REGIONAL CENTER BUSINESS JOURNAL

May 2021

THE EB-5 REFORM AND INTEGRITY ACT OF 2021

A NEW DAWN FOR EB-5

BEHRING REGIONAL CENTER V. DEPARTMENT OF HOMELAND SECURITY AND THE CASE FOR COMMON SENSE

EB-5 REFORM & INTEGRITY ACT SECTION-BY-SECTION SUMMARY

REAUTHORIZATION OF EB-5 PROGRAM CRITICAL TO NATION'S ECONOMIC RECOVERY

THE RISE OF CITIZENSHIP BY INVESTMENT, E-2; EB-5 PROGRAMS AS A HYBRID IMMIGRATION; INVESTMENT VEHICLE TO THE U.S.

WHAT THE LATEST UNEMPLOYMENT DATA TELLS US ABOUT THE TRENDS AND DISTRIBUTION OF EB-5 TEAS

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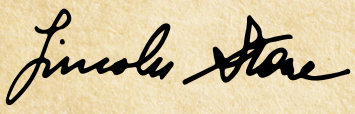
IIUSA
INVEST IN THE USA

Letter from the Editor

Dear Readers:

The EB-5 Regional Center Program is on the precipice. This edition of the *Regional Center Business Journal* is published less than 6 weeks before the June 30, 2021 sunset date. The EB-5 Reform and Integrity Act, introduced in both the Senate and the House of Representatives earlier this year, seeks to reauthorize the Program for 5 years and to establish welcome integrity reforms. While the advocacy work and policy discussions heats up in Washington, the work of EB-5 stakeholders continues throughout the land.

This edition of the RCBJ provides insights on what new reform legislation would likely change about the Program. It also reflects certain trends in conducting EB-5 business and in USCIS adjudications of investor petitions. We hope this edition is informative and useful to your business.



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in EB-5 Capital Raised

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Projected American jobs

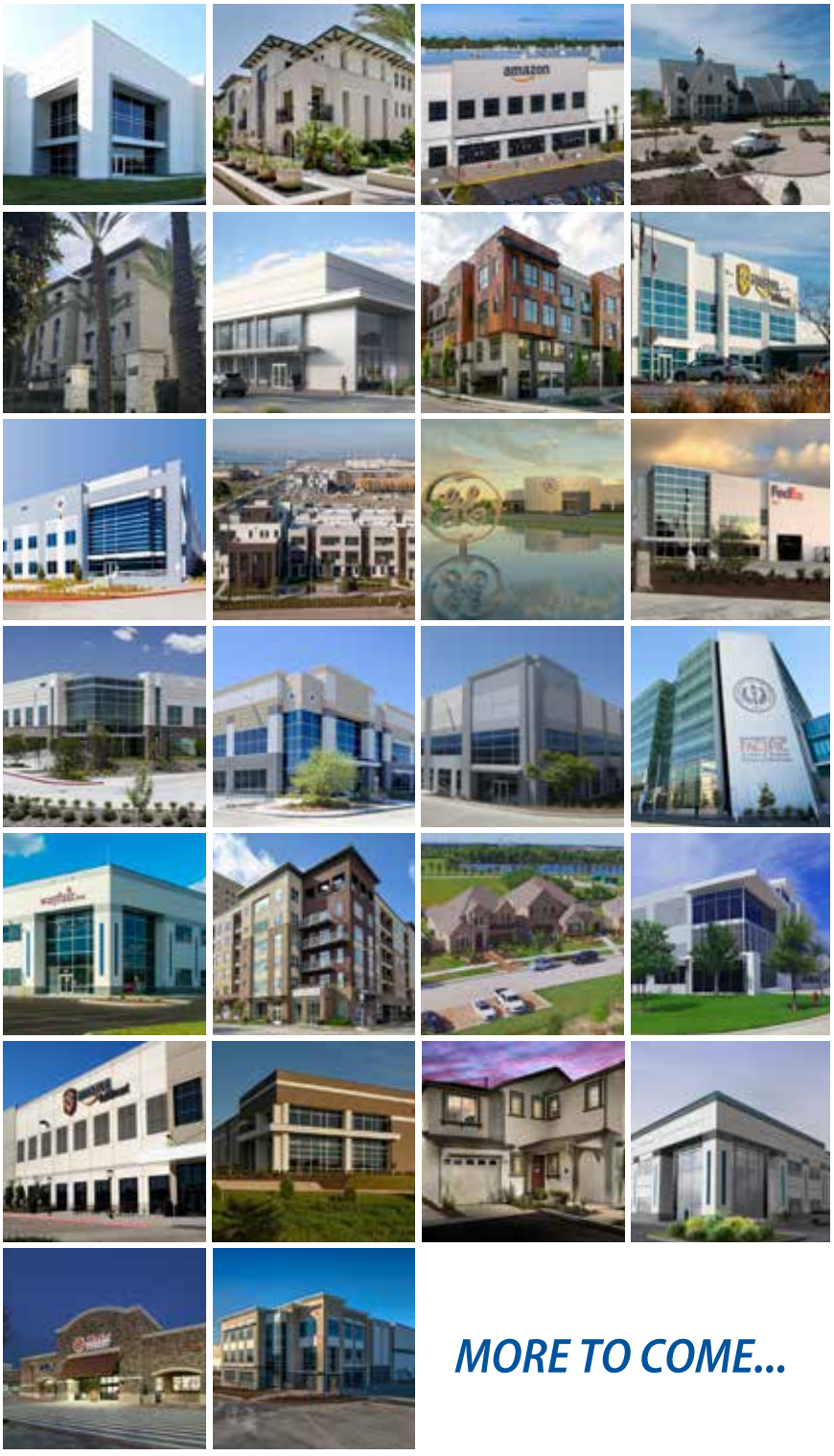
100%
Project Approval Rate

32
Partnerships

26
Partnerships with I-526 Approvals

17
Partnerships with Loan Repayment

6
Partnerships with I-829 Approvals



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The Rise of Citizenship By Investment, E-2, & EB-5 Programs as a Hybrid Immigration & Investment Vehicle to the U.S

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Introduction

In the past few years, the EB-5 industry has begun to explore the intersection of global Citizenship By Investment Programs ("CBI") and U.S. investment programs, such as E-2 and EB-5, to create a new hybrid investment and immigration vehicle to the U.S. This approach has gained traction recently due to longer USCIS processing times and EB-5 visa backlog because it provides a short-term and long-term immigration strategy. This article addresses background information on the programs, explores sample case studies of a CBI/E-2/EB-5 conversion, and finishes with closing thoughts and insights that should be considered as part of the investment structuring and immigration planning process.

A New Investment & Immigration Vehicle

Anyone attending investment seminars or conferences during recent years will have undoubtedly noticed other countries vying for the same investors and High Net Worth Individuals ("HNWI") as the E-2 and EB-5 programs, including Grenada, Turkey, Malta, Australia, Portugal, and Canada.

As some savvier agents and professionals have discovered, some CBI programs may actually work in conjunction with the E-2/EB-5 programs. Namely, investors from backlogged countries can invest in a country with a qualifying Trade (E-1) or Investor (E-2) Treaty to acquire a second citizenship and subsequently use that citizenship as a bridge to enter the U.S. on an E-2 visa. The holy grail of course, is being able to successfully convert the E-2 investment into a qualifying EB-5 visa to permanent residency in the U.S. The interplay between E-2 and EB-5 programs is especially relevant given the increasing popularity of other countries raising

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PROGRAM	CBI	E-2	EB-5
TIMING	~6 mos.	6 mos. to 1 yr.	Depends on backlog
PROGRAM	$200K to $350K	$200 to $300K	$900K to $1.8M

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capital through their own CBI programs. Thus, we now have a new roadmap to the U.S. which is illustrated above[1].

Although it sounds good in theory, in our experience, most migration agents or professionals have focused on the CBI portion of the process, instead of laying out a possible 5-to-7-year roadmap that incorporates the E-2 and EB-5 investment portions of the investor's journey, including potentially requiring investors to not just fund the initial E-2 investment, but potentially $900K to $1.8M to qualify for EB-5[2].

As we discuss in more detail below, a major roadblock is after the passport for the qualifying E-2 country is acquired, not many migration agents or professionals have identified or structured a business investment that will satisfy both E-2 and EB-5 components (after all, as beautiful as Grenada may be, most journeys do not end there). Done correctly, it is possible to engineer an alternative (and possibly quicker) path to the U.S. and ultimately attain a green card by combining CBI and E-2/EB-5 programs, but it requires careful planning from the beginning.

Case Studies: Planning & Structuring Considerations for Using E-2 Businesses to Qualify as EB-5 Investments

Part of this critical planning relates to the investment opportunities being offered, the individual investor's circumstances, and their primary goal surrounding U.S. immigration. Immigration counsel's role can vary dramatically depending on their given role in a deal, and whether they are representing the individual investor, the U.S. business, or the migration agent.

Hybrid Vehicles for Individual Immigration/ Investment

For example, say an immigration firm is currently handling an E-2 case for a foreign national that acquired citizenship through his or her investment in Grenada. This client now wants to enter the U.S. on an E-2 visa to open an interior design firm that includes import/ exporting of furniture and home furnishings. The first question that should be asked in that situation is whether his or her ultimate goal is permanent residency. If so, counsel should chart out a 5- or 7-year business plan (or longer) to ensure that they can qualify through the E-2 program, the business is capable of converting to an EB-5 investment, and ultimately, whether it can create the 10 jobs necessary to support the EB-5 petition. On the other hand, even if the client is unsure of their exact future immigration plans at the moment, it may be helpful for counsel to advise on a flexible corporate structure with a holding company that is able to add additional future businesses along the way to allow the client to hedge their future immigration and business plans.

Moreover, a competent and reliable business plan writer is critical for this endeavor, as they must understand both the firm's legal analysis as well as the goals of the U.S. business. Ideally, the business plan writer will work closely with counsel as they chart out employment projections, expansion plans, and financial targets that will take into account when the remaining capital is needed. For example, one basic foreseeable issue that should be tackled from the outset is the determination of what the remaining investment capital will be used for. Although easy to claim the remaining funds are for working capital, it is advisable to demonstrate the specific areas the funds will likely be earmarked for (and why it is needed for the business' operations) to increase the credibility of the business plan. For the client above, one could point to a boom in demand for online home shopping, future orders (especially pre-paid ones from their suppliers), and the possible lease or acquisition of a larger showroom/warehouse. Employment and staffing needs would similarly scale.

Another important consideration regarding timing is when does the investor want to complete the investment to lock in TEA eligibility, including the timing in which the investor wants to release the funds directly into the NCE/business. The obvious question asked is whether the entire qualifying EB-5 investment should be invested upfront or if the client can file with partial funding and a commitment to invest. The optimal answer must take into account the investor's risk tolerance and need for capital. The cleanest situation is if the entire $900K (or $1.8M) is invested wholly upfront to ideally preempt a Request for Evidence ("RFE").However, for funding flexibility purposes, if the investor decides a partial investment is desired, it would be advisable to lay out a realistic timeline to complete funding so that either an interfiling or a ready response to a future RFE is available.

Moreover, is the investor also looking to invest in a new franchise opportunity or looking to acquire or expand a U.S. business? This is especially critical given COVID-19's depression of employment rates which may create acquisition/expansion opportunities where none existed before. Other factors to consider are the corporate structure of the U.S. business, how best to hedge/ retain maximum flexibility for business and immigration purposes (as stated above, perhaps a holding company that will be able to slot in future businesses as necessary if the investor wants to use those businesses to qualify for EB-5), and the effect an owner obtaining US permanent residency may have

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1 All amounts are estimated and can vary depending on timing and ultimate nature of investment.
2 Please note that due to the ongoing COVID-19 pandemic, consulate processing times are inherently unpredictable at the moment and will likely take longer due to an unprecedented backlog.

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on other E-2 visa holders working for the company, as well as E-2 visa duration and immigrant intent. Note, this is a very case-specific issue, and it is best to seek a thorough understanding from immigration counsel to help rebut any presumptions of immigrant intent, such as strong home ties and evidence of future return.

Hybrid Vehicles as Project Financing for US Businesses & Agents

While the above example may work for an individual investor, the analysis and standards listed above change dramatically if approached from the perspective of U.S. businesses and migration agents seeking to create such hybrid vehicle options.

In many cases, U.S. businesses and migration agents will both encounter the same fundamental issue: inventory and scalability. Direct investments have been around since the dawn of EB-5, but the same problems that prevent most direct EB-5 investments from being sold at scale will hinder most businesses from being sold as E-2 (or L-1) investments, unless certain conditions are met, namely, limited inventory for the amount of resources that must be committed. After all, creating a new offering for only 2 or 3 units every time will quickly balloon the ultimate cost of capital for a business.

Thus, a U.S. business and agent that wants to create a hybrid investment program to raise money on the scale of a pseudo-Regional Center will have to consider several factors, including:

- **Ample & Predictable Inventory:** If an agent has 50 investors, does the U.S. business have adequate inventory? Or is it a new concept that, although promising, has only 2 locations.
- **Predictable Investment Terms:** E-2 (and L-1) investors do not make decisions overnight and the closing process can be longer than an EB-5 investment. The U.S. business will ideally have a constant deal structure that is easily understood and will survive new sales/marketing people being hired by their partners around the world.
- **Track Record of Managing Multiple Locations & Operators:** While there may be promising brands and concepts in the marketplace, what the client and agent may not always be aware of is that they may not be dealing with the master franchisor and may be dealing with a new franchisee with limited track record. In other words, you may be investing in a Starbucks, but the franchisee that was awarded the Starbucks contract may have only one or two locations under management.
- **"Developing and Directing" - Management Systems & Organizational Structure:** Though the investor is undoubtedly in charge of ultimate policy making and direction, who will help support the U.S. investor as he or she grows the U.S. enterprise? Will there be a proven multi-unit operator familiar with the U.S. business that will help support the U.S. investor if needed? Are there predictable staffing and employment needs that will support an EB-5 petition?

  Put another way, it is well understood that the owner of a hotel is usually not the day-to-day operator of the hotel – yet the owner will still maintain full control and direction over the hotel's business. It is thus critical that the U.S. business has systems in place such as Standard Operating Procedures, cloud-based management software, organized meeting minutes, etc. that are readily available to help the investor run and track information anywhere in the world. This will especially be critical as a business grows to even 10 or 20 units. In any event, it is critical that immigration counsel and the business make it clear that the investor retains sufficient rights and power to ensure they meet the E-2 requirement to develop and direct a business, regardless of whether a third-party manager or operator is in control. Again, this is a case-specific situation and the company's bona fide organizational and business structure will be the best evidence here.
- **Partial Investments & Financing:** Depending on the flexibility and resources of the U.S. business, it may be possible for an E-2 investor to file for an I-526 based on a partial investment and complete the funding of the business in the future with either profits or dividends (paid to the investor after any applicable taxes due) or even credit lines/unsecured loans in the name of the investor (see Zhang v. USCIS).
- **Standardized Immigration & Business Documents:** Similar to EB-5 offerings, it's advisable to have immigration counsel work closely with the U.S. business to standardize or template the necessary business and corporate documents, as well as to train and oversee the work of an agent's case processing team to ensure smooth processing of new cases.

These are but a handful of issues, and the parameters and players in each deal will dictate the ultimate deal terms. Creativity and flexibility among the key players will be paramount, and it's predicted that as EB-5 offerings evolve over time, so will these hybrid vehicles.

Closing Thoughts

The simplest investment path to the U.S. has, and always will be, the EB-5 Regional Center program. However, a new area brings new opportunities. Unfortunately, many of these issues are those of first impression and different consulates may have more stringent adjudication, so there will likely not be crystal clear answers or a consensus within the industry on the best way to move forward. Moreover, as complex as the underlying legal and business issues may be, they are dwarfed only by the difficulty of assembling a competent professional team from around the globe that understands these issues from a variety of immigration, business, and investment industries. These hybrid immigration investment models are certainly not for everybody, but forward-thinking groups around in the world have already poured countless hours because they all see the same opportunity and market demand. Either way, as investment and immigration programs continue to evolve, so will more paths to the U.S. and the more opportunities that will ultimately develop for the EB-5 industry.

We would like to thank our law clerk, Ms. Swati Paul, for her contribution and work on this article.

The Corporate Rights of EB-5 Investors:

How to Navigate the Legal Maze of Redeployment and Liquidation Once the EB-5 Investment is Repaid

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The Corporate Rights of EB-5 Investors: How to Navigate the Legal Maze of Redeployment and Liquidation Once the EB-5 Investment is Repaid

As the EB-5 Program matures and more projects reach the "exit" stage, investors are faced with new challenges and issues regarding their investment. These issues include the redeployment of their capital by the new commercial enterprise (NCE) or the return on their investments.

To qualify for a permanent EB-5 green card, an investor must show that their EB-5 investment funds remained "at-risk" throughout the two-year conditional residence period, which begins only when the conditional green card is issued to the investor. Most EB-5 investments are structured as either a loan or equity investment, where the NCE extends a loan or invests in a job-creating enterprise (JCE).

Generally, these loans/investments have an initial term of five years and include the possibility of one or two one-year extensions. This five-year term became the industry standard because it typically took that same amount of time for most investors to complete the immigration process. Now, due to visa backlogs for certain countries, some investors may have to wait 10 years – or even longer in some cases – to become eligible for permanent residence. As a result, projects structured with five-year terms are reaching maturity (possibly even after exercising extensions) before investors from back logged countries can complete their immigration process.

According to USCIS policy, after the original EB-5 project is complete and the JCE repays the loan or equity to the NCE, the money cannot simply sit in the NCE's bank account. It must be "redeployed" again so that the investors can satisfy the EB-5 Program's at-risk requirements until the end of the investors' two-year conditional residence period.

