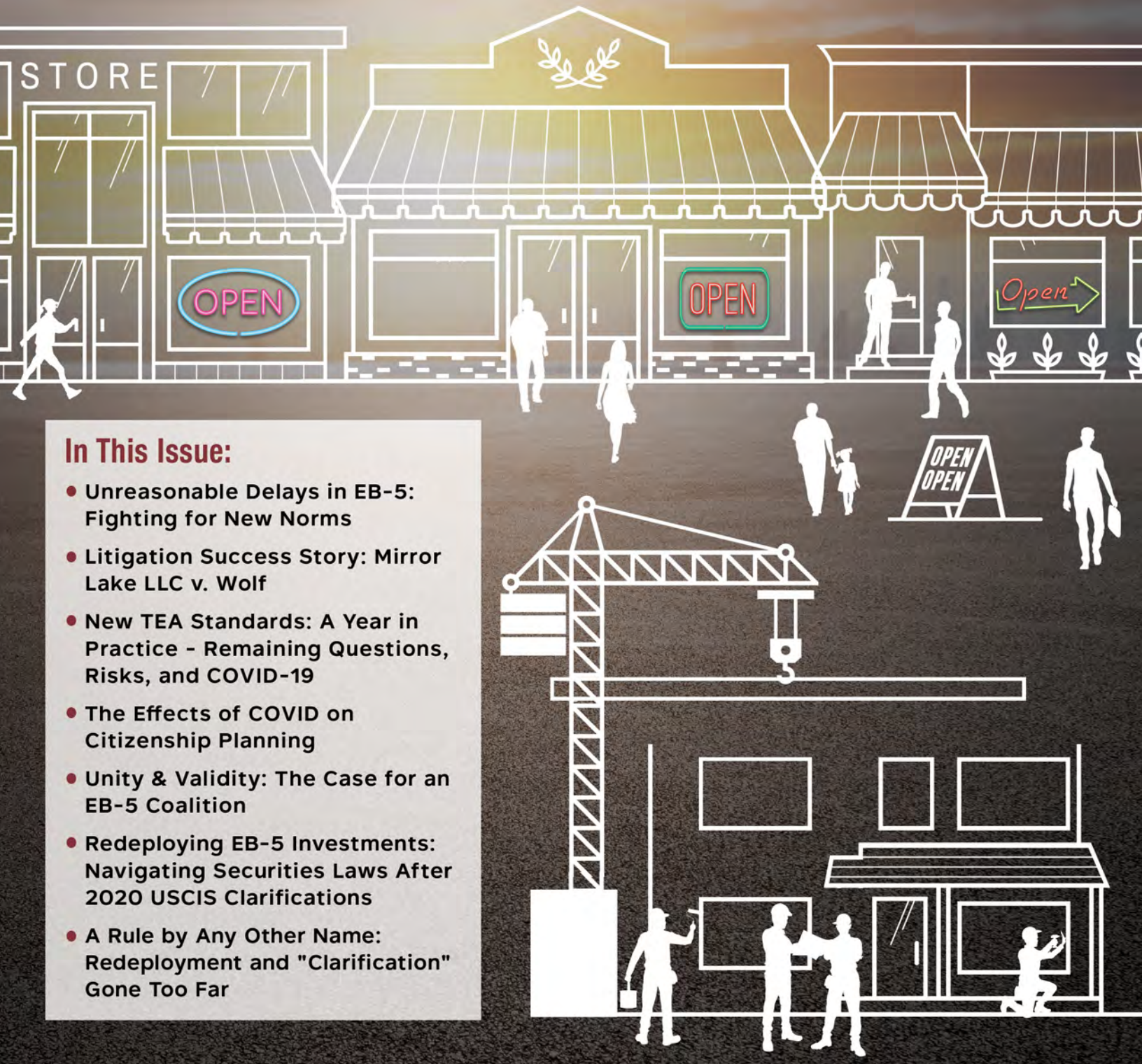
REGIONAL CENTER BUSINESS JOURNAL

November 2020

EB-5 REBUILDING AMERICA



In This Issue:

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IIUSA
INVEST IN THE USA

Letter from the Editor

Dear Readers:

This edition of the *Regional Center Business Journal* serves as a barometer of where the action is in the EB-5 industry, and as a resource for those attending IIUSA's 2020 Virtual EB-5 Industry Forum. Panel discussions in the Industry Forum aim to share insights on how best to manage the current challenges facing stakeholders.

With so many existing EB-5 investors in the very substantial pipeline of immigration processing, it is no surprise that several articles in this edition of the Journal are wrestling with the complications posed by immigration policies and processing, and the corresponding need to responsibly care for invested capital. The difficulties are especially acute for stakeholders in this extraordinary year 2020, with the persistent health threats of COVID-19, business lockdowns and the ensuing economic damage.

One article in particular, concerning targeted employment areas, should spur more creative thinking about what could be possible in the future EB-5 program. Although the article hits its objective as a "How To" informative piece for stakeholders, it also perhaps unintentionally is an invitation to policymakers and advocates to a new conversation about how best to incentivize foreign-source investment that is channeled to highest national priorities. Distinct cycles are evident over the course of the 30-year history of the EB-5 program, yet meaningful stakeholder engagement has been sporadic. A new conversation that elevates a shared vision of national interests could spawn the sustainable changes the EB-5 program requires.

The Editorial Committee joins me in wishing all of our readers renewed optimism and the best of health as we approach the end of this challenging year.

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Chair, IIUSA Editorial Committee

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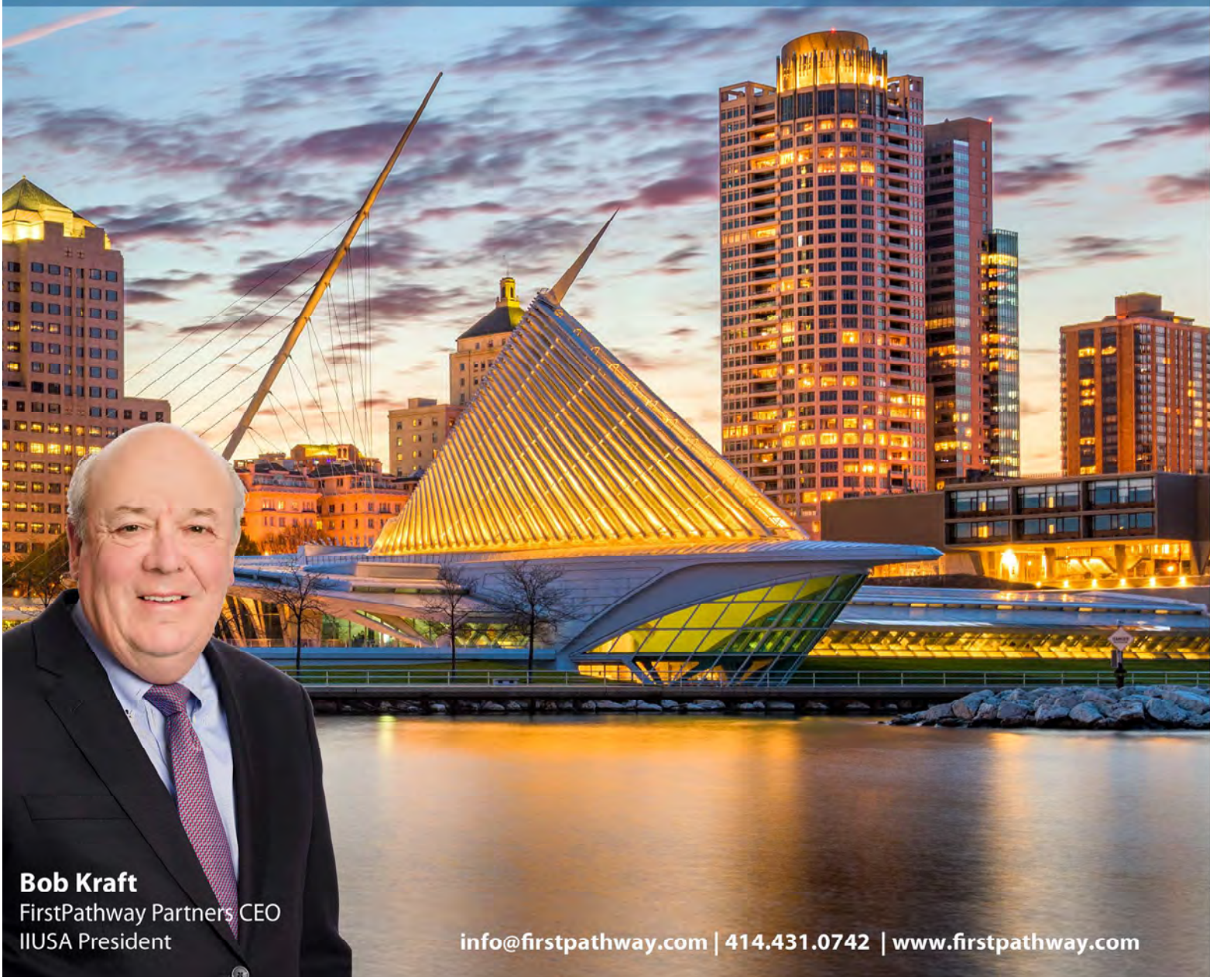

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UNREASONABLE DELAYS IN EB-5: *FIGHTING FOR NEW NORMS*

BRAD BANIAS
PARTNER, WASDEN BANIAS LLC

For years, the EB-5 litigation bar advised clients to wait to file "mandamus" suits until after the delays exceeded published processing times. These cases would invariably settle as they were (by definition) some of the longest pending petitions at the Immigrant Investor Program Office (IPO) at U.S. Citizenship & Immigration Services (USCIS). Motions to dismiss submitted by the U.S. government in response to federal complaints filed by frustrated investor plaintiffs were rare, and settlements were the rule. This was the norm. But this norm backfired because it allowed the IPO, not the plaintiffs, to define what was a "reasonable" amount of time to adjudicate a Form I-526. The results were predictable.

The IPO has started publishing ever-increasing processing times and, implicitly, extending "reasonable" delays for adjudication. The IPO now claims that it takes between three and six years[1] to adjudicate a Form I-526. And over the first six months of Fiscal Year 2020, the IPO adjudicated only 1,359 Forms I-526.[2] If the EB-5 litigation bar continues its past practice, "reasonable" processing times will continue to grow. Now is the time to use litigation to set new norms.

Practically, the EB-5 litigation bar must divorce processing times from what constitutes a reasonable amount of time to adjudicate an EB5 petition. Afterall, "[a]lthough [USCIS processing times] provide context, they don't prove that the delays at issue are reasonable as a matter of law."[3] Processing times are not wholly irrelevant, but they are not dispositive. Other guideposts are more relevant to determine what is a reasonable processing time.

First, congressional intent is paramount. Twenty years ago, Congress expressed concern about the excessive backlogs in processing immigration benefit applications, which it defined, among other things, as including petitions to confer status under the INA.[4] To address the problem of agency delay, Congress authorized the appropriation of funds to eliminate the backlog of petitions pending for more than 180 days.[5] Consistent with that directive, Congress stated that "the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application[.]"[6] Again in 2003, when Congress created the Department of Homeland Security, it amended the prior backlog elimination statute by directing the agency to eliminate immigration application backlogs within one year.[7]

Second, actual IPO metrics are crucial to identifying the workload the IPO can actually handle. As of 2019, the IPO had 212 adjudicators.[8] USCIS states that it takes an adjudicator at the IPO 8.65 hours to adjudicate an I-526 petition.[9] If we assume half of the IPO adjudicators are working on Forms I-526—106 adjudicators—and each of those adjudicators works 40 hours a week for 50 weeks a year,

1 The Agency's published processing times on September 25, 2020 were 37 to 74 months for a Form I-526.

2 https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2020Q2.pdf

3 Raju v. Cuccinelli, No. 20-cv-01386-AGT, 2020 U.S. Dist. LEXIS 153269, at *6 (N.D. Cal. Aug. 14, 2020) (available at www.wasden-banias.com/eb5decisions).

4 See Pub. Law No. 106-313, Title II, § 202(a)(1)-(2), 203(2) (Oct. 17, 2000).

5 Id. §§ 203(1) (defining backlog), 204(a)(1) (funds to reduce backlogs), 204(b)(1) (appropriation of funds). Congress also directed the Attorney General to "make such other improvements in the processing of immigration benefit applications as may be necessary to ensure that a backlog does not develop" in the future. Id. § 204(a)(2).

6 Id. § 202(b).

7 See Homeland Security Act of 2002, Pub. Law No. 107-296, § 458 (Nov. 2, 2002).

8 Modernization Stakeholder Call – Talking Points 3 (Sept. 9, 2019) Available at: www.uscis.gov/sites/default/files/document/outreach-engagements/EB-5_Modernization_Stakeholder_Call.pdf.

9 See 84 Fed. Reg. 62280, 62292 (Nov. 14, 2019).

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this means there are approximately 212,000 work hours associated with adjudicating Forms I-526. If we assume then divide the reported "touch time" for a Form I-526—8.65 hours—this would mean the IPO easily has the capacity to adjudicate approximately 24,500 Forms I-526 each year. The actual adjudication numbers are a fraction of this number.

Finally, every case is unique, and individual factors must be considered. USCIS interprets the statutory authorization for the regional center program as granting the agency authority to give priority to individual foreign investor petitions filed through regional centers.[10] Second, USCIS gives deference to project fundamentals where there is an approved exemplar application.[11] If a regional center project, it is exceedingly relevant whether the particular investor's new commercial enterprise has received other approvals and when those approvals were issued. Finally, IPO has begun prioritizing petitions for investors from countries where visas are currently available.

Unfortunately, there is no black and white answer to the key question of "how long do I have to wait before I file a 'mandamus'?" Every case is different. Every delay is different. A client who invested in a new commercial enterprise with an approved exemplar with a dozen approvals has a very different delay claim than a direct investment with a lone investor, even if they've waited the same amount of time. The reasons for this disparate outcome are congressional intent, regulatory deference, and the particular factors that courts review when considering whether a delay is reasonable.

Rest assured, USCIS will fight back. It hides behind its published processing times. It uses them as a shield and a sword. By arguing that published processing times do not dictate what is reasonable, you should expect motions to dismiss. It has already demonstrated a proclivity to file motions to dismiss as litigators challenge delays of 18 or 24 months. You should be ready to defend against them. And you should prepare your client's expectations accordingly. These motions increase the risk, stress, and cost of these cases.

This is why innovation in this litigation is paramount. For example, there appears to be a common belief that the District of Columbia is the best place to file these cases, or even the only place to file them. A quick review of the venue statute at 28 U.S.C. § 1391(e) reveals that you can bring these suits where the investor lives. And a bit more legal research will reveal that venue is proper against a federal agency in a multi-plaintiff suit if venue is proper for even a single plaintiff. Rather than brining a suit for one individual in the District of Columbia, there may be strategic advantages to bringing a group suit in a smaller jurisdiction. In certain jurisdictions, it may be wise to pursue discovery immediately while in others moving to compel production of an administrative record.

To impact the processing times, the EB-5 litigation bar must try new and different tactics. Some will win. Others will lose. That is the nature of litigation. But if we continue to do the same old, same old, we can only expect the same old. Now is the time to fight on our terms in new and creative ways to protect the EB-5 program and our clients.

10 ee 84 Fed. Reg. 35750, 35756 (final rule) (July 24, 2019).
11 See USCIS, 6 Policy Manual, Part G, Chapter 3, Section B. (Available at: www.uscis.gov/policy-manual/volume-6-part-g-chapter-3.

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New TEA Standards – A Year in Practice – Remaining Questions, Risks and COVID-19

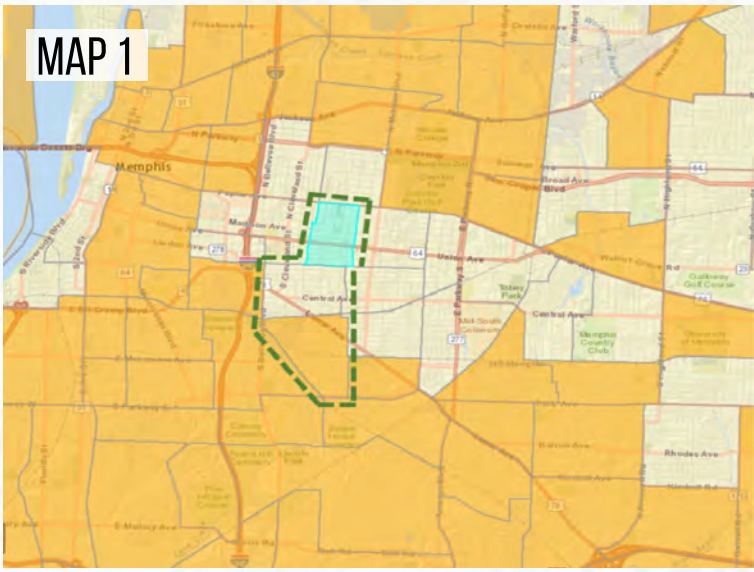
MICHAEL KESTER
PARTNER & LEAD EB-5 ECONOMIST,
IMPACT DATASOURCE

The EB-5 industry has now had almost a year to digest and adapt to the new TEA standards that went into effect on November 21, 2019 as a result of The EB-5 Immigrant Investor Program Modernization regulation ("Final Rule") imposed by the United States Citizen and Immigration Services (USCIS). In this article, we discuss the main TEA-related changes in the Final Rule, but also review some of the issues and risks that the industry has faced over the year, including impacts of COVID-19 on TEA calculations.

The Basics: Re-visiting Census Tract Aggregation

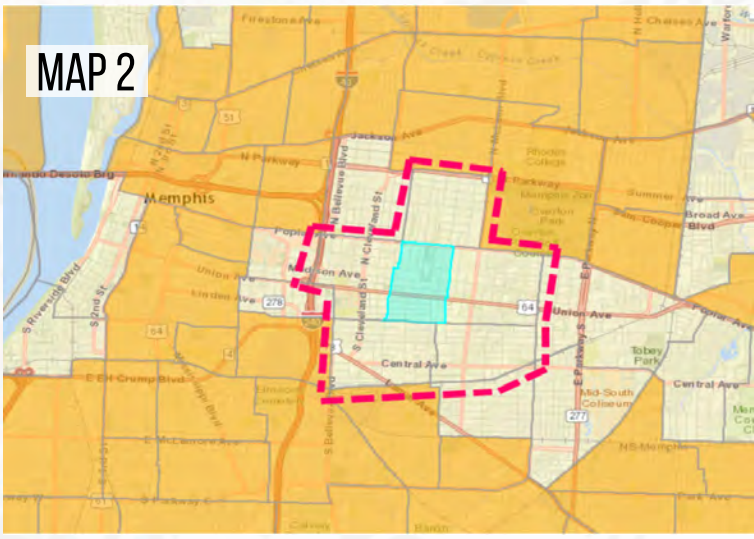
The Final Rule drastically limited census tract combinations for TEAs when compared to the prior standards: census tract aggregation is now limited to the project tract(s) plus some or all of the tracts that are "directly adjacent" to the project tract, i.e., for aggregation purposes a TEA can only consist of the tracts that touch the project tract.

The following maps provide an illustration of how drastic the limitations are now compared to the pre-Nov 2019 rules. In both maps, high unemployment census tracts are shown in orange, with the project census tract highlighted in light blue. Under the prior TEA standards, the site in Map 1 below of Memphis, TN, would have been TEA-eligible by a relatively simple and reasonable combination of only three tracts (one of several reasonable combinations). This type of combination would have been certified easily by almost all states under the prior standards.



Map 1: Prior TEA Standards: One of Many Possible Combinations

Map 2 below analyzes that same census tract under the new Final Rule. As shown, the same project census tract does not touch any other high unemployment census tracts, and so it is not possible to construct a TEA under the Final Rule in this example.



Map 2: New TEA Standards: Census tract not TEA-eligible

This illustrative example is not unique, as the Final Rule results in similar limitations throughout the country. In many cities, higher unemployment areas are highly concentrated in a certain area of the city, as opposed to being scattered throughout. While the imposition of this general census tract limit has probably removed some instances of what could appear to be "gerrymandering," it has also become a major hinderance to potential EB-5 projects that would in all likelihood have had significant positive economic impacts on nearby high unemployment areas.

The Basics: Datasets Accepted by USCIS for TEAs

In announcing the new Final Rule, USCIS did not provide one specific set of data that petitioners can use to demonstrate TEA eligibility. USCIS does state that unemployment data provided by the U.S. Census Bureau's American Community Survey (ACS) and the Bureau of Labor Statistics (BLS) qualify as reliable and verifiable data for petitioners to use.

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American Community Survey (ACS) is the only source of census tract level data specifically mentioned as "reliable and verifiable" by USCIS, and it is based on data collected over a five-year period. ACS publishes 1-year, 3-year and 5-year estimates for different geographies, but data at the census tract level is only released as 5-year estimates. The most recent ACS data available for census tracts as of the time of this article is the five-year period of 2014 to 2018 (ACS 14-18). ACS data may be found at data.census.gov and the five-year estimates are updated each December.

