB-5 Project Owner, but often times an EB-5 Project Owner’s sole asset is the EB-5 Project itself, and once that is sold, the EB-5 Project Owner will often have no other assets available to repay the NCE’s loan. If the EB-5 Project Owner has any remaining assets after a foreclosure sale, the NCE

<sup>5</sup> It would be extremely rare for an NCE holding a junior lien mortgage to not have an intercreditor agreement with the senior lender that prohibited the NCE from foreclosing on the junior mortgage, but if there was no intercreditor agreement, the NCE could foreclose on its second mortgage, but in that event it would have to repay the senior loan in cash at the time of the foreclosure sale, unless the senior lender agreed to allow the NCE to assume the senior loan, which would also be a rare occurrence.

would have to bring a legal action to obtain a monetary judgement, and then seek a writ of attachment on the remaining assets, which would be sold in a court ordered sale. If the EB-5 Project Owner owns no other assets, the NCE would have no other source of funds from which to obtain payment of the NCE’s loan, unless the NCE had also obtained a loan repayment guaranty from another party, in which event the NCE could seek repayment from the guarantor.

### **Effects of Subordination on NCE Junior**

**Lien Rights.** An NCE with a junior lien mortgage on an EB-5 Project will virtually always be required to enter into an intercreditor agreement (sometimes also called a subordination agreement or standstill agreement) with the senior lender holding the senior lien on the EB-5 Project. The intercreditor agreement will almost always prohibit the NCE from taking any form of enforcement action against the EB-5 Project Owner until the senior loan is repaid. This means that the NCE would not have the right to foreclose on an EB-5 Project until the senior loan has been fully repaid. Therefore, if the NCE desires to acquire or sell the EB-5 Project, the NCE will be required to pay off the senior loan itself or find a third party willing to pay off the senior lien and keep the NCE’s lien in place. Since an NCE will usually have no capital other than the amount of the NCE’s loan advanced to the EB-5 Project Owner, an NCE normally will have no funds available to repay the senior lender, which would mean that the NCE will likely receive no more than the excess foreclosure price, if any, above the senior loan amount that a third party will pay in a foreclosure sale. Because of this risk that the NCE will ultimately receive little or nothing in a foreclosure by a senior lien holder, the NCE should be motivated to work with the EB-5 Project Owner if possible to avoid a senior lien foreclosure in the hope that the EB-5 Project Owner will be able to sell the EB-5 Project for a high enough price to repay the senior loan and the NCE’s junior loan. In some cases, the intercreditor agreement may allow the NCE to cure the senior loan default by paying the amount that is then due and payable under the senior

loan. If the NCE does have a source of funds to make the cure payment, the NCE should consider making the cure payment. However, the NCE also needs to consider the likelihood that the EB-5 Project Owner will default again on the senior loan, and whether the NCE will have the ability to make another cure payment. The NCE may be able to negotiate a forbearance with the senior lender if the NCE makes a cure payment that could effectively extend the senior loan and possibly prevent a senior loan foreclosure. The NCE should consider all available options to prevent a senior loan foreclosure.

### **EB-5 Loan Secured by Pledge of**

**Membership Interests.** It is common for EB-5 loans to be secured by pledges of membership interests of either the EB-5 Project Owner or another entity in the chain of ownership.<sup>6</sup> The pledge of membership interests legally allows the NCE to conduct a foreclosure sale of the membership interests under the Uniform Commercial Code (or “UCC”) of the state in which the debtor is organized. Similar to a foreclosure on real property, the UCC allows the secured party to credit bid for the amount of the debt owed to the secured party. If no one at the foreclosure sale bids more than the credit bid, then the NCE would acquire the ownership of the membership interests. However, in almost all cases where membership interests have been pledged, there is a senior lender to the EB-5 Project Owner, and the NCE will have entered into an intercreditor agreement with the senior lender which prohibits the NCE from foreclosing on the membership interests until the senior loan is paid in full. In that case, if the senior lender forecloses on the EB-5 Project, and that is the only property that the EB-5 Project Owner owns, then even if the NCE forecloses on the pledge of membership interests, after the senior lender forecloses on the EB-5 Project, the entity in which the NCE would acquire membership interests upon a foreclosure

<sup>6</sup> The NCE may have a pledge of membership interests of the entity that owns the EB-5 Project Owner, sometimes referred to as the “mezzanine borrower”, or another entity higher up the chain of ownership.

*Continued On Page 27*

*Continued From Page 26*

may own nothing. Therefore, the NCE would have no way to recover repayment of its loan. In addition, if the NCE holds a pledge of membership interests of a mezzanine borrower (or another entity above the EB-5 Project Owner in the chain of ownership), then all of the unsecured creditors of the EB-5 Project Owner would be required to be repaid first, before the NCE would have a right to any proceeds of a sale of the EB-5 Project. These risks mean that the NCE holding a pledge of membership interests should be motivated to work with the EB-5 Project Owner if possible to avoid a senior lien foreclosure in the hope that the EB-5 Project Owner will be able to sell the EB-5 Project for a high enough price to repay the senior loan and the NCE's junior loan.