In addition to the fundamental "at-risk" principle, redeployments must meet several additional criteria, including:

- The redeployment can only occur once the entire investment has been deployed to the JCE, the JCE has created all the required jobs, and most of the goals set out in the original business plan have been met.
- The redeployment must be within the regional center's geographic area, including any amendments to its geographic area approved prior to redeployment.
- The redeployment must take place within a commercially reasonable amount of time.
- The redeployment must be consistent with the purpose of the NCE to engage in the ongoing conduct of lawful business (including as may be evidenced in any amendments to the NCE's charter documents made to describe the further deployment into such activities).

The EB-5 Project Has Repaid the NCE:

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The Corporate Rights of EB-5 Investors:
How to Navigate the Legal Maze of Redeployment and Liquidation Once the EB-5 Investment is Repaid

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What Now?

After years of waiting patiently, investors may be informed that the NCE's EB-5 loan or investment has been repaid to the NCE. At such time, the NCE's partnership or operating agreement will govern (and possibly provide specific mechanics) with respect to such proceeds. For example, the NCE's governing documents could provide the manager or general partner the right to act with respect to redeployments without the need for investor consent or input, be silent on the issue or provide certain rights to the investors regarding the selection of a redeployment project.

To the extent the governing documents are silent or ambiguous as to redeployments, an investor may be faced with the choice of either (i) allowing the NCE to redeploy the investment funds on his or her behalf in order to continue satisfying the "at-risk" requirement or (ii) requesting the withdrawal or liquidation of the investment (whether because the two-year conditional green card period has been completed or because the investor no longer wishes to proceed with the EB-5 immigration process).

Redemption or Liquidation: Can I receive my capital?

For the capital to be "at risk" there must be a risk of loss and a chance for gain. Matter of Izummi held that entering into a redemption agreement is, in effect, entering into a debt arrangement and is prohibited by 8 C.F.R. § 204.6(e). 22 I&N Dec. 169, 188 (Assoc. Comm. 1998). "For the alien's money truly to be at risk, the alien cannot enter into a partnership knowing that he already has a willing buyer in a certain number of years, nor can he be assured that he will receive a certain price. Otherwise, the arrangement is nothing more than a loan .... " Id. at 186.

Therefore, in no event may an EB-5 investor enter into a redemption agreement prior to the end of the two-year period of conditional residence. The immigrant investor must go into the investment not knowing for sure if he or she will be able to sell his or her interest at all after obtaining the unconditional permanent resident status, and if the investor is successful in selling the interest, the sale price may be disappointingly low or surprisingly high.

When this time comes, investors need to fully understand their rights and obligations under the governing documents of the NCE where they invested their capital, as well as the offering documents pursuant to which they invested. The main agreement that will describe the rights and obligations of the investor will be the Limited Liability Company Agreement or Partnership Agreement of the NCE.

Because of the forementioned "at-risk" requirements, the governing documents would not contemplate liquidation or redemption of the investment after the approval of investors' I-526 petition. The project's private placement memorandum (PPM) may briefly describe how the NCE will handle redeployment after the first project is completed and the loan is repaid. EB-5 offerings are securities offerings and as such, are subject to the anti-fraud provisions of the Securities Exchange Act of 1934. In particular, securities issuers are prohibited from making material misstatements and omissions of any material facts in their offering documents. Although the PPM is generally considered an offering document rather than a binding contract, any statements regarding redeployment need to be consistent with the governing documents of the NCE and should include any material facts to ensure that the information provided to the investors is not misleading.

As a result, redeployment is rarely accounted for in the governing documents much less the additional guidance that we now see codified in EB-5 Program guidelines. Although many projects have reached out to investors to make the necessary amendments to their governing documents (for example to add voting rights for the investors to select for or against a potential redeployment target or simply permitting the reinvestment of capital), others have not and as such the investors will likely have limited rights to demand a say in the redeployment and/or return of capital. The investors should evaluate their rights to liquidate or redeem their interests and understand under what circumstances this could be feasible and/or practicable.

It is important to focus on the following issues and questions when evaluating these rights under the governing documents:

1. What are the notice requirements under the agreements and whether a prior notice to the investors is required to effect a redeployment?
2. What are the conditions to request a redemption or liquidation, such as number of votes that may be required to approve such request or any other applicable voting mechanics, limitations or restrictions (e.g., requirement for a certain number of all of Forms I-829 or time that needs to have passed since the time of the investment)?
3. What are the documents or agreements necessary to request such liquidation or redemption?
4. What are the voting and other requirements to amend the governing documents, in the event that an amendment is necessary or recommended?
5. Is redeployment permitted under the agreements and if so what

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The Corporate Rights of EB-5 Investors:
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> are the powers of the Manager or General Partner in choosing a project to redeploy capital and what are the investors' rights regarding such decision?

Investors also should be able to then compare what is in the governing documents to what was disclosed in the PPM regarding the issues of liquidation/redemption and redeployment. These documents will also include the Subscription Agreement, Manager's Management Agreement and Business Plan, among others. The disclosures in the different agreements and offering documents need to be in compliance with the applicable securities laws, including the anti-fraud rules.

The investor should also look carefully at the NCE's periodic communications and reports provided to them to determine if any changes, revisions, or requests were implemented or proposed. While it generally true that Managers or General Partners have broad powers under the governing documents of an NCE, often investor consent is required for certain major actions, like redeployment. It is likewise important to evaluate all of these agreements and communications to ensure that the Company and the Manager or General Partner of the NCE have been in compliance with their respective obligations under the governing documents and the securities laws.

Finally, since EB-5 investments are securities and the offering must be in compliance with applicable securities laws, it is important that the PPM and related offering documents, governing documents, and subsequent communications are consistent and provide adequate disclosures. Inconsistent statements, if material, may give rise to securities claims against the NCE and its manager or general partner based upon a material misrepresentation or omission in violation of the securities anti-fraud rules or other applicable securities laws.

Redeployment

Depending on the financing structure and the provisions of the NCE's governing documents, as well as where an individual investor may be situated from a financial and immigration perspective, investors could be required to redeploy their capital or wish to redeploy their capital. These investors who wish to redeploy their investment in order to continue meeting the requirements of sustaining the investment "at risk" may have many questions and concerns about their rights, the new proposed investment and the risks related thereto.

This can be a very confusing and stressful process to the investors, because unlike the initial project where an investor was able to evaluate and determine the likelihood of success of the project and the related investment risks, things may not be that clear with redeployment which is, in most situations, essentially an investment of pooled funds initiated and controlled by the NCE on behalf of its investors.

It is important for the investors not only to understand their rights under the governing documents, but to be able to gather the necessary information and familiarize themselves with the interplay between the investment status and the immigration application process. Generally, in the event that the EB-5 investment is repaid to the NCE, the investors should expect a Notice to Investors or similar communication informing them of the general terms of the repayment and possibly raising the issue of redeployment. If the governing documents do not allow redeployment or other actions, investors should expect a proposed amendment to the governing documents to be provided also.

Investors may not be aware, but they generally have rights to inspect the books and records of the Company under applicable law. As an example, in the state of Delaware which is one of the principal jurisdictions where corporate entities are organized, investors have various rights to access the books and record of a corporate entity. In Delaware, a member of a limited liability company can, upon reasonable demand for any purpose reasonably related to the investor's interest as a member of a limited liability company request the following:

> (1) True and full information regarding the status of the business and financial condition of the limited liability company;
>
> (2) Promptly after becoming available, a copy of the limited liability company's federal, state and local income tax returns for each year;
>
> (3) A current list of the name and last known business, residence or mailing address of each member and manager;
>
> (4) A copy of any written limited liability company agreement or partnership agreement, as applicable, and certificate of formation and all amendments thereto, together with executed copies of any written powers of attorney pursuant to which the limited liability company agreement or partnership agreement and any certificate and all amendments thereto have been executed;
>
> (5) True and full information regarding the amount of cash and

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The Corporate Rights of EB-5 Investors:
How to Navigate the Legal Maze of Redeployment and Liquidation Once the EB-5 Investment is Repaid

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> a description and statement of the agreed value of any other property or services contributed or to be contributed by each member, and the date on which each became a member; and
>
> (6) Other information regarding the affairs of the limited liability company as is just and reasonable.

While some of these rights may be limited by the provisions of the governing documents, they generally cannot be eliminated altogether. Investors are therefore entitled to request information about any potential redeployment projects, including financial projections and other details about the project. This information is not only important, but essential for an investor's informed decision. Depending on the terms of the governing documents, a vote of the investors may be required to either amend the governing documents or to approve or select a project.

As these choices are complex and require the evaluation of several agreements and documents, it would also be advisable for investors to get the right corporate and immigration legal team to work with them in analyzing their rights under the law and the NCE's governing documents, as well as understanding the requirements to request and analyze the necessary documents and information of the Company.

Am I Alone: What about my fellow investors?

As the saying goes, there is strength in numbers. During this complex process, investors can and should reach out to their fellow investors in order to analyze and work with the NCE as a group. This becomes quite relevant when a majority or super majority of investors is required to make certain decisions related to the NCE. As a group, the investors also will have a stronger position to request information and make demands to an NCE regarding the situation of the entity or making decisions such as the selection of a redeployment project.

Another advantage of working as a group is that to the extent that the investors' interests are aligned, they may be able to pool their resources and reduce the impact of the legal costs associated with this process. Not always do investors find themselves aligned as a group, but to the extent that they do it makes sense to work together.

Depending on the size of the group, investors may need to designate certain ground rules about general decisions and designate a small number of representatives that will work with legal counsel during this process. Being organized would help the group achieve its goals in an expedited and cost-efficient manner.

However, in some cases, a conflict of interest may arise among the investors as the investors have different goals with respect to their investment, because each investor may be at a different stage in the immigration timeline, i.e., some may have reached the 2-year conditional green card mark, while some are probably still waiting for their I-526 priority date to become current. It is recommended that each investor seek advice from his/her own investment advisor or legal counsel.

What happens if things go Wrong?

Although we try to resolve matters amicably, sometimes conflict cannot be avoided. In these situations, it is important to understand the dispute resolution options included in the governing documents of the NCE. Investors also should carefully analyze the process and requirements to commence and continue any of these dispute resolution mechanics because failure to comply with the requirements under those documents may jeopardize investors' rights.

Generally, the governing documents would contemplate arbitration or litigation at a predetermined court. Following the right procedure and adhering to the necessary rules is key in the success of any claim or action involving investors' rights. Failure to do so could cause significant delays and additional expenses to the investors. Working with experienced legal counsel in this process is critical, as the dispute resolution options, as well as the procedures and requirements, may be very different from an investor's understanding of the United States corporate and legal systems.

Conclusion

Once an EB-5 loan or investment has reached maturity, investors could be faced with important decisions based on the status of their immigration process, as well as their financial needs. These decisions may involve reinvestment of the investors' capital into a new project and may require investors to develop a better understanding of the finances of the original project and the organizational documents of the NCE.

While investors evaluate liquidation or redeployment of their capital, the NCE needs to balance the interests of the investors who elect liquidation or redemption and of the investors who elect to redeploy their capital. To add to the complexities surrounding these cases, all this process takes place in the context of the US securities and corporate laws which impose additional obligations and fiduciary duties on the NCE and its Manager or General Partner.

As a result, it is important to work with experienced corporate and immigration counsel who can guide you through the legal maze of redeployment and liquidation.

Role of EB-5 Regional Centers: Moving into a New Era

SHERMAN BALDWIN
CHIEF EXECUTIVE OFFICER, LCR CAPITAL

The role of EB-5 Fund Managers has traditionally been focused on the investment product. They evaluate projects & developers, ensure the business plans meet USCIS guidelines, maintain the records required for investors to receive their approvals, and oversee the appropriate management of the invested capital. That role is now changing dramatically, and Fund Managers need to develop significant new capabilities to stay relevant to investors in today's EB-5 market.

Most Fund Managers focused on markets with strong agent communities like China and Vietnam. This limited the role and importance of a Fund Manager in a client's EB-5 decision making process since the agents held the primary client relationship.

Today, with the higher investment level of $900,000 and the slowdown of China as a source of investors, Fund Managers face a completely new market.

To succeed in this new environment, it is imperative that Fund Managers focus on building deep direct relationships with the clients themselves and enhancing the client experience throughout the EB-5 journey. Providing local support, ensuring that communications meet investor expectations, and providing services that go beyond the EB-5 investment will be key differentiators.

Investing in culturally sensitive local teams and globally available client servicing capabilities can be a significant contributor to establishing and maintaining valuable client relationships.

Challenges brought about by changes to the EB-5 Program

After the exciting last few years with thousands of petitions filed annually, there was a significant decrease in 2020 which can be attributed to a number of factors.

Over the past year and a half, we have witnessed significant changes including the increased investment amount, a new definition of TEA zones, and unprecedented delays in processing times and in the allocation of visas. Add to these factors political and social events that occurred in the US and the negative impact created by the Covid-19 pandemic, which only created a greater urgency driver for industry players to innovate in order to survive and thrive.

The pandemic has made business harder across the industry, but it has also stirred interest from around the world for immigration options. Investors are more focused than ever on the importance of a safe living environment, strong educational institutions, better healthcare options, open and flexible business environments, and access to professional opportunities. They are looking for a more holistic approach to legacy planning, with services addressing overall standard of living and their family's future.

Disruptive Thinking & Engaging Beyond EB-5

Fund Managers can no longer rely solely on raising capital and funding construction projects. To be successful in this new market, the Fund Managers must make two important shifts: the first is changing how Fund Managers work with clients, and the second is providing a broader scope of value added services.

Fund Managers must look beyond the traditional role and explore different ways of engaging with clients, both during and after the success of the EB-5 visa process.

Adding Value to the Client Experience & their Transition to the US

What may not occur to many is just how challenging a transition for an individual, and more so for a family, can be when they decide to move to the US. Without having experienced this first-hand, it is oftentimes difficult to fully understand that EB-5 immigrants to the US do not settle in quickly. What many people consider standard procedures may not actually be that easy nor simple for new immigrants.

Many new immigrants face challenges when navigating even the very basic essentials for everyday life in the US: things as simple as setting up their bank accounts, getting a driver's license, applying for credit cards, getting health insurance, and leveraging their Green Cards for educational and professional opportunities. The cultural and practical challenges of moving from one's home country to the US should not be overlooked, and represent an opportunity for a truly client-centric organization to deliver meaningful value to these immigrant families.

Providing value added services can be extremely important to immigrants who may be overwhelmed by the things they need to do in order to fully assimilate to the US. Supporting clients through these challenges can be a significant factor in improving their experience and building trust.

Focusing on the Family

Families that can afford an EB-5 investment expect and deserve a quality of service that is commensurate with their net worth. It is not enough to focus solely on the EB-5 investment; it is equally important to offer solutions that can create multi-generational relationships with the family. The trust built with EB-5 families can further strengthen their relationships with the Fund Manager, allowing them to provide a more robust set of value added services to these families.

To better meet the needs of clients, both during their EB-5 process and beyond, Fund Managers should explore new revenue streams by providing additional services that are highly relevant to the EB-5 investor's transition experience. Fund Managers can both create additional value for their clients and expand the scope of their own business beyond EB-5 investments.

Fund Managers need to work with a new client focused mindset to succeed in this new market.

Frequently Asked Questions (FAQs)

IIUSA, the national, membership-based, 501(c)(6) not-for-profit, industry trade association for the EB-5 Regional Center Program,1 prepared these FAQ to address the most common questions received concerning the reauthorization of the EB-5 Regional Center Program on June 30, 2021.

1. What does reauthorization mean?

Reauthorization refers to the legal authority to continue the EB-5 Regional Center Program, which was established by the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (Public Law 102-395, Section 610(b)) with an initial five-year term. Over the past 29 years, the program has been extended for various intervals of time, and most recently, for shorter intervals, because the program authorization was included in the omnibus, the government's annual spending bill. Currently, the program has been extended through June 30, 2021, as authorized in Public Law 116-260 Consolidated Appropriations Act, 2021, Division O, Title I Immigration Extensions, but it must be reauthorized to continue after that date.2

2. Does IIUSA expect reauthorization on June 30, 2021?

Yes, if the EB-5 industry acts in coordination, IIUSA believes the EB-5 Regional Center Program, a sustainable and critical thread to U.S. economic development, which has over 30 years of bipartisan support, will be reauthorized. Regional centers account for billions of dollars in EB-5 capital formation that have created tens of thousands of jobs in American communities at no cost to the U.S. taxpayer.3

3. What is different about the June 30, 2021 reauthorization?

Reauthorization of the EB-5 Regional Center Program on June 30, 2021 will likely depend upon stand-alone legislation. Historically, the program was attached to the spending bill that funded either the Department of State or the Department of Homeland Security (or its predecessor agency, Immigration and Naturalization Services). Spending bills, although frequently delayed because of political debate, are always expected to pass because they fund the government. Inclusion of the program in spending bills helped provide assurance of reauthorization alongside government funding. But, in December 2020, the program was "decoupled" from the spending bill, which means it was separated from it. The reason for the decoupling is unknown, however, if the program is not attached to an existing bill, the decoupling provides the opportunity for it to receive attention as a stand-alone matter where both the program's challenges and its powerful impact on our economy can be addressed.

4. How is IIUSA involved in advocating for reauthorization?

IIUSA's mission includes serving as a strong, unified voice for permanent authorization and improvement of the EB-5 Regional Center Program. To that end, IIUSA is working diligently to ensure that the program's reauthorization is either attached to an existing bill or that it is addressed in a stand-alone bill.