Bureau of Labor Statistics (BLS) Local Area Unemployment Statistics (LAUS) data at the county level is what is typically used for counties and MSAs that might qualify as a TEA on their own (as is permitted under the Final Rule), but more importantly, it is also used in conjunction with the ACS five-year data to complete the "census-share" calculation as outlined by the BLS for census tract aggregation. BLS LAUS data is released monthly with a lag of 2 to 3 months or so. As of the date of this article, August 2020 is the latest month available. Calendar year estimates, which almost all states used in the census-share calculation under the prior rules, are typically finalized in mid-April, i.e., 2020 calendar year BLS LAUS estimates will not be final until mid-April 2021. BLS LAUS data may be found at bls.gov/lau

ACS and BLS Timing / Data Lag

With the lack of clear-cut guidance from USCIS on what "time period" of data must be used for TEA calculations (discussed more later) combined with the uncertainty about the near-term and long-term impacts of COVID-19, it is important to take stock of the periods that ACS and BLS cover, i.e., the "data lag". As COVID-19 has impacted certain parts of the country harder than others, in general, if the local area is impacted more than the nation as a whole, then there is higher chance for more TEA-eligible areas to eventually emerge. Conversely, if a local area is only impacted minimally from COVID-19, then it may show fewer TEA-eligible areas over time, as it will not keep pace with the increasing 150% national rate threshold that needs to be met. However, these impacts are not necessarily immediately seen in typical high-unemployment TEA calculations, due to data lag.

ACS Release Dates

Recall that as of the date of this article, the latest ACS data available at the census tract level is ACS 14-18, and so does not reflect any COVID-19 impacts.

ACS 15-19 data is set to be released in **December 2020** (impacts from COVID-19 will not be captured, as the final year of the data collection will only be through 2019).

ACS 16-20 data is set to be released in **December 2021** (impacts from COVID-19 will be captured, however, 2020 will only be one year out of five in the data collection period, so the impacts will be somewhat blunted).

In summary, for TEA calculations that can reasonably rely on ACS data only (discussed in more detail later in this article), impacts from COVID-19 would not be seen until December 2021.

BLS Release Dates

For typical TEA calculations that utilize BLS LAUS data (as most states previously utilized), a 12-month calendar year average is used. The most recent calendar year average that is finalized as of the date of this article is calendar vyear 2019, and so does not reflect any COVID-19 impacts.

Calendar Year 2020 BLS LAUS county-level data is set to be finalized **mid-April 2021**. Impacts from COVID-19 will be captured.

Calendar Year 2021 BLS LAUS county-level data is set to be finalized **mid-April 2022**. As it is unclear how long the Impacts from COVID-19 will last, it is difficult to determine how the 2021 data might look. As of the date of this article, it seems likely that effects from the pandemic will last into at least a portion of 2021, if not 2022.

While typical TEA calculations made by most states for the past decade or so used a 12-month calendar average, it is not necessarily the only option, as USCIS did not provide strict guidance on what time period must be used. Later in this article, we discuss the possibility of using "rolling" averages, that incorporate COVID-19 impacts sooner than the typical calculations.

ACS vs BLS/Census-Share: A Comparison Example

Most (if not all) states under the prior TEA standards utilized the "census-share methodology," which combines ACS and BLS data for TEA calculations at the census tract level. While the Final Rule does not specifically state that USCIS will continue to accept the census-share methodology, the general consensus in the industry is that it will continue to be permitted, as USCIS had approved the census-share method countless times under the prior rules. Besides the census-share method, it also seems reasonable to assume that USCIS

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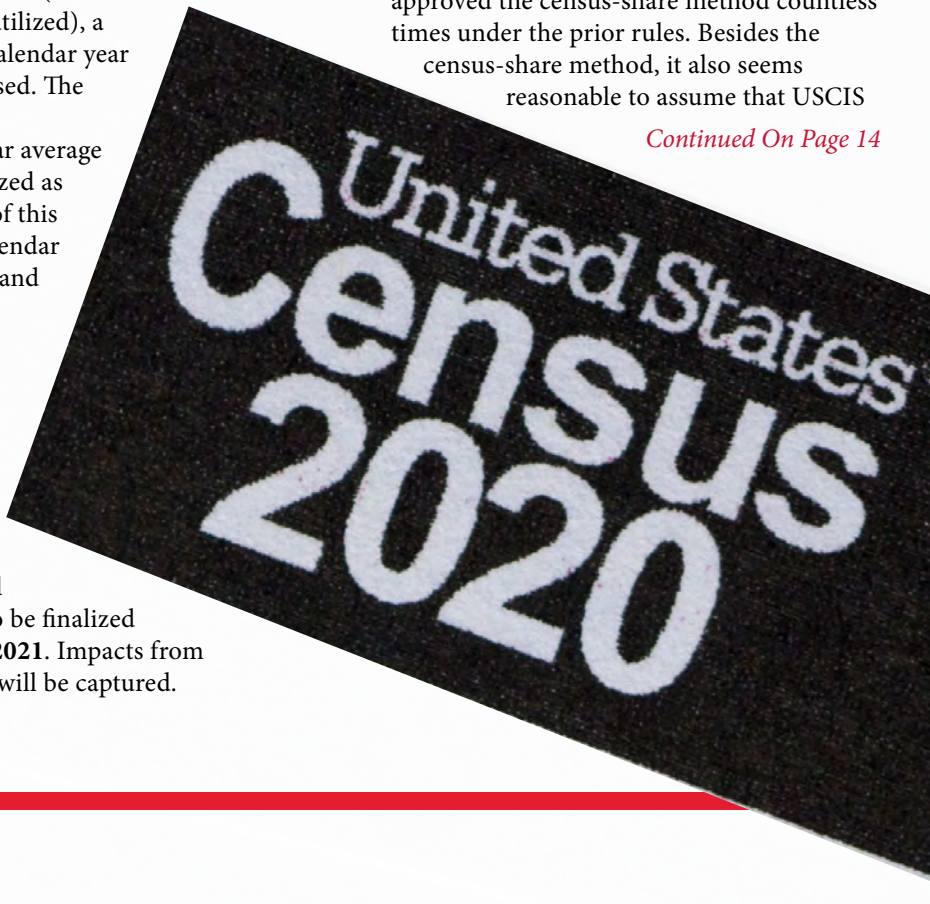

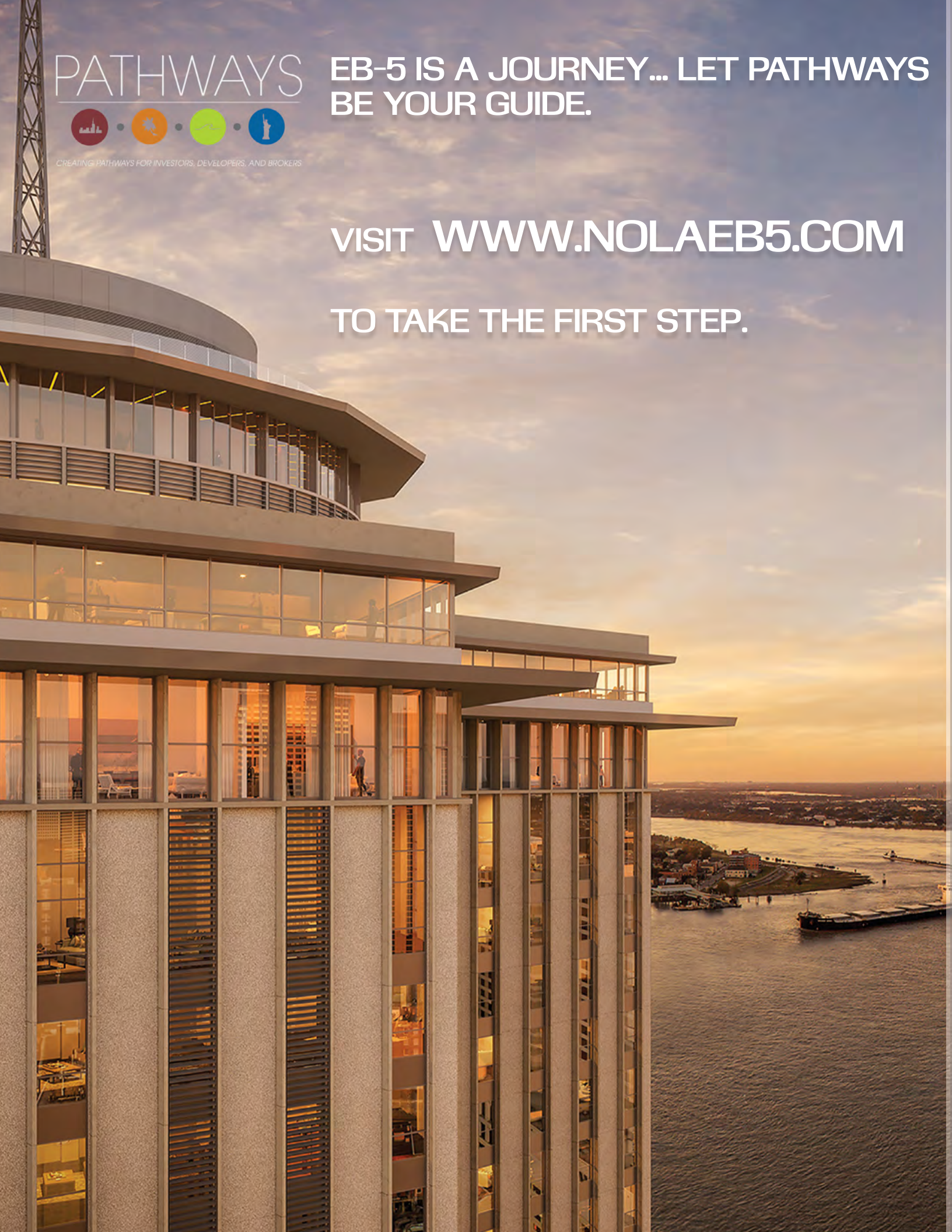
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will also allow for another approach that uses only ACS data (which for the purposes of this article we will call "ACS-only"). The following language in the preamble of the Final Rule first discusses the necessity for consistency when using different datasets and then appears to specifically refer to an ACS-only scenario:

Regardless of which reliable and verifiable data petitioners choose to present to DHS, the data should be internally consistent… If petitioners rely on ACS data to determine the unemployment rate for the requested TEA, they should also rely on ACS data to determine the national unemployment area [sic] to which the TEA is compared.

While it should be noted that I personally had never worked on nor seen a project that utilized an ACS-only approach under the prior rules, and to the best of my knowledge there have not been any I-526 approvals under the new standards that utilized an ACS-only approach, the language above would leave the reader to believe that USCIS will accept different methodologies that would utilize different 150% national unemployment rate thresholds. Accordingly, an ACS-only calculation does need to be compared to a national unemployment rate that is different than a census-share calculation.

TABLE 1: ACS-Only Estimate for Census Tract 36 in Shelby County, TN (Civilian Labor Force)

	Employed	Unemployed	Unemployment Rate
Census Tract 36 (ACS 14-18)	1,051	114	9.8%
National (ACS 14-18)	152,739,884	9,508,312	5.9%
150% Nat'l Threshold	-	-	8.9%

TABLE 2: Employment & Unemployment Shares Based on the ACS 14-18

	Employed	Unemployed	Unemployment Rate
(A) Census Tract 36 (ACS 14-18)	1,051	114	9.8%
(B) Shelby County, TN (ACS 14-18)	432,142	36,236	7.7%
Census Tract 36 Share (A / B)	0.2432%	0.3146%	-

TABLE 2: Census-Share Estimate Based on 2019 BLS Annual Unemployment and ACS 14-18

	Employed	Unemployed	Unemployment Rate
(A) Shelby County (BLS LAUS 2019)	431,885	18,080	4.0%
(B) Census Tract 36 Shares (ACS 14-18)	0.2432%	0.3146%	-
Census Tract 36 CY19 (A x B)	1,050	57	5.1%
(C) National Rate (BLS 2019)	157,538,000	6,001,000	3.7%
150% Nat'l Threshold (ACS 14-18) (C x 1.5)			5.6%

Lastly, the regulatory language 8 CFR 204.6(e) defines a high unemployment area as "… an area that has experienced unemployment of at least 150 percent of the *national average rate*". The regulations referring to a "national average rate" would appear to provide more flexibility on the usage of different time-periods than if the regulations just stated a "national rate".

ACS-only Method for Census Tracts: An example

An ACS-only approach for census tracts utilizes the latest 5-year average data at the census tract level and compares the resulting unemployment rate to 150% of the national rate from the same ACS 5-year average dataset. Table 1 below demonstrates the results of an ACS-only calculation for Census Tract 36 in Shelby County, TN:

Under an ACS-only approach, Census Tract 36 in Shelby County, TN results in an unemployment rate of 9.8%, which is greater than the 150% national threshold rate of 8.9% as calculated from the same ACS 14-18 dataset.

Census-Share for Census Tracts: An example

Census-share disaggregation utilizes the same ACS data at the tract level to calculate "shares" of employment and unemployment, and then applies those "shares" from the outdated ACS data to the more recent BLS LAUS county data to arrive at a more current estimate of census tract unemployment. In other words, the census-share methodology assumes that whatever percent of unemployment and employment the tract had when compared to the county will continue into the future. Those percentages are applied to more recent data (BLS) to achieve a more recent census tract estimate.

To illustrate the census-share calculation, consider the same Census Tract 36 in Shelby County, TN. According to ACS 14-18, the tract accounted for 0.2432% of the county's employment and 0.3146% of the county's unemployment as shown in Table 2 below.

In order to estimate a more current unemployment rate at the census tract level, the shares calculated from the ACS 14-18 can be used in conjunction with the unemployment data from BLS to determine the census-share estimate of unemployment. Table 3 shows the updated Census Tract 36 employed and unemployed data which is obtained by multiplying the census shares from Table 2 by the Shelby County employed and unemployed figures. This calculation results in an unemployment rate for Census Tract 36 of 5.1% for calendar year 2019, which must be compared to 150% of the calendar year

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2019 national average, which is 5.6%.

To conclude, Census Tract 36 in Shelby County, TN has a 2019 unemployment rate from census-share (5.1%) that does not meet the 2019 national threshold (5.6%).

Census Tract 36 appears to work under an ACS-only approach, but not under census-share (for simplicity this example does not factor in the possibility of combining directly adjacent tracts to meet the required threshold). For most census tracts, if the tract qualifies under one method, it usually qualifies under the other, but it is not uncommon for the two methods to differ. Furthermore, the two typical methods for determining TEA qualification will be affected differently by the changes in unemployment caused by COVID-19. As discussed in detail above, the census-share method will reflect unemployment data from 2020 (when COVID-19 started) sooner than the ACS-only method. Therefore, depending on your TEA situation (whether you currently have a TEA that you are hoping will stay a TEA, or you have a project location that does not currently qualify but eventually might due to COVID-19), one method might be more beneficial than the other. In general:

- The ACS-only method will be more stable over time.
- The census-share method has more possibilities for big swings over time, especially as impacts from COVID-19 work its way in and out of the labor force data

TEA Timing – How long is a TEA good for?

USCIS did not provide clear-cut guidance in the Final Rule as to when one must start using new data for a TEA analysis. As TEAs come into play at the time of filing of the investor's I-526 petition (or time of the investment), a general rule-of-thumb for TEAs is to ensure that the certification utilizes the most recent data that is available at that time.

However, in many projects it is difficult to anticipate exactly when investors might subscribe or when the I-526s might be filed. The time lag between when the EB-5 stakeholder asks the initial question "is this project in a TEA" and the successful completed marketing of a project is often more than a year.

Does my project qualify as a TEA? In many cases, a simple "yes" or "no" response based on a single point-in-time analysis will not provide a sufficiently detailed answer for a project stakeholder to make a decision on whether or not to travel down the EB-5 path. TEA-eligibility for a project can change over time and so there is no guarantee that a site that is currently TEA-eligible will remain so in the future.

Under the prior standards, we could almost always "rescue" a TEA from year-to-year, since most states were relatively flexible on how many tracts one could aggregate together to form a TEA. In other words, even if the exact same TEA configuration that worked one year happened to no longer qualify the next year, we could usually find an alternative group of tracts that would work. However, now that TEAs are restricted only to tracts that border the project tract, if a combination of tract(s) that worked one year falls out of TEA-eligibility, there aren't many options to try and save it by finding other combinations. While some TEAs are so significantly above the threshold that they are almost certain to stay a TEA from year to year, for many locations it is difficult to tell. Given the relatively small labor force of most tracts and the difficulty in estimating how a single tract's unemployment rate is likely to change compared to the national unemployment rate, for many TEAs it is difficult to say with confidence that a tract(s) that qualifies as a TEA at any point in time will continue to qualify as a TEA in the future. This is especially troublesome for borderline TEAs with only one high unemployment census tract, i.e., single census tract TEAs, or TEAs that only have one directly adjacent high unemployment tract.

This lack of certainty regarding TEA validity can cause issues at any stage of the project planning and construction process. Based on the initial perceived TEA-status of the project, project developers can expend significant amounts of time and money preparing the application for project approval only to find out later that the project is no longer TEA-eligible, and hence possibly no longer marketable. Similarly, for projects subscribing investors over a longer period of time, the earlier investors in the project might be initially safe at the TEA investment level. However, as TEA data changes, the later investors might be required to invest at the higher non-TEA amount. With the new non-TEA investment level being $1.8 million, non-TEA projects are even less marketable than before.

"Non-Standard" Calculations – Rolling Averages

Under the census-share method for census tracts (or for reviewing if an MSA or County might qualify on its own), one "non-standard" possibility is to utilize a different/rolling 12-month average to complete the calculation, instead of using a calendar year average. Under typical census-share (such as most states used under the prior rules), county-level data from a *calendar year* is used to complete the calculation, which is why impacts from COVID-19 would not show up until April 2021 (when *calendar year 2020* data is finalized). However, as previously discussed, BLS releases county-level data on a monthly basis. Accordingly, one could theoretically look at different "rolling" 12-month periods, instead of the calendar year, as new data is released each month, to see how COVID-19 is impacting a TEA.

For example, as of this date of this article unemployment data at the county level through August 2020 has been released. Utilizing a rolling 12-month period from September 2019 to August 2020 would pick up six months of COVID-19 impacts which could significantly increase the unemployment rate in the project location. If using this method, one would need to compare the result in the scenario above to 150% of the national unemployment rate from September 2019 to August 2020 (a higher threshold than the calendar year 2019).

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As a 12-month period is still being used under this rolling method (and technically it would be more current than the typical calendar year approach), it seems that this would be a reasonable approach. For example, until 2015/2016 the state of Massachusetts used a rolling 12-month average for their TEA certifications and updated their TEA data monthly, so USCIS has seen this approach before. It should be noted that as this approach is somewhat new (to the best of my knowledge, there have been no I-526 petitions yet adjudicated under the new TEA standards, let alone any that utilized a "rolling" analysis), it is important to review this "rolling" approach with the entire EB-5 team to ensure all have approved using this untested approach.

As a "rolling" analysis might be objectionable to a USCIS adjudicator, to avoid any confusion with USCIS, the calculations should likely be updated on a monthly basis to ensure that each investor's I-526 is using the latest 12-month period. In the example above, it is likely safest to only have investors file with the September 2019 to August 2020 analysis only up until the point that the final September 2020 data is released. When final September 2020 is released, new investors should likely file with an analysis of October 2019 to September 2020 data (assuming the location continues to qualify as new months of data are released).

Rolling continued: Less-than-12-month Periods

What about analyzing smaller rolling periods (9-month, 6-month, 3-month, 1-month)? The smaller the monthly group that is utilized, the higher chance there is for larger variations in the data, especially during COVID-19. In addition, it will likely be riskier to file an I-526 with a TEA that uses a less-than-12-month period for a tract, MSA or county calculation as USCIS has never weighed in on this issue. Although there is no language in the new TEA standards that addresses this topic specifically, USCIS could question if the TEA under this scenario provides a full, accurate picture, especially if the impacts of COVID-19 are somewhat short-lived. This is especially important as USCIS will not be providing an answer on TEA approval until the I-526 is adjudicated which can possibly take two years or more from the time of filing. It is also likely that the attorneys would want to update the risk language in the securities documents should this approach be utilized. Perhaps the government would be a bit more lenient on the methodology due to the toll that COVID-19 is having on the country, but it is of course difficult to predict what USCIS might do.

Is there any precedent or communications from USCIS concerning a less-than-12-month calculation? In the "Questions and Answers: EB-5 Immigrant Investor Program Modernization Rule" from March 2020, USCIS does at least describe a less-than-12-month TEA calculation when discussing the unrelated item of decimal rounding in TEA calculations. In the example they provide, the question posed includes the following:

"For example, if the unemployment for August 2019 for the United States is 3.7%, and 150% of that is 5.55%, would a weighted average of 5.445% qualify? What is the cut-off point?"

USCIS continues on to answer the question without remarking at all about the single-month timeline posed. While this Q&A is about an unrelated topic, and is certainly not anything close to being codified law, and is probably not strong legal support, at the very least it shows that USCIS has posited a less-than-12-month calculation for TEAs without pushback.

