REGIONAL CENTER BUSINESS JOURNAL

October 2022

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Letter from the Editor

Dear Readers:

I am honored to have been appointed as the new Chairperson of the Editorial Committee. The prior Chairperson, Lincoln Stone, has led us here having established a great trajectory and legacy for the Journal forged by his vision, grace, foresight, wisdom and wit. It will not be easy to succeed him. I have served on the Editorial Committee for 5 years, all under Mr. Stone's direction. I know I will never match his wit, but, hopefully, I have learned a few other things under his tutelage. I look forward to guiding the Committee and the Journal through these new times, which I believe will be exciting and challenging on many levels as we try to divine the meaning of several 2022 Reform and Integrity Act provisions.

My view of the Committee's goal and purpose has always been and remains about education. I think every article should strive to provide a gem of knowledge or two. Our readers and the industry deserve that. Through the years, mainly thanks to Mr. Stone's leadership, we have attracted wonderful writers with deep experience. But nothing happens without the Editorial Committee and its work. We are blessed to have excellent members with vast experience in several fields. Serving on the Committee are top securities attorneys, immigration attorneys, economists, a business plan writer, regional center executives and key industry professionals. My heartfelt thanks to them, including our new members, our long-time members, Mr. Stone and, of course, Ashley Casey (our real tireless leader) for making my transition a smooth one. I hope you enjoy our next edition and all future ones.

Sincerely,

Ozzie Torres
Torres Law PA
Chair, IIUSA Editorial Committee

IIUSA Editorial Committee

OSVALDO F. TORRES
Torres Law
(Committee Chair)

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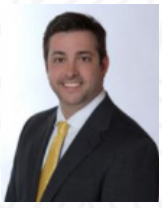

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Regional Center Transactions Post-RIA:

Considerations for the Purchase, Sale, and/or Rentals Thereof

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This article focuses on some of the significant effects that the EB-5 Reform and Integrity Act of 2022 (the "**RIA**") has on regional centers ("**RCs**"), as a result of the heightened compliance issues related thereto, and how such compliance requirements have a marked effect on the valuations of regional centers. Such valuations play a role in either the sale of an RC or the fees allocable to an RC by a new commercial enterprise ("**NCE**") as a result of a sponsorship of a project thereof. Relatedly, this article also focuses on various considerations associated with the sponsorship of NCEs by the RCs.

Anecdotally, the authors have noticed that alongside a certain level of trepidation privately communicated by a number of veteran RC principals, a number of other RC principals have already floated their RC ownership interests for sale out of concern with the RIA's heavy compliance

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duties and significant liability exposure resulting thereof.

As a result, the authors expect a steep decline in the number of active RCs following USCIS's terminations of many RC designations in the coming months. Of course, not all of the RC terminations will arise from a failure to meet the RIA requirements. USCIS's Regional Center's webpage notes that as of October 25, 2021, there were 632 approved RCs[1] with the last published RC termination dated June 29, 2021.[2] The authors recognize that a number of RCs did not file the Form I-924A, Annual Certification of Regional Center ("**Form I-924A**") at the end of calendar year 2021 and would, therefore, possibly face USCIS termination in the coming years. In addition, following the recent Settlement in the Behring et al case[3] (the "**Settlement**"), a number RCs may opt against filing Form I-956, Application for Regional Center Designation ("**Form I-956**") by December 29, 2022 as seemingly mandated for all RCs therein (the "**Form I-956 Deadline**") and/or fail to file a Form I-956G, Regional Center Annual Statement ("**Form I-956G**") and may also, subsequently, face termination as a result thereof.

Accordingly, the authors estimate that the number of RCs pre- and post- RIA will decline from a high of approximately 950 (which was pre-Covid) to possibly half that number, or more, in the next two years (assuming, that is, USCIS is able to timely issue terminations; otherwise, such number could stagger downward for a few years before settling at some smaller number).

The following legal factors should be considered in RC valuations:

1. Is the RC still sponsoring NCEs under pre- RIA agreements that require filing of the Form I-956G?[4] It is noteworthy that if the RC fails to file the Form I-956G/comply with the RIA, the underlying NCEs can associate with another RC ("Substitute RC") within one hundred and eighty (180) days. Those Substitute RCs will become more valuable as a result thereof.
2. Certain RCs that are in the process of complying with the Form I-956 Deadline will have significant potential to generate more revenue and, of course, be encumbered with additional expenses related to the RIA's compliance and fees thereof. As such, the RC's valuation does need to consider the liability exposure as well.
3. Will the RC timely pay the fees associated with the EB-5 Integrity Fund as stipulated under the RIA?[5]

It is noteworthy that there remain several pending Forms I-924, Application for Regional Center Designation Under the Immigrant Investor Program ("**Form I-924**") with USCIS, and there is a question as to what priority, if any, these pending Form I-924s will have against new Form I-956s currently being filed by various RCs. The authors are aware that USCIS recently began issuing Requests for Clarification ("**RFC**") seeking input as to how certain pending Form I-924s should be treated in light of the filed Form I-956s, and so this remains, therefore, an open question. As a result thereof, though, if a pending Form I-924 is not adjudicated, it is unclear if the RC principals would ever be entitled to a refund of the Form I-924 filing fees.