In late 2020, Senator Grassley and Senator Leahy – the two Senators most invested in reforming and reauthorizing the program – reached out exclusively to IIUSA to help shape a good-government bill to (1) instill integrity reforms into the program and (2) provide the program with a stabilizing, five-year reauthorization. IIUSA negotiated with Senators Grassley and Leahy to draft and enact the EB-5 Reform and Integrity bill.4 It includes these key components - integrity reforms and a five-year reauthorization. IIUSA is now working with Senators Grassley and Leahy to have the bill introduced and passed into law before June 30, 2021.

1 https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor-regional-centers

2 Section 610(b) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (8 U.S.C. 1153 note) shall be applied by substituting 'June 30, 2021' for 'September 30, 2015.'"

3 https://iiusa.org/resources-data/eb-5-economic-impact/

4 https://iiusa.org/wp-content/uploads/2020/12/EB-5-Reform-and-Integrity-Act-2020-Final-Language.pdf

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IIUSA will continue to educate communities and policy-makers about the jobs that the EB-5 Regional Center Program creates and saves. IIUSA will also work to illustrate that our country must continue to benefit from the meaningful economic impact that the program provides during this time of economic recovery in the wake of the COVID-19 pandemic.

IIUSA's focus includes:

- Building a coalition of those who have benefited from EB-5 Regional Center Program investment, including mayors, chambers of commerce, and businesses that have been impacted by the COVID-19 economic crisis – specifically, the hospitality, travel, and health care industries;
- Leading a media campaign to promote the EB-5 Regional Center Program's economic impact in key media markets, with focus on markets where legislators have the strongest influence over the program's reauthorization – New York City, Chicago, San Francisco, Silicon Valley, and Washington, DC; and
- Communicating directly with members of Congress and their staff to champion the EB-5 Regional Center Program and the EB-5 Reform and Integrity bill.

5. Has a new bill been introduced to reauthorize the EB-5 Regional Center Program?

Not yet. If reauthorization is to be accomplished via a stand-alone bill, IIUSA advocates for the introduction of the EB-5 Reform and Integrity bill. Timing of any such introduction, however, is presently unknown.

6. What is in the EB-5 Reform and Integrity reauthorization bill?

The EB-5 Reform and Integrity bill protects good-faith investors, it protects lawfully operating regional centers and new commercial enterprises, and it provides reasonable oversight while allowing the industry's business operations to continue. It achieves the industry's goal of sound integrity reforms in a workable environment and a five-year reauthorization. IIUSA prepared a summary of the bill, as it was proposed in December 2020, that can be found at: https://iiusa.org/wp-content/uploads/2020/12/EB-5-Reform-and-Integrity-Act-of-2020-Section-by-Section-Summary.pdf.

7. Are there any other legislative proposals to reauthorize the EB-5 Regional Center Program?

No.

8. Why does IIUSA support the EB-5 Reform and Integrity bill?

The EB-5 Reform and Integrity bill is the best first step toward additional and more comprehensive reform and improvement. IIUSA supports the EB-5 Reform and Integrity bill; not merely because it is the only existing, already negotiated bill to support, but because the bill has been carefully streamlined to address what the industry agrees is needed: integrity reform and a long-term reauthorization.

9. If the EB-5 Reform and Integrity bill passes, how and when might other EB-5 Regional Center Program issues be addressed?

There is renewed, national interest in immigration reform and IIUSA believes that if the EB-5 Regional Center Program is reauthorized in June, there will be future opportunities to discuss further program

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changes.

Although virtually impossible to negotiate and pass by June 30, 2021, President Biden's Comprehensive Immigration Reform (CIR) bill[5] has been introduced in the House by Representative Sanchez and in the Senate by Senator Menendez. The introduction of CIR shows that the Biden Administration is willing to look at steps to positively move immigration programs forward. The CIR speaks directly to employment-based visas, including EB-5. Its initial White House synopsis even discussed correcting the derivative count, which would be significant for all stakeholders, but most important, to the tens of thousands of U.S. workers to be hired as a direct result of extensive EB-5 investments nationwide. The CIR conversation opens doors for the EB-5 community – as long as the EB-5 Regional Center Program is reauthorized and the industry has strongly supported the bipartisan effort to improve its integrity.

A reauthorized program will require new regulations and a revised public comment period. That administrative process will provide an opportunity to voice remaining concerns, provided that the program has been reauthorized with the proposed integrity reforms.

A stable, five-year reauthorization may also give the EB-5 community the opportunity to revisit the program in the context of a transportation bill, Opportunity Zones, or other measures related to the Departments of Commerce or Labor.

At this time, nobody can accurately predict or guarantee exactly when and how the EB-5 Regional Center Program will ultimately be extended, but if the industry remains focused on securing a long-term reauthorization through the passage of the EB-5 Integrity and Reform bill, it will be in a good position to continue to improve the program further by addressing remaining concerns such as additional visa numbers, removal of derivative visas, and other improvements.

10. What happens if the EB-5 Regional Center Program is not reauthorized on June 30, 2021?

If the EB-5 Regional Center Program is not reauthorized on June 30, 2021, it is unclear what would happen next. There could be a temporary lapse of the program or it could be discontinued permanently.

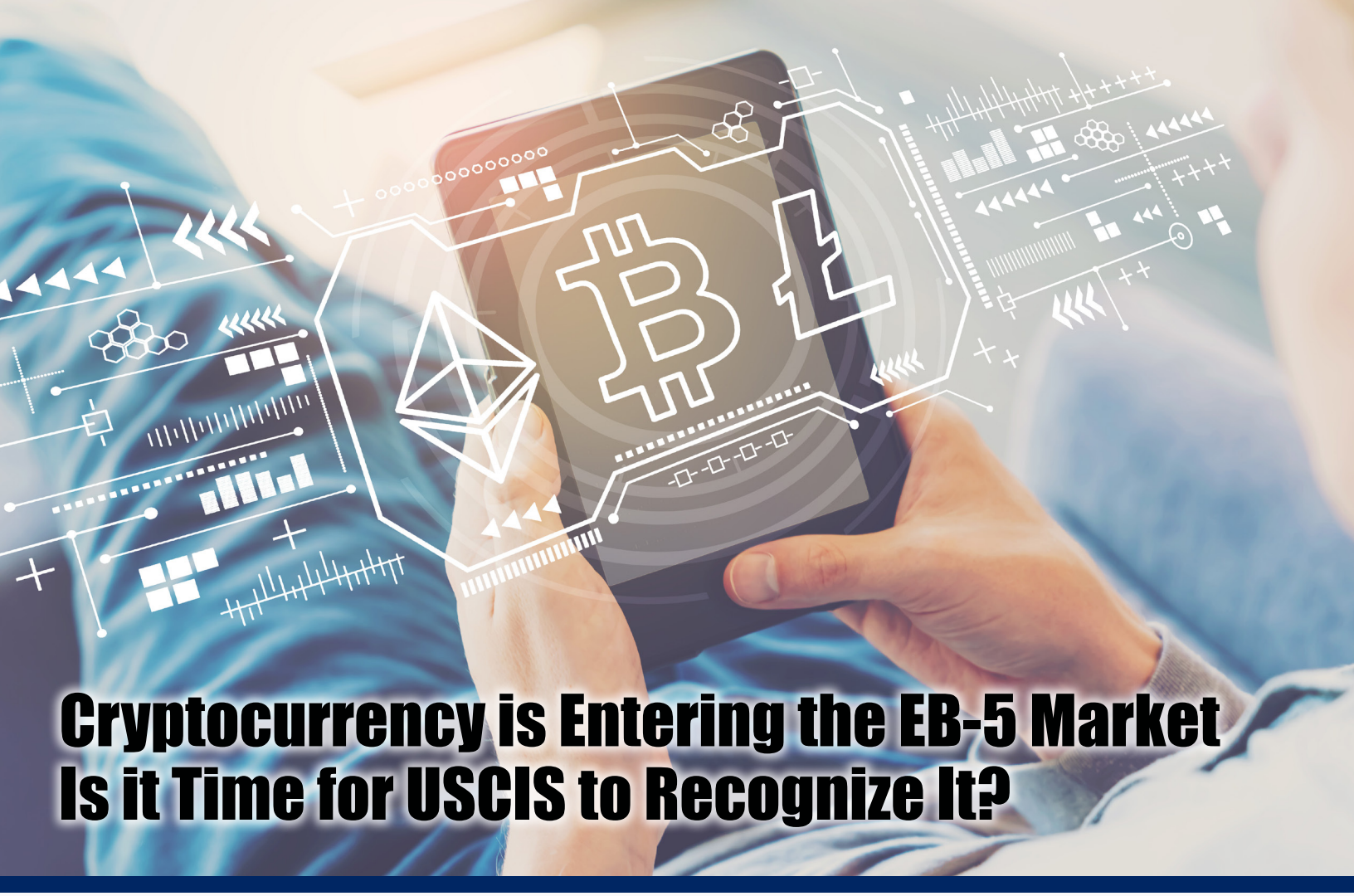
If there is a temporary lapse, immigration experts have speculated that the USCIS may hold petitions in abeyance for an undetermined period of time. The program lapsed from December 22, 2018 to January 25, 2019, during which time the USCIS communicated that: (i) I-924 applications to create new regional centers and amendments for existing regional centers would not be accepted and that pending I-924 applications would be placed on hold; (ii) it would continue to require that existing regional centers file its annual certifications (I-924A); (iii) it would continue to accept newly filed I-526 and I-485 petitions, but would place such filings on hold while all newly received petitions that were not affiliated with a regional center continued to be processed because the direct EB-5 program is permanent; (iv) it would not treat I-829 petitions filed before or after the expiration date as affected by the expiration of the program; and (v) it would resume the processing of pending petitions and

the State Department would resume the processing of visa applications as soon as the program was reauthorized.

A permanent discontinuance refers to the situation where after a prolonged period of time, all efforts to reauthorize the program are abandoned and/or legislation is introduced to permanently end the program. This has never happened before and IIUSA believes that a permanent end with no legislation to create an orderly wind-down for investors with pending applications is unlikely. The EB-5 Regional Center Program has widespread support from lawmakers as an economic development tool and job creation program. Few legislators will openly oppose a job creation tool that has proven to be effective and costs no tax dollars.

These FAQs are a publication of IIUSA, intended to provide general information and to notify EB-5 stakeholders, including EB-5 regional centers and EB-5 investors, of IIUSA's understanding and objectives regarding reauthorization of the EB-5 Regional Center Program. These FAQ are not intended as, nor should they be used, as legal advice.

5 https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/ and https://lindasanchez.house.gov/sites/lindasanchez.house.gov/files/2021.02.18%20US%20Citizenship%20Act%20Bill%20Text%20-%20SIGNED.pdf



Cryptocurrency is Entering the EB-5 Market Is it Time for USCIS to Recognize It?

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With an enormous pool of cryptocurrency capital currently in circulation, it is no longer a question whether funds that originated from crypto trade are becoming a part of the EB5 process, but rather how to present the source of these funds in a cohesive format that is compliant with the evidentiary standards of the United States Citizenship and Immigration Services (USCIS).

The unprecedented economic impact of the COVID-19 pandemic revealed a shift in the perception of asset protection mechanisms used by investors. As countries closed borders and shut down non-essential local businesses, the investment community increased its reliance on assets that are fungible, global in application, and fully decentralized – cryptocurrency. Cryptocurrency is a digital medium of exchange. The first and most famous example of cryptocurrency – Bitcoin - was described by its presumed inventor, Satoshi Nakamoto, as "an electronic payment system based on cryptographic proof instead of trust."[1] Cryptocurrencies are regulated by users, rather than Governments. Ownership of cryptocurrency is proved cryptographically, in the form of verified and recorded transactions called blockchain.

Once the "outcast" of investment trends, investment in digital currencies saw a remarkable rise in 2020. This occurred despite many factors that would normally make investors cautious in allocating their assets, such as the global health crisis, Brexit, and turbulent US-China relations.

1 Nakamoto, Satoshi, Bitcoin: A Peer-to-Peer Electronic Cash System (2008), https://bitcoin.org/bitcoin.pdf (last accessed April 29, 2021)

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The crypto trade market that was just few years ago dominated by individual tech-savvy investors is now becoming more mainstream, with the recently introduced option to buy and sell Bitcoins using a PayPal account. However, both immigration practitioners and USCIS adjudicators, are still not fully receptive to cases involving cryptocurrency. The novelty of the issue, lack of distinct policy guidance, and complexity of evidentiary materials render these types of EB5 petitions especially challenging.

In documenting the source of their investment funds, EB5 petitioners must demonstrate that the investment capital was obtained lawfully and can be clearly attributed to the investor.[2] In cases involving digital assets, the investment's adherence to these requirements is frequently challenged by USCIS through Requests for Evidence (RFEs). USCIS often alleges that the funds either do not appear legitimate, cannot be traced to the investor, or cannot be properly authenticated. This article explores the most recent trends in RFEs concerning cryptocurrency trade and possible ways of addressing them.

"Cryptic" issues of legality

Since EB-5 regulations exclude "[a]ssets acquired, directly or indirectly, by unlawful means (such as criminal activities)" from the permissible source of capital,[3] the main concern raised by USCIS relates to the issue of whether cryptocurrency trade as a source of the investment funds produces "legal capital." The answer to this question greatly depends on where the investor's money is coming from.

In a common scenario, an investor using cryptocurrency will convert his or her digital assets into conventional currency prior to investing the funds into the investment project. However, when proceeds from the sale of digital coins originate from a country with no legal framework for or other restrictions on cryptocurrency exchange, the adjudicator may question the "legality" of these funds. For example, while some countries such as Algeria, Egypt and Morocco ban the purchase, sale, use, and holding of cryptocurrency outright, other countries such as Saudi Arabia, Jordan, and Turkey ban the use of cryptocurrency for the purchase of tangible goods or prohibit banking institutions from dealing with companies that sell purely digital assets. In such cases, USCIS will typically issue an RFE asking for an explanation as to how the digital tokens were converted by the investor into conventional currency without violating domestic laws. This inquiry is arguably outside of the scope of USCIS's review because the focus should be on the source of funds, rather than on investor's compliance with foreign laws. Nevertheless the question still must be taken into consideration until there is policy guidance or established precedent regarding this form of investment.

This challenge to "legality" is better addressed preventively when evaluating the source of funds, rather than reactively post-filing. Investors who wish to use cryptocurrency as the source of their investment, should be advised to consult with their attorneys before those crypto assets have been converted into USD or other national currency. In this case, they can be advised in advance to conduct transactions only in jurisdictions with established regulatory frameworks for cryptocurrency exchanges. The decentralized nature of digital assets allows investors to select an appropriate jurisdiction, assuming the investor can otherwise legally open a bank account to deposit the proceeds there. When the conversion happens in a crypto-friendly country, such as Australia, Estonia, Liechtenstein, Malta, New Zealand, Portugal, Singapore, Sweden, or Switzerland, the "paper trail" documenting the nexus between the digital conversion and deposit of conventional currency into investors' accounts may be more easily explained compared to the countries where digital trade is banned or restricted.

Filling the "gaps"

The second trend apparent from recent RFEs concerning origination of funds from digital trade is challenges to the "path of funds." Due to the perceived anonymity of digital trade, this path rarely presents an uninterrupted chain of documented transactions from "mining[4]," to appreciation in value, to conversion, and ultimately – to the investment. Relying on Matter of Ho[5], USCIS frequently claims that substantial "gaps" in transactions "lead to reevaluation of reliability and sufficiency of the remaining evidence offered in support of the visa petition."[6]

Anecdotal evidence suggests that at least in a narrow context, when the investor's digital wallet can be linked to his or her real-life identity through collateral evidence, USCIS is receptive to the argument that the petitioner has satisfied his burden of proof by demonstrating a sufficient nexus between the links in the chain of custody of the asset. As in all immigration cases, the standard in adjudication of EB5 petitions is "preponderance of evidence." Remarkably, the Policy Manual specifically advises USCIS adjudicators that the petitioner "does not need to remove all doubt."[7] The Policy Manual instructs that even when the adjudicator has some doubt, when the petitioner submitted relevant, probative, and credible evidence, he has satisfied the standard of proof.[8] Furthermore, a

2 8 CFR §204.6(j)(3)
3 8 C.F.R. § 204.6(e)

4 Cryptocurrency "mining" is a process by which high powered computers solve complex computational math problems that cannot be solved by hand resulting in the production of new Bitcoin, and ensuring that the payment network is trustworthy and secure by verifying its transaction information.
5 22 I&N Dec. 206 (Assoc. Comm'r 1998)
6 Quoted from actual RFE issued in January, 2021.
7 USCIS Policy Manual, vol. 6, Part G, citing Matter of E-M-, 20 I&N Dec. 77, 79-80 (Comm'r 1989))
8 Id.

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USCIS Policy Memorandum reiterated the appropriate adjudication standard specifically in the context of EB5 cases, pointing out that the preponderance of evidence standard "is a lower standard of proof than both the standard of "clear and convincing," and the standard of "beyond a reasonable doubt".[9]

Armed with these policies, a petitioner deriving his or her wealth from crypto trade may satisfy the burden of proof by showing bank receipts consistent with the volume of trade and documents reflecting tax compliance (in many countries, including the U.S., cryptocurrency is classified as property and is a subject to the tax on capital gains). Additionally, to satisfy the "more likely than not" criteria, a petitioner may wish to supplement core documents with collateral evidence such as: materials, showing that he or she is an experienced trader, proof of income sufficient to make an initial investment into mining equipment or first purchase of Bitcoins, or evidence of bank deposits reflective of the manifested value of the portfolio and cryptocurrency price fluctuations.