Rolling continued: Taking a look at our Census-Tract in Shelby County Under Census-Share

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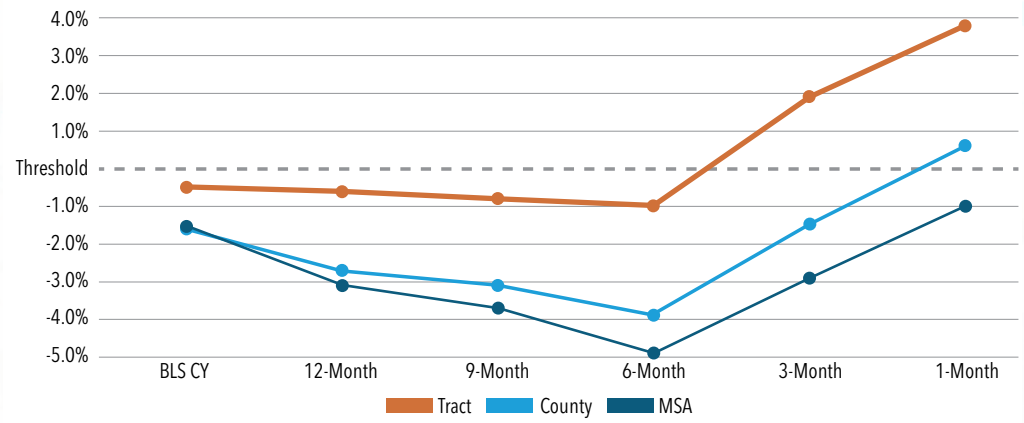
TABLE 4: TRENDS FOR CENSUS TRACT 36 IN SHELBY COUNTY, TN UNDER DIFFERENT ROLLING PERIODS

	BLS CALENDAR YEAR 2019	12-MONTH ROLLING AVG.	9-MONTH ROLLING AVG.	6-MONTH ROLLING AVG.	3 MONTH ROLLING AVG.	1-MONTH ROLLING AVG.
		MONTH ENDING AUGUST 2019				
TEA Threshold Rate	**5.6%**	**10.4%**	**12.2%**	**15.5%**	**15.2%**	**12.8%**
Tract	**5.1%**	**9.8%**	**11.4%**	**14.5%**	**17.1%**	**16.6%**
Unemployed	57	109	127	162	195	198
Labor Force	1,107	1,111	1,112	1,118	1,141	1,192
County	**4.0%**	**7.7%**	**9.1%**	**11.6%**	**13.7%**	**13.4%**
Unemployed	18,080	34,557	40,415	51,364	61,961	63,015
Labor Force	449,965	446,600	445,570	444,466	450,995	471,530
MSA	**4.1%**	**7.3%**	**8.5%**	**10.6%**	**12.3%**	**11.8%**
Unemployed	26,625	46,354	53,397	66,686	77,679	77,733
Labor Force	641,975	633,760	630,786	626,616	633,745	658,557

GRAPH 1: Percent Above/Below Threshold for Different Time Periods



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While it might be deemed a bit too risky to file investors using a less-than-12-month calculation, it can be beneficial to understand the trends in unemployment over time to help with the decision-making process as COVID-19 affects unemployment rates. As discussed previously, it can often be difficult to provide any certainty on whether a TEA will remain so in the future. Continuing our analysis of the same census tract above, we can also see how the county and MSA are trending (since the Final rule also allows a county and an MSA to qualify).

The first column in Table 4 shows the typical census-share calculation (calendar year 2019), which we calculated earlier, with the remaining columns demonstrating the different rolling periods through August 2020.

Table 4: Trends for Census Tract 36 in Shelby County, TN Under Different Rolling Periods

The analysis reveals that the most recent months of released data (June, July and August of 2020) are helping this census tract from a TEA standpoint, as the 3-month and 1-month rolling averages are exceeding the corresponding national TEA threshold rates. Furthermore, the most recent impacts from COVID-19 have been so significant that the entire county exceeds the national threshold when looking at the 1-month time period. In other words, Shelby County has been impacted more by COVID-19 than the nation as a whole during these recent months. The following graph shows the difference between the unemployment rate of the census tract, county and MSA versus the national rate threshold over these time periods.

Graph 1: Percent Above/Below Threshold for Different Time Periods

In summary, if I were reviewing a potential EB-5 project location in Census Tract 36 for a client, I would likely communicate to them something similar to the following (recall that for simplicity in this example we are assuming that Census Tract 36 does not have any directly adjacent high unemployment tracts to aggregate):

Census Tract 36 currently meets the TEA threshold under one of the two typical TEA methods that it seems reasonable to assume that USCIS would accept: an ACS-only approach. Furthermore, while it doesn't meet the threshold under the typical census-share method that most states used over the previous decade (using a calendar year basis), it does appear to be trending favorably from a TEA standpoint based on the most recent months of data. In summary, this location appears to qualify as a TEA until at least December of this year when new ACS data at the census tract level will be released. Furthermore, based on the recent trends, it seems likely to continue to qualify as a TEA under one of the two typical methods (or possibly both). However, we will want to review the new ACS data as soon as it is released in December to double-check the continued eligibility under the ACS-only method, and we can also continue to keep an eye on the monthly BLS data as it is released to see if the trends continue to be favorable from a TEA standpoint.

Other Topics/Questions

Counties and MSAs: BLS versus ACS

The Final Rule continues to permit counties and MSAs to also qualify as TEAs in their entirety. Under the prior standards, for projects making filings where the TEA qualified at the county or MSA level, the most recent calendar year data from BLS would typically be provided as evidence. However, for some locations, using ACS data at the county-level or MSA-level, instead of BLS, would be more beneficial. For example, under the most recent ACS 5-year average data (ACS 14-18), Philadelphia County meets the TEA threshold in its entirety. However, Philadelphia County does not meet the TEA threshold based on the more recent BLS data (calendar year 2019). This is an interesting scenario for projects that do not qualify at the census tract level, but might consider moving forward based on the ACS data at the county or MSA levels. While USCIS does consider either ACS or BLS data to be reliable and verifiable, the ACS data (which does meet the threshold for Philadelphia County) in this case would be a good bit more outdated than the more recent BLS data (that does not meet the threshold). Would USCIS be able to reasonably question using ACS data under this scenario, since more recent county data is available?

Summary

EB-5 stakeholders have had to make many adjustments based on the new TEA standards. After a year of adjusting to the new framework, the industry still faces many questions and potential risks related to TEAs. USCIS will hopefully listen to the comments and questions from the industry and provide additional clarification to the key remaining questions. Due to the nuances of the new standards, EB-5 stakeholders should continue to carefully discuss the methods and data utilized in the TEA analysis for each project location with their economists and attorneys.

The Effects of Covid on Citizenship Planning

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COVID-19 pandemic has led governments around the world to limit people's freedoms, including adjustments to social benefits, limiting who can work and where they can work, limiting where consumers can and can't shop or buy and not buy, and whether (or where) they can go on vacation.

These limitations force people to reassess and evaluate whether having global mobility options (including a second passport) is important.

Citizenship by investment (CBI) (or residency with a path to citizenship by investment) is nothing new. The first CBI program was introduced in 1984 by the dual-island nation Saint Kitts and Nevis as a way to boost its economy. Today, many countries including Australia, Cyprus, Greece, Grenada, Portugal, Saint Kitts and Nevis, Spain, Turkey, the U.K., and the U.S. participate in citizenship by investment-like programs. In fact, there are so many programs in existence that CBI is considered by many to be an investment asset class of its own.

In 1990, the United States introduced the EB-5 Immigrant Investor Program, a CBI program that was created to provide immigrant investors with a path to lawful permanent residency and to encourage foreign investment into projects that stimulate U.S. job growth. Once relatively obscure, in the decade since the financial crisis began there has been an exponential rise in the use of EB-5 capital in projects of all types and sizes.

Why the U.S. is still a top choice for investors

Despite world-leading COVID rates, the U.S. is still a top choice for investors and their families wanting to relocate to pursue a better life. Access to education and healthcare are the leading reasons for immigrant investors, as the top four universities in the world are based in the U.S., according to U.S. News. According to a survey by EB5 Affiliate Network of 300 wealthy Chinese investors, the U.S. ranked as their number one destination because of education and real estate investment opportunities. The top three hospitals in the world are also in the U.S., according to Newsweek's 2020 report. Another bonus is the ability to work and live in the United States without additional immigration requirements though the EB-5 program.

"The U.S. is still the first destination for immigrants because its economic and political stability gives them opportunities that they don't have in their home country," said Nicolas Cesario, Director of JTC's PCS Miami office. JTC Company is a multi-jurisdictional provider of fund, corporate and private client services. The

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company administers more than $130 billion in assets and employs more than 900 people worldwide.

"With the good and the bad, U.S. is still the land of the free, where those who study hard and work hard normally (more often than in most other countries in the world) are rewarded."

Turmoil outside of the U.S.

While education and healthcare opportunities have long contributed to the allure of the EB-5 program, political and economic stability is increasingly a driver for investors in many countries.

In Latin America, for example, the cyclical and endemic ups and downs of the region's politics and economies, which have only been exacerbated by the pandemic, have spurred wealthy individuals and their families to seek CBI programs.

In Argentina, Chile, and Mexico, specifically, political and economic changes have placed wealthy individuals and their families under significant pressure. New taxes have been proposed (and have been - or will be shortly - pushed through these countries' congresses) that are aimed at collecting more money to pay for oversized governments, and embedding policies that eschew healthy private capitalism in favor of inefficient social plans.

As a consequence, high net worth individuals (HNWI) in these countries are shifting their wealth out in an effort to protect their assets from their starved and voracious motherlands. Moreover, HNWI are getting themselves out of reach of their government's claws, by moving out to other countries. For these individuals, the U.S. is the preferred destination for themselves, their families, and their wealth. As a result, interest in the E-2 and EB-5 programs will grow considerably in the coming years with applicants from these countries.

Boosting the American Economy

While it's no secret that citizenship by investment programs offer meaningful incentives to foreign investors, the EB-5 program also offers American citizens crucially important benefits through much-needed job creation and economic growth.

Critics of the EB-5 program often do not understand that it is not only a CBI program, but a domestic job creation and economic impact initiative. As such, it is a win-win for a country that is currently experiencing high unemployment due to the COVID-19 pandemic and is in need of an economic boost as well as employment for American workers.

In fact, an objective 2013 study by the U.S. Department of Commerce highlighted the significant job growth that has resulted from the EB-5 program: more than 11,000 immigrant investors provided $5.8 billion in capital, or roughly 35% of the total investment ($16.7 billion) for 562 EB-5 related projects that were active in FY2012 and FY2013. These projects were expected to create an estimated 174,039 jobs during that period. This kind of job growth – and programs that enable it - is instrumental to the recovery of the country post-pandemic. To support continued investment, however, investors need support for citizenship planning.

The complexities of moving to the U.S.

Anyone who has planned an overseas vacation or a big move knows there are a lot of logistics that need to be considered and planned for, especially when it comes to financial strategies and estate planning. Many investors like to think of the long term, not just the short term, so it is important to have the right support from the start.

People and entrepreneurs who are planning on moving to the U.S. should work with a company that offers a comprehensive range of solutions for international families and entrepreneurs moving to and starting a business in the U.S. They should look for a company that offers services that include pre-immigration tax and legal guidance, corporate formation, accounting, local tax and regulatory compliance, trust formation, and administration.

It is also important for foreign investors who decide to move to the U.S. to know that their tax situation will change significantly. The U.S. has a worldwide Income tax model, which means that a taxpayer will be required to include U.S. and foreign income on the annual returns. Also, worldwide reporting will be required for foreign accounts, assets, and investments.

The EB-5 program is crucial to the country's success, and we have to help the investors who are helping us get back on our feet.

JOHANNESBURG CHAMBER OF COMMERCE AND INDUSTRY

Johannesburg Chamber of Commerce and Industry – commonly referred to as JCCI was established in 1890.

Since its inception 130 years ago, JCCI has focussed on the promotion and facilitation of international trade. The Chamber has a significantly high profile in the international trade arena – its trade expertise and worldwide contacts have opened doors to new business opportunities for many of members and non-members doing business internationally.

Every year we host a number of high-level incoming Trade Missions and also lead outgoing Trade Missions to explore new international markets. Chamber missions are very efficient in introducing and facilitating new trading partners to each other as pre-arranged business-to-business meetings ensure that the participants obtain the maximum benefit.

JCCI is a direct member of the International Chamber of Commerce in Paris, which makes the rules and regulations for international trade. Through its direct involvement with the ICC, JCCI participates in the numerous commissions covering all aspects of international trade, including transportation and finance.

In addition, the Chamber plays a key role in providing training in the fields of importing and exporting. Each year we run a series of workshops covering trading conditions and opportunities in different countries. Recently these workshops have mainly focussed on countries in Africa as the continent has grown in importance as a trading partner. One of the unique activities that the Chamber is involved in hosting its own EXPORTER INCUBATOR wherein black owned exporters are trained and supported throughout the value chain of Import/Export Trade until they at least reach an off-take stage of their market exploration journey.

est. 1890

J C C I

Johannesburg Chamber
of Commerce and Industry

Navigating the Uncertainties of COVID-19: A Guide for EB-5 Issuers on Securities Laws Disclosure in the Midst of the Pandemic

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The novel coronavirus known as COVID-19 ("COVID-19"), together with related governmental and regulatory responses, have affected economic and financial market conditions as well as the operations, results and prospects of companies across many industries. Although the true extent of the economic and financial disruptions remains unclear, the global economy has experienced and continues to experience significant changes in business and economic conditions generally as the COVID-19 crisis continues.

Unfortunately, projects utilizing EB-5 financing ("EB-5 Projects") are not immune from the pandemic and its adverse effects on the U.S. and global economies, including market volatility, market and business uncertainty and closures, supply chain and travel interruptions, the need for employees to work at external locations and extensive medical absences among the workforce.

As the pandemic economy continues to impact new commercial enterprises ("NCEs") and job-creating-entities ("JCEs") alike, this article will discuss (i) appropriate disclosures to EB-5 investors regarding COVID-19 and its impact on both their investment and their EB-5 Project and (ii) the timing of such disclosures and when obtaining consent from EB-5 investors is appropriate. We will discuss these issues in the context of three common EB-5 offering scenarios: new offerings, existing/on-going offerings and offerings that are either closed or experiencing distress.

New Offerings

In addition to COVID-19's clear impact on the business and operations of EB-5 Projects within a myriad of industries, it has also seemingly had a stifling effect on the number of NCEs conducting new EB-5 offerings ("EB-5 Offerings").

Of course, there has been a gradual reduction in the number of EB-5 Offerings in recent years that cannot be attributed to COVID-19 alone. To be sure, the lack of definitive policy determinations by USCIS, changes to TEA determinations and methodologies, increased minimum investment amounts and the increasing visa backlog for investors from Mainland China are contributing factors. The United States' uncertain political climate – particularly in an election year – is also likely a factor.

Nevertheless, the financial and market disruptions caused by COVID-19 have led some EB-5 operators to adopt a "wait and see" approach with respect to new EB-5 Offerings. Though certain EB-5 operators with exceptional projects and/or meaningful migration agent relationships have been able to conduct successful EB-5 Offerings during this tumultuous time, prospective EB-5 Offerings must deal directly with the uncertainties faced caused by COVID-19, the constraints it continues to impose, and the potential impact, financial and otherwise, that COVID-19 may have on prospective EB-5 investors.

Those considering a new EB-5 Offering should ensure that appropriate disclosures are made in the offering materials. Afterall, the laws, rules and regulations promulgated by the Securities and Exchange Commission ("SEC") are designed to protect investors by attempting to ensure that offering documents contain full and fair disclosure, and at their core focus on the disclosure of material information.

The obligations to provide full and fair disclosures are codified in numerous federal statues, including Rule 10b-5 of the Securities Exchange Act of 1934 (the "Exchange Act") (which prohibits disclosing any untrue statement of material fact or omitting a material fact that is necessary to prevent statements already made from becoming misleading), Rule 14a-9, promulgated under Section 14(a) of the Exchange Act (which provides that no proxy solicitation shall be made "which . . . is false or misleading with respect to any material fact, or which omits to state any material fact necessary

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in order to make the statements therein not false or misleading"), and the Securities Act of 1933 (the "Securities Act").

Although the SEC has made clear there is no bright-line quantitative test for materiality, the standard for materiality in the context of federal securities laws remains whether there is a substantial likelihood that a reasonable investor would consider the misstatement or omission important in deciding whether to purchase or sell a security.

In the context of a new EB-5 Offering, offering documents should contain cautionary language and forward-looking statements that avail NCEs of safe-harbors enacted under the Private Securities Litigation Reform Act of 1995 (PSLRA) and Securities Act. Accordingly, NCEs should (1) tailor these forward-looking statements specifically for COVID-19 and the various risks and uncertainties related thereto and (2) emphasize that the accuracy of such statements depends on future events and assumptions, and that COVID-19 may cause actual results to differ materially.

In addition to cautionary language and risks factors that might traditionally be associated with a particular EB-5 Project, an NCE's offering documents should also include robust disclosures regarding COVID-19 and how the pandemic may present additional risks or exacerbate existing project-specific risks. With this in mind, NCEs should clearly disclose how COVID-19 may cause construction delays, impact operations and demand for the project or delay the ability to obtain financing (or the ability to obtain financing on commercially reasonable terms, if at all). As an example, a hospitality project may provide disclosures regarding COVID-19's potential impacts on the tourism industry, including how demand may be impacted by travel restrictions and how operations may change as the hospitality industry continues to recover and evolve.

NCEs conducting new offerings should also engage immigration counsel to review offering documents for immigration disclosures related to COVID-19, including the potential impact to job creation and allocation and how operational changes at USCIS may lead to increased processing times for investor petitions.

Existing Offerings

For NCEs currently conducting an EB-5 Offering, it is possible that its offering documents were prepared prior to COVID-19 pandemic. Though an NCE's offering documents may contemplate general risks, including those related to public health crises and pandemics, they are unlikely to address the current nature of the pandemic or the severity of its impact on the global economy.

Since securities laws consider materiality in light of the statutory mandate to disclose any facts with real potential to influence the decision of whether to invest, the net is cast wide and issuers are well advised to disclose new facts via supplemental offering documents when in doubt. In this way, issuers can potentially avoid securities liability by providing investors with material disclosures on an on-going basis.

As an example, imagine an EB-5 Offering where offering documents were prepared more than one year ago and contain a capital structure and development timeline that predated COVID-19. Now for illustrative purposes, imagine that COVID-19 caused supply chain disruptions, employee furloughs and reduced operations that delayed construction and significantly increased project costs. If the NCE delivers its dated offering materials to prospective EB-5 investors without also providing supplemental disclosures that update and/or correct the dated information (such as the extent of the delays or how the project will account for the capital shortfall), the NCE may be deemed to have violated federal securities laws by failing to disclose material facts and/or making statements that might now be misleading as a result of the changed circumstances presented by COVID-19.

Since it is generally known that securities laws cast a wider net in terms of "materiality" than would USCIS in the adjudication of individual EB-5 investor petitions,[1] securities attorneys typically urge disclosure consistent with the purpose of securities laws (i.e., full and fair disclosure). However, such disclosure does not necessarily have to be at the cost of sacrificing the EB-5 investor's pending petition since there may be instances where supplemental disclosures on account of updated facts should not trigger a finding of material change by USCIS.[2]

As NCEs gather the information necessary to update their offering materials in response to COVID-19, they should be mindful of providing as much up-to-date information as possible, including the current financial and operating status of the EB-5 Project, job creation, updated capital structures, development timelines and financial projections. In addition to providing current updates, NCEs should consider providing any plans to update future operations or financial plans in response to COVID-19 along with risks factors and cautionary language describing how COVID-19 may impact projections and estimated timelines.

Once prepared, NCEs should distribute their supplemental offering materials to existing investors in order to keep them apprised of recent developments. Additionally, the supplemental offering materials should be provided to all prospective investors alongside the original offering documents. By providing both current and prospective investors with updated disclosures regarding COVID-19 and meaningful updates on the EB-5 Project, EB-5 issuers can help avoid liability for securities laws violations based upon the failure to disclose new material information. Moreover, providing existing investors with an update of any potentially material changes effectively starts the "clock" with respect to any statutory period of time by which investors may bring a claim against the issuer for securities laws violations related to such updates.

Distressed Projects

Although hospitality, condominium, multifamily rental and mixed-use real estate development projects have certainly experienced significant impact from COVID-19, they are far from the only businesses affected by these conditions. However, the impact of COVID-19 cannot be understated, as businesses across various industries are now experiencing severe financial distress.

For example, there has been reluctance in financial markets that has delayed bond issuances and other government-backed forms of financing in the context of education and charter school projects. Many EB-5

1 O Torres & W Cornelius, Determining Materiality in Securities and EB-5 Immigration Contexts, Immigration Options for Investors & Entrepreneurs (AILA 4th ed 2019).