**EB-5 Unsecured Loan.** An NCE with an unsecured loan has no right to foreclose on any property of the EB-5 Project Owner. Upon a default of an unsecured loan, the NCE would be required to file a complaint in a court having jurisdiction against the borrower to obtain a monetary judgment. Upon obtaining a monetary judgment, which could take months or in some cases years, the NCE would then be required to file a writ of attachment on any assets of the borrower that can be found, so that those assets may be sold to collect on the judgment. Any assets that have already been pledged by the borrower to other creditors would first have to be used to satisfy those other creditors, which means that it could be difficult for the NCE to satisfy its monetary judgment.

**EB-5 Equity Investment.** An NCE with an equity investment in the EB-5 Project Owner is structurally subordinated to all creditors of the EB-5 Project Owner, including any senior mortgage lender, junior mortgage lender and any unsecured creditors of the EB-5 Project Owner. In the event the senior lender foreclosed on the EB-5 Project, the proceeds of foreclosure would be used first to repay the senior lender, then to repay the junior mortgage lender and then to repay all unsecured creditors. The NCE would

only have a right to receive distributions from the EB-5 Project Owner after all of those creditors were repaid. If the EB-5 Project Owner had no remaining assets after payment of all of its creditors, then the NCE would have no ability to obtain distributions from the EB-5 Project Owner, and no ability to obtain a monetary judgment against the EB-5 Project Owner. Some NCEs with preferred equity interests have subordination agreements (sometimes also called "recognition agreements") with senior lenders, which allows the NCE to cure a senior loan default. If that is the case, and the NCE has the ability to make a cure payment, the NCE should consider making a cure payment.<sup>7</sup>

**The "White Knight" Rescue.** If the NCE has no additional funds with which to repay senior lenders in any of the scenarios described above (except the one in which the NCE is the senior lender), the NCE may seek to find a third party (often referred to as a "white knight") to buy the EB-5 Project, or to repay or take over the senior loan on the EB-5 Project, who would be willing to retain the NCE's interest in the EB-5 Project. However, the white knight will normally want to purchase the EB-5 Project for a discount and extinguish the debts of the EB-5 Project Owner. Therefore, a white knight will often require the NCE to convert its loan or preferred equity interest into a subordinated equity interest. This would typically mean that the NCE would only have a right to be repaid its investment after the white knight is repaid its capital, plus a specified return on its capital, and all other creditors are repaid. This would mean that the NCE would still have the possibility of being repaid some or all of its investment at some future date (often not until the EB-5 Project is sold), but the risks of the new investment will almost always be higher than the original investment. Even so, retaining a subordinated equity interest is better than losing the NCE's entire investment upon a foreclosure or sale of the EB-5 Project.

<sup>7</sup> The discussion of cure payments under the heading "Effects of Subordination on NCE Junior Lien Rights" would be applicable to an NCE holding an equity interest as well.

### B. Immigration issues to be considered in connection with exercise of remedies.

When an EB-5 Project Owner defaults on a senior loan or on an NCE's loan or equity investment, in addition to protecting the NCE's financial investment, the NCE must also consider the effects that will be caused to the immigration status of EB-5 investors in the NCE. These issues will include the following:

**Has the EB-5 Project created sufficient jobs for all of the EB-5 investors?** The NCE will want to obtain records from the EB-5 Project Owner demonstrating that the EB-5 proceeds have been received by the EB-5 Project Owner and that the EB-5 Project Owner has used the proceeds, together with other funds, to perform work on the EB-5 Project in a manner consistent with the business plan and economic report filed by EB-5 investors with USCIS. Even if the EB-5 Project has not been completed, it is possible that the records will show that enough proceeds have been spent, and enough work has been performed, that sufficient jobs have been created for every EB-5 investor in the NCE to receive credit for at least 10 jobs. It is critical for the NCE to obtain these records from the EB-5 Project Owner before any foreclosure action is taken that might cause the EB-5 Project Owner to lose control of the project or the records needed by the NCE. Therefore, when an NCE becomes aware that its EB-5 Project is in distress, one of the first steps that should be taken is to ask for the records the NCE will need to demonstrate the job creation that can be supported as of that date. If sufficient jobs have been created, then it should be possible for the EB-5 investors to make a reasonable argument that they should retain their visa benefits, even if the financial investment is lost.