"Let me see your ID"

Another issue a practitioner submitting I-526 identifying cryptocurrency as a source of funds may expect to encounter is a challenge to the authentication of a digital wallet used by the investor in trade. A "wallet" is a device, program or service that stores the public and private keys for cryptocurrency transactions. These keys can be used to track ownership, receive, and spend cryptocurrencies.

The struggle USCIS has with the concept of digital assets is apparent from adjudicators' frequent attempts to apply standards of conventional asset transfers to the cryptocurrency trade. The USCIS adjudicator may issue an RFE observing that digital wallets "do not contain Petitioner's photograph, legal name, or address" that would assist in authentication.[10] Citing Matter of Soffici, USCIS claims that "unsubstantiated information is not sufficient to satisfy a petitioner's burden of proof."[11]

In many cases, the most readily available way to authenticate the wallet is to affirmatively supplement an investor's trade ledger with an affidavit claiming ownership of the wallet. Even though USCIS is notorious for dismissing petitioners' affidavits and sworn statements as "self-serving" or "non-credible," regulations expressly allow presentation of affidavits when certain record do not exist or are unavailable.[12]Even in the context of removal proceedings, Federal Regulations provide that "[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."[13] Inclusion of a detailed affidavit authenticating the digital wallet of the investor may assist in preserving the issue for appeal or later judicial challenge of a denial.

Conclusion

Despite many predictions of a collapse and dramatic fluctuations in value, cryptocurrency has become a prominent player in financial markets and cannot be ignored as a possible source of capital for EB5 programs. There is a hope that under the current Presidential administrative agencies, including the Department of Homeland Security, will become more adaptive to the realities of modern economies. These aspirations are supported by the recent appointment of Gary Gensler, who has taught courses on digital currencies at MIT, as Chairman of the Securities and Exchange Commission. Meanwhile, investors seeking to introduce funds sourced from the crypto trade must rely on empirical knowledge of experienced attorneys and the evolving experience of USCIS adjudicators.

9 "EB-5 Adjudication Policy" (May 30, 2013) PM-602-0083

10 Quoted from actual RFE issued in Nov. 2020.
11 22 I&N Dec. 158, 165 (Assoc.Comm'r 1998).
12 8 CFR 103.2(b)(2)
13 8 CFR §208.16(c)(2).

Reauthorization of EB-5 Program Critical to Nation's Economic Recovery

Originally published at *The Morning Consult*

BOB KRAFT
CHAIRMAN AND CEO, FIRSTPATHWAY PARTNERS,
IIUSA PRESIDENT

As everyone in the EB-5 community knows, this reauthorization saga is like no other we have ever faced. Our typical legislative vehicle for convenient extension is gone. The Consolidated Appropriations Act of 2020 extended the EB-5 Regional Center Program authorization through June 30, 2021, decoupling it from the government's annual spending bill.

The EB-5 Regional Center Program allows qualified regional centers across the country to pool EB-5 visa applicants' investments to execute impactful economic development projects that create thousands of jobs. Regional centers facilitate billions of non-U.S. taxpayer dollars every year to create or retain the jobs, but even more important is the role these investments serve in catalyzing larger economic development initiatives. In fact, without EB-5 investments, many projects – and the jobs they create – are simply not viable.

Where many see a reauthorization challenge, I see an opportunity. Congress decoupled the Regional Center Program to bring attention to a powerful job-creating initiative that otherwise sits among a disparate group of immigration programs awaiting tacit approval each budget cycle. It was not decoupled to die, but to live and to thrive. I have confidence in the power of our program and the difference it has made in communities across the country, both rural and urban. Advocates for the reauthorization are numerous and diverse, and there are countless positive stories to uncover and share with our united voice.

We have the same bipartisan support we have always had, but we will soon have a vehicle to get us to long-term reauthorization. Sens. Chuck Grassley (R-Iowa) and Patrick Leahy (D-Vt.) plan to introduce an integrity reform bill to improve the EB-5 program by achieving long-sought protections for investors and eliminating bad actors from program involvement. With these improvements, Congress will see the program the way it was intended – to stimulate the economy and create jobs. This will open doors to expand and make the program more accessible.

The bill, as presented at the end of 2020, has bipartisan support and would positively impact thousands of communities while protecting valued investors from around the globe. And this couldn't come at a better time. On our shores, now more than ever, we need economic development to recover from the pandemic immediately and cannot afford to wait for comprehensive immigration reform, which may take years to pass.

In addition, all the way across the ocean, investors who have already placed their investments in our communities wait for conditional green cards and the certainty of a long-term authorization.

Once it passes, the EB-5 program will be on solid ground for further policy debates around Targeted Employment Areas, additional visas and other improvements the EB-5 community desperately needs and wants.

In addition to the legislation, a new attitude has emerged in Washington, D.C., born from the new and motivated Biden administration's efforts to prioritize the importance of immigration for the United States. A strong possibility exists for visa recapture and a proper interpretation of derivatives (investor applicants' family members), which would still allow their migration, but remove them from counting against the overall visa cap.

There is even discussion about increasing visas in the employment-based categories, which would be a huge boost for the U.S. economy. It is important to note, however, that being able to take advantage of these possible policy changes hinges on the Program's reauthorization before June 30, 2021. Invest in the USA is assiduously working to advocate for the Program and its reauthorization representing its members' interests and concerns to Congressional Offices.

We eagerly await the introduction of the EB-5 bill from Sens. Grassley and Leahy. Once the bill is introduced, the EB-5 community and its partners must rally behind it or the U.S. economy faces the possibility of losing billions of investment dollars and missed opportunities for tens of thousands of American jobs. We cannot let this opportunity slip through our hands.

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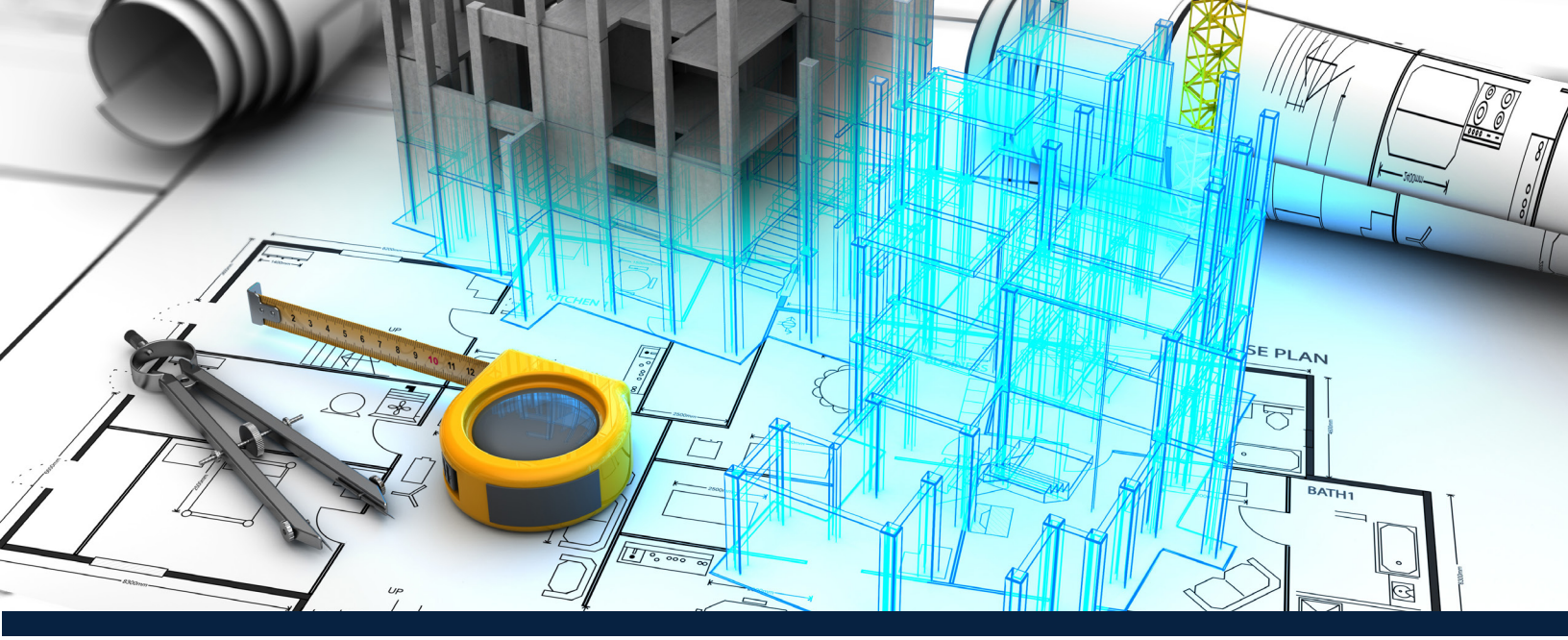

EB-5 Investor Trends:
Shifts from Large Real Estate Projects

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Introduction

The dominance of large real estate projects in EB-5 investment financing began as a result of the 2008 Great Recession in the United States. The years 2008 and 2009 were historically catastrophic years for real estate development in general, and for hotel development in particular. Obtaining financing from conventional lenders became increasingly difficult, construction loans notably being the first victims. On January 16, 2009, USCIS released a policy memorandum that would facilitate the infusion of EB-5 funding into the real estate industry through the counting of indirect and induced jobs created through construction. The result was to provide alternative financing for real estate developers that could be structured as short-term, low-interest, and sometimes unsecured or membership interest only secured, loans. During this period, EB-5 investors came to the rescue of many troubled hotel and real estate developments. Following the recovery of the market, real estate developers continued to seek low-interest EB-5 financing, most often used in place of mezzanine capital, saving themselves millions of dollars. The collateral value of a tangible asset ensured that EB-5 investors would continue preferring real estate projects over alternate industries, with hotels, condominiums and hospitality leading the way.

Fast forward twelve years, though real estate projects continue to dominate the EB-5

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industry, there has been a divergence that may be explained by a variety of factors, including the increase in the minimum investment amount, a swing in the cultural origins of investors and a global pandemic that wrought havoc to the hospitality industry. These factors have led to a noticeable increase in the shift towards more entrepreneurial projects in non-real estate industries and may continue to do so as we enter yet another era of EB-5.

Factor One: Sufficient Startup Capital

Prior to the 2019 EB-5 Modernization Regulations, the minimum capital investment of $500,000, encouraged investors to file with a pooled regional center project rather than their own entrepreneurial project, which likely would require additional investment to achieve viability. The initial investment in a new operating business is often the venture's "startup capital," which is used to pay for the required expenses to start the new EB-5 business, including paying for initial hires, obtaining office space, permits, licenses, inventory, research and market testing, product manufacturing, marketing, or any other expense. Depending on the project, these costs can be quite substantial and $500,000 is often insufficient to support the initial stages of the business, requiring an additional injection of capital that may be unavailable to the average EB-5 investor. Thus, even for entrepreneurs, investing into a pooled development project made financial and practical sense at the $500,000 investment level. However, with the introduction of the EB-5 Modernization Regulations, a single investment of $900,000 could be enough startup capital to launch a credible operating business venture, allowing entrepreneurial investors to pursue their own, or their family's or friend's, new operating business with their EB-5 investment.

Factor Two: Economic Turmoil- The Effect of the COVID-19 Pandemic

The EB-5 Modernization Regulations went into effect on November 21, 2019 and the EB-5 industry was still reeling from its impact when, a short four months later, the full brunt of the COVID-19 pandemic hit the United States. During this initial onslaught, the constant newsfeed of bankruptcies and closures within the hospitality industry undermined confidence in the viability and longevity of some hospitality projects. Investors, nervous of losing their investment from larger, pooled real estate development projects in the hospitality sector, began favoring smaller raises or projects with friends and family. In addition, some investors began showing an interest in moving away from traditional development projects in the real estate industry to more countercyclical, or defensive, industries.

Countercyclical industries exhibit positive financial performance in direct contradiction to negative economic trends. Such industries can include the food and beverage industry, information technology industry, health and senior services industries and the transportation industry. Recent projects within these industries have provided diversification to the EB-5 industry, introducing alternative projects that provide investors with a wider array of options when choosing an industry within to invest.

Industries with high revenues have attracted EB-5 investors in recent years, such as the technology sector. The IT industry is forecast to experience consistent growth over the next five years. Due to the high market capitalization of the top 5 companies in the S&P 500, IT is the largest single segment of the market, eclipsing all others (including the financial sector and the industrials sector). In fact, the top five companies in the S&P 500 (Apple, Amazon, Microsoft, Facebook and Google parent Alphabet) are all part of the tech sector, accounting for 18% of the total market capitalization of the S&P 500 in Q1 2020.[1] Though start-up technology ventures are more complex, investors largely expect steady streams of growth fueled by innovative new products, services, and features developed by companies in the tech sector.

Another example is the U.S. pharmaceutical industry, which accounts for 3.2% of U.S. GDP and supporting over 4 million direct and indirect jobs.[2] EB-5 projects within this industry look to attract investors through their potential for revenue growth. For example, spending on prescription medicines in the United States has been forecasted to reach USD 1,562.15 billion by 2026, with an expected growth of 8.9%.[3] More than 2,300 novel products in later stage development, including more than 600 drugs for cancer, if they prove effective and are approved for use, may be able to command very high prices in the global market.[4] As per Evaluate Pharma research, the global prescription drugs market in 2024 is expected to reach USD $1.18 trillion.[5]

Another example of a popular non-real estate project is transportation and, in particular, trucking:

Freight trucking is the backbone of the nation's supply system, carrying 85%

1 https://www.morganstanley.com.au/ideas/other-type-income-inequality
2 The Economic Impact of The U.S. Biopharmaceutical Industry: 2017 National and State Estimates. TEConomy Partners. December 2019. https://www.phrma.org/-/media/Project/PhRMA/PhRMA-Org/PhRMA-Org/PDF/D-F/Economic-Impact-US-Biopharmaceutical-Industry-December-2019.pdf
3 Prescription Drugs Market Size, Share & Industry Analysis. Fortune Business Insights. May 2020. https://www.fortunebusinessinsights.com/enquiry/request-sample-pdf/prescription-drugs-market-102709
4 QuintilesIMS Institute Study: U.S. Drug Spending Growth Of 4.8 Percent In 2016. BioSpace. May 05, 2017. https://www.biospace.com/article/releases/quintilesims-institute-study-u-s-drug-spending-growth-of-4-8-percent-in-2016-/
5 World Preview 2019, Outlook to 2024. EvaluatePharma. June 2019. https://info.evaluate.com/rs/607-YGS-364/images/EvaluatePharma_World_Preview_2019.pdf
World Preview 2019, Outlook to 2024. EvaluatePharma. June 2019. https://info.evaluate.com/rs/607-YGS-364/images/EvaluatePharma_World_Preview_2019.pdf

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of domestic cargo by value and 70% by weight.[6] Trucking is responsible for most overland freight movement and comprises a USD $791.7 billion industry in the United States (as of 2019).[7] Data also shows that nearly 6% of all full-time jobs in the United States are in the trucking industry.[8] This number has grown exponentially even in the past few years, with the number of employees in the trucking industry in the United States estimated at 7.95 million people in 2019.[9]

"Despite a challenging year, the data contained in American Trucking Trends shows the industry was in good shape entering the global pandemic," said the American Trucking Association's Chief Economist Bob Costello.[10] Though almost every industry in the country has experienced disruption due to the Coronavirus, the trucking industry is expecting a quick rebound in the coming months. A recent Morgan Stanley Research survey of 400 transportation and logistics executives indicates that though supply chains reached their peak disruption over the summer, the transportation industry is expected to have a "V-shaped" recovery in which the rebound trajectory is sharp and quick.[11] This is expected even in the face of a U- or L-shaped recovery in the overall economy of the U.S.

Factor Three: Investor Entrepreneurism and Experience

The increase in entrepreneurial projects may also be explained by the change in the cultural origin of EB-5 investors. In 2015, the majority of EB-5 investors came from Mainland China and tended to be younger in age with a desire for passive investments. By 2019, the country of origin shifted from East Asia to include: India (#2), Brazil (#5), Mexico (#9) and South Africa (#10). According to global market research, these countries have some of the highest rates of entrepreneurial spirit within a cultural context, with South Africa ranked second in the world, followed closely by Mexico (#5), India (#7) and Brazil (#11). Data provided by Ipsos Global Advisor. Entrepreneurialism: The Emergence of Social Entrepreneurialism to Compete with Business Entrepreneurialism. The strong entrepreneurial spirit fostered in these cultures may also contribute to the increase in entrepreneurial EB-5 projects across a wide range of industries outside of real estate.

EB-5 investors habitually represent the top echelon of their countries, with a strong record of investment and capital markets experience. These investors are frequently self-made and have funded their own diverse and often intelligently structured ventures in different industry sectors, not necessarily high-end real estate. This factor has garnered interest in EB-5 projects from more diverse industries, thus allowing investment into projects the Investor understands, or can even own-and-operate. Warren Buffett has discussed the concept of a "circle of competence," which he posits consists of businesses and industries with which the investor is familiar and thoroughly understands. He encourages investors to largely stay within their circle, where they have an advantage in analyzing the performance of a prospective business, pinpointing its strengths and weaknesses and evaluating the competitive climate of the industry.[12] The investor's knowledge is even more valuable if they pursue their own entrepreneurial project, which they can guide and operate using their knowledge and expertise.