2 USCIS has articulated a doctrine of "material change" that penalizes EB-5 investors, mandating the re-filing of I-526 petitions where the changed facts render unapprovable a petition that otherwise would be approved. This conception of materiality, consequently, is directly tied to concluding that new facts make the EB-5 investor ineligible for the immigrant visa. USCIS Policy Manual, Ch.4, Immigrant Petition by Alien Entrepreneur, at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartG-Chapter4.html.

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Projects, particularly those in recreational and entertainment industries, have struggled to meet the financial projections contained in their offering materials.

Of course, hospitality, multifamily and other commercial real estate projects remain particularly affected by COVID-19, and such industries may be particularly subject to distress based on significant reductions in the work force, restricted operations and supply chain disruptions brought on by the pandemic. As a result, EB-5 Projects within these industries may be forced to delay or forego construction activities or operations, in some cases leaving JCEs unable to service their EB-5 financing obligations.

Additionally, financial markets are trending conservatively and historically low interest rates have made it difficult to sell EB-5 Projects subject to the EB-5 financing, which was once common underwriting and industry practice.

Depending on the severity of the distress, NCEs must analyze the impact of distress and determine whether it is advisable to continue the EB-5 Offering. Of course, such determination must be predicated on the potential remedies and outcomes and the fiduciary duty to preserve visa eligibility and financial investment of EB-5 investors.

For on-going EB-5 Projects that have managed to sustain operations during COVID-19, or projects that have become distressed due to the pandemic, NCEs must ensure that they comply with best-practices regarding securities laws disclosures while also balancing how project-level changes may be construed by USCIS and whether such changes would be deemed material in the immigration context and that could affect the approvability of the I-526 petition.

The NCE would be well advised to err on the side of providing EB-5 investors with as much information as is practicable as it weighs its options. Should the NCE elect to terminate its EB-5 Offering, the NCE should consult with both securities counsel to craft the appropriate disclosures and immigration counsel to determine the potential impact on existing immigration petitions. If the NCE is seeking to take action on account of a distressed project, such as accepting a reduced payoff amount for EB-5 financing, consenting to material modifications to the capitalization or altering the fundamental nature of the underlying EB-5 Project, the NCE should endeavor to provide all material information to ensure that NCEs fulfill their disclosure obligations and demonstrate their adherence to fiduciary duties.

When is Investor Consent Required?

For on-going EB-5 Projects, NCEs should be urged to strongly consider providing EB-5 investors all material updates and information. Although the most conservative approach would entail always seeking investor consent to material changes and/or proposed actions, some issuers may, depending on the context of materiality and the nature and extent of the proposed changes, opt for a simple acknowledgement of receipt of the disclosure.

Alternatively, some issuers may elect to provide a standalone, informational notice that contains meaningful updates but requires no further action on the part of the EB-5 investor. Such practice may be more practicable where the EB-5 Offering is no longer active (and as such there is no affirmative duty to update the offering materials).

In determining a desired course of action, NCEs should first review their operating agreement or limited partnership to understand what rights are held by EB-5 investors. If, for example, EB-5 investors were granted approval rights in certain circumstances – such as changes in structure or EB-5 financing terms – then the provisions of the operating agreement or limited partnership agreement must control. If consent or approval is required, NCEs should provide all information necessary for EB-5 investors to exercise their rights. Even if consent is not expressly required, NCEs should still be mindful of their fiduciary duties to investors (which would obligate the NCEs and their managers or general partners to act in good faith and in the best interests of investors) and proceed with caution when consenting to and/or taking certain actions that could potentially impact investors. In those circumstances, prudence would dictate that EB-5 issuers err on the side of providing more information rather than less, and at least seek written acknowledgement from investors that such information was received.

Ultimately, EB-5 issuers should consult with securities counsel on the nature and extent of its disclosures and should weigh the potential risks of not seeking investor consent. Of course, it would always be advisable to have affirmative consent since it likely provides the best defense against claims of securities laws violations relative to disclosure obligations.

As EB-5 issuers weigh disclosure, it is critical to determine how significantly the changes described differ from the original offering materials. For example, if the notice details that construction has been delayed or an additional source of financing is available, perhaps a simple notice of the change is sufficient. If, on the other hand, the NCE is forced to take a particular action that may have a direct or indirect impact on EB-5 investors – such as accepting a reduced payoff amount on its EB-5 financing – the conservative approach would dictate that the NCE seek the affirmative consent of investors. In doing so, the NCE effectively insulates itself from liability because investors would face an uphill battle in trying to prove securities laws violations based on not having received appropriate updates.

Additionally, if COVID-19 has forced a dramatic departure from the project's business plan, EB-5 issuers should consider seeking investor consent, particularly because such changes could be deemed material from an immigration perspective. In such event, the best defense available to the EB-5 issuer is the consent provided by the EB-5 investor.

Conclusion

Ultimately, securities laws and the rules and regulations promulgated by the SEC can be complex and can be further muddled by the numerous uncertainties facing EB-5 Projects in the midst of the COVID-19 pandemic. While it remains best practice to provide EB-5 investors with as much meaningful information as possible, including updates necessitated by COVID-19, the current standard for securities laws purposes hinges on the determination of what information is considered material for securities laws purposes. Though general risks and disclosures regarding COVID-19 may be uncontroversial in light of current financial and market conditions, EB-5 issuers would be well advised to consult with securities counsel with experience in the EB-5 industry to best determine (i) what information might be deemed material, (ii) how to best frame appropriate disclosures (including how much information to provide and the timing of delivery) and (iii) and what rights, if any, EB-5 investors may have following receipt of updated disclosures.

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

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

The issues faced by new commercial enterprises (**"NCEs"**) with loans to or equity investments in EB-5 Projects that are in default are particularly challenging for two reasons. First, most NCE loans or equity investments on EB-5 Projects are subordinated to senior creditors, which require an analysis of what legal remedies are available to an NCE under all of the financing documents to which the NCE is a party, including agreements with the owner of the EB-5 Project (the **"EB-5 Project Owner"**) and agreements with the senior lenders. Second, an NCE must analyze the effect of any action it may take that might negatively impact the eligibility of its investors (**"EB-5 Investors"**) for permanent residence under the EB-5 program. An NCE confronted with the problem of a defaulting EB-5 Project Owner must determine what remedies are available to the NCE and what the effects on the NCE and the EB-5 Investors will be if a senior lender exercises its remedies against the EB-5 Project Owner.

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

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

The remedies available to an NCE upon a default by the EB-5 Project Owner will be primarily determined by the terms of the EB-5 financing documents. Different remedies will apply depending upon whether the EB-5 investment is: (a) a loan secured by a senior mortgage on the EB-5 Project, (b) a loan secured by a junior mortgage on the EB-5 Project, (c) a loan secured by a pledge of membership interests in the EB-5 Project Owner[2]; (d) an unsecured loan; or (e) an equity investment in the EB-5 Project Owner.[3] The remedies available for each type of EB-5 financing are summarized below:

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

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

2 An NCE may also have a loan secured by a pledge of membership interests in an entity that is in the chain of ownership of the EB-5 Project Owner, which will involve the same issues as those discussed in this article. For the sake of brevity, this article does not discuss every variation of pledge that the NCE may have, but refers to pledges of membership interests of EB-5 Project Owner.

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

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

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will be paid to the EB-5 Project Owner, who will be required to pay its other creditors to the extent of those excess proceeds. *Importantly, upon a foreclosure sale, the NCE or third-party purchaser will acquire the EB-5 Project free and clear of all obligations for any other junior debt or unsecured debt of the EB-5 Project Owner.*

EB-5 Loan Secured by Junior Lien Mortgage on EB-5 Project. An NCE with a junior lien mortgage also has the contractual right to foreclose on an EB-5 Project (subject to any restrictions under any intercreditor agreement between the NCE and the senior lender, as described in the next paragraph), but the senior lender holding the senior mortgage on the EB-5 Project has the first right to bring a foreclosure action on the property and "credit bid" the full amount of the senior loan.[5] Assuming that the senior lender brought a foreclosure action against the EB-5 Project Owner, if there were proceeds from a foreclosure sale to a third party in excess of the amount owed to the senior lender, those excess proceeds would first be paid to the NCE holding the junior lien on the EB-5 Project. However, if the excess proceeds were not enough to fully repay the NCE loan, the NCE's junior lien would be extinguished in the foreclosure sale, and the NCE would have no additional rights under its junior lien. In the event the proceeds of the foreclosure sale by the senior lender did not fully repay the NCE's loan, the NCE would still have a right to obtain a monetary judgement against the EB-5 Project Owner that could be satisfied with other assets of the EB-5 Project Owner, but often times an EB-5 Project Owner's sole asset is the EB-5 Project itself, and once that is sold, the EB-5 Project Owner will often have no other assets available to repay the NCE's loan. If the EB-5 Project Owner has any remaining assets after a foreclosure sale, the NCE would have to bring a legal action to obtain a monetary judgement, and then seek a writ of attachment on the remaining assets, which would be sold in a court ordered sale. If the EB-5 Project Owner owns no other assets, the NCE would have no other source of funds from which to obtain payment of the NCE's loan, unless the NCE had also obtained a loan repayment guaranty from another party, in which event the NCE could seek repayment from the guarantor.

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

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

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

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

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

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

EB-5 Equity Investment. An NCE with an equity investment in the EB-5 Project Owner is structurally subordinated to all creditors of the EB-5 Project Owner, including any senior mortgage lender, junior mortgage lender and any unsecured creditors of the EB-5 Project Owner. In the event the senior lender foreclosed on the EB-5 Project, the proceeds of foreclosure would be used first to repay the senior lender, then to repay the junior mortgage lender and then to repay all unsecured creditors. The NCE would only have a right to receive distributions from the EB-5 Project Owner after all of those creditors were repaid. If the EB-5 Project Owner had no remaining assets after payment of all of its creditors, then the NCE would have no ability to obtain distributions from the EB- Project Owner, and no ability to obtain a monetary judgment against the EB-5 Project Owner. Some NCEs with preferred equity interests have subordination agreements (sometimes also called "recognition agreements") with senior lenders, which allows the NCE to cure a senior loan default. If that is the case, and the NCE has the ability to make a cure payment, the NCE should consider making a cure payment.[7]

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

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

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

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

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

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

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

Does the EB-5 immigration status of EB-5 investors matter in the event of a foreclosure sale? EB-5 Investors who have not yet obtained conditional permanent residence must continue to show they have "invested" the required capital, they are on course to create the required level of jobs, and there has been no "material change" from the I-526 petition they have filed with USCIS. For those EB-5 Investors who already have conditional permanent residence, the exposure to "material change" factors is much less. However, these EB-5 Investors must have "sustained" their investments and will be required to prove sufficient job creation. If sufficient jobs have been created by the EB-5 Project Owner before a foreclosure sale, even if the EB-5 Project is not complete, will a foreclosure sale cause the EB-5 Investors to lose eligibility for their immigration benefits? It does not seem that this should be the case, and USCIS has previously approved I-829 petitions in cases of EB-5 Projects that have failed under other circumstances causing the project not to be completed. But if all required jobs have not been created when an EB-5 Project is sold in a foreclosure sale, what would happen if the new owner decided to change the business plan to such an extent that it would be considered a "material change"? If all of the NCE's EB-5 investors have commenced their two-year period of conditional permanent residency, then the USCIS Policy Manual indicates that there could be a material change in the business plan without a loss of eligibility for permanent residence without conditions. However, if the NCE receives no proceeds from its original investment, how would the NCE invest in a new project? Perhaps the NCE could send a notice to the EB-5 Investors, informing them of the status of the original investment, and ask them to contribute additional capital for a new investment. In that event, how much would the EB-5 Investors have to contribute to the new project? Also, a new project would require a new business plan and new economic report, and who would pay for those? Because of these uncertainties, it would seem to be a better choice, if possible, to retain an investment in the existing EB-5 Project. It might be possible for the NCE to take other actions in cooperation with the EB-5 Project Owner that would preserve the ability to create jobs in the original EB-5 Project without an additional investment by the NCE. This analysis would require a detailed knowledge of the specific facts and circumstances of the EB-5 Project and the possible outcomes of the EB-5 Project in order to make a determination of the best course of action to preserve the residence benefits to the EB-5 Investors.

If the NCE or a new owner acquires the EB-5 Project will that cause a material change to the EB-5 Investors' applications? Although USCIS has never commented on this topic specifically, it has framed "material change" in a rigid manner when applied to EB-5 Investors who have not yet obtained conditional permanent residence. On the other hand, the USCIS consideration of what exactly constitutes a material change appears to depend on whether the EB-5 Investor would fail to meet a specific eligibility factor. Therefore, it should not matter who owns an EB-5 Project, as long as the EB-5 Project is completed (or partially completed) in accordance with the business plan filed with USCIS. Even if the EB-5 Project itself is changed in some way, such as a reduction in the size of the EB-5 Project, as long as the nature of the EB-5 Project remains unchanged (so as to frustrate the job creation methodology, or the job creation totals -- as just two examples), it should not be considered a material change. However, USCIS has never addressed the specific issue of change of project ownership in the Policy Manual or elsewhere. Nevertheless, the NCE must consider these issues when analyzing the best course of action to protect the residence benefits of the EB-5 Investors, and the NCE should thoroughly review all of the relevant facts and circumstances with its lead immigration attorney for this purpose.

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

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

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

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

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

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

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

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

7. Determine the best method and timing of communication with EB-5 Investors. The manager or general partner of an NCE has a fiduciary duty to its EB-5 Investors to keep them informed of material developments affecting the EB-5 Investors. However, before any communication with EB-5 Investors, the NCE must have determined its strategy, because it may be necessary to maintain confidentiality in order to execute on that strategy and best protect the EB-5 Investors' interests. This also requires discussion with the NCE's business legal counsel before proceeding with any communications to EB-5 Investors. The NCE should also seek to explain to the EB-5 Investors the status of the EB-5 Project, whether the job requirements have been satisfied as of that date, the factors the NCE believes require the action the NCE has determined to take, and the reasons why the NCE believes the action taken by the NCE is best possible course of action available to protect the interests of the EB-5 Investors.

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

Conclusion

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

REDEPLOYING EB-5 INVESTMENTS: Navigating Securities Laws After 2020 USCIS Clarifications

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Redeployment of EB-5 investments continues to be a focus for EB-5 stakeholders as EB-5 investors face visa backlogs while EB-5 immigration requirements, such as "at risk" and "sustainment," remain. The EB-5 Program's own success is partially to blame for the redeployment necessity and the situation had been concerning from an immigration law standpoint because of a lack of clear redeployment guidance. In a "Policy Alert" released in July 2020, the USCIS issued updates to its Policy Manual clarifying certain redeployment requirements. In summary, the update provided that EB-5 capital may be redeployed through the original new commercial enterprise ("NCE"), within the territory of the original regional center ("RC"), provided that it be redeployed "in commerce," and consistent with the NCE's ongoing purpose of conducting lawful business activity. Redeployment does not have to be within a targeted employment area ("TEA") if the required number of jobs have been created, even if the original investment was within in a TEA. Additionally, the guidance provides that the USCIS considers twelve months to be a reasonable time to redeploy capital. While this guidance is helpful for future redeployments, it leaves open the issue of whether these requirements are to be applied retroactively to redeployments that have already occurred. Regardless, redeployment must be approached in light of the existing securities laws and compliance obligations that are the focus of this article.

Before analyzing the current redeployment situation, a quick review of EB-5 basics and common deal terms prior to the emergence of the current visa backlog is merited. In the typical RC investment scenario, the EB-5 investor-applicant subscribed to a RC-sponsored NCE and contributed her capital investment. That transaction involved the sale of securities and triggered U.S. securities law compliance. The NCE then aggregated the capital of all its EB-5 applicants and made a single loan or equity investment into a single job creating entity ("JCE" or "Project") typically for a five-year term. Assuming the JCE was successful and that the investment was timely repaid to the NCE at the end of the five-year term, the long-held assumption was that the EB-5 applicants should have, by that time, completed all immigration processing steps and should be eligible for exit from the NCE. And in fact, that paradigm served the EB-5 industry well from 1990 until about 2014. Generally, EB-5 applicants were able to achieve conditional resident status and file their I-829 petitions within a five-year timeframe. But in 2014, with a deluge of applicants from countries like China, India, and Vietnam overwhelming the limited supply of EB-5 visas available, visa backlogs started to significantly delay immigration processing for many years. Among many EB-5 eligibility requirements are two of relevance to duration -- that the investment must be "at risk" and "sustained" throughout the process of initial petition and two years of conditional permanent residence. But, if the EB-5 investor must wait for six or more years just to start conditional permanent residence, due to petition processing and visa backlogs, then the historical assumptions about a five-year term investment are wildly out of sync with the realities of the EB-5 visa application process.

The timeline for each EB-5 investor's immigration process is dependent upon a host of variables including visa backlogs, processing times at the USCIS, and in many cases the National Visa Center and various Consular posts, therefore, it is difficult to accurately predict how long an EB-5 investor might be required to sustain his or her EB-5 investment,

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IMC EDUCATION &TRAINING

Certification in Investment Migration - Cert (IM)

Overview and Objectives

The Certification in Investment Migration is an intermediate level course designed to be studied over about 6 months. This practical introduction leads to a professional status with the IMC and is benchmarked at Associate level for those working in the IM industry. This is the first global Investment Migration course of its type - specially designed for those working in the industry. The course is taught online through our custom Learning Management System and includes 5 compulsory modules.

Target Audience

- All staff working in, allied to, or intending to work in the industry
- Advisors
- Agents
- Lawyers/paralegals
- CIP programme staff
- Regulators and government staff
- Compliance professionals
- Financial services practitioners
- Investment advisors

Course Format

- Delivered online via an easy to use, comprehensive Learning Management System (LMS)
- Accessible by a range of mobile and laptop technologies
- Around 6 months to complete the programme
- Comprehensive support materials including:
  - comprehensive module manuals
  - interactive e-learning modules
  - case studies and examples
  - specimen test questions

Entrance Requirements

Applicants should possess:

- Good educational background
- Ability to complete the readings and comprehend core principles in the English language

Assessment

The programme is assessed via:

- Two hour, online, multiple choice test
- 100 multiple choice questions to be answered

Certification and Designation

Individuals who successfully complete the programme will be awarded the 'IMC Certification in Investment Migration'. The certificate carries with it the designation Cert (IM) and leads to membership of the IMC.

Example designation - Carmen Swift Cert (IM); IMCM (Associate)

Professional Status

On successful completion of the Certification, Non IMC Members will become eligible for membership of the IMC at Associate level.

How to Apply

To apply for the Certification in Investment Migration course please go to investmentmigration.org/education to enrol online.

Rationale for Taking the Certification

The IMC Certification is a groundbreaking initiative designed to prepare participants for work in a new and vibrant industry where high professional standards, values and enhanced competencies are required. This certification will:

- ✓ Provide verifiable evidence of competency (knowledge, skills and behaviours)
- ✓ Provide a practical focus and benchmarking of your work in the industry
- ✓ Help you to reduce risk in your firm and enhance the firm's reputation
- ✓ Enhance your career prospects
- ✓ Keep you abreast of developments in the industry

Programme Structure / Course Format

Module 1

Citizenship and Residence by Investment

- ✓ Industry Overview
- ✓ Understanding Citizenship and Residence
- ✓ Ways of Acquiring the Status of Citizenship
- ✓ The Concept of Residence
- ✓ Development and Characteristics of Investment Migration
- ✓ Citizenship and Residence by Investment: Assessing the Arguments

Module 2

Ethics, Conduct and Professional Standards in Investment Migration

- ✓ Ethics
- ✓ Codes of Conduct
- ✓ Corporate Culture and Values
- ✓ Integrity
- ✓ Competence
- ✓ Transparency
- ✓ Marketing of Citizenship & Residence by Investment Programmes
- ✓ Practical Application of the IMC Code
- ✓ Whistleblowing

Module 3

Anti-Money Laundering (AML) and Financial Crime Prevention (FCP)

- ✓ Nature of AML, Terrorist Financing (TF) and Sanctions
- ✓ Terrorist Financing
- ✓ Sanctions
- ✓ Key International AML and Sanctions Bodies
- ✓ Suspicious Activity Reporting
- ✓ Concept of Risk Management
- ✓ Bribery and Corruption
- ✓ Cybercrime

Module 4

Investor Migration — Know Your Customer (KYC) and Customer Due Diligence (CDD)

- ✓ Generic KYC and CDD
- ✓ Customer Due Diligence
- ✓ Types of Due Diligence
- ✓ Politically Exposed Persons
- ✓ Customer Risk Rating
- ✓ CDD Gone Wrong - Regulatory Action
- ✓ Citizenship by Investment and Residence by Investment - the need for CDD
- ✓ Minimum Standards for Agents

Module 5

Personal Data: Management and Protection

- ✓ What is Personal Data?
- ✓ Principles of Data Protection
- ✓ Risks Associated with Inappropriate Management of Personal Data

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or for how long the associated NCE might be required to continue to redeploy the EB-5 capital. In addition to such significant wait-times, note that the sustainment period runs throughout the full two years of the initial grant of conditional permanent residence. Therefore, two more years should be added to the above wait-time estimates and potential investment exit dates. As visa wait times have increased, so too have the "sustainment" requirement and mandatory timeframe during which the EB-5 investment funds must be "at risk." In an effort to comply with these USCIS requirements some NCEs have elected not to repay EB-5 investors when EB-5 loans are repaid by the JCE, but instead, to redeploy EB-5 investment funds when permitted by their organizational documents to do so.