**What if the EB-5 Project has not created sufficient jobs for all of the EB-5 investors?** If the NCE determines that the EB-5 Project has not created sufficient jobs, then the NCE will need to analyze whether the EB-5 Project Owner or a third-party purchaser of

*Continued On Page 29*

*Continued From Page 27*

the EB-5 Project would continue to work on the EB-5 Project, so that additional jobs can be created in a manner consistent with the business plan and economic model filed with USCIS. If so, even if the NCE takes a loss on its financial investment, the visa benefits of the EB-5 investors might be preserved. This will require that the NCE engage in discussions with the third-party purchaser of the EB-5 Project to determine the intentions of the purchaser and whether the purchaser is willing to retain the NCE as an investor in the EB-5 Project.

**Does the EB-5 immigration status of EB-5 investors matter in the event of a foreclosure sale?** EB-5 Investors who have not yet obtained conditional permanent residence must continue to show they have “invested” the required capital, they are on course to create the required level of jobs, and there has been no “material change” from the I-526 petition they have filed with USCIS. For those EB-5 Investors who already have conditional permanent residence, the exposure to “material change” factors is much less. However, these EB-5 Investors must have “sustained” their investments and will be required to prove sufficient job creation. If sufficient jobs have been created by the EB-5 Project Owner before a foreclosure sale, even if the EB-5 Project is not complete, will a foreclosure sale cause the EB-5 Investors to lose eligibility for their immigration benefits? It does not seem that this should be the case, and USCIS has previously approved I-829 petitions in cases of EB-5 Projects that have failed under other circumstances causing the project not to be completed. But if all required jobs have not been created when an EB-5 Project is sold in a foreclosure sale, what would happen if the new owner decided to change the business plan to such an extent that it would be considered a “material change”? If all of the NCE’s EB-5 investors have commenced their two-year period of conditional permanent residency, then the USCIS Policy Manual indicates that there could be a material change in the business plan without a loss of

eligibility for permanent residence without conditions. However, if the NCE receives no proceeds from its original investment, how would the NCE invest in a new project? Perhaps the NCE could send a notice to the EB-5 Investors, informing them of the status of the original investment, and ask them to contribute additional capital for a new investment. In that event, how much would the EB-5 Investors have to contribute to the new project? Also, a new project would require a new business plan and new economic report, and who would pay for those? Because of these uncertainties, it would seem to be a better choice, if possible, to retain an investment in the existing EB-5 Project. It might be possible for the NCE to take other actions in cooperation with the EB-5 Project Owner that would preserve the ability to create jobs in the original EB-5 Project without an additional investment by the NCE. This analysis would require a detailed knowledge of the specific facts and circumstances of the EB-5 Project and the possible outcomes of the EB-5 Project in order to make a determination of the best course of action to preserve the residence benefits to the EB-5 Investors.

**If the NCE or a new owner acquires the EB-5 Project will that cause a material change to the EB-5 Investors’ applications?** Although USCIS has never commented on this topic specifically, it has framed “material change” in a rigid manner when applied to EB-5 Investors who have not yet obtained conditional permanent residence. On the other hand, the USCIS consideration of what exactly constitutes a material change appears to depend on whether the EB-5 Investor would fail to meet a specific eligibility factor. Therefore, it should not matter who owns an EB-5 Project, as long as the EB-5 Project is completed (or partially completed) in accordance with the business plan filed with USCIS. Even if the EB-5 Project itself is changed in some way, such as a reduction in the size of the EB-5 Project, as long as the nature of the EB-5 Project remains unchanged (so as to frustrate the job creation methodology, or the job creation

totals -- as just two examples), it should not be considered a material change. However, USCIS has never addressed the specific issue of change of project ownership in the Policy Manual or elsewhere. Nevertheless, the NCE must consider these issues when analyzing the best course of action to protect the residence benefits of the EB-5 Investors, and the NCE should thoroughly review all of the relevant facts and circumstances with its lead immigration attorney for this purpose.

**C. A Protocol for Analyzing Available Remedies and Outcomes for an EB-5 Project in distress. Based upon the issues described above, when an NCE becomes aware that its EB-5 Project is experiencing distress, the following steps should be taken:**

**1. Review the NCE’s investment documents.** The NCE should review with its business legal counsel the NCE’s loan documents or equity investment documents to determine its rights and remedies under those agreements. The available remedies will initially be determined by those agreements.

**2. Review any senior loan documents and intercreditor agreements between the NCE and senior lenders.** The NCE should review with its business legal counsel the senior loan documents, and in particular any intercreditor agreement entered into between the NCE and any senior lender. The intercreditor agreement may prohibit the NCE from taking certain actions, even if those actions are permitted under the NCE’s own loan or equity investment documents with the EB-5 Project Owner. The NCE should not send any written notices to either the EB-5 Project Owner or senior lender without first understanding the consequences under the senior loan documents. For example, if the NCE sends a notice of default under the NCE’s loan documents with the EB-5 Project Owner, it could result in an event of default under the senior loan agreement, which could accelerate a foreclosure action by the senior lender. The

*Continued On Page 30*

*Continued From Page 29*

NCE will usually want to avoid such an outcome, for the reasons explained earlier in this article.