A Real Estate component in Alternative Industries

Unlike other residential visas, the US EB-5 Investment Visa is a job creation program. Non- real estate projects focused on operating businesses such as technology, pharmaceuticals or transportation, would derive their job creation from operations and expenditures, using top line revenues from the pro forma income statement and the appropriate multipliers. In comparison, construction project jobs are calculated by the amount spent on construction multiplied by a final demand multiplier. This is far easier to understand and calculate than operational jobs. In addition, over the years, USCIS have become familiar with real estate idiosyncrasies, lessening the chance of a Request for Evidence. Therefore, it is common to add a real estate component to an alternative industry project to bolster the job creation.

Conclusion

It is likely that, even with the increasing popularity of smaller EB-5 investment projects among prospective EB-5 investors, real estate projects will continue to dominate. As stated above, even within alternative industries, a real-estate component gives investors a level of job creation security. Regardless of the industry, there are many factors that play a role in the success or failure of a project. The volatility of the real estate market during the COVID-19 pandemic has shown that unconventional industries can provide viable alternative investment opportunities. EB-5 investors are continuing to become savvier, turning to countercyclical industries often within their circle of competence, to pursue investments that they understand rather than trusting developers exclusively.

6 1997 Commodity Flow Survey, U.S. Census.
7 https://www.statista.com/topics/4912/trucking-industry-in-the-us/#:~:text=Trucking%20is%20responsible%20for%20most,less%20than%20the%20industry%20requires.
8 https://markets.businessinsider.com/news/stocks/trucking-industry-facts-us-truckers-2019-5-1028248577#
U.S. Trade Representative's Office Report (2019).
9 https://www.rtsinc.com/articles/why-trucking-still-america-s-number-one-job
10 https://www.trucking.org/news-insights/trucking-moved-1184-billion-tons-freight-2019
11 https://www.joc.com/trucking-logistics/truckload-freight/after-april-crash-us-trucking-industry-awaits-peak-disruption_20200414.html
12 https://buffett.cnbc.com/video/2014/05/03/afternoon-session---2014-berkshire-hathaway-annual-meeting.html?&start=1675&end=1966

EB-5 REFORM AND INTEGRITY ACT OF 2021:
Section-by-Section Summary

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The below is a high level section-by-section summary of the EB-5 Reform and Integrity Act of 2020 (the "Integrity Act" or the "Act") proposed this week by Senator Chuck Grassley. Most of the substantive amendments to the current Immigration Nationality Act ("INA") section 203(b)(5) and the public law governing the regional center program are in Section 2 of the Integrity Act.

The Act is effective upon enactment, except Section 2 which is effective 90 days after enactment. EB-5 investor petition eligibility will be determined at the time of filing. This means the Act will apply only to investor petitions filed on or after enactment without retroactive impact on pending investor petitions. Form I-829 petitions will be decided by the law under which the underlying I-526 petition was filed.

SECTION 1. Short title. This section simply states the title of the proposed law, "EB-5 Reform and Integrity Act of 2020."

SECTION 2. Reauthorization and Reform of the Regional Center Program. This section adds onto existing INA 203(b)(5) which ends at subparagraph (D) and adds subparagraphs (E) through (Q).

Subparagraph (E) Regional Center Program.

Subparagraph (E) incorporates the current regional center authorization statute.[1] It contains standards for establishing a regional center, which will be required to include a description of the policies and procedures reasonably designed to ensure program compliance and monitor new commercial enterprises and job-creating entities.

Attestations confirming compliance with "good actor" provisions in subparagraph (H) will also be required. Ten percent (10%) of required jobs must be directly created but may be established by employees of the job-creating entity and estimated by economically valid methodologies. Regional centers are required to retain 5-year records and will be audited at least once every 5 years.

Subparagraph (F) Business Plans for Regional Center Investments.

Subparagraph (F) requires regional centers to file business plans for specific projects, what we today call "exemplar" applications on the Form I-924. Importantly, the business plan need not be approved before investor petitions may be filed. There is a list of items required in the application, including material investment risks, material litigation, and information regarding fees paid by the regional center, new commercial enterprise, or any issuer of securities to agents, finders, and brokers involved in the offering.

Subparagraph (G) Regional Center Annual Statements.

Subparagraph (G) requires annual statements containing several certifications generally to the certifier's knowledge after due diligence investigation. The regional center must certify that it is only involved with bona fide actors not precluded by subparagraph (H) and that it is in compliance with securities requirements set out in subparagraph (I) as well as promoter requirements in subparagraph (K).

Sanctions for failing to submit, knowing submission of untrue facts, or failure to conduct itself in accordance with its designation will subject a regional center to fines, temporary suspension, permanent bar, or termination.

Subparagraph (H) Bona Fides of Persons Involved with Regional Center Program.

Subparagraph (H) precludes persons failing to meet the bona fides requirements from involvement with a regional center, new commercial enterprise ("NCE"), or job-creating entity ("JCE"). A person is precluded if the person (1) has committed a crime or offense involving fraud, (2) is subject to an adverse order by a financial regulator, (3) would be barred under U.S. immigration inadmissibility laws, or (4) has been listed, disciplined or reprimanded for reasons including fraud.

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1 Section 610 of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1993 (8 U.S.C. 1154 note), which would be repealed if S. 2540 passes into law.

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A separate preclusion applies to a person who is not a U.S. national or a permanent resident. Foreign governments also may not fund or have any ownership or administration role over a regional center, NCE, or JCE, but a foreign investment fund owned by a sovereign wealth fund or foreign fund permitted to do business in the U.S. may be involved with the ownership, though not the administration of, a JCE.

Subparagraph (I) Compliance with Securities Laws.

Subparagraph (I) requires compliance with U.S. and applicable State securities laws. It specifies the content of the initial and annual regional center certification, which must confirm compliance with securities laws to the best of the certifier's knowledge after a due diligence investigation. Discovery of noncompliance is required to be reported along with remedial efforts and certification that the regional center and associated parties are back in compliance.

Significantly, the regional center's oversight requirement now has a reasonableness standard. A regional center is required to use commercially reasonable effort to "monitor and supervise" securities transactions. In prior iterations of this provision, this obligation was open and undefined.

Subparagraph (J) EB-5 Integrity Fund.

Subparagraph (I) creates a fund to monitor, investigate, ensure compliance, and to conduct audits and site visits. Starting October 1, 2021, the annual fee is $20,000 from each regional center, reduced to $10,000 for one with 20 or fewer total investors in the prior year. A failure to pay the fee will subject the regional center to a penalty and termination. The DHS will be required to submit an annual report describing the uses of the fund in the prior year.

Subparagraph (K) Direct and Third-Party Promoters.

Subparagraph (K) authorizes DHS to prescribe rules and standards for direct and third-party promoters (including migration agents) to oversee the promotion of EB-5 offerings. The rules and standards may include: registration with USCIS, certification of compliance with subparagraph (H)'s bona fides requirements, guidelines for accurately representing the visa process to investors, and guidelines describing permissible fee arrangements under securities and immigration laws.

Subparagraph (L) Source of Funds.

Subparagraph (L) requires business and tax records or similar records to be filed with form I-526, including tax returns of any kind filed during the past 7 years (or another period determined by the DHS) by or on behalf of the investor. The identity of all persons transfer funds into the U.S. on the investor's behalf is required and any funds used to pay costs and fees associated with the investment, not limited to the capital investment, will need to be shown as lawfully sourced.

Gifts and loans now have a good faith requirement accompanied by an emphasis on disqualification of funds from impermissible sources including illegal activity. The donor's records will be required in gift cases.

Subparagraph (M) Treatment of Good Faith Investors Following Program Noncompliance.

Subparagraph (M) provides substantive relief and procedures to preserve immigration benefits for investors associated with terminated or debarred EB-5 entities. Under subparagraph (M), when a regional center is terminated or NCE or JCE debarred, DHS will notify investors. Investors will be given 180 days then to file an amendment or file a notice with DHS to confirm or establish continued eligibility.

Within the 180 days, the NCE can affiliate with a regional center in good standing, if the associated regional center is terminated. If the NCE is debarred, the investor can associate with an NCE in good standing. Additional investment is needed solely to the extent necessary to satisfy job creation. Amendments may be filed without being deemed material change and recovered funds may be used to meet EB-5 requirements.

Investors will retain their priority dates and, significantly, children will be protected from age-out.

None of these benefits apply if the investor was a knowing participant in the conduct leading to the termination or debarment.

Subparagraph (N) Threats to the National Interest.

Subparagraph (N) requires DHS to deny or revoke EB-5 benefits including approved petitions, designations, and exemplar applications if approval is contrary to the national interest of the United States for reasons relating to public safety or national security. If a regional center, NCE, or JCE has its participation in the EB-5 program terminated for national interest reasons, any person associated with the terminated entity will be permanently barred if the person was a knowing participant in the conduct leading to the termination.

Subparagraph (O) Fraud,

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Misrepresentation, and Criminal Misuse.

Subparagraph (O) allows DHS to deny or revoke EB-5 benefits upon determining that the benefit was predicated on fraud or criminal misuse. The DHS will provide notice of its determination.

Subparagraph (P) Administrative Appellate Review.

Subparagraph (P) provides for administrative appellate review by the Administrative Appeals Office ("AAO") for any DHS determinations made under INA section 203(b)(5). There is judicial review to review a determination after exhaustion of all administrative appeals. This means if there is a denial or revocation, the decision must first be appealed with the AAO before seeking remedy in federal court.

Subparagraph (Q) Fund Administration.

Subparagraph (Q) requires separate accounts for all NCEs including the involvement of a fund administrator unless waived., and additional procedures for affiliated JCEs, In general, independent fund administrators will be required to monitor, track, verify, and approve fund transfers. Fund administrator retention may be waived if an NCE or affiliated JCE is controlled by or under common control of a registered investment advisor or broker-dealer. The DHS will grant a waiver in other instances involving an annual independent financial audit.

Effective Date.

Section 2 of the Integrity Act will take effect 90 days after enactment.

SECTION 3. Conditional Permanent Resident Status for Alien Entrepreneurs, Spouses, and Children.

This section amends INA section 216A, which governs the removal of conditions on residence. A petition for removal of conditions is made on the Form I-829.

A key amendment to Section 216A is that if the required jobs are not all created at the time of filing the Form I-829, investors will have 1 additional year to create the remaining jobs. If the additional year is needed, the investor's capital also must be invested during that time.

A defrauded investor who makes a second investment in accordance with subparagaph M may file for removal of conditions during the 90-days before the second anniversary of the subsequent investment, though the procedural mechanics of this intended benefit will need to be sorted out.

SECTION 4. EB-5 Visa Reforms. Section 4 adds new defined terms, including "affiliated job-creating entity," "job-creating entity," and "certifier." An "affiliated job-creating entity" is a JCE that is controlled, managed, or owned by any of the people involved with the regional center or NCE.

Section 4 provides further age-out protection for children of investors whose conditional residence is terminated under section 216A or the new subparagraph (M), where the investor files a subsequent EB-5 petition. The dependent must remain unmarried and the second I-526 petition must be filed not later than 1 year after the termination of conditional residency.

Concurrent filing of EB-5 petitions and adjustments of status applications will now be permitted in cases of immediate visa availability, and EB-5 petitions will also get the same reprieve for status violations for 180 days or less under INA section 245(k). These provisions bring EB-5 more in-line with benefits afforded to other employment-based immigrants.

SECTION 5. Procedure for Granting Immigrant Status. An EB-5 petitioner must establish eligibility at the time of filing. This means that pending petitions will be decided by the law in place at the time of their filing. Petitions filed under the regional center program as amended by the new subparagraph (E), will establish eligibility under the Integrity Act and be subject to the approval of an exemplar approved under the new subparagraph (F). This Section also requires that DHS continues to adjudicate petitions while it is implementing the changes in the program required under the Act.

SECTION 6. Timely Processing. Not less than 1 year after enactment, the Director of United States Citizenship and Immigration Services ("USCIS") will complete a fee study. After completing the fee study, the Director will be required to set fees at a level to process petitions according to the schedule in Section 6, including 180 days for initial regional center designations and investment/exemplar applications, 240 days for investor petitions, and 90 and 120 days, respectively, for the same filings based on targeted employment area investments.

SECTION 7. Transparency. DHS employees will be required to act impartially without preferential treatment. Written and oral communications are required to be kept in the record of proceedings and logs also maintained. Communication from a third party may not be made a part of the record without notice and the opportunity to respond. Law enforcement information may also not be made a part of the record without consent.

Why Credit History is Important for Immigrants and Their Homeownership Aspirations

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Immigrants come to the United States to build a better life, enhance their career opportunities, and provide a better future for their families. In their transitional years they face many challenges, especially when they engage with U.S. banks and apply for a loan to purchase property.

Challenges Immigrants Face in Accessing Credit

One of the biggest challenges for new immigrants to the United States is their ability to access quality credit and financing opportunities across all credit facilities - from credit cards to personal, auto, or student loans, to mortgages. Financial institutions operating in the U.S. are subject to strict requirements from federal agencies to provide credit financing.

Regulations require borrowers to have established a strong credit history over a period of time to be eligible for the most attractive rates. Unfortunately, they do not take into consideration the current income of new immigrants nor their ability to service loans through their accumulated wealth in their home countries. As a result, immigrants must establish a U.S.-based credit history before they can access quality credit facilities. This can take anywhere between two and ten years, putting new immigrants at an unfair disadvantage.

What is Credit History?

An individual's credit history is an aggregate record detailing how they have managed their debt facilities. It includes all accounts the individual has ever opened and/or closed, the type of credit provided by such accounts, outstanding balances, and a record of repayments. A credit bureau can prepare a credit report for any individual with his or her detailed credit history, personal information, and public records such as bankruptcies, liens, or pending investigations. Anyone that has had a credit account in the U.S. can request a copy of their credit report from an approved credit bureau and is eligible for one free report annually.

A credit score is assigned based on an individual's credit history to gauge credit worthiness. This allows any future lender to assess the individual's complete credit profile, including potential default risks.

Importance of Credit History in the U.S.

An individual's credit history impacts many major aspects of life. Employers are increasingly referencing credit reports prior to extending new employment offers. Landlords will assess a prospective new tenant's credit risk. Lenders providing financing options for personal loans, school loans, and credit cards will first review an individual's credit report to determine the amount and the rates at which they will extend credit to a borrower.

For new immigrants, establishing a credit history in the United States that accurately depicts their creditworthiness can take years. In the meantime, it would be difficult for them to obtain credit options for every day needs such as credit cards or a home loan.

EB-5 investors in particular invest a large amount of money in the U.S. and maintain significant wealth in their home countries, but are often not considered to be "creditworthy" by traditional lenders due to their lack of U.S. credit history.

Credit and Real Estate

While real estate is widely considered to be a stable asset that creates wealth for its investors, purchasing power in the real estate market is heavily influenced by credit history. Mortgage underwriting guidelines define what credit history and documentation are required from borrowers. Investors who meet these requirements are offered conforming loans that are backed by federal agencies.

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In the absence of a credit history that fits within the guidelines of the industry's underwriters, lenders are only able to offer non-conforming loans. Because these loans are not backed by federal agencies, they are typically structured with high down payment requirements and high interest rates to protect lenders from cases of default.

Homeownership: Part of the American Dream

For most new immigrants, living the American Dream involves finding the right career opportunities but also includes finding the perfect home for their families.

However, many EB-5 investors are unable to access mortgage loans through regular providers and banks, despite having a strong financial standing in their home countries. The lack of access to good financing options leaves many EB-5 investors frustrated and unsure of how they should proceed.

Few may get lucky and be offered some sort of financing option, but they are typically subject to mortgage down payments of 40% or higher. Some may tap into savings from their home country or seek financial assistance from family members. These options have their own complications, as several countries have foreign exchange controls in place and restrict large remittances of money overseas.

This can be burdensome especially after investing in an EB-5 project, which forces many to wait until their EB-5 capital is returned or until they build sufficient U.S. credit history, both of which could take years to come to fruition.

Addressing These Challenges: The Need for New Solutions

A small group of operators have identified the challenges associated with the lack of credit options available for new immigrants and have started to introduce immigrant-specific financing programs and solutions.

While these new programs are a great first step in bridging the gap, there is also a need for tailored solutions for EB-5 investors who have significant capital invested in the U.S. for at least 5 years, and in some cases, maybe even 10 years or more.

There is a significant opportunity to serve EB-5 investors' needs for high quality credit by taking into account home country credit history and leveraging the value of their EB-5 investments when assessing creditworthiness. Mortgage lenders and operators should aim to remove the stress from the buying process by providing end-to-end solutions that make the U.S. property ownership experience for EB-5 investors as delightful and gratifying as it should be.

Disgorgement in EB-5 Cases:

Wrongdoers Should Not Profit from Their Wrongs

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In June 2020, the U.S. Supreme Court issued a landmark securities enforcement decision when it upheld the Securities and Exchange Commission's ("SEC") authority to obtain disgorgement for ill-gotten gains in federal court actions. The Supreme Court's decision is noteworthy in the context of the EB-5 Program because the underlying case that served as the basis for the appeal involved securities laws violations perpetrated by a couple that raised EB-5 funds from Chinese investors.[1] The ruling, of course, will also apply to all future enforcement actions sought by the SEC in federal court.

Importantly, however, the Court's recent decision in *Liu v. SEC*[2] did not address the substance of the securities laws violations themselves, which were nothing if not textbook examples of garden variety fraud that could arise in any securities offering. In fact, the Court agreed that defendants Charles C. Liu and his wife Xin Wang committed securities fraud by misappropriating funds and must pay civil penalties for that fraud. Instead, *Liu v. SEC* presented the Court with narrower issues of whether the SEC had the statutory authority to seek and obtain disgorgements in federal court and under which circumstances the SEC may obtain such relief. In rendering its decision, the Court upheld the SEC's authority to seek disgorgement as equitable relief in securities laws enforcement actions but clearly reasoned that disgorgement awards must not exceed a wrongdoer's net profits.[3]

Consequently, the SEC recently filed in California district court asking the court to make the defendants Liu, Wang, and their associated companies pay just under $20.9 million in disgorgement plus nearly $71,000 in prejudgment interest.