Securities Law Issues Affecting Redeployment

EB-5 financings have usually involved an offering of limited partnership interests or limited liability company (LLC) membership interests to investors, with organizational documents contemplating the use of EB-5 investment funds to provide financial support (typically in the form of a loan or preferred equity investment) for one identified project owned or controlled by an identified JCE. EB-5 investment documentation generally provides that upon repayment of the loan, the proceeds may be distributed to the NCE's investors, assuming cash is available and certain immigration milestones are achieved. The initial project and the terms of repayment to the investors are disclosed in the offering materials given to investors and are relied upon by prospective EB-5 investors to make their investment decisions. Unless a redeployment is contemplated by investors where their initial investment is made, a redeployment involving a second financing similar in scope to the initial deployment described above involves a decision by each investor to take her portion of the loan repayment, or to reinvest such funds in a new project, which may also involve a new JCE or an unrelated project entity.[1]

In order to amend the organizational documents to provide for a redeployment, a vote or consent of investors may be required. Inasmuch as this would constitute a new investment decision, such consent would likely constitute a sale or offering of securities, and, if so, would require the inclusion of information and disclosures normally included in an offering document. A decision to consent to redeployment generally is viewed by the Securities and Exchange Commission (the "SEC") and the courts as a sale and new investment decision with respect to the NCE's securities and, therefore, a new offering and sale of the NCE's securities that must either be registered under the Securities Act of 1933, as amended (the "Securities Act"), or be eligible for an exemption from registration. If EB-5 investors are individually advised with respect to a redeployment, and depending upon the nature of the advice given, concerns are often raised under the Investment Advisers Act of 1940, as amended (the "Advisers Act"),[2] and relevant state securities laws. In addition, the redeployment may raise investment company issues with respect to the NCE, requiring that it find an exemption under the Investment Company Act of 1940, as amended (the "1940 Act").[3]

Securities Act Considerations

1 In some instances, certain EB-5 investors may not consent to the changes to the financing because they prefer to have their investments returned, or because they no longer seek an immigration benefit. As a result, NCEs may have less funds to redeploy than were originally deployed.

2 15 USC §80b-1 et seq.
3 15 USC §80a-1 et seq.

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If EB-5 investors are asked to make a new investment decision, as described above, a new offering and sale of securities is deemed to have occurred, and the NCE is required to comply with the Securities Act with respect to the redeployment.[4] The SEC has not provided specific Securities Act guidance in an EB-5 context with respect to a redeployment; however, the SEC and the courts have provided ample guidance in analogous situations.

The most relevant guidance provided by the SEC relates to the manner in which calls for additional investments or assessments made to investors are treated. The request to investors in a proposed redeployment to use their cash again or to exercise their right to receive cash[5] they would otherwise receive to fund an investment in a new project, is similar to asking investors for voluntary assessments, which often occur in real estate and oil and gas offerings.[6]

The SEC takes the position that if an issuer's offering materials initially describe the circumstances under which a call for additional funds may be made, the maximum amount of funds that may be called, and the use of any such additional funds, then any such call is not deemed to be a new investment decision by an investor because these matters were previously disclosed and contemplated when the initial investment was made.[7] Conversely, if such matters were not contemplated when the initial investment was made, any such call would involve a new investment decision, and thus, a new offering of securities.[8]

Although not directly on point, but representative of the SEC's position in similar situations is guidance from the SEC regarding the manner in which rescission offers are treated. Because the investor must decide whether to accept the rescission offer and sell the securities back to the issuer or whether to retain the securities, such offers are deemed by the SEC to be an offer or sale of securities that must be registered or exempt from registration.[9]

Additionally, court decisions have invoked the "investment decision doctrine" in determining when a sale of securities has occurred for purposes of a statute of limitations determination. These cases generally involve an anti-fraud action where the defendants allege a statute of limitations defense because the initial sale of securities occurred earlier than allowed by such statute. In turn, the plaintiffs respond that the court should not look at the date of the initial sale, but that it should look at the later date when additional funds were called and paid. Thus, the courts have to determine whether the later payment of funds constituted a "sale" of securities for purposes of the securities laws.[10]

As a result of the three strands of guidance referred to above, if a repayment of the initial investment is received by an NCE and EB-5 investors are asked to decide between (a) receiving their portion of the repayment proceeds and (b) making a new investment with those funds into a newly identified JCE, then an analysis of the Securities Act is required. This analysis involves a determination of whether a sale is being made and whether securities law exemptions provided by Regulation S, Regulation D, or any other available offering exemptions under the Securities Act are available. EB-5 professionals are reminded that just because a registration exemption may have been originally available, because of the passage of time and the occurrence of certain events, those same exemptions may not be available when redeployment occurs. For example, investors who originally may have been accredited investors or not U.S. residents, at a later sale date when a redeployment occurs may not continue to be so accredited or so domiciled.

Investment Adviser Issues

An NCE's general partner or managing member, as the case may be, is often deemed a "private fund adviser" to the NCE under the Advisers Act.[11] Private fund advisers can only advise private funds and have certain reduced reporting obligations under the Advisers Act that differ from those advisers who are not private fund advisers.

The primary issue in the context of an NCE in an EB-5 financing is whether the general partner or managing member of the NCE is advising the limited partnership or the limited liability company, as the case may be, or whether the general partner or managing member is advising the individual limited partners or LLC members.[12] Under Rule 203(b)(3)-1[13] of the Advisers Act[14], the SEC takes the position that an NCE will be deemed a single client if that entity obtains investment advice based on its stated investment objectives, as opposed to the individual objectives of its investors.[15] The closest SEC staff guidance on this issue involves a general partner soliciting consents from limited partners whether to take distributions in cash or in kind.[16] In that case, the SEC provided assurances it would take no-action, but cautioned that the general partner could make no recommendation to any limited partner as to whether the limited partner should consent to one alternative or the other. Depending on the nature of any individual advice, the general partner or managing member may no longer be deemed a private fund adviser under the Advisers Act because it would not be advising only private funds and, therefore, would be subject to additional SEC regulation.

Any Advisers Act analysis should also include a consideration of relevant state adviser laws.

4 The Securities Act is designed to regulate the offer and sale of securities. Compliance with the Securities Act requires that the new sale of securities be registered under the Securities Act or that an exemption from registration be available.
5 The definition of a "sale" includes a disposition of value (such as a rescission right) in addition to the disposition of cash. See: Thomas Lee Hazen, The Law of Securities Regulation §5 (7th ed. 2016) ("Hazen").
6 A call for additional funds is sometimes also called an assessment. A call or assessment can be either mandatory as contemplated by the initial investment decision or voluntary if not so contemplated.
7 Tejon Agricultural Partners, SEC No-Action Letter (pub. avail. Apr. 12, 1974); For a further general discussion of what constitutes a "sale" for purposes of Section 2(a)(3) of the Securities Act, see Hazen.
8 American Real Estate Trust, SEC No-Action Letter (pub. avail. July 30, 1976). The SEC has provided additional guidance on the issue of what constitutes a "sale" for Securities Act purposes in the form of Rule 136 (17 CFR §230.136) thereunder. An assessment is related to an additional call for funds in the context of a redeployment and Rule 136 provides that assessable securities are deemed to be an offering and sale of securities. (See, Ingentino v. Bermec Corp., 376 F. Supp. 1154 (S.D.N.Y. 1974)).
9 See, generally, Michelle Rowe, Rescission Offers Under Federal and State Securities Laws, 12 J. Corp. Law 383 (1987).
10 See: Goodman v. Epstein, 582 F.2d 388 (7th Cir. 1978); Hill v. Equitable Bank, N.A., 599 F. Supp. 1062 (D. Del. 1984); Stephenson v. Calpine Conifere II, Ltd., 652 F.2d, 808 (9th Cir. 1981); Issen v. GSC Enterprises, Inc., 508 F. Supp. 1298 (N.D. Ill 1981); and Ingentino v. Bermec Corp., 376 F. Supp. 1154 (S.D.N.Y. 1974) ("Ingentino").
11 Private Funds are pooled investment vehicles that are excluded from the definition of investment company pursuant to, among other sections, Section 3(c)(1) of the 1940 Act.
12 Murray Johnston Ltd., SEC No-Action Letter (pub. avail. Apr. 17, 1987).
13 17 CFR §275.203(b)(3)-1.
14 Rule 203(b)(3)-1 is a nonexclusive safe harbor for determining the circumstances in which a person may count the partnership rather than each individual limited partner as a "client" for purposes of Section 203(b)(3) of the Advisers Act.
15 Six Pack, SEC No-Action Letter (pub. avail. Nov. 13, 1998), see also: WR Investment Partners Diversified Strategies Fund, LP, SEC No-Action Letter (pub. avail. Apr. 15, 1992) (regarding different investor investment amounts); and Burr, Egan, Deleage & Co., Inc., SEC No-Action Letter, 1987 WL 107965 (pub. avail. Apr. 27, 1987) (regarding providing tax advice).
16 Latham & Watkins, SEC No-Action Letter, 1998 WL 527079 (Aug. 24, 1998).

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1940 Act Issues

Most NCEs are considered to be investment companies because, for transactions involving an underlying loan as the deployment to the JCE, the NCE holds a promissory note as a majority of its assets. As a result, these NCEs rely on a 1940 Act exemption from registration provided either by Section 3(c)(1)[17] or Section 3(c)(5)(C)[18] of the 1940 Act.[19] Any redeployment will then also require an analysis of whether such initial exemption remains applicable or whether a new 1940 Act exemption is required.

For example, if the NCE relied initially on the Section 3(c)(1) exemption provided by the 1940 Act, then it must determine whether after the redeployment the number of investors remains at 100 or less. However, if the initial 1940 Act exemption replied upon was Section 3(c)(5)(C), then the NCE must determine whether after the redeployment the provisions of the exemption would continue to exist, or whether another 1940 Act exemption would then be available.

Policy Alert Impact on Securities Law Issues

The Policy Alert allows, with certain restrictions, the NCE to redeploy capital into any commercial activity that is consistent with the purpose of the NCE. In addition, the Policy Alert requires for a redeployment the use of the same NCE and RC, but does not require the use of the same or any JCE, the same commercial activity, or the location of the new project in the same TEA. These provisions and requirements, however, do not change to any significant extent the securities law analysis described above.

Conclusion

Because of long wait times and visa backlogs, NCEs have or are now considering the redeployment of EB-5 funds returned from the initial deployment into new projects and JCEs that may not have been originally contemplated by their respective EB-5 investors. Issuers preparing for new EB-5 offerings should carefully consider structuring offerings to help ensure that redeployment is not deemed to constitute a new investment decision when investors are asked to forgo distribution of repaid investment proceeds and invest such proceeds in a new project. EB-5 professionals structuring initial EB-5 financings should include such contingencies in offering and organizational documents, and provide that the general partner or managing member have authority to make such determinations. While the SEC has not specifically provided guidance regarding securities law issues arising as a result of redeployment of EB-5 funds, significant guidance has been provided in similar situations that EB-5 professionals should strongly consider. In addition, even if the original organizational documents and offering documents provide authorization for a redeployment, any such redeployment will require an extensive 1940 Act analysis, if applicable, to ensure a continuing 1940 Act exemption. Likewise, if a vote is being taken with respect to a redeployment, Advisers Act issues should also be addressed.

EB-5 professionals should be mindful that redeployments are contemplated by the USCIS Policy Manual and appear to be required for many EB-5 transactions, therefore, securities law issues must be thoughtfully addressed for ongoing compliance in redeployments.

17 Section 3(c)(1) provides that an issuer shall not be deemed to be an investment company if it has no more than 100 investors and does not make or propose to make a public offering of its securities (15 CFR §80a-3(c)(1)).
18 Section 3(c)(5)(C) provides a 1940 Act exemption if the issuer's promissory note is secured by qualifying real estate assets (15 CFR §80a-3(c)(5)(C)).
19 The 40 Act is designed to regulate the creation and conduct of investment companies.

A RULE BY ANY OTHER NAME:

Redeployment and "Clarification" Gone Too Far

ERIN LUCHSINGER (CORBER)
ASSOCIATE ATTORNEY, TROW & RAHAL PC

More than three years after revising the Policy Manual to offer new guidance to EB-5 stakeholders on the subject of "sustainment" of the investment, which would require "redeployment" of EB-5 capital, USCIS has now updated its Policy Manual to "clarify" its policy with respect to redeployment of EB-5 investors' capital by New Commercial Enterprises (NCEs) following return of the funds by the Job Creating Enterprises (JCEs). While industry stakeholders, experts and immigration professionals have long sought guidance from USCIS to clarify ambiguities and inconsistencies in its June 14, 2017 revision to Volume 6 of the Policy Manual, the present attempt by USCIS to "clarify" its previous guidance in fact constitutes a retroactive policy shift that could result in dire consequences for EB-5 investors all over the world. As billions of dollars in repayments were repaid to NCEs during the three years in which the industry has awaited these "clarifications," the effort by USCIS to retroactively apply its new guidance could result in denials of petitions where NCEs redeployed funds in a manner inconsistent with guidance that was unavailable at the time the redeployment decisions were made. These denials would undoubtedly be challenged in the courts, and past precedent suggests that USCIS would not prevail in these suits. Nevertheless, countless investors are likely to suffer irreparable harm as a result, and the EB-5 industry must consider the human toll of this latest development.

Interpretation or Rule-Making?: Zhang v. USCIS

In spite of a long tradition in American jurisprudence that deeply frowns upon retroactive changes in the law,[1] this is not the first time that USCIS has attempted to make major changes to the legal framework of the EB-5 program by presenting major policy shifts as "clarifications" of existing policy. In 2014, Jane[2], a young South-African woman and mother of two made the tough decision to pursue a permanent future in the United States, away from the home she had always known and loved. There were many reasons for Jane to seek such an opportunity—her children's education and future employment prospects and family ties in the United States—but a driving factor for Jane was the steadily deteriorating political situation at home. Jane was fortunate to have a parent with the means to help her make the change, and she received an unsecured loan from her father to cover the costs of investment with a regional center under the EB-5 program. Jane filed an I-526 petition in May of 2014, but in November 2015, her I-526 was denied, with USCIS finding that her cash investment of the funds loaned to her by her father constituted "indebtedness" rather than cash. Jane was understandably shocked and devastated by the news. Relying on the expert guidance of her attorneys and the regional center, naturally she wanted to know why no one had advised her that her investment would not satisfy the eligibility requirements under the EB-5 program. The answer, of course, was simply that at the time that Jane filed her petition, the policy that formed the basis for her denial did not exist.

On April 22, 2015, USCIS's Immigrant Investor Program Office (IPO) had issued remarks that stated that third-party loan proceeds could not be used as EB-5 capital unless the investor could demonstrate that he or she was personally and primarily liable for the indebtedness, secured by the investor's

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1 See, e.g. Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988); Landgraf v. USI Film Products, 511 U.S. 244 (1994); Nat'l Mining Ass'n v. Dep't of Labor, 292 F.3d 849, 859 (D.C. Cir. 2002).
2 The investor's name and other identifying information have been redacted or altered to protect her privacy.

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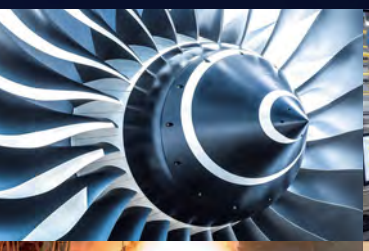
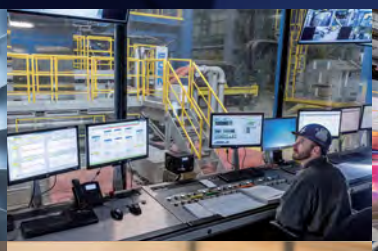




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personal assets in an amount sufficient to secure the amount of the loan. While this "clarification" represented an obvious policy shift from longstanding interpretations of "cash" and "indebtedness", by representing the remarks as a "clarification" rather than a change in existing policy, USCIS essentially presented the policy as part of the original regulation, thereby allowing them to deny petitions filed before the announcement by the IPO but after announcement of the underlying policy shift. The tactic further enabled USCIS to circumvent the notice and comment requirements for rule-making under the Administrative Procedures Act (APA), which requires federal agencies to publish "[g]eneral notice of proposed rule making" and to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."[3]

Following the announcement by the IPO and USCIS's subsequent denials of I-526 petitions filed by investors who had used proceeds of unsecured loans to fund their investments, two EB-5 investors brought suit against USCIS, requesting class certification for all affected parties. On November 30, 2018, the U.S. District Court for the District of Columbia issued a decision in Zhang, et al. v. United States Citizenship and Immigration Services, et al., 344 F.Supp.3d 32 (D.D.C. 2018) (Zhang), which ordered vacated all denials issued by USCIS based on the new policy, and remanded the cases to USCIS for adjudication. In its decision, the Court not only rejected USCIS's interpretation of its own regulation as plainly erroneous -- finding that "cash" from loan proceeds squarely fit the definition of acceptable "capital" and instead to treat it as "indebtedness" was arbitrary and capricious -- significantly, the Court further held that the binding interpretation constituted unlawful rule making by the agency in violation of the APA. In its holding, the Court upheld the plaintiffs' claims as timely filed, with the lawsuit coming just a few months after the USCIS announced its new policy. The Court further held that the IPO announcement was clearly a change to existing rules, thereby giving rise to a cause of action for improper use of the agency's rule-making authority under the APA. More simply stated, the Court clearly held that USCIS could not enforce sweeping changes in adjudication requirements by portraying the changes as simply an "interpretation" that is "mere clarification" of requirements, without first following the APA. The U.S. Court of Appeals for the District of Columbia has affirmed this decision.[4]

3 5 U.S.C. 553(b),(c).

When "Clarification" Becomes a Rule

In guidance published on July 24, 2020, USCIS is once again attempting to engage in obvious rule making, while attempting to circumvent the requirements of the APA. Redeployment of invested funds has become necessary in the EB-5 industry as a result of increasing USCIS processing times and visa retrogression. USCIS policy requires that funds must remain deployed and "at-risk" until an investor has been a conditional permanent resident for two years. This means that if a loan is repaid to the NCE before the investor has met the "sustainment" requirement and therefore is not yet eligible to receive repayment of invested capital, the funds must be placed "at-risk" through redeployment, and cannot simply remain in an account held by the NCE. USCIS published draft redeployment guidance in 2015, and it published final policy guidance in 2017 to address the issue of redeployment.

On June 14, 2017, USCIS had revised Volume 6 of the Policy Manual with the intention of finalizing policy with regards to "sustainment" of the investment. The industry and investors welcomed the guidance, as USCIS acknowledged that investments needed to be sustained only to the date of meeting two years of conditional permanent residence rather than the date of adjudication of the I-829 petition to remove conditions, which today can be up to six years or more. USCIS further confirmed that an NCE was permitted to accept returned funds from the JCE as soon as the time that all the required jobs had been created even before satisfying the "sustainment" requirement. Unfortunately, while USCIS also prescribed that capital returned to the NCE by the JCE after the creation of 10 jobs, but before the end of investors' 2-year sustainment period, must be redeployed into other commercial activity" that is "consistent with the scope of the new commercial enterprise's ongoing business," USCIS failed to provide any clarification as to what that meant. Did such redeployment need to be in the same jurisdiction as the regional center? Did it need to be in a Targeted Employment Area (TEA)? Did the commercial activity need to closely resemble the activity of the original JCE?

After years of silence, on July 24, 2020, USCIS issued additional updates to the Policy Manual as clarification of the requirements for redeployment of EB-5 investment funds—three years after the initial guidance was published. The updated guidance includes among others the following key provisions:

1. Redeployment must be made through the original NCE (which could mean that investors whose NCEs have closed due to fraud or bankruptcy are unable to receive the funds from the JCE and reinvest them individually, and as a result have no available path to their immigration benefits).

2. The funds do not need to be reinvested in a TEA, if the required job creation threshold has been met.

3. Redeployment must occur within a reasonable amount of time, which USCIS has now clarified should be within 12 months. USCIS will consider evidence demonstrating that a longer period of time was reasonable due to the nature of the commercial activity in which the funds are being invested.

4. Redeployment can be made into any commercial activity consistent with the purpose of the NCE to engage in the "ongoing conduct of lawful business." This would appear to modify the original redeployment guidance, which suggested that redeployment needed to be within the scope of the NCE's original documents as filed with the I-526. It appears that USCIS will now accept an amendment of the relevant documents before redeployment of the funds, including investor agreement if required by the entity's

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4 On October 27, 2020 the District Court of Appeals affirmed the decision, finding that the agency's interpretation "violated the regulation". Zhang, et. Al v. United States Citizenship and Immigration Services, No. 19-5021, at *6 (D.C. Oct. 27, 2020) The Court therefore did not address the question of whether the interpretation also violated the APA for lack of a notice and comment period, or whether the interpretation could be applied retroactively.

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governance provisions.