**3. Determine the remedies available to the NCE based on all of the relevant agreements.** Together with its business legal counsel, the NCE should conduct a thorough analysis of the facts and circumstances that will determine the best course of action to preserve the NCE's interest in the EB-5 Project. Among other issues, the following should be considered: Can the NCE take any action against the EB-5 Project Owner, or is it prohibited from doing so under intercreditor agreements? If the senior lender might bring a foreclosure action (even if it has not yet done so), what action could the NCE take to protect its investment in the EB-5 Project? What is the amount of the senior loan that would need to be paid off? Does the NCE have a right to cure a senior loan default – if so, what amount would be required to pay off the senior loan default amount? What is the viability of the EB-5 Project in its current state? Does the NCE have resources available to take over the project, or possible sources of a “white knight” the NCE could work with to save its investment in the EB-5 Project? All of these and other issues unique to each EB-5 Project must be considered by the NCE in determining the appropriate course of action.

**4. Obtain records from the EB-5 Project Owner necessary to determine jobs created to date.** When an EB-5 Project defaults on senior loan or on the NCE's loan or equity investment, it will often mean that the EB-5 Project Owner is in economic distress and may be in danger of losing control of the EB-5 Project. Before that happens, the NCE must obtain the records it will need to demonstrate that the EB-5 Project Owner received the EB-5 investment proceeds, and used those proceeds, together with any other funds, to complete some or all of the EB-5 Project. Once those records are obtained, the NCE should ask its economist to prepare an update to the economic report

demonstrating the jobs that have been created as of that date. This will allow the NCE to determine if sufficient jobs have been created, which will influence the potential actions the NCE should consider in its analysis of all possible means to protect its investment in the EB-5 Project.

**5. Analyze the immigration status of the NCE's EB-5 Investors and the effect on their residence eligibility from the potential actions and outcomes that could occur as a result of the economic distress of the EB-5 Project.** Would any action or outcome result in a “material change” to an EB-5 Investor's application? Would any particular action or outcome be more favorable to EB-5 Investors from an immigration perspective? This analysis will largely be informed by whether or not sufficient jobs have been created in the original EB-5 Project. The NCE needs to have all of the relevant facts regarding the status of the EB-5 Project and the status of senior financing available in order to discuss immigration status issues with the NCE's lead immigration counsel.

**6. Determine a best course of action and discuss with the EB-5 Project Owner and relevant third parties.** Any action that might be taken by an NCE will need to be coordinated with the EB-5 Project Owner, any senior lenders, other existing major investors and potential third-party purchasers. Before any discussions, however, it is critical that the NCE discuss and determine a strategy with its business legal counsel, to determine the best method of communication with the parties involved. Premature action or discussions could impede the ability to implement the NCE's strategy.

**7. Determine the best method and timing of communication with EB-5 Investors.** The manager or general partner of an NCE has a fiduciary duty to its EB-5 Investors to keep them informed of material developments affecting the EB-5 Investors. However, before any communication with EB-5 Investors, the NCE must have determined its strategy,

because it may be necessary to maintain confidentiality in order to execute on that strategy and best protect the EB-5 Investors' interests. This also requires discussion with the NCE's business legal counsel before proceeding with any communications to EB-5 Investors. The NCE should also seek to explain to the EB-5 Investors the status of the EB-5 Project, whether the job requirements have been satisfied as of that date, the factors the NCE believes require the action the NCE has determined to take, and the reasons why the NCE believes the action taken by the NCE is best possible course of action available to protect the interests of the EB-5 Investors.

**8. Document the NCE's considerations and reasons for its decisions.** The NCE will potentially face claims brought against it by EB-5 Investors if they lose their investment, even if the NCE has done everything possible to protect the EB-5 Investors under the circumstances. The best defense the NCE will have against claims brought by its own EB-5 Investors is good documentation of the facts and circumstances that existed at the time, and the reasons for the NCE's decisions and actions. The NCE cannot always prevent the loss of the investment by EB-5 Investors, but it can and should be prepared to document the reasons why it took the actions it did in good faith and in the exercise of reasonable business judgment based on the facts and circumstances. This may help avoid claims brought against the NCE by EB-5 Investors, or if claims are filed, will help the NCE to defend its actions.

### Conclusion

NCEs with investments in EB-5 Projects under financial distress must remain in close contact with the EB-5 Project Owner to maintain sufficient knowledge of the status of the EB-5 Project, particularly use of EB-5 investment proceeds and job creation, and the status of senior loans secured by the EB-5 Project. In these difficult times, all NCEs must be vigilant in monitoring their EB-5 Projects to protect the interests of their EB-5 Investors. ■