This article aims to discuss the historical context for SEC disgorgement awards, provide a procedural backdrop for *Liu*, and address the potential impact on securities laws violations in the context of the EB-5 Program.

Disgorgement Authority under Kokesh v. SEC

As a threshold matter, it is critical to distinguish between the SEC's authority in an administrative law setting versus the authority granted to it under federal securities laws. The SEC has express statutory authority to obtain disgorgement in enforcement proceedings it brings before administrative law judges.[4] However, the federal securities laws, including the SEC's authorizing statutes, did not expressly enumerate disgorgement as an available remedy in federal actions at the time *Liu* was decided.[5] Rather, federal securities laws instead provide that the SEC may ask courts for "any equitable relief that may be appropriate or necessary for the benefit of investors."[6]

Of course, the SEC has successfully sought and obtained disgorgement as a form of "equitable relief" without significant scrutiny for nearly 50 years until 2017, when the U.S. Supreme Court heard *Kokesh v. SEC*.[7] In *Kokesh*, the Court determined that the SEC primarily used disgorgement to redress public wrongs and generally deter securities laws violations, and imposed a meaningful hurdle on the SEC by reasoning that disgorgement was a "penalty" subject to a five-year statute of limitations.

Though the Court's opinion mentioned in a footnote that the Court was not passing judgment on "whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context," to some the Court's ruling in *Kokesh* was interpreted as a willingness to at least consider the issue of the SEC's disgorgement authority. Perhaps it was the specter that led the SEC to announce in its 2019 annual report that the Court's decision in *Kokesh* adversely impacted the SEC's ability to disgorge long-running frauds and estimated that *Kokesh* forced the SEC to forgo approximately $1.1 billion dollars in disgorgement.[8]

SEC v. Liu: A History

Following *Kokesh*, the SEC's disgorgement authority remained largely unsettled until *SEC v. Liu*, a 2017 California district court case that became widely known to EB-5 practitioners. There, the SEC charged Charles Liu and Xin

1 See SEC v. Liu, 262 F. Supp. 3d 957 (C.D. Cal. 2017).

2 140 S. Ct. 1936 (2020).

3 Of course, the SEC will still retain the authority to seek other penalties for wrongdoers, such as punitive damages.

4 15 U.S.C. § 78u-2(e).

5 On January 1, 2021, Congress amended Section 21(d) of the Securities and Exchange Act of 1934 to expressly authorize the SEC to obtain disgorgement in civil actions.

6 See 15 U.S.C. § 78u(d)(5).

7 137 S.Ct. 1635 (2017).

8 https://www.sec.gov/files/enforcement-annual-report-2019.pdf.

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(Lisa) Wang with defrauding Chinese investors in connection with the development and operation a proton therapy cancer treatment center to be located in Southern California. In its case, the SEC alleged that the defendants had raised approximately $27 million from fifty investors in order to finance the cancer center, but had deliberately defrauded investors with the illusion of progress while misappropriating funds by diverting them to overseas marketers and paying themselves exorbitant salaries.

In its 2017 decision, the U.S. District Court for the Central District of California held that Liu and Wang had violated federal securities laws and ordered the couple to pay approximately $8.2 million in civil penalties and approximately $26.7 million in disgorgement. In response, the defendants argued that the disgorgement award should be offset by purported business expenses. On appeal, the U.S. Court of Appeals for the Ninth Circuit upheld the District Court's award by holding that it would be "unjust to permit the defendants to offset against the investor dollars they received the expenses of running the very business they created to defraud those investors into giving the defendants the money in the first place."[9]

By November 2019, the U.S. Supreme Court agreed to hear the defendants' case. In briefing, the couple argued that the omission of "disgorgement" from the statute enumerating the SEC's judicial remedies was intentional since Congress expressly authorized the SEC to obtain disgorgement in administrative proceedings (and presumably could have codified such remedy in federal securities laws as well). The SEC rebutted the defendants' argument by stating that the SEC's authorizing statute impliedly granted it the authority to seek disgorgement under the general umbrella of "equitable relief." Moreover, the SEC offered precedent from numerous lower court decisions that widely held that courts could award the SEC disgorgement as an equitable remedy ancillary to an injunction.

In June 2020, the Court sided with the SEC by holding that "a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under §78u(d)(5)."[10]

Importantly, the Court was unpersuaded by the fact that Congress used the term "disgorgement" when defining the SEC's administrative remedies but not when defining its judicial remedies, noting that "it makes sense that Congress would expressly name the equitable powers it grants to an agency for use in administrative proceedings," because agencies, unlike courts, lack "inherent equitable powers."[11] The Court further noted the usage of various terms that are often synonymous with disgorgement – including restitution – that have long authorized courts to strip wrongdoers of their ill-gotten gains.[12] These remedies, by whatever name or label, underscore a core tenet of equity, namely that a wrongdoer should not profit from his own wrong.[13]

Of course, the Court also understood that decisions made in equity are also inherently limited by the countervailing principle, namely that the wrongdoer should not be punished by "pay[ing] more than a fair compensation to the person wronged."[14] Accordingly, the Court's central holding was that equity courts should limit disgorgement to net profits from wrongdoing and must deduct legitimate business expenses before calculating and ordering disgorgement. As a result, *Liu* was remanded to the Central District Court in California for a determination of the amount of disgorgement.

In its recent April 2021 filing, the SEC argued that the defendants are only entitled to deduct from the disgorgement award amounts they spent in accordance with the offering documents to establish the proton therapy center and listed several illegitimate expenses that Liu and Wang "incurred solely to fuel their fraudulent scheme" that should not be deducted from disgorgement. Among these illegitimate fees were $3 million paid to an equipment supplier and salaries that Liu and Wang paid to themselves in the amounts of $6.7 million and $1.5 million, respectively.

Impact of Liu Decision on EB-5 Enforcement Actions and Beyond

The impact of *Liu* is not so much an issue of whether the SEC may obtain disgorgement but under what circumstances it may obtain such relief. Going forward, the SEC will be required to deduct "legitimate" expenses from disgorgement amounts. Additionally, the Court's holding in *Liu* would also require disgorgement proceeds to be distributed to defrauded investors (to the extent feasible). Although only time will tell, the SEC could perhaps seek higher civil monetary penalties in judicial actions to counteract what it may perceive as a limitation on its authority to seek full disgorgement of all ill-gotten gains. After all, the SEC has broad flexibility under the federal securities laws to determine civil penalties in each case and, as such, could seek civil penalties in the amount of a defendant's illicit gain.

It would also be possible for the SEC to instead seek enforcement actions as administrative proceedings, where disgorgement awards may face less scrutiny and are less susceptible to be challenged. However, as the Court's opinion in *Liu* suggests, disgorgement in administrative proceedings would likely be subject to challenge to the extent it fails to abide by the equitable principles articulated in *Liu*,[15] such as the failure to deduct legitimate business expenses. Nonetheless, as the SEC argued on remand, general ledgers that document seemingly legitimate expenses are not in and of themselves probative so as to be excluded from disgorgement as a matter of right.

As such, disgorgement may not be avoided simply because the accounting ledgers detailed the expenses projected to be incurred and paid using EB-5 funds. Rather, once the SEC has established its reasonable calculation, the burden would shift to the defendant to prove the expenses were legitimate and indeed contemplated in the EB-5 project's offering documents. As always, the "sources and uses" of funds is at the crux of securities disclosure and is the core of the investment decision. What remains to be determined on remand are what types of business expenses would be deemed legitimate and reasonable, including EB-5 project development and operational expenses not disclosed in the offering materials, offering and other legal fees and expenses, fees paid to overseas migration agents and salaries and/or management fees paid to principals. Nevertheless, the SEC has already argued on remand that disgorgement in *Liu* would be proper based on the equitable principles handed down by the Court since the defrauded EB-5 investors, and the amounts of their investments, are clearly identifiable. Accordingly, should the SEC successfully obtain disgorgement from defendants Liu and Wang, the SEC would be in a position to disburse the disgorged funds to the aggrieved EB-5 investors as equitable relief for the securities laws violations committed by the defendants.

9 SEC v. Liu, 754 F. App'x 505, 509 (9th Cir. 2018) (quoting SEC v. JT Wallenbrock & Assocs., 440 F.3d 1109, 1114 (9th Cir. 2006)).
10 Liu v. SEC, 591 U. S. ____, Slip Op. at 1.
11 Id. at 13.
12 Id. at 6.
13 Id. (quoting Root v. Railway Co., 105 U. S. 189, 207 (1882)).
14 Id. at 7 (quoting Tilghman v. Proctor, 125 U. S. 136, 145–146 (1888)).
15 Note, in Liu, the Court also held that disgorgement would only be proper where it is appropriate or necessary for the benefit of investors, which would seemingly cast doubt on the SEC's authority to collect disgorgement in circumstances where disgorged proceeds would be deposited in the Treasury rather than returned to investors.

IIUSA Meets with CIS Ombudsman Office to Address Program Questions and Concerns

ASHLEY SANISLO CASEY
DIRECTOR OF EDUCATION & PROFESSIONAL DEVELOPMENT, IIUSA

On February 17, 2021, IIUSA met with the Citizenship and Immigration Services (CIS) Ombudsman's Office to discuss issues and concerns the EB-5 Regional Center industry has with current U.S. Citizenship and Immigration Services (USCIS) operations. IIUSA collected specific points of concern from EB-5 stakeholders in advance of the meeting and submitted them to the Ombudsman's Office on behalf of the industry. The hour-long meeting gave IIUSA the opportunity to expand upon some of these topics in hopes that the Ombudsman's Office will use its capacity as a third-party mediator to make recommendations to USCIS for improvements or changes for the Program.

Attending the meeting on IIUSA's behalf was IIUSA staff, its government affairs consultants and IIUSA's Public Policy Committee Chair, Irina Rostova. IIUSA looks forward to an ongoing and mutual relationship with the Ombudsman's Office to collaboratively address areas of concern with the EB-5 Program and USCIS operations and we are thankful for the opportunity.

While the Ombudsman Office can have an impactful role in USCIS changes it was noted during the discussion that it does not have any authority to mandate changes. However, there was cautious optimism from the Ombudsman staff that the new administration coupled with a more friendly view of immigration (and receding COVID concerns) would bring USCIS back to peak efficiencies.

The full list of topics that IIUSA submitted for discussion is available at iiusa.org/blog, which includes expanded-upon information of each topic, but a summarized list of those topics is below. While not all topics were discussed during the meeting, rest assured that the Ombudsman's Office has the full list with context for each topic or area of concern. The topics were organized by easy-to-fix issues that would have a substantial impact on the industry and issues that require policy changes/review.

- G-28s
- IPO email box
- NVC file transfers
- Missing I-797s
- I-829 extension letters
- Biometric notices
- Inter-filings for project documents
- Processing times
- Processing time report
- Redeployment policy
- Innocent investor protection
- IPO coordination of adjudication
- TEA designation
- Transparency in document requirements
- IPO's scot of adjudication
- Preponderance of evidence standard
- Making program data available

The Ombudsman's Office meets with stakeholder communities across the country to hear about their concerns and identify issues with USCIS programs and processing. The Ombudsman then uses this input to make recommendations to USCIS to fix systemic problems and improve the quality of their services.

The Ombudsman's Office is an impartial and confidential office separate from U.S. Citizenship and Immigration Services (USCIS). Congress created the office to help individuals and employers who are having issues with pending applications or petitions with USCIS.

IIUSA in its capacity as the industry representative in government affairs, IIUSA will continue dialogue with the Ombudsman's Office and USCIS to address the systemic issues that have hampered the EB-5 Program (and other immigration routes) in recent years. We are confident that through continued engagement we will be able to effect long-lasting changes that improve and grow the EB-5 Program to the benefit of our members and the country at large.

IIUSA Events Are the Premier Engagements for Business Development and Education - Here's Why

MCKENZIE PENTON
DIRECTOR OF EVENTS & BUSINESS DEVELOPMENT, IIUSA

In the seemingly endless cycle of webinars, virtual conferences, investor "meet and greets" and the like, it can often be challenging and confusing as to where to spend your valuable marketing dollars and more importantly where to receive the most accurate information.

While technology (especially during the COVID-19 pandemic) has greatly increased the ability of EB-5 projects and service providers to reach potential clients around the globe, it has also resulted in a proliferation of event companies looking to make a quick profit.

Invest in the USA (IIUSA) on the other hand has successfully hosted both virtual and in-person events in the EB-5 space since 2005. More to the point, IIUSA, as the only trade association advocating for the EB-5 Regional Center Program, is the definitive authority on all things EB-5. The association has regular communication with members of Congress, the administration, and the various agencies behind U.S. immigration and investment. Even the most well intentioned of event organizers cannot speak with the same authority as IIUSA nor marshal industry-leading experts and government officials in the same way.

To that end, we thought it would be beneficial to highlight some of the things that set IIUSA events apart in the hope that you will consider joining us for an event(s) in the year ahead (If you weren't already planning to do so!)

We Are the Industry's Representative on Capitol Hill

IIUSA has a seat at the table for every EB-5 legislative discussion. In fact, our lobbying team and members' input is greatly valued by members of Congress and has been incorporated into all previous legislative Program reauthorization efforts. IIUSA was the only industry representative at the negotiating table on S. 831, the EB-5 Reform and Integrity Act of 2021, and its companion bill H.R. 2901. The bills would provide the EB-5 Program with a much-needed long-term reauthorization and other integrity improvements and we are confident they will be signed into law before the June 30, 2021 deadline.

IIUSA's role as the industry's lead negotiator makes us uniquely positioned to provide up-to-the-minute (and accurate) information on any and all potential legislative changes to the Program.

Further to that point, IIUSA is in direct communication with many of the most important U.S. government agencies with oversight or input on the EB-5 Regional Center Program. Just recently, IIUSA discussed Program inefficiencies with the CIS Ombudsman's Office, coordinated virtual engagements with representatives from Congress, the State Department and USCIS and responded to a host of public requests for comments in conjunction with our member-led Public Policy Committee.

We Maintain a Network of Like-Minded Organizations Around the World

While IIUSA's international membership network is always growing, we also know that collaboration with other leading organizations around the world is imperative to the success of our events and the industry at large. To that end, we have formalized partnerships with organizations in many of the industry's key markets.

In just the past few years we have established and strengthened partnerships with the World Trade Center network, Investment Migration Council, Korean Emigration Association, Taiwan Immigration Consultants Association, PHD Chamber of Commerce, Johannesburg Chamber of Commerce, and many more.

While you do not need to be a rocket scientist to deduce that working with partners can drive significant value for events, you do have to be the right type of organization that not only welcomes partners, but also one that attracts them. IIUSA is the only membership association for U.S. professionals in EB-5. Accordingly, similar organizations in overseas markets (think associations for migration agents or chambers of commerce) naturally look to IIUSA for industry guidance and education.

Our position as an educator, and our non-profit status makes us a much more attractive partner for organizations looking to receive unbiased and good faith information. We are eager to continue building on our recent virtual success with partners around the world as we look ahead

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to the return of in-person events and our Global Banquet Series.

We Have the Facts – Others Have Conjecture

IIUSA is also the foremost authority on all things data in the EB-5 space. Our data analytics team regularly provides members and the general public alike with economic impact reports, processing trend analyses, TEA mapping tools, investor origin insights and so much more.

The data that IIUSA meticulously compiles and analyzes is not only a valuable resource available for industry stakeholders use on our website, but it also underpins all of the educational content we produce and the events we host. More so than any other group, IIUSA is a repository of EB-5 knowledge, our members are recipients of those insights and our regular events act as a way to convey this information to a broader audience.

Sure, IIUSA's event panel topics in name will look similar to other events out there. However, IIUSA's content is backstopped with the cold hard data needed to ensure that the information conveyed is accurate and beneficial. In fact, more often than not, other event hosts are relying on information being generated by IIUSA whether that be investor market data, legislative updates or processing trends. So why not go directly to the source?

IIUSA Members Are Champions of Ethical Market Behavior

IIUSA members are the leaders in the EB-5 industry. Each member, upon joining the association, has agreed to uphold our Code of Conduct and to conduct their businesses with our Best Practices in mind. IIUSA members contribute their industry insights and leadership to each and every one of our events ensuring that EB-5 stakeholders, investors, and their representatives receive the most accurate and up-to-date information available.

To participate as a speaker with IIUSA one must be a member in good standing of the association and as a member they must be committed to strengthening the Program and upholding the industry ideals.

More to the point, we do not have "pay to play" options for our events. The individuals who speak are members of the association and experts in their fields. They are chosen to speak by our education team which works diligently to ensure topics are relevant and the right speakers are featured. Our commitment in this regard results in high quality educational events that are devoid of shameless self-promotion or dubious claims.

We Are a Non-Profit with a Clear Advocacy Mission

Perhaps we sound like a broken record at this point, but it bears constant repeating. **IIUSA IS THE ONLY MEMBERSHIP ASSOCIATION FOR EB-5 PROFESSIONALS.** We are the industry non-profit and we have a vested interest in and a mandate to help see the industry succeed.

We continue to work towards a long-term reauthorization for the EB-5 Program, representing the industry in government affairs and public relations and continue to advocate for long-term program fixes that will enable the program to again flourish. We do this on behalf of all EB-5 professionals (members or not).

However, you can rest assured that any financial contribution to an IIUSA event, be it a ticket or sponsorship, is directly reinvested into the association's work. Put another way, by participating in an IIUSA event you are directly supporting the association's advocacy goals, educational commitment, and industry resources, and by extension, a bright future for your industry.