5. Redeployment must be for "commercial activity," and it cannot involve the purchase of financial instruments on the secondary market, which the Policy Manual characterizes as primarily "financial" rather than "commercial" activity.[5] This clarification has spawned further confusion, as the 2017 guidance seemed to approve redeployment in "new issue municipal bonds" within the scope of the NCE's ongoing business.

6. Redeployment must occur within the regional center's previously approved jurisdiction, including any amendments that have been approved prior to the redeployment.

Disturbingly, the new guidance does not indicate that it will apply only to redeployment on or after the date of publication, and USCIS has made it clear that they intend to apply the guidance retroactively.[6] USCIS has argued that the guidance may be applied retroactively because they have "determined that any potential impacts to investors would be minimal because the updated guidance merely clarifies continuing eligibility requirements…" and that "[t]his clarification does not change any substantive requirements."[7]

In spite of USCIS's assertion that the potential impact on investors will be minimal, the changes outlined above undoubtedly represent significant shifts from USCIS's previously published guidance and will have a sweeping impact on pending petitions in which redeployment occurred or commitments were made prior to publication of this guidance. There are two changes that are most egregious and likely to give rise to petition denials if applied retroactively. The first is the new limitation stating that "commercial activity" cannot include the purchase of financial instruments on the secondary market. This new limitation may pose problems for certain redeployments executed in reliance on the guidance previously provided by USCIS in 2017. The second and arguably most problematic is the requirement that redeployment may only occur within the regional center's already approved geographic scope. This new restrictive requirement has no basis in law or regulation, and USCIS cites no authority beyond the general regulation requirement that a petitioner must be eligible for the benefit sought at the time of filing and through final adjudication.[8] The plain language of the regulation governing regional center investment, however, only requires that the petitioner make an investment within a regional center, and that the investment must create 10 qualifying jobs.[9] There is no language in law or regulation that requires that once a qualifying investment has been made within a regional center, the new commercial enterprise may only redeploy investor funds and conduct future business in the same geographic area.

Contrary to USCIS's claim that the new guidance merely clarifies the existing guidance and does not include any new "substantive requirement," it is clear that in fact, USCIS has created whole new requirements without legal support or justification and with the intention of applying them retroactively. USCIS provided draft guidance in 2015, and final guidance in 2017. With this most recent guidance, they are further altering their position on this issue.

Redeployment is a complex issue that was never contemplated by the original statute, but has instead arisen as a result of visa backlogs and extended adjudication processing times at USCIS. Guidance from USCIS is therefore critical to investors and practitioners navigating the immigration process in the context of real-world commercial realities. However, EB-5 stakeholders have been operating under the previous guidance for up to 5 years. Given that current I-526 petition processing times can exceed six years and visa waiting times can extend many years beyond petition approval, stakeholders have been forced to make redeployment decisions in that time, and petitions filed under the previous guidance remain pending. If USCIS is permitted to apply these new rules retroactively, then it is clear that many petitions that were filed in good faith will be subject to denials that are completely outside of investors' and their attorneys' control. Litigation may be necessary and inevitable. Just as the D.C. district court found in Zhang that USCIS could not avoid the notice and comment mandates of the APA by erroneously labelling activity that obviously constitutes agency rule-making as "clarification" of existing policy, so USCIS should not be permitted to repeat that deception here.

If the Zhang ruling is permitted to stand after appeal, ultimately, litigation on the redeployment issues will likely prove successful for the same reasons and legal arguments used in the Zhang case. Unfortunately, relief would not arrive in time for many EB-5 investors. Consider the example of Jane. Faced with the denial of her I-526 petition in 2015, Jane had to make a choice. She could wait for the outcome of the lawsuit (although decided in her favor in 2018, the decision remains stayed two years later, pending the outcome of an appeal), or she could make a second investment and file a new I-526 petition entirely. As the political and economic climate in her home country continued to deteriorate, ultimately resulting in open violence, Jane chose the latter option. Today, she resides in a small rural town in the Southern United States where her husband has found gainful employment and her children attend good schools. But Jane has continued to grapple with the financial consequences of being forced to make not one, but two massive investments in order to secure her family's future. Ultimately, not all EB-5 investors will have the funds or the fortitude to make this decision, and even those who do may not have that option due to other factors such as a child aging out while the first EB-5 petition remained pending. USCIS has demonstrated an obvious disregard for the laws governing its rule-making authority repeatedly in the past. Investors rely on our legal expertise to navigate a landscape that can shift at any time without warning. As practitioners seeking big-picture solutions to the problems that arise, we must always keep in mind the very real people whose lives may be upended in the process.

5 One lingering ambiguity among others is that the negative reference to financial instruments traded on secondary markets appears only in the section titled "before" the job creation is satisfied; the specific reference does not also appear in the section titled "after" the job creation is satisfied. The latter section however does appear to require deployment in "commercial" activity.
6 USCIS released a Q&A on July 24, 2020 confirming its intention to apply the guidance retroactively, arguing that the changes mere "clarify" existing guidance and are not "substantive." See https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/questions-and-answers-eb-5-further-deployment (last visited October 20, 2020).
7 Id.
8 See 8 C.F.R. 103.2(b)(1).
9 See 8 C.F.R. 204.6(m)(7).

How EB-5 Reform Can Help Hong Kong

In one fell swoop, Congress can send a message to Beijing, attract Hong Kong's best and brightest to the U.S., and create thousands of American jobs

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In response to China's recent implementation of the Hong Kong Security Law, which countries around the world have condemned as an attack on democratic freedoms, the U.S. Congress recently passed and President Trump authorized the Hong Kong Autonomy Act, a sanctions package that penalizes banks conducting business with Chinese officials. These measures are a good first step to push back against Beijing, but there are other tools the federal government should deploy to support the people of Hong Kong – one of which would also help the U.S. economy create desperately needed jobs.

Now is the perfect time to reform the federal EB-5 program so that Hong Kong residents can invest in the U.S., create American jobs, and escape the heavy hand of mainland China.

The EB-5 Immigrant Investor Program is a federal economic development program that already drives billions of investment dollars to markets from coast to coast, with a focus on rural and high-unemployment urban areas. According to a 2019 study by Economic & Policy Resources[1], the program added over $55 billion to U.S. GDP in 2014-15, creating over 355,000 jobs in the process. The best part? The Congressional Budget Office confirms the program has "no significant cost to the federal government"[2] – it costs taxpayers nothing, because it is fully paid for by the investors it attracts! It's a win-win program that could be used to great effect in Hong Kong – if Congress implements consensus-based reforms now.

Other countries are already using similar programs to help the people of Hong Kong. British Prime Minister Boris Johnson has already announced that the roughly 350,000 Hong Kong residents who hold a British overseas passport, as well as some 2.5 million who are eligible to apply for one, would be granted renewable visas allowing them to work in the UK and put them on a path to citizenship.

There is precedent for this strategy in North America. In anticipation of the end of British rule over Hong Kong almost 25 years ago, Canada used its version of EB-5 to welcome professionals and entrepreneurs from Hong Kong. The result was not only a generation of highly educated and talented job creators, but billions of CDN dollars in foreign investment that transformed areas like Vancouver, British Columbia, into world-class gateway cities. In 2015, the Real Estate Board of Greater Vancouver estimated the dollar volume of residential resales attributable to Hong Kong investment at $38.6 billion.

The government should follow suit – instead, we are making the U.S. option less attractive. In July, President Trump signed an executive order that makes it even more difficult for Hong Kongers to take part in the EB-5 program. The Hong Kong Normalization Order states that "[it] shall be the policy of the United States to suspend or eliminate different and preferential treatment for Hong Kong …" – meaning, among other things, that Hong Kongers no longer receive special immigration status separate from Chinese citizens. Hong Kongers applying to the EB-5 program are now subject to the same extremely large EB-5 Chinese mainlander backlog, adding years to their wait for a U.S. Permanent Resident Card.

EB-5 reform is therefore essential to maintain Hong Kongers' view of the U.S. as an attractive immigration destination. The U.S. is already home to more Hong Kongers than any other area outside mainland China, but we compete for their investment and talent with markets like the UK, Canada, Singapore, and Australia. Hong Kong is already a top 10 source for inbound EB-5 investment and creates thousands of jobs in America, but the current investment volume is a fraction of what is possible. To increase the amount of both investment and jobs, Congress can implement Hong Kong-specific reforms for EB-5 that would allow Hong Kongers to escape the anti-democratic crackdown and find freedom in America. Common sense reforms like requiring Hong Kong EB-5 investment to occur in rural areas or census tracts of high-unemployment would catalyze economic development and avoid the investment concentration problems Canada experienced in the 1990s. Given the urgency of the situation in Hong Kong, the federal government could establish a window of time for fast-track processing of Hong Kong investors and exempting them from the annual visa caps that would normally apply.

The ultimate details of a plan should include these and other reforms. Senate Majority Leader Mitch McConnell has indicated a strong interest in supporting the people of Hong Kong. Including Hong Kong-specific EB-5 reforms in a sanctions or recovery bill would reinforce bedrock American principles of freedom, democracy, and economic opportunity – and send the right message to China and the world. The time to act is now.

1 https://iiusa.org/wp-content/uploads/2019/03/Joint-Report-Asessment-of-EB-5-economic-impact.pdf

2 https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/costestimate/hr55690.pdf

Litigation Success Story - Mirror Lake Village, LLC v. Wolf:

After Years of Fighting, "At Risk" Finally Means At Risk

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EB-5 regulations require an EB-5 investor to make an investment that is "at risk." The concept of "at risk" is not unique to EB-5 and has been part of the requirements for an E-2 Treaty Investor non-immigrant visa for decades. Nevertheless, in interpreting the term "at risk" in the EB-5 context, USCIS added a new twist. USCIS has interpreted the term to exclude any investment agreement that constitutes a "debt arrangement." In construing what constitutes a "debt arrangement," USCIS has rejected any agreement that provides an EB-5 investor with a right to redeem his or her investment at any time, even after the period of conditional residence is over, despite the fact that both the regulations and USCIS policy allow an investor to get his or her investment back after this "sustainment period." According to USCIS, any agreement that allows the investor a right to demand his or her money back or sell his or her shares back to the company, no matter whether it is contingent on any event or condition, and regardless of whether there is a promise to repay the investor, is an impermissible "debt arrangement." Under the regulations, a "debt arrangement" does not constitute an "investment," so USCIS has routinely denied I-526 petitions where the investor has any such purported right of redemption.

Many EB-5 stakeholders have argued that this policy makes no sense. An investor may have a right to request his or her money back at some point in the future without undermining the "at risk" nature of the investment, and without turning an equity investment into a loan or "debt arrangement". Fortunately, in *Mirror Lake Village, LLC et al. v. Wolf* (No. 19-5025), the U.S. Court of Appeals for the District of Columbia Circuit recently agreed. Notably, this appellate court victory is important for EB-5 because prior litigation victories related to the issue of redemptions were only district court cases, and USCIS has previously taken the position that it is not bound by such decisions it disagrees with.

The NCE's Operating Agreement

This case involves an investment agreement that provides the investors with a one-time right to sell all of their membership interests in the NCE back to the company for the purchase price after the conditional basis of their residence is removed, or to sell back 20% of their membership interests per year, at fair market value, beginning from a point two years after removal of the conditions on their residence. Both of these options were *explicitly contingent* on the NCE having "sufficient Available Cash flow" to purchase the interests at the time the option is triggered. Available Cash Flow was defined in the NCE's Operating Agreement as the "total cash available to the Company from all sources less the Company's total cash uses before payment of debt service," and excluding member capital contributions. Thus, the investors could not be repaid unless the NCE had enough money to continue operations and pay the purchase price to the investors. If the company failed, or was only marginally successful, there would not be sufficient Available Cash flow, and the investors' right to have the NCE repurchase their interests would be meaningless. The investors' investments were therefore subject to business fortunes, and there was no guarantee that they would be repaid or make a profit.

Procedural History

USCIS denied the petitions, finding that because the investors had a put option, which was a redemption agreement, the investment was a "debt arrangement" and therefore not "at risk" in accordance with 8 C.F.R. § 204.6(j)(2) . Through NOIDs, the denial, and subsequent denial of investor motions to reopen, USCIS used these terms essentially interchangeably, basing its decisions on selected sentences from *Matter of Izummi.* In their NOID responses and Motions to Reopen, the investors pointed out that their money was at risk because the put option is expressly contingent on there being sufficient Available Cash flow to repurchase their interests. Notwithstanding this, USCIS found that this was a redemption agreement because there was a chance the business would be successful, and the put option was "clearly written as an exit strategy for the investor to compel [the NCE] to purchase" their interests. The investors also argued that the investment had all the hallmarks of equity, and not debt (including a lack of an unconditional promise to repay the money), all to no avail.

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District Court Rules in Favor of USCIS

The EB-5 investors filed a complaint in the U.S. District Court for the District of D.C., alleging that the denials were arbitrary and capricious under the A.P.A.; challenging USCIS' interpretation of the regulations to prohibit any kind of agreement that allows investors the right to a return of their capital; and arguing that USCIS' interpretation of *Matter of Izummi* itself was flawed because *Izummi*, when read as a whole, simply does not say what USCIS claimed it says. A long analysis of debt factors vs. equity factors, and a detailed parsing of *Izummi* and the regulations was provided, but in the end, the District Court granted summary judgement to the government. The judge found that *Matter of Izummi* – and USCIS' interpretation of it – were entitled to deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Under *Auer* and its progeny, "[w]hen reviewing an agency's interpretation of its own regulation, [courts] accord substantial deference to the agency's interpretation, giving it controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Mellow Partners v. Comm 'r of Internal Revenue Serv.*, 890 F.3d 1070, 1079 (D.C. Cir. 2018) (internal citations and omissions omitted). The District Court's entire opinion was devoted to analyzing the *Auer* factors and finding that it owed deference to USCIS' decisions.

Appellate Court Victory

Not satisfied with the District Court's decision, the EB-5 investors filed an appeal to the Court of Appeals for the District of D.C., renewing their arguments that this particular investment arrangement is "at risk," and not an impermissible debt arrangement, because it meets the standard set by USCIS- there is a risk of loss and a chance for gain. The investors are not guaranteed a return, and any return is entirely dependent on the success of the business. Because the put option is expressly contingent on sufficient Available Cash Flow, and there is no promise to repay the investors regardless of the success or failure of the business (as there was in *Izummi*), this is simply not a debt arrangement. .

However, because the District Court decision was based almost exclusively on deference, and the Supreme Court had recently decided *Kisor v. Wilkie*, which placed significant limits on *Auer* deference, a large portion of the appellate brief was focused on why USCIS' decisions and its interpretation of its regulations and *Matter of Izummi* were not entitled to deference.

Deference, as it turns out, was not an issue for the Court of Appeals. Instead, the Court found USCIS' decisions to be arbitrary and capricious because "USCIS did not reasonably explain its denials of the plaintiffs' visa petitions." Op. at 7. The Court found that in both the initial denials and the denials of the motions to reopen, USCIS offered a clear definition of "at risk," which was "there must be a risk of loss and a chance for gain." Id. The Court found that the investor's investments fit that description. The Court found:

> Because the sell-back options in the Operating Agreement are contingent on Mirror Lake's available cash flow, any return on capital is "entirely subject to business fortunes." If Mirror Lake is unsuccessful -- or even just short on cash -- the plaintiffs will be unable to recoup their investments. Only if Mirror Lake is successful will they have an opportunity for gain.

Op. at 7 (internal citations omitted). According to the Court:

> The agency's only response to this point was to say: "[T]he petitioner is arguing that her capital is at risk only insofar as the [business] is not profitable. Should the [business] be profitable and have sufficient cash flow, the [sell-back] Option was clearly written as an exit strategy." Elaborating on this explanation for why the capital was not "at risk," the agency's denial of rehearing stated: "[The petitioner's] argument neglects to contemplate the [business'] potential success."

Op. at 7 (internal citations omitted). Finally, the Court found that this

> "explanation" is no explanation at all. The possibility that the business will succeed does not negate the risk of loss if it does not. If it did, even the purest stock investment would not be at risk because there is always the possibility (and the hope) that a business will succeed. In fact, as quoted above, the agency's explanation directly contradicted its own definition of "at risk," as set out earlier in each USCIS decision under review.

Id. In concluding that this explanation is inadequate, the Court noted that on appeal, "the government does not even attempt to rescue this explanation of why the petitioner's capital is not at risk." Op. at 8.

In addition to addressing this flaw in USCIS' reasoning, the Court addressed USCIS' miscalculated reliance on *Matter of Izummi*. The Court noted that the investor in *Izummi* had invested with the agreement that his investment would be returned at a certain point, and, unlike here, there was no contingency. The NCE in *Izummi* had promised to repay the investor regardless of the success or failure of the business, and therefore was guaranteed. Op. at 8.

In further rebuke, the Court also found fault with USCIS' selective reading of "isolated sentences" in *Izummi* to mean that any redemption agreement constitutes a prohibited debt arrangement. The Court instead found that "in context, it is plain that what *Izummi* meant by 'redemption agreement' was the kind of agreement at issue in that case: one that guaranteed a return of capital, without risk." *Id.* The Court further noted that USCIS misread

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Izummi by citing it "for the proposition that a sellback option contingent on business success constitutes an 'illusory promise' that the agency will not accept." Id., at 9. "*Izummi* discussed 'illusory promises' in the context of responding to an attorney's claim that the investment there was "at risk," not because its redemption was dependent on business success, but because the business might simply refuse to repay the petitioner as the contract required," finding that "[t]he investment risk at issue [for Mirror Lake investors] is not of that illusory type." *Id.* Ultimately the Court found that the denials of the investors' petitions were neither reasonably explained nor supported by agency precedent, and therefore arbitrary and capricious.

Concurring Opinion

Although the Mirror Lake opinion brings some clarity to this area, the concurring opinion of Judge LeCraft Henderson muddies the waters. The concurring opinion cites to EB-5 fraud and abuse, and states:

> I believe we should hesitate to undo USCIS's efforts designed to ensure the integrity and further the purpose of the program—i.e., to benefit the United States economy and create full-time employment. This includes its effort to ensure that the funds invested in domestic businesses in exchange for permanent residency remain there.

Op. at 11. Sadly, the Concurring Opinion does not note that the overwhelming majority of EB-5 fraud and abuse in the last decade has been perpetrated on the investors, and not by them.

The Concurring Opinion also purports to require some threshold level of risk that is ill-defined:

> Nevertheless, to ensure that a sufficient risk exists that does not simultaneously defeat the purpose of the EB-5 program, the risk threshold—i.e., the requisite success of the business—should plainly be something more demanding than simply not going bankrupt.

Id. at 12.

The EB-5 regulations already leave significant gaps that are only partially filled by ambiguous and frequently changing USCIS policy guidance and adjudicative decisions. Each iteration of the USCIS Policy Manual generates as many questions as it answers. Introducing room for USCIS to subjectively (and even retroactively) define terms that were not previously ambiguous could create additional challenges for immigrant investors and practitioners already struggling to ensure the investment agreements they participate in are compliant with the EB-5 regulations. Clarity, rather than subjective interpretation, should be the order of the day when USCIS is involved, and it is hopeful that USCIS updates its Policy Manual to be consistent with the majority opinion.

Significance to EB-5 Industry

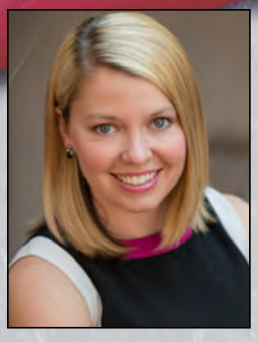
The appellate court decision hopefully means the end to a long, hard fight by Mirror Lake Village investors to have their I-526 petitions approved, but the decision also has significance to the EB-5 industry as a whole.

First, it is simply not true that *every* agreement providing an investor a right to exit the investment at some point in time after the end of the conditional residence period is a prohibited redemption agreement. This decision will hopefully end USCIS' policy of categorically treating any agreement that has any possibility of allowing an investor to request the return of his or her investment as a "debt arrangement," and force USCIS to look at the details of the agreement. The EB-5 community has long argued that the at-risk requirement does not mean that an investor should be trapped in an investment forever. Prohibiting an investor from being able to exit an investment after the EB-5 requirements are satisfied and after they have successfully completed the conditional residence period encourages fraud and abuse. EB-5 investors should have the ability to take action if they do not like the way their investments are being managed after they have satisfied program requirements. Prohibiting them from being able to compel a return of their investment after the jobs have been created, and once the investment and EB-5 Program requirements have been met, makes an EB-5 investment riskier than a normal, arms-length transaction. USCIS policy should require, but not create, investment risk.

Second, the Court rather succinctly summarized what USCIS has not been able to clearly articulate in many years of interpreting the terms "at-risk" and "redemption agreement," and "debt arrangement," which USCIS has used almost interchangeably. In the words of the Court, "[i]n order to distinguish between a qualifying capital contribution and a prohibited debt arrangement, USCIS determines whether an immigrant-investor has 'placed the required amount of capital *at risk*.'" Op. at 3. Moreover, the Court clarified that *Izummi* does not prohibit every agreement that allows the investor an opportunity to exit the investment at some point, but only agreements that shift the risk from the investor to the company. If there is an agreement that guarantees a repayment (whether or not that guaranty is supported by any recoverable assets), it is a debt arrangement. If the return of capital is subject to business fortunes, it is not. In other words, if the agreement says the company promises to repay the investor, it is debt. See *Izummi* at 185 ("The risk that the petitioner might not receive payment if the Partnership fails is no different from the risk any business creditor incurs."). If the agreement says the company will only pay the investor if it can, it is generally not a debt.

This battle was long and stressful for EB-5 investor but ultimately, reason and adherence to Congress' intent won. Litigation may be the only option when faced with an entrenched immigration agency.

IIUSA & FOIA: Compelling Information Through the Court



ASHLEY SANISLO CASEY
DIRECTOR OF EDUCATION & PROFESSIONAL DEVELOPMENT, IIUSA

In recent previous editions of the *Regional Center Business Journal*[1], I have written about IIUSA's ongoing efforts to collect important EB-5 industry data through Freedom of Information Act (FOIA) requests and the subsequent frustration with the lack of timely response or of relevant information resulting from those requests. To quickly summarize, IIUSA relies on FOIA requests to gather information from the federal government that in turn helps us inform our members of industry trends and to create and update pertinent resources for our members' business development. These resources include, but are certainly not limited to, I-526 and I-829 data reports, economic impact reports and interactive tools on iiusa.org like our TEA map and Investor Markets Portal. Without information through FOIA, these tools and resources would be impossible to create.

The problem is, in recent years, the response time between when we submit a request to U.S. Citizenship & Immigration Services (USCIS) to when we receive a response that includes the data we requested has become untenable. The table below demonstrates the backlog we are experiencing in getting responses to our requests. Additionally, it is important to note that we have requests pending that are over three years old.

Table 1: IUSA FOIA REQUESTS OF SEPTEMBER 2020

Total Requests	Pending	Denied	In Appeal	Fulfilled
285	82	20	1	182

Table 2: IUSA FOIA REQUESTS OF AUGUST 2019

Total Requests	Pending	Denied	In Appeal	Fulfilled
248	70	20	0	158

In the 12 months since the last article on FOIA, we have submitted an additional 37 requests and our pending cases increased from 70 to 82. In that same time period, we received 24 responses, moving our fulfilled cases to 182.

FOIA statute[2] states that the agency to which a request is sent has 20 business days to provide a response. Towards the end of 2019, we decided it was time to take a more active approach in compelling USCIS to provide information in a more reasonable time frame. We filed law suits in the US District Court for the District of Columbia, citing USCIS's failure to meet the standards of the FOIA statute that require the agency to reply within 20 days of receipt of our request.

Below I will outline the various requests we have made since December 2019 for which we also filed complaints in court against USCIS. As of the date of writing this article, IIUSA has filed three complaints covering four FOIA requests. We have carefully chosen which requests on which we should take legal action, based on the necessity of the information that would be provided in a response and its timeliness and importance to association and industry intel. We have not filed complaints for every request we have submitted. In fact, in the last nine months, we have submitted 31 requests.

Complaint 1

Request Subject: I-526 USCIS Adjudicator Training Materials for Petitions Filed Before November 21, 2019

Submission Date: December 16, 2019

Request Details: At IIUSA's EB-5 Industry Forum in Seattle, WA in October 2019, Immigrant Investor Program Office (IPO) Chief Sarah M. Kendall stated, "…in the last year we conducted a training update for all I-526 adjudicators and economists." Citing her remarks, IIUSA requested the updated adjudicator training materials referenced by Ms. Kendall.

Two separate requests were made, one for adjudicator training materials for petitions filed ***before*** November 21, 2019 and one for adjudicator training materials for petitions filed ***after*** November 21, 2019. With the substantial regulatory changes made to the EB-5 Regional Center Program that went into effect on November 21, 2019, there was an assumed corresponding major update to training materials for adjudicating under the new rules.

Complaint Filed: March 2, 2020

Status: The U.S. Department of Justice, on behalf of USCIS, answered our complaint and entered into a "Joint Status Report" with IIUSA agreeing to a schedule for document production. The Court accepted the filing thereby holding USCIS accountable to adhering to the JSR's schedule. As of August 2020, USCIS has produced roughly 500 pages per month in response to IIUSA's original FOIA request and subsequent lawsuit. The agency is obligated to continue

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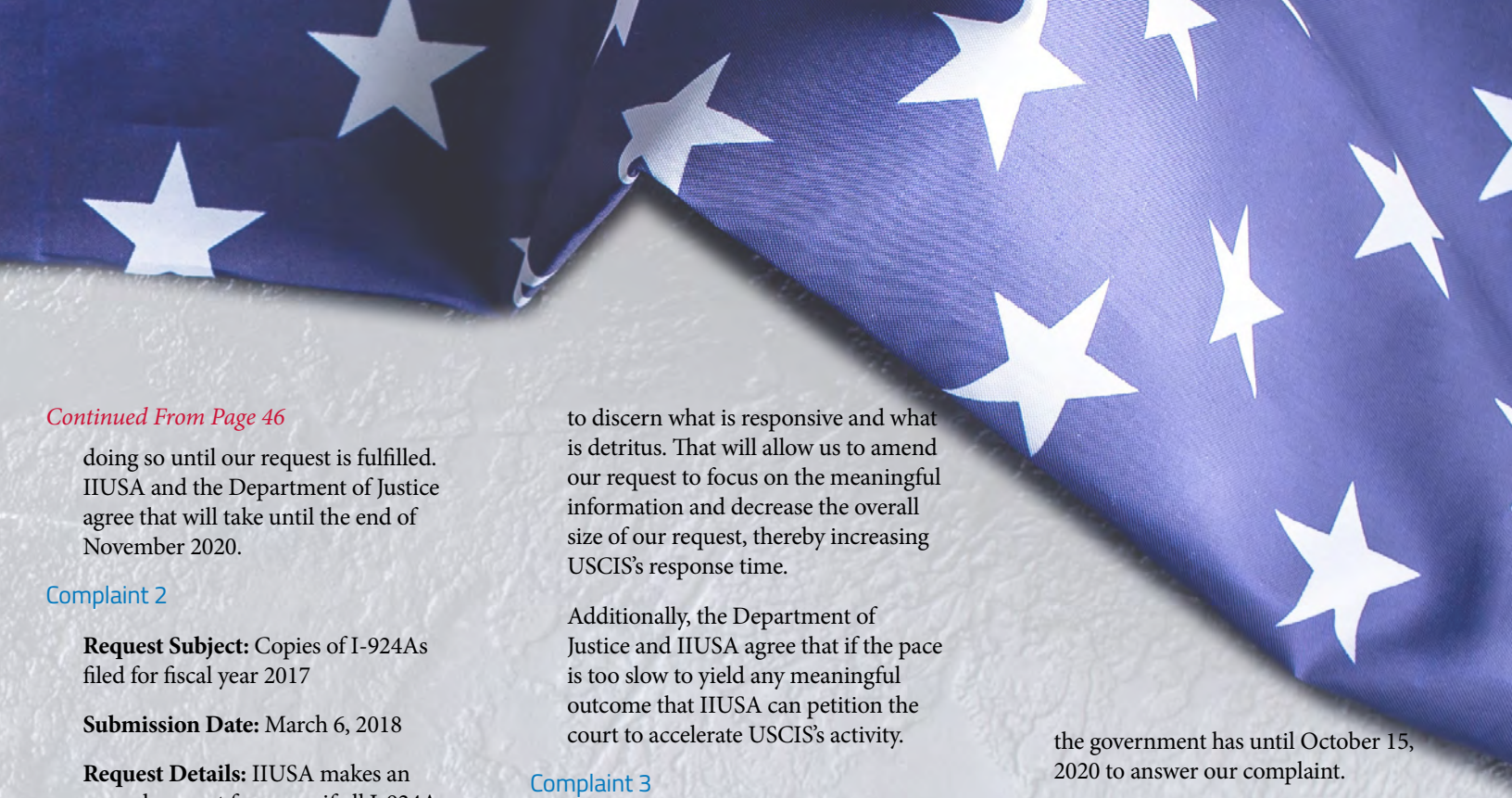
1 Vol. 6, Issue 1; Vol. 7, Issue 2 https://iiusa.org/news-publications/regional-center-business-journal/

2 Public Law No. 114-185



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doing so until our request is fulfilled. IIUSA and the Department of Justice agree that will take until the end of November 2020.

Complaint 2

Request Subject: Copies of I-924As filed for fiscal year 2017

Submission Date: March 6, 2018

Request Details: IIUSA makes an annual request for copes if all I-924As that were filed for the previous fiscal year. It is an annual requirement for any designated Regional Center to file an I-924A, regardless of the Regional Center's activity (or lack of) in that fiscal year.

This year request has been made by IIUSA every year since 2012 and the information received is used to create economic impact reports. Without this information being provided to us by USCIS, it is impossible to make a comprehensive analysis of the annual economic impact of the EB-5 Regional Center Program.

Complaint Filed: July 30, 2020

Status: As with IIUSA's March lawsuit, the Department of Justice answered the complaint and entered into a JSR. Again, the Department of Justice and IIUSA acknowledge that USCIS's pace for document production is roughly 500 pages per month. Pursuant to the JSR, IIUSA will begin receiving its requested information at the end of October 2020 and is likely to receive its final document delivery on or about January 2022.

That pace, however, can be accelerated. Once IIUSA begins receiving information, we will be able to discern what is responsive and what is detritus. That will allow us to amend our request to focus on the meaningful information and decrease the overall size of our request, thereby increasing USCIS's response time.

Additionally, the Department of Justice and IIUSA agree that if the pace is too slow to yield any meaningful outcome that IIUSA can petition the court to accelerate USCIS's activity.

Complaint 3

Request Subject: Redeployment Policy Records

Submission Date: August 3, 2018

Request Details: The details within this request were rather extensive[3], but essentially it seeks to gather all records of development and implementation of the July 24, 2020 USCIS Policy Manual Volume 6, Part G update that updated the policy on further deployment of funds (also known as redeployment).

The purpose of this request was to shed light on how the agency came to this new policy and better understand any and all consideration given to how the new policy would impact the EB-5 Program, including current and future investors and current and future projects.

Complaint Filed: September 3, 2020

Status: On or about September 15, 2020, IIUSA perfected service of process of its complaint to the Department of Justice, USCIS, and the Department of Homeland Security. As of the time of this article, the government has until October 15, 2020 to answer our complaint.

We have every reason to believe the Department of Justice will do so and, depending on the Court's orders, again enter into a JSR to begin complying with IIUSA's FOIA request.

After finding initial success from filing our first complaint in March 2020, we looked at our other pending requests to see which ones may benefit from added persistence in the same manner.

The information we garner from FOIA requests is essential to the operation of IIUSA and the EB-5 industry. While we are pleased with our preliminary results from, we must remain patient and diligent in the ensuing activity to gather all of the responsive documents as USCIS's standard procedure is to send only 500 pages per month of responsive documents. Therefore, depending on the breadth of the request, this could take several months, if not well over a year, to get all of the documents associated with a single request. For instance, our request for FY2019 I-924As was determined to have over 6,700 responsive pages. At 500 pages per month starting in October, it will likely be November or December 2021 until we have all of the pages associated with the fulfillment of this request.

We are hopeful that this new approach will result in not only receiving the information sought in the subject of the complaints, but also more timely responses to all requests moving forward.

3 IIUSA would like to thank John Pratt from Kurzban Kurzban Tetzeli & Pratt for his assistance in drafting this FOIA request. Mr. Pratt provided extensive and exhaustive verbiage to ensure the request encompassed all possible information that would shed light onto the development and implementation of the new redeployment policy published on July 24, 2020.

IIUSA Goes Virtual

Continuing to Deliver Members Business Development and Educational Value in the Stay-at-Home Era

MCKENZIE PENTON
DIRECTOR OF EVENTS & BUSINESS DEVELOPMENT, IIUSA

To call 2020 an unprecedented year is perhaps a bit of an understatement. With worldwide shutdowns, office closures and cancelled events due to a global pandemic, everyone and every business is doing its best to stay afloat and if they are lucky, flourish.

As the industry leader in business development, networking and events, IIUSA was of course put into a difficult situation (along with everyone else) from the onset of the pandemic in early spring of this year. Namely, how do we continue to deliver value to our membership and ensure that industry stakeholders, investors, government officials and others remained informed and up to date all while stuck at home?

The answer may now seem simple as everyone has become more comfortable with living their lives (temporarily) through a Zoom video screen. However, in early March the decision was not so clear cut. In fact, as the COVID curtain began to fall on the U.S., IIUSA was gearing up for its next event in our Global Banquet Series in Johannesburg, South Africa. As our first-ever event in Africa, we were excited to go and honored to have the support of our members and the Johannesburg Chamber of Commerce in our endeavor. With over 150 registrants and 12 sponsor organizations, we were assuredly ready to deliver a great event.

Of course, we did not go to Johannesburg in March, nor Washington, DC in May, Brussels in June or Sao Paulo in August. In fact, we cancelled events in almost every major investor market around the world. However, if there is a silver lining to that fact it is that we learned (on the fly) how to create effective digital marketing and educational platforms in their place.

In late March, we proudly announced the launch of our Investor Market and Advocacy Webinars Series. To date, the investor market discussions have covered markets around the globe over the course

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IIUSA's Investor Market Webinar Series featured:

- 12 global events
- 25+ Sponsors highlighting their projects and services
- Expert discussions from industry leaders
- Well over 1000+ live participants!

Continued From Page 48

of 12 events and featured 25 sponsors highlighting their projects and services, illuminating expert discussions from industry leaders, and well over 1000+ live participants! The Advocacy Series was equally successful as we hosted the first-ever digital address by Charles Oppenheim, Chief of the Visa Control and Reporting Division, U.S. Department of State as well as a unique presentation by Congressional staff on the state of play and path forward for EB-5.

With the success of both of those series under our belts we felt confident enough to kick things up a notch with our Virtual EB-5 Industry Forum this fall. The event will cover many of the industry's hottest topics including redeployment, EB-5 litigation, real estate workouts, advocacy, investor market updates and much, much more. As of this writing, we have over 30 sponsor organizations, 50 speakers, 7 partner organizations and well over 300 registrants for the event. With such strong support and dynamic programming, we are certain it will be informative and successful.

I would like to say our transition to the digital event space was seamless. However, I do not think anyone would believe that as we have all had our internet stop working, got stuck on mute or been the victim of an inopportune lawn mower in the background as we tried to navigate the digital work environment. In more serious terms, given the circumstances of this highly unpredictable and certainly unexpected year, I am proud of the work we have done to deliver value to our members and the EB-5 industry despite all of the obstacles.

IIUSA had to determine ways to reach new audiences, work collaboratively with partners across time zones, deliver content on virtual platforms and reengineer our marketing and business development prospective. We had to do this all while ensuring our members stayed engaged and enthusiastic about what we were up to; and for the most part, I am pleased to say we did just that. With over 16 virtual events hosted since March, and a Virtual Forum upcoming, I am confident in saying that IIUSA has delivered on our mission of providing the industry with educational and business development opportunities and we have also laid the ground work for a successful 2021 of virtual and hopefully in-person events.

Where Did We (Virtually) Go in 2020?

So far this year, IIUSA has successfully hosted virtual events covering the largest investor markets and key target audiences including:

- India
- South Africa
- Brazil & Latin America
- Hong Kong & South Asia
- Russia
- Capitol Hill

On top of that, we have been pleased to see a truly global attendance for our events with many of the Investor Market Webinars

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attracting not only market-specific attendees, but also those individuals from neighboring countries. In fact, our most recent discussion focused on the Brazilian market had live attendees from across Latin America including Mexico, Argentina, Chile, Bolivia, the Dominican Republic, Panama and elsewhere.

Some Key Lessons Learned

1. There's no substitute for in-person meetings but virtual opportunities can be a cost-effective way to market and gain exposure…especially as one looks to enter a new market.
2. If you build it they will come. People continue to be eager for information on the EB-5 Program and with the barriers of travel and in-person gathering removed we have seen exponential international participation growth.
3. Partners are the key to success…and IIUSA is uniquely positioned to capitalize on a strong international network.
4. Under promise and over deliver.
5. Virtual allows us to be more nimble and deliver educational content in a more timely manner than waiting for in-person events

Outlook for 2021 and Beyond

If nothing else, 2020 has shown us that much of what we as individuals, IIUSA as an organization and indeed EB-5 stakeholders as a whole deemed to be "essential" travel is anything but. That is not to say that we are not excited to once again be together in-person to help our members grow their businesses around the world.

However, as we grow and evolve in the digital environment we have come to realize that virtual educational and business development opportunities will continue to be of critical importance. That is not so much a prognostication on what 2021 may look like from a COVID perspective, but rather a recognition of the effectiveness of virtual events in the EB-5 space.

We know that when you get down to it no one is going to be closing a client, choosing a project to invest in or hiring an attorney from a Zoom meeting. But what the virtual landscape does offer projects, service providers and investors is an immediate entrance into a new market, access to timely information or a way to market a brand across the globe (and in multiple places at once with lower costs).

While it may be too early to tell exactly what 2021 has in store, we look forward to the continuation of our virtual series. In fact, the ground work has already started for virtual events focused on South Africa, Taiwan, Korea, India and Brazil for Q1 2021.

For members looking for business development and marketing opportunities in the year ahead, we invite you to consider our virtual platforms. A comprehensive 2021 schedule will be available soon, but in the interim we invite you to email info@iiusa.org to learn more about how you can get involved.

We hope to see you (virtually) in the year ahead!

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Unity & Validity: The Case for an EB-5 Coalition

AARON GRAU
EXECUTIVE DIRECTOR, IIUSA

One reason associations exist is to leverage its members' buying power or political capital. Improving or strengthening a profession's or an industry's ability to serve their markets is a direct result of coming together on the same platform and speaking with one voice to underscore unanimity and the message's importance.

There are risks, however, in relying solely on strategies that leverage an association's voice, namely the appearance of self-serving. For example, if the International Association of Vampires (IAV) spoke clearly and unequivocally that garlic should no longer be sold in grocery stores, their message -although unified- may find significant criticism, not the least of which would be from the International Association of Garlic Growers (IAGG).

Sometimes a unified voice must be substantiated by authorities *outside* an association to claim validity, demonstrate truly comprehensive benefits, and dispel mercenary or self-regarding motives.

IIUSA's drive to reform and reauthorize the EB-5 Regional Center Program is easily the association's top priority. Other than its demand for additional EB-5 visas, there is little else that speaks as loudly or clearly to the association's mission and vision. In years past, differences of opinion among EB-5 Regional Centers confused the association's call for reauthorization; confused and frustrated policy makers and ultimately frustrated IIUSA's goal. Today, that confusion is largely eliminated. IIUSA members and non-members are finally collectively leveraging their political capital toward a common end. The industry's bifurcated history (or histrionics), however, still colors policy makers' memory and perceptions, so it is no longer enough to demonstrate unity. Now we also need validity.

Even before the global pandemic and its economic impact, IIUSA sought inroads with "outside" organizations to more emphatically illustrate EB-5 investments' economic impact. For example, IIUSA has a good working relationship with the Council of Development Finance Agencies (CDFA), a national association dedicated to the advancement of development finance concerns and interests. During our 2019 Seattle gathering, IIUSA welcomed its first honorary economic development organization (EDO) members. The message was clear. EB-5 investments are an economic driver. EDOs that recognize that or EDOs that want to know more: Welcome. Let's work together.

As the pandemic's economic realities became clear, so did the need (and opportunity) to further these inroads, widen them, pave them, and fill them. EB-5 investments' economic benefits are no different now than they were last year, but in 2020 they are more necessary to validate.

Our association's push to reform and reauthorize the Regional Center program now has clear meaning to others outside our traditional orbits. In particular, municipalities, small business interests, and hotel and lodging owners all realize that in these times, when operating and development capital is scarce and expensive, EB-5 investments are an incredibly valuable asset. Just as the 2008 Great Recession focused attention on EB-5 investments, so too is 2020's COVID-19.

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This time, however, to overcome the EB-5 industry's recent discord and to be sure our unified voice is validated, IIUSA is actively pursuing these "outsiders" and developing a very broad and very strong coalition. Unlike 2008, this time EB-5's value does not speak for itself. This time, it demands unity *and* validity.

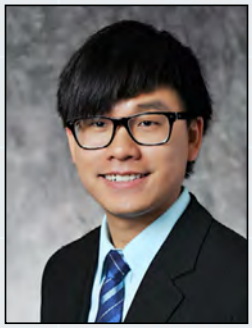
IIUSA's coalition is based on a singular message captured in our long-standing letter to Congress. EB-5 has helped the economy before. It can do it again, but this time we need Congress to act with purpose. This time the Regional Center program needs integrity reforms and long-term stability. And this time, it is not just the EB-5 industry that is saying so.