They Cost a Heck of A lot Less

Money isn't everything but it sure as heck makes a big difference when deciding where to spend valuable and limited marketing dollars. The goal with each event IIUSA hosts is to provide educational and business development platforms that are accessible to all interested parties. After all, we know the industry will be most impactful when its stakeholders are well informed.

What Other Events Might Offer You:

- Speculation on topics in which IIUSA is the expert;
- "Pay to Play" insights;
- Factually incorrect or outdated assessments;
- Diluted programming;
- Direct competition from other CBI programs around the world;

A look Ahead to the Return to In-person Events

The EB-5 Industry Forum | October 6-8, 2021

The past year has given us all our fair share of splitting our at-home office space with the homework zone, intermittent internet outages in the middle of conference calls and virtual happy hours with friends and colleagues. It is safe to say we are all "Zoomed out" and with that, we couldn't wait to announce that IIUSA will be returning to in-person events this fall!

The IIUSA EB-5 Industry Forum is the industry's premier business development and educational platform developed to connect attorneys, regional centers, economic development professionals, project sponsors, foreign intermediaries, and more. We look forward to providing the industry with this key platform as we look ahead to a new and brighter future for the Program in sunny Orlando, FL this October!

We are pleased to offer a host of exhibiting and marketing sponsorships for this year's event. Doesn't it sound wonderful to network and interact with potential clients and partners face-to-face again? To learn more about the available opportunities please email info@iiusa.org.

Behring Regional Center v. Department of Homeland Security and The Case for Common Sense

AARON GRAU
EXECUTIVE DIRECTOR, IIUSA

On December 21, 2020 the Behring Regional Center (formerly known as the Berkley Regional Center Fund) filed a federal lawsuit in the Northern District of California to enjoin and then overturn the United States Citizenship & Immigration Services' (USCIS) EB-5 regulations, finalized in November 2019.

Since the lawsuit initially sought a preliminary injunction against the continued implementation of the regulations, the Department of Justice, representing the defendant USCIS, did not immediately file an answer to the complaint. Instead, it filed its response to the plaintiff's motion for a preliminary injunction. The Department of Justice did finally answer the initial complaint on April 27, 2021

At its core the Behring Regional Center case and its less discussed sister case, *Florida EB5 Investments LLC v. Wolf* (filed in the federal District Court for the District of Columbia) are about the plaintiffs' dislike of new rules. They are not about the matter plead, namely that the government illegally finalized the regulations. Naturally, if these plaintiffs or their law firm liked the regulations, their efforts would be focused elsewhere. It is worth noting that among the hundreds of other regional centers and perhaps thousands of other possible plaintiffs with standing, not one entity stepped up to stand by either Florida EB5 Investments or Behring Regional center. It is also worth noting that both cases were brought by the same law firm.

So, what prompted these lawsuits? Where do they stand now and importantly, what might their outcomes mean to the much (much) broader EB-5 community?

1. In Most Cases We Don't Even File Once. Why In This Case Do We File Twice?

The federal rule precipitating these lawsuits went into effect on November 21, 2019. The regulation, exhaustively promulgated through many extended months, revamped administration of the EB-5 Regional Center Program in several ways. The most pertinent are a) changing how targeted employment areas (TEA) are defined; b) increasing the investment amount for TEAs from $500,000 to $900,000; and c) increasing the difference between a TEA investment and a non-TEA investment from $500,000 to $1,000,000, making non-TEA investments $1.8M.

If you like these changes, you cheer. If you don't like the changes, but understand why they were made, you grimace and find a way to do business under the new rules. Perhaps you even develop a strategy to improve the program in other ways that ameliorate any impact the changes may have. If you hate the changes; if they simply make your business model untenable, you sue to have them vacated.

No one cheered.

The vast majority of the EB-5 community began looking for ways to do business under the new rules and otherwise improve the program.

Only the two regional centers (Behring and Florida EB5) sued. The theory of their cases is simple. Even though the new rule was promulgated correctly, it was finalized illegally. The person at the Department of Homeland Security who put the rule into effect did not have the authority to do so. Therefore, say the plaintiffs on each coast, the rule is invalid. Both the Florida EB5 Investments suit and the Behring Regional Center suit make this claim and, given the irreparable harm they claim the rule causes their businesses, they also sought to enjoin the rule from being implemented until their underlying assertion could be resolved.

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But why two lawsuits? Simple. The first one did not work out the way the plaintiff thought. The Florida EB5 Investment's motion for injunctive relief (to halt the regulations) was denied and the rule remains in effect while Florida EB5's underlying allegation of "illegal finalization" is adjudicated. So, Florida EB5 Investments appealed the court's decision, and a new plaintiff filed the same lawsuit in a different court seeking a better outcome.

2. Plaintiff's Persuasive Argument

Although the DC Court was unmoved by Florida EB5's arguments to enjoin the rule's implementation, the California Court was receptive. In fact, during a hearing to debate two motions: first, the defendant's (DHS) motion to remove the California case to Washington, DC and combine the matters; and second, the plaintiff's motion for injunctive relief the Court clearly appreciated the plaintiff's arguments.

First, the Court denied the government's motion to remove the matter to Washington, DC and combine the two cases. Although the case theories were the same, the relief sought was the same, and the law firm representing both plaintiffs was the same the Court saw enough differences between the plaintiffs themselves to keep the two cases in separate courts.

Second, the Court (with permission from both parties) changed the nature of the plaintiff's motion for a preliminary injunction to a motion for summary judgement. In other words, rather than debate whether implementing the DHS rules should be halted while the underlying question of "illegal finalization" is decided, the Court brought that underlying question of law to the fore and created a winner-take-all situation. The judge told the parties that rather than debating questions of fact associated with the motion for preliminary injunction such as whether Behring suffered irreparable harm, she would simply rule on the one matter of law over which the Court has full authority and dispense with splitting hairs as to whether Behring's harm was "irreparable."

That was a game changer and the Court's request that the government come back to her with suggestions about what it saw as possible remedies indicated to many how she would ultimately rule. After the hearing ended, EB-5 newsletters across the globe proclaimed that the regulations were dead! The investment amounts were reverting back to $500,000 and $1M for TEAs and non-TEAs respectively. Those assertions, however, ignored some very important realities. The scales of Justice were (are) not finished balancing.

3. The Mayorkas Mindset

The plaintiffs' argument for "illegal finalization" is convoluted. At the time the Behring case was filed the plaintiff could assert that "[t]here has been no Senate-confirmed Secretary leading DHS since April 10, 2019." (3:20-cv-09263 Document 1, Complaint, at p. 16) Then the plaintiff continues, "Instead, the Trump Administration has unlawfully appointed individuals to "acting" positions at the Agency. These "acting" appointments violate the [Homeland Security Act] and the [Federal Vacancies Reform Act.]" (Ibid at p.17)

The plaintiff(s) goes on to assert:

1. The Federal Vacancies Reform Act (FVRA) specifies that when a position requiring a Senate confirmation is vacant "the assistant to the office of such officer" temporarily takes on the office's duties in an acting capacity and that actions taken by any person not acting lawfully under the FVRA are unenforceable and may not be ratified.

2. The Homeland Security Act (HSA) initially designated "the assistant" as the DHS Deputy Secretary, but Congress amended the HSA to allow the Secretary to "designate other officers in further order of succession."

3. The last Senate confirmed DHS Secretary resigned on April 10, 2019. Prior to her resignation, she amended the order of succession allowing the Commissioner of Border Protection to be *third in line* after the Deputy Secretary.

4. Since the office of Deputy Secretary was vacant at the time of the Secretary's resignation, the Commissioner became the Acting Secretary, and it was he who finalized the EB-5 regulations.

According to the plaintiffs' complaints, the resigning Secretary's amended order of succession violated a third authority, Executive Order Number 13753. EO 13753 lists sixteen DHS officials who are authorized to take over as Acting Secretary and the Commissioner is seventh in line, not third. Therefore, the Secretary's amended order was invalid making the Commissioner's "acting" position invalid as well as any actions he took as "Acting Secretary."

The Court's decision to change the nature of the plaintiff's motion for preliminary injunction to a motion for summary judgement and consider only matters of law boils the Behring case down to whether the outgoing Secretary's amended order of succession trumps EO 13753. If it does, the government wins as a matter of law. If not, the plaintiff wins and the rules are vacated, bringing us back to the request the Court made of the government to provide a brief on possible remedies and the phrenetic assumption that the only remedy would be a reversion back to the old regulations and therefore the old investment amounts.

In a surprising twist, however, the (now) Senate confirmed Department of Homeland Security Secretary, Alejandro Mayorkas simply ratified the regulations. It's hard to know Secretary Mayorkas' mind set. Perhaps he was anticipating the Court's decision to vacate the rules and send them back to DHS. Perhaps he felt the lawsuit was a pretext to revisit rules that some simply don't like. Perhaps he and the Biden Administration like the rules and regardless of what the Court decides was signaling that the rules

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will ultimately be in place one way or another.

The lawyers for the Behring Regional Center quickly filed a pleading in response to the Secretary's ratification citing, *inter alia*, "The FVRA's prohibition on ratification was designed to prevent the practice of a properly appointed official reissuing a decision taken in violation of FVRA provisions." Pub. *Emples. For Envtl. Responsibility v. National Park Service*, Case No. 19-3629 (RC), *2021 U.S. District*. In essence, the government cannot protect the EB-5 rule, "after the fact."

As of the time of this writing, the Court had not issued a decision regarding whether the FVRA was violated and if so, what impact the Secretary's ratification has, if any.

4. On Capitol Hill

At the same time the Courts are deliberating the legal issues in the Behring and Florida EB5 cases, Congress is pushing forward to reauthorize the very program the regulations administer. In the course of these debates two schools of thought emerge.

First, IIUSA and the vast majority of EB-5 stakeholders as well as a growing number of mayors, trade associations, chambers of commerce, and economic development organizations stepped up to support a bipartisan bill introduced by Senators Grassley (R-IA) and Leahy (D-VT) (S.831) and its companion House bill introduced by Representative Stanton (D-AZ) and Fitzpatrick (R-PA) (HR.2901). The bill provides a badly needed and stabilizing five-year reauthorization as well as badly needed integrity reforms including significant investor protections. The bills' sponsors and the expanding number of supporting stakeholders acknowledge that the bill does not address all the EB-5 Regional Center program questions but agree that with a five-year runway all can be addressed, including the case for more program visas.

Alternatively, an organization called the EB-5 Investors Coalition (EB5IC) opposes the bills; not because of what the bills do, but because of what they do not do. In particular, EB5IC hates that the bill does not address issues like investment amounts, the difference between TEA investments and non-TEA investments, and the definition of TEA altogether. The EB5IC feels that if these matters are not addressed in the days before the program ultimately terminates (June 30, 2021), they can never be addressed again.

The issues the EB5IC insist must be addressed are addressed in the regulations being challenged in California and Washington, DC. Further, the lawyers that represent the plaintiff in the Behring lawsuit and the plaintiff Florida EB5 lawsuit are also the lobbyists of record for the EB5IC.

The lawsuits never impacted the legislative work and now that a Senate bill and a companion House bill are introduced, they never will.

Conclusion: Call for Common Sense

As of May 1st, the Behring Regional Center case parties are still waiting for the California Court to determine if she will decide the FVRA matter of law based on their submitted briefs or whether an additional hearing is necessary. It is also unclear what impact Secretary Mayorkas' ratification will have or what other "remedies" may be considered or needed. The Florida EB5 case is also still undecided as the District of Columbia court addresses the original complaint and the appeals court considers the denied motion for preliminary injunction.

Given the Administration's clear support for the regulations and the plaintiffs' (two) lawsuits, any decision in either court is sure to be appealed, assuring no final decision for quite some time.

Meanwhile, as the June 30th program sunset date looms closer, the Grassley/Leahy and Stanton/Fitzpatrick bills gain momentum and support from within and without the EB-5 community.

As an attorney, I respect the Behring Regional Center's position and its arguments are persuasive, to a point. Its assertions that the FVRA may have been violated have certainly resonated with the California Court, but to what end?

The Administration seems committed to the regulations. If they are vacated, the government will appeal. Further, a California Federal District Court decision to vacate the regulations may well be at odds with the District of Columbia's Federal District Court decision setting up yet another reason for appeal and a delayed outcome.

As a practical matter the lawsuits will have no impact on the legislative work to reauthorize the Regional Center program. Two bills are introduced, and each are gaining support from other Members of Congress. At this point, the only effect these lawsuits have or will have is to cloud the question of the Regional Center Program's future. Casual observers and those without a clear understanding of the litigation and legislative landscapes can easily interpret the Behring case as something it is not: a watershed case to reduce EB-5 investment amounts and revert the EB-5 ground rules to an earlier time.

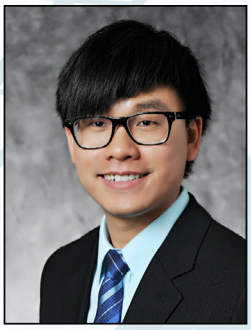
The California Court may say that legal principals and the letter of the FVRA require the EB-5 regulations be vacated. Given the totality of the circumstances, both legal and legislative, common sense says the case no longer has any real meaning and its outcome will amount to a distinction without a difference.

Postscript

To help advocate for S.831 and HR.2901, IIUSA established the Coalition to Save and Create Jobs. (www.saveandcreatejobs.org) The Coalition supporting these bills includes chambers of commerce, investors, mayors, hospitality industry trade associations, economic development associations, urban and rural interests, and, as of April 15, 2021 the Behring Regional Center.

Just when you thought the story could not get any richer, the plaintiff itself validates the legislation that purposefully left issues like investment amounts to the regulations it is now counter-intuitively fighting against.

What The Latest Unemployment Data Tells Us About The Trends and Distribution Of EB-5 TEAs



LEE LI
DIRECTOR OF POLICY RESEARCH & DATA ANALYTICS, IIUSA

In April 2021, the Bureau of Labor Statistics (BLS) published the latest annual Local Area Unemployment Statistics (LAUS) for 2020. This data release is significant because it reflects the impact of COVID-19 on unemployment rates across the country. Additionally, the new set of employment data from BLS is even more consequential in the context of EB-5 given the fact that it changes the landscape of targeted employment areas (TEA) in urban America, affecting the geographic areas that are eligible for the lower minimum EB-5 investment amount. Based on the annual LAUS data for 2020, the national average unemployment rate is 8.05%, establishing the threshold of qualifying as a high unemployment area as 12.08% (150% of the national unemployment rate).

In addition to the LAUS data from BLS, the U.S. Citizenship and Immigration Services (USCIS) confirms that unemployment data published by the U.S. Census Bureau's (CB) through the American Community Survey (ACS) also qualifies as "reliable and verifiable" to demonstrate TEA qualification for an area when an EB-5 investor files his/her form I-526 petition.[1] However, the most current ACS data measures economic statistics in the U.S. between 2015 and 2019, which does not reflect how COVID-19 impacted the unemployment rate for American workers in 2020 and beyond.[2] Based on the ACS 5-year estimates for 2015-2019, the national average unemployment rate is 5.33%, meaning that any area with an unemployment rate of 8.00% or higher will qualify as a high unemployment area, hence a TEA.[3]

TEA Trends on National Level

Under the new EB-5 regulations that went into effect in November 2019, a TEA can be either a rural area or a high unemployment area. According to USCIS, a rural area is an area that is located outside 1) a metropolitan statistical area (MSA); or 2) any city or town with a population of 20,000 or more; while a high unemployment area could be any of the following areas if the area "has experienced an average unemployment rate of at least 150% of the national average unemployment rate:

- An MSA;
- A specific county in an MSA;
- A county in which a city or town with a population of 20,000 or more is located; or
- A city or town with a population of 20,000 or more outside of an MSA."[4]

1 USCIS. (March 3, 2020). Questions and Answers: EB-5 Immigrant Investor Program Modernization Rule. https://www.uscis.gov/working-in-the-united-states/questions-and-answers-eb-5-immigrant-investor-program-modernization-rule
2 ACS 2020 data is scheduled to be released in December 2021 from the Census Bureau.
3 It's important to point out that rounding unemployment rates to different decimal places will affect the TEA qualification for a small number of census tracts. This article and IIUSA's EB-5 TEA mapping tool (https://iiusa.org/eb5_tea_mapping_tool) round the unemployment rates to 2 decimal places.
4 USCIS. (March 25, 2021). About the EB-5 Visa Classification. https://www.uscis.gov/working-in-the-united-states/perma-

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Additionally, the new regulations also introduced a new TEA method that allows a TEA to consist of a census tract or multiple contiguous census tracts as long as each one of the included tracts is directly adjacent to the project tract when calculating the weighted average unemployment rate for the entire area.

As summarized on Table 1, nearly 15,000 (or 20.5%) census tracts across 50 states plus the District of Columbia independently qualify as a high unemployment area based on the ACS 5-year estimates for 2015-2019 ("single-tract high unemployment areas"); while another 14,000+ (or 19.2%) census tracts also qualify as a TEA by combining one or more census tracts that are directly adjacent to the project tract ("multi-tract high unemployment areas"). Based on the annual LAUS data for 2020, nearly 14,500 (or 19.8%) census tracts qualify as a TEA on their own and additional 13,000+ tracts also qualify as a multi-tract high unemployment area in accordance with the new TEA method introduced by the new EB-5 regulations. Nearly 11,000 (15.0%) census tracts qualify as a rural area, hence a TEA. While data from BLS has reflected a more current unemployment rate in the U.S. with the impact of the pandemic taken into account, the ACS employment statistics from the Census Bureau actually allows more census tracts across the country to qualify as a TEA.