IIUSA's shoe-leather drive along with a recently developed educational video have captured the attention and support of, among many others, the U.S. Conference of Mayors, the American Hotel and Lodging Association, the Dallas Regional Chamber of Commerce, the Greater Cleveland Partnership, the Latino Hotel Association, the Las Vegas Latin Chamber of Commerce, the Metropolitan Milwaukee Association of Commerce, the United States Hispanic Chamber of Commerce, and Argentum - the leading national association for companies operating professionally managed senior living communities.

This growing coalition supports and validates IIUSA's long held position: That a reformed and reauthorized Regional Center program not only benefits the EB-5 community and its investors, it benefits local, regional, state, and national economies. It creates and saves jobs. Its Congressional intent as an economic development driver is being met and with Congressional action can be augmented, just when we need it most.

Soon, Congress will refocus its attention from elections to policy. Its make-up may be different when that happens, but IIUSA's (and now its coalition's) message will be the same. We will continue to expand our "outside" support to validate our internal synchronized beliefs to ultimately reach our goal. If you would like to help us do so, please share this link: https://iiusa.org/advocacy/eb-5-letter-of-support/. Encourage your local mayors, chambers of commerce, and business owners to join. We've worked hard to finally establish unanimity. Validation will carry us through.

EB-5 BY THE NUMBERS IN THE ERA OF NEW REGULATIONS



LEE LI
DIRECTOR OF POLICY RESEARCH & DATA ANALYTICS, IIUSA

2020 has been a year that is full of significance, particularly for the EB-5 industry. In addition to the fact that COVID-19 has hugely impacted the economic environment for conducing businesses in EB-5, it is also the first year in which the new EB-5 regulations were fully in effect, imposing the most significant regulatory reform for the EB-5 program since its inception in 1990. Moreover, since March 2020, U.S. Citizenship and Immigration Services (USCIS) adopted a new adjudication process for I-526 cases that is based on visa availability instead of the old "first-in-first-out" approach that the agency has been using for almost 30 years. Furthermore, in July 2020, USCIS published additional policy guidance about redeploying EB-5 capital that impacts many Regional Centers across the country and tens of thousands of EB-5 investors who are still waiting for their EB-5 visa availability due to retrogression.

While 2020 is almost in the rear-view mirror, we took a comprehensive review at the most recent EB-5 statistics and strived to shed some light on the latest EB-5 trends in the era of the new regulations that posed significant changes affecting all EB-5 stakeholders.

I-526 Filings Jumped to a 3-Year High Before the New Regulations Took Effect

4,285 EB-5 investors filed their I-526 petition in the first half of fiscal year (FY) 2020, an increase of 80% from the same time period last year. However, it is important to highlight that 4,264 I-526 filings occurred in the first quarter of FY2020 (between October 1 and December 31, 2019); while only twenty-one I-526 petitions were filed in Q2 FY2020 (January 1s – March 31, 2020) when the new EB-5 regulations were in effect for a full quarter. See Figure 1. It is also important to note that the COVID-19 pandemic hit during Q2.

Although 4,264 EB-5 investors filed their I-526 petition during Q1 FY2020, we estimate that the vast majority (if not 100%) of the filings in Q1 took place between October 1 and November 21, 2019 when investors were still able to invest at the $500,000 or $1,000,000 levels before the new regulations almost doubled the minimum investment amount to $900,000 for TEA projects and $1,800,000 for non-TEA projects.

I-526 Adjudication Volumes Continued to Decline with a Lower Approval Rate

USCIS only processed 1,359 I-526 cases in the first half of FY2020, less than half of the I-526 adjudication volume from a year ago. As Figure 2 illustrates, the productivity of processing I-526 continued to decline since FY2018 when USCIS was able to adjudicate nearly 6,660 cases in 6 months. The Immigrant Investor Program Office (IPO) stated that the reduction in I-526 adjudication volume was due to a combination of

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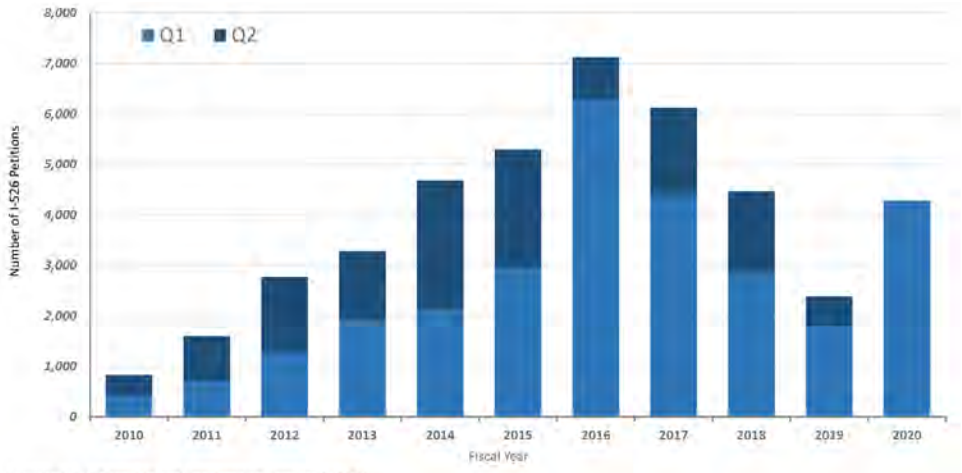
FIGURE 1: **4,264 EB-5 Investors filed their I-526 petition in Q1 FY2020, the highest quarterly filing volume since FY2017**

Number of I-526 petitions filed in the first half of each fiscal year (FY2010 - FY2020) per quarter:



Source: U.S. Citizenship and Immigration Services (USCIS).
Prepared by: IIUSA

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the "greater coordination" with other governmental agencies, the more robust quality assurance and control programs and the new training for all I-526 adjudicators and economists.[1]

According to USCIS Deputy Director Mark Koumans, IPO adapted a new I-526 process starting in April 2020 that is based on visa availability with the goal of, "Allowing qualified EB-5 petitioners from traditionally underrepresented countries to have their petitions approved in a more timely fashion." The I-526 statistics in Q3 and Q4 FY2020 will be key to evaluate the I-526 production rate under this new adjudication process. However, the I-526 processing time data as reported on USCIS's website between May and October 2020 does not look too promising. More on that in the next section.

The average approval rate of I-526 cases also exhibited a continuing decline in a year-over-year comparison. 81% of the EB-5 investors who received their I-526 adjudication in FY2020 were approved by IPO while this number was 84% in FY2019 and 91% in FY2018. IIUSA members have been reporting an increase of RFEs (requests for evidence) and NOIDs (notices of intent to deny) for I-526 cases since 2018, but those challenges did not materially translate into I-526 denials until FY2020 as indicated by the average I-526 approval rates.

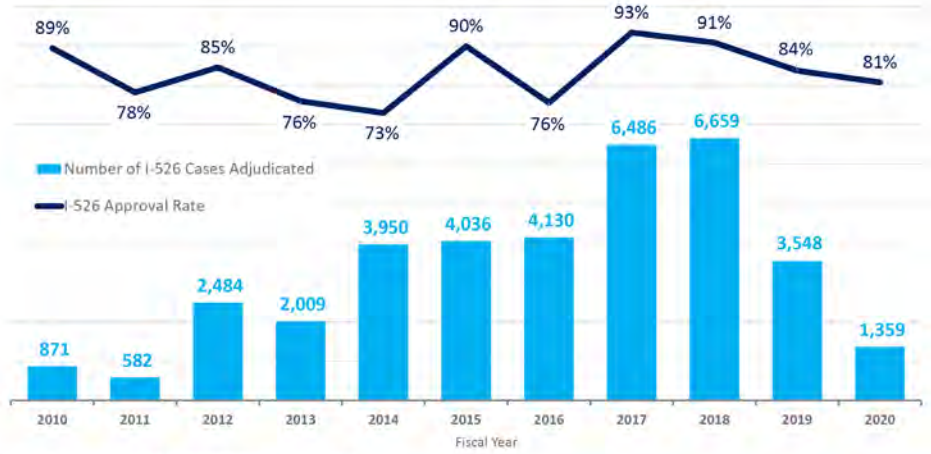
I-526 Processing Time Rose to an All-Time High

Figure 3 demonstrates the estimated I-526 processing time ranges each month as reported on the USCIS website. Overall, there were two significant increases in I-526 processing time since December 2017: in May 2019, the I-526 processing time jumped from between 22-28.5 months to 29-45.45 months; while in July 2020, the I-526 processing time rose again from 29.5-61 months to 46-74.5 months.

While IIUSA members report some of their investors received their I-526 approval in a shorter time period than the official processing time estimates on the USCIS webpage, IIUSA's analysis on 9,000+ individual I-526 adjudication cases also found that the median processing time was lower than USCIS official estimates.[2] The continued growth of I-526 processing time on USCIS website is nevertheless concerning.

FIGURE 2: **First half of FY2020 showed the lowest I-526 adjudication volume since FY2011 with an average I-526 rate at a 4-year low**

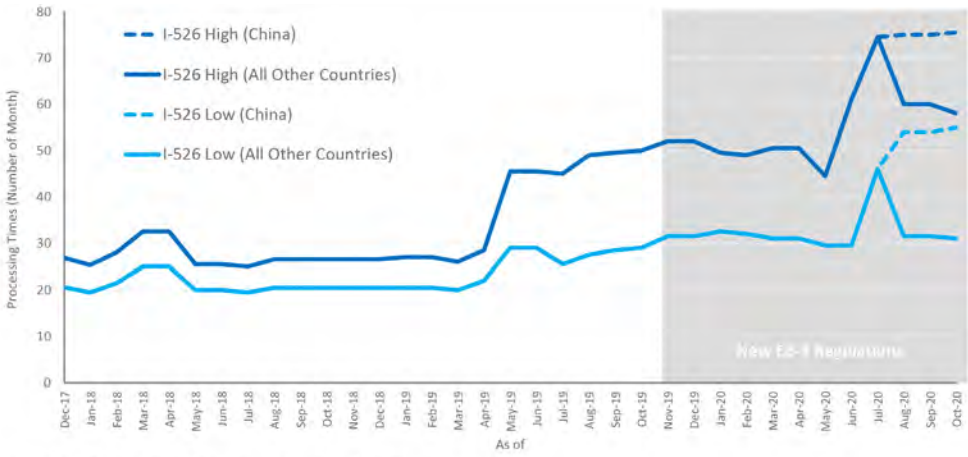
Number of I-526 petitions processed by USCIS and the average approval rates in the first half of each fiscal year (FY2010 - FY2020):



Source: U.S. Citizenship and Immigration Services (USCIS).
Prepared by: IIUSA

FIGURE 3: **I-526 processing time jumped to unprecedented high**

I-526 petitions processing times ranges by month (December 2017 - October 2020):



Source: U.S. Citizenship and Immigration Services (USCIS).
Prepared by: IIUSA

[1] Immigrant Investor Program Office 2019 IIUSA EB-5 Industry Forum Sarah M. Kendall Remarks October 29, 2019. USCIS,

[2] See IIUSA's EB-5 Investor Markets Data Portal: http://member.iiusa.org/node/313743

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USCIS started a new I-526 adjudication process in April 2020 that prioritizes EB-5 petitioners from non-backlogged countries (all countries except for mainland China as of October 2020) and began to report two different I-526 processing time ranges in August 2020 (as showed in Figure 3). As of October 2020, USCIS estimated processing time range is 55-75.5 months for I-526 petitioners from mainland China and 31-58 months for EB-5 petitioners from all other countries. The difference of the processing times between these two tracks remained to be between 18 and 24 months.

IPO's I-829 Productivity Increased in FY2020 While I-829 Approval Rate Remained High

In the first half of FY2020, we saw a bounce in IPO's productivity of processing I-829 cases. The agency adjudicated a total of 1,229 I-829 cases between October 2019 and March 2020, an increase of 62% year-over-year. Moreover, the average approval rate of I-829 cases remained above 95% in 2020.

However, USCIS published a policy memo about redeployment of EB-5 capital in July 2020, which directly affect the adjudication of I-829 cases. The trend of I-829 approval rate in the next few quarters becomes an important indicator for the impact of this new policy guidance.

I-829 Processing Times Became More Unpredictable

The average processing time ranges for I-829 petitions experienced a slight decline in late 2019 but gradually jumped to unprecedented highs from January to October 2020 (see Figure 5). In 2020, we saw the I-829 processing time range drop to 21-45.5 months in January but then rose to 35-56 months as of October 2020. With an even wider range between the high and the low estimated processing time of I-829 adjudications, how long it could take to complete an I-829 case became more unpredictable.

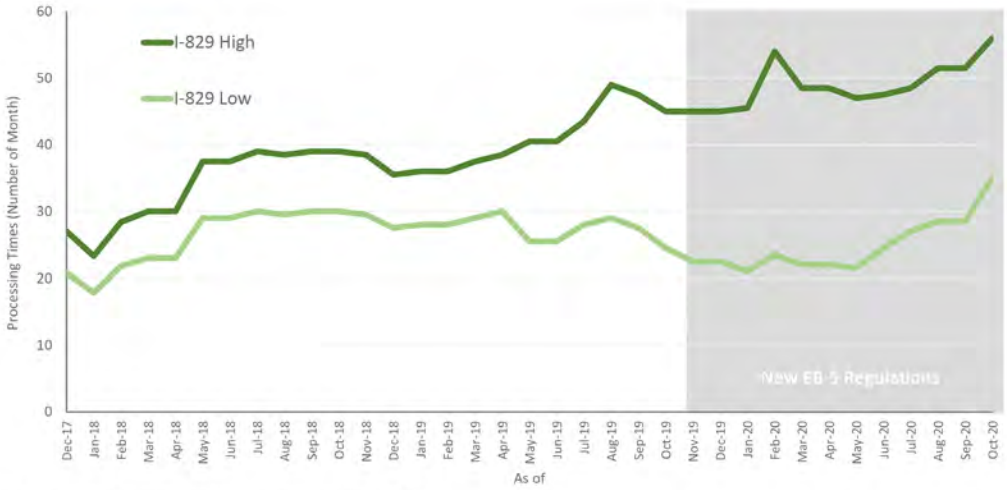
FIGURE 4: **I-829 approval rate remained high in the first half of FY2020**

Number of I-829 petitions processed by USCIS and the average approval rates in the first half of each fiscal year (FY2010 - FY2020):

** Note: Number of I-829 denials in Q3 FY2013 is not available.*
Source: U.S. Citizenship and Immigration Services (USCIS).
Prepared by: IIUSA

FIGURE 5: **I-829 processing time continued to increase with a wider range**

I-829 petitions processing time ranges by month (December 2017 - October 2020):



Source: U.S. Citizenship and Immigration Services (USCIS).
Prepared by: IIUSA

Number of Approved Regional Centers Declined Back to the 2014 Levels

A total of 646 approved EB-5 Regional Centers are listed on USCIS official website as of October 2020, down by 20% from 2019 (see Figure 6). The number of approved EB-5 Regional Centers across the country continued to decrease since 2018 and experienced the largest net decline in FY2020

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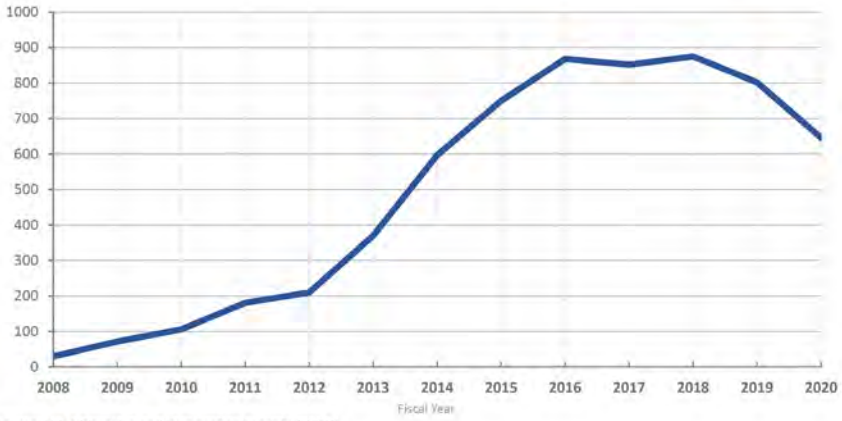
FIGURE 6: **140 EB-5 Regional Centers were terminated since the new regulations went into effect while no new Regional Centers were approved**

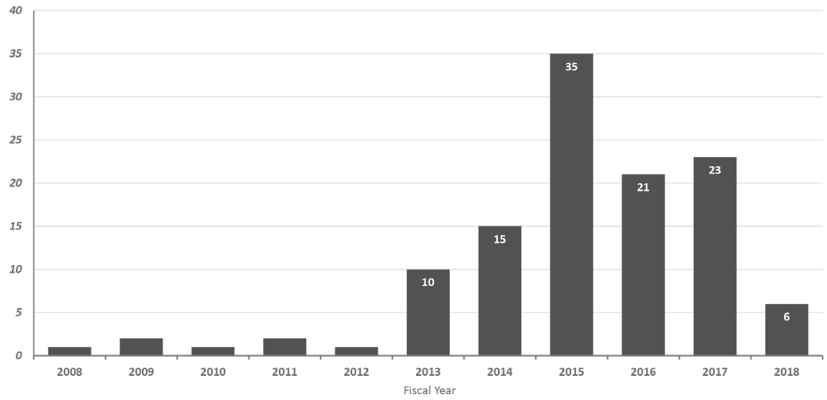
Number of approved EB-5 Regional Centers by fiscal year (FY2008 - FY2020):



Source: U.S. Citizenship and Immigration Services (USCIS).
Prepared by: IIUSA

FIGURE 7: Majority of the EB-5 Regional Centers that were terminated since November 2019 remained inactive for 3 to 5 years

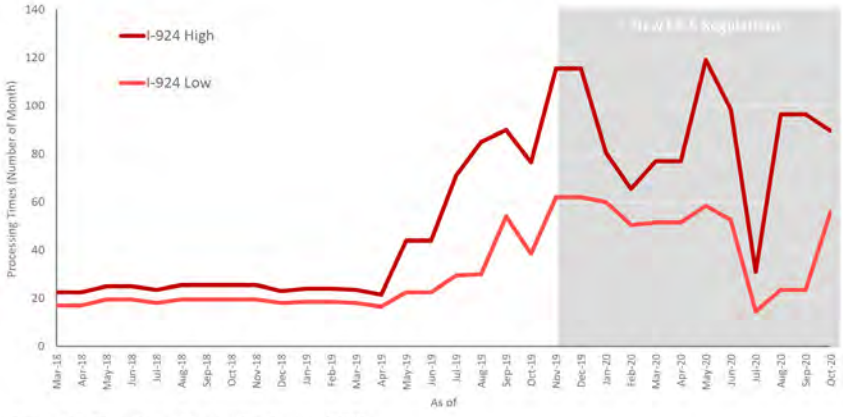
Number of terminated EB-5 Regional Centers since the new regulations by approval year:



Source: U.S. Citizenship and Immigration Services (USCIS).
Prepared by: IIUSA

FIGURE 8: **I-924 processing time exhibited high fluctuations in recent months**

I-924 petitions processing time ranges by month (March 2018 - October 2020):



Source: U.S. Citizenship and Immigration Services (USCIS).
Prepared by: IIUSA

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since the inception of the EB-5 Program. In particular, since the new regulations took place in November 2019, USCIS terminated 140 Regional Centers while approving no new ones.

In addition, between November 2019 and October 2020, on average, 12 Regional Centers were terminated by USICS every month. Analyzing the designation letters of these terminated Regional Centers, we found that most of them were approved between FY2015 and FY2017 (see Figure 7). Given the reason that most of the Regional Centers were terminated because of the lack of EB-5 activity, [3]the data indicates that USCIS would typically terminate a Regional Center if it remained inactive for 3 to 5 years.

I-924 Processing Times Exhibited High Fluctuations

The average processing times for I-924 applications increased significantly between April and November 2019 (see Figure 8), from 16.5-21.5 months to the astonishing 62-115.5 months. However, since the new regulations went into effect, the official I-924 processing time estimates fluctuated greatly. In July 2020, the processing time briefly declined to 14.5-31 months but quickly rosed back 23.5-96.5 months. As of October 2020, it takes USCIS anywhere between 56 and 89.5 months to adjudicate an I-924 application (Regional Center designation or amendment).

Based on the statistics of Form I-526, I-829 and I-924, we examined key EB-5 data trends in the era of the new regulations, including the change of the demands for EB-5, the productivity of USCIS, the approval rates, the processing times, and Regional Center approvals and terminations. While the data on I-526 and I-829 petitions in the first half of FY2020 presented new dynamics of the EB-5 program under the significant changes introduced by the new regulations, the new I-526 processing approach and the new policy guidance regarding redeployment, the data for the second half of FY2020 will be extremely imperative to shed more light on the outlook of the EB-5 program in the era of the new regulations.

3 An Analytical Review of EB-5 Regional Center Approvals and Terminations in 2019. IIUSA. February 7, 2020.

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SHARING

- Share your best practices with other members
- Help enhance competitiveness of Indian Industry

DEVELOPMENT INITIATIVES

Get involved with development initiatives in the areas of

- Child Education
- Women Empowerment
- Social and Rural development
- Skill development
- Sports & Culture
- Build Industry – NGO Partnerships

For More Information, Contact:
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