In addition to census tracts, a number of counties and MSAs also qualify as a TEA in its entirety. As Table 2 summarizes, 99 (or 3.2%) and 25 (or 0.8%) counties in the U.S. – either located within an MSA or in which a city or town with a population of 20,000 or more is located – qualify as a TEA based on the ACS 2019 5-year estimates and the LAUS 2020 1-year data, respectively. 34 (or 8.8%) and 9 (2.3%) MSAs across the country also qualify as a high unemployment area in its entirety using the same datasets. Since BLS only releases unemployment rates of the largest 50 cities in the U.S. through LAUS, the city/town data is not sufficient to conduct

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nent-workers/employment-based-immigration-fifth-preference-eb-5/about-the-eb-5-visa-classification

TABLE 1: Summary of TEA Qualifications by Census Tract

(Excluding census tracts in U.S. territories.)

	CB ACS 5-Years (2015-2019)	BLS LAUS 1-Year (2020)
Single-Tract High Employment Areas:		
# of Census Tracts	14,973	14,464
% of Total Tracts	20.5%	19.8%
Multi-Tract High Employment Areas:		
# of Census Tracts	14,011	13,078
% of Total Tracts	19.2%	17.9%
Rural Areas:		
# of Census Tracts	10,993	
% of Total Tracts	15.0%	

Note: If a census tract qualifies as a high unemployment area and a rural area, it would be reflected in the counts of both categories.

Data Source: Census Bureau and Bureau of Labor Statistics
Prepared by: IIUSA

TABLE 2: Summary of TEA Qualifications by County, City/Town and MSA

(Excluding census tracts in U.S. territories.)

	CB ACS 5-Years (2015-2019)	BLS LAUS 1-Year (2020)
Counties as a TEA in its Entirity:		
Count	99	25
Percentage	3.2%	0.8%
MSAs as a TEA in its Entirity:		
Count	34	9
Percentage	8.8%	2.3%

Note: BLS LAUS do not release employment data for all cities/towns.
Data Source: Census Bureau and Bureau of Labor Statistics
Prepared by: IIUSA

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a comprehensive TEA analysis on the national level.

Mega Counties Such as Los Angeles, Kings and Queens Now Qualify as a TEA

Table 3 highlights a list of 20 counties with a large population that qualify as a TEA in its entirety. As various analyses showed that unemployment in big cities such as New York and Los Angeles have been hit the hardest by the pandemic,[5] mega counties, including Los Angeles County, CA (including the entire City of Los Angeles); Kings County, NY (where Brooklyn is located); Queens County, NY; and Clark County, NV (where Las Vegas is located) experienced an unemployment rate that is at least 150% of the national average in 2020 based on the latest annual LAUS data from BLS, hence qualify as a TEA. In addition, other large counties with a population of more than 1 million such as Wayne County, MI (including the entire city of Detroit); Philadelphia County, PA; and Bronx County, NY also qualify as a high unemployment area in its entirety under both LAUS annual data and the ACS 5-year statistics.

Although cities as such New York, Chicago,

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5 Iacurci, G. (July 22, 2020). "A second Great Depression? Unemployment crisis hits big cities hard" CNBC. https://www.cnbc.com/2020/07/21/some-big-cities-are-hitting-great-depression-unemployment-levels.html

TABLE 3: Large Counties Qualify as a TEA in Its Entirety

(Only 20 TEA counties with the largest population are included in the table.)

County Name	Populaiton	BLS LAUS 2020 Unemployment Rate (%)	CB ACS 2015-2019 Unemployment Rate (%)	TEA Qualification Data Source
Los Angeles County, California	9,819K	12.80	6.09	BLS
Kings County, New York	2,505K	12.53	6.17	BLS
Queens County, New York	2,231K	12.53	5.59	BLS
Clark County, Nevada	1,951K	14.73	6.41	BLS
Wayne County, Michigan	1,821K	13.81	9.2	ACS & BLS
Philadelphia County, Pennsylvania	1,526K	12.37	9.17	ACS & BLS
Bronx County, New York	1,385K	16.03	10.02	ACS & BLS
Fresno County, California	930K	11.28	8.71	ACS
Kern County, California	840K	12.52	9.83	ACS & BLS
Essex County, New Jersey	784K	11.68	8.06	ACS
Baltimore city, Maryland	621K	8.79	8.29	ACS
Stanislaus County, California	514K	10.70	9.08	ACS
Passaic County, New Jersey	501K	12.60	4.52	BLS
Tulare County, California	442K	13.21	9.54	ACS & BLS
Genesee County, Michigan	426K	11.16	9.33	ACS
Orleans Parish, Louisiana	344K	12.17	7.91	BLS
Marion County, Florida	331K	7.05	8.32	ACS
Cumberland County, North Carolina	319K	9.50	8.46	ACS
Winnebago County, Illinois	295K	11.42	8.15	ACS
Atlantic County, New Jersey	275K	17.76	8.43	ACS & BLS

Data Source: Census Bureau and Bureau of Labor Statistics
Prepared by: IIUSA

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Memphis, Long Beach and Cleveland also experienced an unemployment rate that is higher than 150% of the national average according to the new BLS annual data, these urban cities are not "outside of an MSA" so they fail to meet all the requirements on the new EB-5 regulations for the entire city or town to qualify as a TEA.

TEA Census Tract Distribution Among States

As each state has a different economic environment and labor force participation, TEA census tracts do not spread out across the country equally among states. As Figure 1 shows, Mississippi is the state with the highest percentage of census tracts that qualify as a TEA (87% of census tracts in the state are either a high unemployment or a rural area), seconded by Nevada with 85% state census tracts qualifying as a TEA.

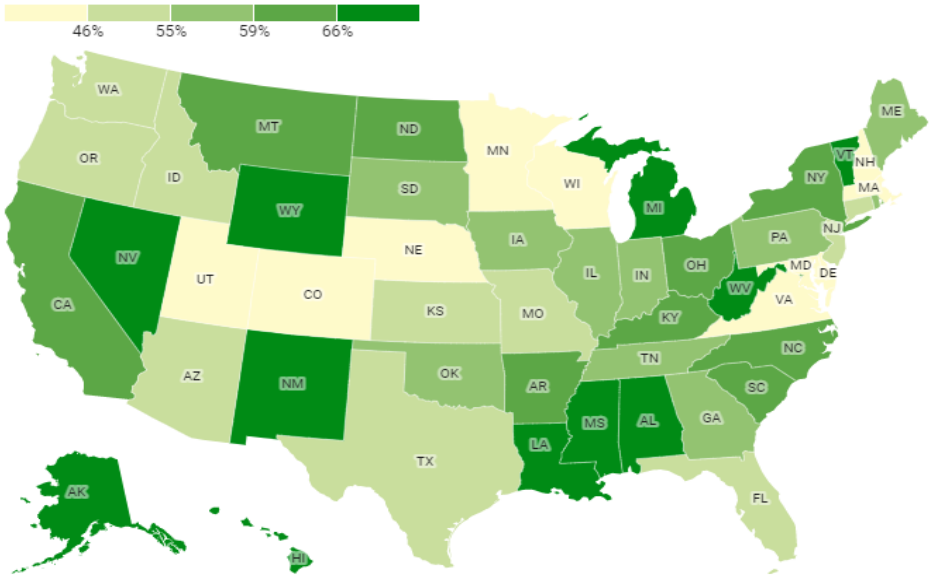
As of those traditional "hot bed" states with the most EB-5 investments such as California and New York, more than 62% of the census tracts in each state are a TEA based on the most current annual data from BLS or the ACS 5-year estimates from the Census Bureau.

TEA Opportunities Among Counties

Figure 2 highlights a list of 21 counties across the country in which more than 60% of the local census tracts qualify as a TEA, presenting opportunities to attract EB-5 capital at the lower investment amount. In particular, 73% of the census tracts in Riverside County and San Bernardino County of California qualify as a high unemployment area; while nearly 65% of the area in Cuyahoga County, OH (including census tracts within the City of Cleveland) is a TEA using either BLS or Census Bureau's latest unemployment statistics. Furthermore, 68% of the census tracts in Orange County,

Continued On Page 42

FIGURE 1: TEA Census Tracts by State & District of Columbia



Data Source: Census Bureau and Bureau of Labor Statistics
Prepared by: IIUSA

FIGURE 1 (Cont.): States with 60%+ Census Tracts as a TEA

Continued From Page 43

FL (including Orlando) also experienced a high unemployment rate and qualifies as a TEA for the lower tier of the EB-5 investment requirement.

Bringing Comprehensive TEA Information to Your Fingertips

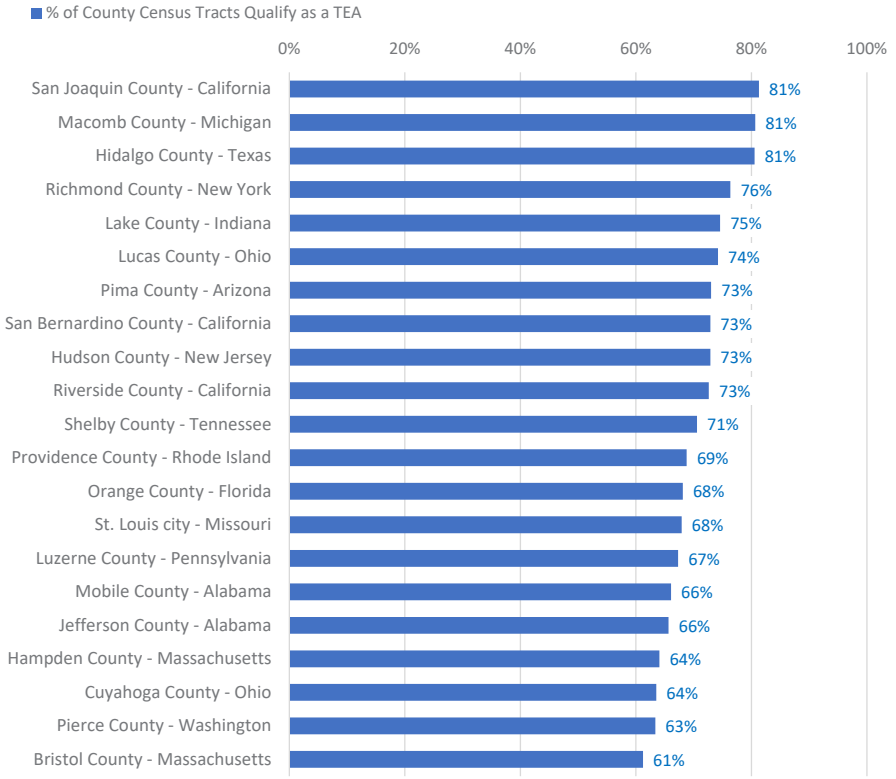
TEA determination is one of the most data intricate but nevertheless critical tasks when conducting due diligence for any EB-5 project. IIUSA is proud to provide the EB-5 community with cutting edge tools and resources, including our interactive (and free!) EB-5 TEA mapping tools. Since we launched the EB-5 TEA map in 2020, more than 1,900 stakeholders across the U.S. and around the globe have used this resource to retrieve TEA information. In April 2021, IIUSA released an updated version of our powerful EB-5 TEA mapping tool, allowing all EB-5 community members to check TEA qualification and obtain in-depth employment statistics for every single census tract in the U.S.

Among many features, this updated EB-5 TEA mapping tool lets you:

- Search any location in the U.S. to check TEA qualification;
- View whether any location qualifies as a single-tract high unemployment area, multi-tract high unemployment area, or rural area;
- Retrieve the latest ACS and LAUS employment statistics for any census tract, county, MSA and city/town with a population of 20,000 or more.

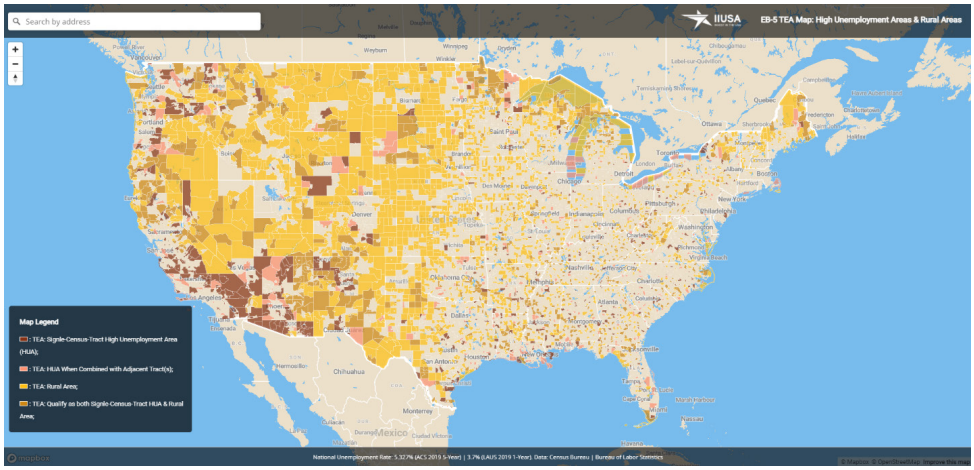
The TEA mapping tool is available to the public here: https://iiusa.org/eb5_tea_mapping_tool.

FIGURE 2: Countries with over 60% Census Tracts as TEA



Data Source: Census Bureau and Bureau of Labor Statistics
Prepared by: IIUSA

FIGURE 3: IIUSA's EB-5 TEA Mapping Tool



TO: New York Real Estate Developers
FROM: The Coalition to Save and Create Jobs

Create new jobs and keep billions in construction capital flowing with a few clicks of support.

Originally published on TheRealDeal.com

Speak up now or leave billions of dollars of real estate development capital and new jobs on the table, just when New York critically needs EB-5 capital and the jobs it creates, and when much of New York City qualifies for incentivized EB-5 investment. Visit the Coalition to Save & Create Jobs to easily make your voice heard with just a few simple clicks.

The EB-5 Regional Center Program, the hundreds of thousands of new U.S. jobs it can create and save, and the billions of investment dollars it can facilitate will disappear on June 30, 2021 unless the program is reauthorized. Please tell Senator Chuck Schumer you support Senate bill 831 and Representative Jerry Nadler you support House bill 2901 to reform and reauthorize the EB-5 program.

Since 2008, the EB-5 Regional Center Program has:

- created more than 205,000 jobs in New York;
- brought more than $6.5 billion in investment to the state; and
- all at no cost to New Yorkers or the U.S.

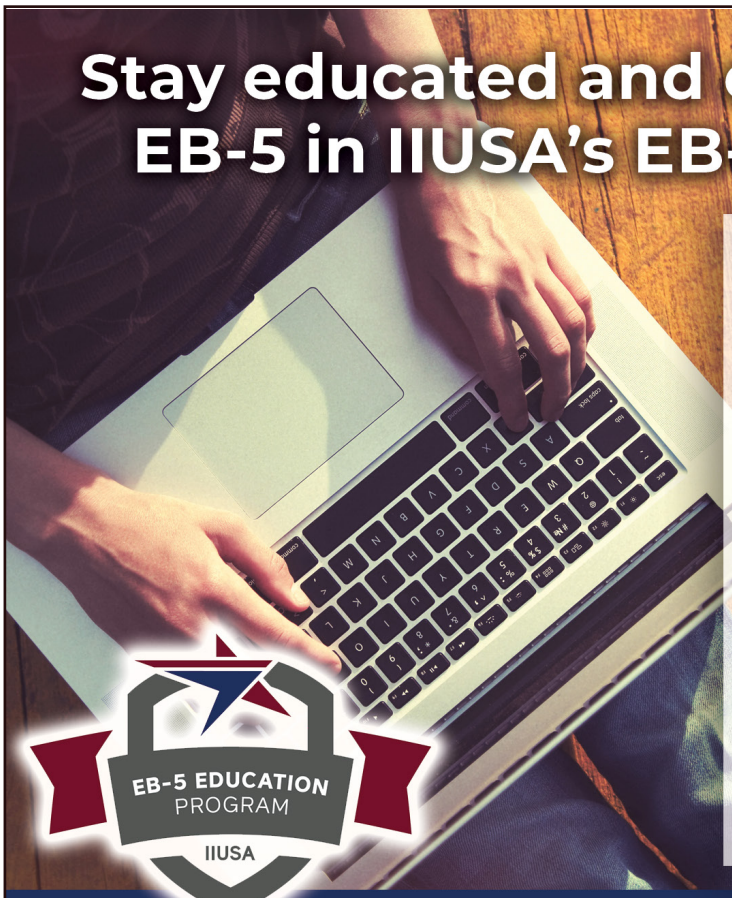
Without Senator Schumer and Congressman Nadler's support, this powerful job creation and economic development tool goes away. Future EB-5 investments and the jobs they will create will be eliminated.

At a time when the country is still reeling from the economic impact of COVID-19, and as once bustling and vibrant cities like New York City are scrambling to recover, letting a program like the EB-5 Program expire should be a non-starter.

Senator Schumer and Congressman Nadler need to hear from you – the individuals and companies in New York that support EB-5 and S. 831/H.R.2901 and stand to benefit from the bills passing, but also that stand to lose if they do not. Keeping the EB-5 Program around could be the difference between getting a project off the ground or it never coming to fruition.

The time to act is now. Please join your fellow New Yorkers in the Coalition to Save and Create Jobs to preserve and improve this vital economic development tool. Additionally, your outreach to Senator Schumer and Congressman Nadler is critical. Take action today, visit https://www.saveandcreatejobs.org/email-key-staff to find an email template and contact information.

Stay educated and engaged on all things EB-5 in IIUSA's EB-5 Education Library



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