The following market driven factors should be considered in the valuations of RCs:

1. There is a substantial demand for RCs that have viable rural locations within their geographic territories. From a marketing standpoint, especially related to (soon to be and already) retrogressed countries, primarily China and secondarily India and Vietnam, a project located in a rural area allows EB-5 investors investing therein to be eligible for priority processing and a reserved visa

1 See https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor-regional-centers/approved-eb-5-immigrant-investor-regional-centers (last visited on September 28, 2022).
2 See https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor-regional-centers/regional-center-terminations (last visited on September 28, 2022).
3 See EB5 Capital, et al v. United States Department of Homeland Security, No. 3:22-cv-02487-VC, consolidated with Behring Regional Center and Invest in the USA v. Alejandro Mayorkas and Ur M. Jaddou, No. 3:22-cv-03948-VC.
4 Notably, the Settlement did not directly address whether RCs that are *not* sponsoring new NCEs post-RIA need to file the Form I-956 by the Form I-956 Deadline. It is also not clear that if such RCs do decide to sponsor a NCE after the Form I-956 Deadline and do file a Form I-956 as a result thereof, whether such RCs would receive any form of deference as a Previously Approved Regional Center (as defined in the Settlement). Such nuance does weigh on the valuation of such RCs.
5 As of the date of this Article, USCIS had not yet issued direction on how RCs can pay these fees. The USCIS Regional Center's webpage indicated that USCIS was in the process of preparing a Federal Register notice associated with this fee requirement. See https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor-regional-centers (last visited October 5, 2022).

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described in the RIA;

2. The authors have noticed that there is a shortage of Previously Approved Regional Centers, as defined in the Settlement, in certain states such as Wyoming, Idaho, Alaska, Vermont and certain other low population states that were in good standing pre-RIA and which specifically cover rural areas that are ripe for "attractive" EB-5 projects (primarily in the real estate, and more specifically, residential asset class); &

3. Notwithstanding the emphasis on rural areas, RCs located in primary target states such as California, Texas, Florida and New York have gained a certain amount of market advantage as a result of high demand for EB-5 investments in high unemployment areas ("**HUAs**") in these states.

Therefore, from a market perspective geographic coverage (or, location, location, location) plays an important roll in the valuation of RCs. That, in turn, must be coupled with the legal considerations associated with the RC principals' ability to properly comply with the RIA's obligations.

For those interested in negotiating the sponsorship of a project with an RC, as opposed to purchasing the ownership interests in the RC, the following factors should be considered by both the RC and the NCE:

1. With respect to financial terms:

   (a) The upfront fees to be paid for the underlying sponsorship;

   (b) The per investor administrative fees, if applicable, to be paid to the RC, which fees could vary depending on the number of investors that participate in the sponsored NCE;

   (c) Any ongoing annual sponsorship fees that could either be fixed or based on a percentage of EB-5 capital raised by the NCE. Notably, in larger EB-5 raises, there could be a staggered set of fees based on the total number of investors therein; &

   (d) The provision for a cost sharing of RC expenses that is based on a formula related to the number of NCEs being sponsored and/or the allocable investor total for each NCE. This can include the Form I-956 filing fees, Form I-956G filing fees, the annual maintenance fees related to the RIA and associated legal fees of same.

2. From a NCE sponsor standpoint, the appropriate representations, the compliance of which carry heightened fees, by the RC should include the following:

   (a) The RC will spend a sufficient amount of capital to ensure it remains compliant with the RIA and in good standing with USCIS;

   (b) The RC will file the Form I-956 by December 29, 2022;

   (c) The obligation to file the I-956F on behalf of the NCE (the filing and preparation fees to be paid by the NCE);

   (d) Fees allocated to recordkeeping obligations should be consistent with the RIA's requirements and disclosed accordingly;

   (e) The filing of the annual Form I-956G;

   (f) Cooperation in the preparation of the Form I-956H in connection with the preparation of the Forms I-956H and I-956F; &

   (g) The ability to reference the RC in all offering and marketing documents. Notably, the RC must fully understand and appreciate that it is, essentially, "on hook", in the eyes of USCIS, for the NCE's offering and representations to EB-5 investors thereof.

3. From an RC's standpoint, the following factors should be considered:

   (a) The compensation arrangement as set forth above;

   (b) Certain approval rights over the contents of the I-956F to be filed;

   (c) Certain approval rights as to the contents of the offering documents and marketing materials together with a representation that same comply with the RIA;

   (d) Representations as to securities law compliance;

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(e) The right to otherwise cure any deficiencies at the sole cost and expense of the sponsor; &

(f) The effect of a non-payment of obligations due and whether the RC sponsorship can be terminated.

4. Mutual provisions in the RC sponsorship agreement should address the following:

(a) Applicable provisions relating to a default together with a right to cure;

(b) Cross-indemnification provisions for any claims made as a result of a breach by the applicable party;

(c) Governing law and venue for any action to be taken;

(d) Consideration of an arbitration clause to avoid the publicity of a lawsuit;

(e) The potential appointment of an "expert" in the industry if the parties have a disagreement as to an approval issue; &

(f) The term of the agreement that would, in effect, apply at least until the repayment of the capital contributions to the EB-5 investors and the filing of all I-829 Petitions (and not necessarily the approval of same). Accordingly, to the extent the EB-5 investment funds are redeployed, the sponsorship will need to continue.

The other type of RC engagement can involve the purchase of the RC ownership interests itself either, in whole or in part, and take into account the filing thereof. The rights to an RC designation by USCIS cannot be assigned since the designation is only issued to the RC entity itself. Furthermore, any change in ownership and/or management requires the filing of a Form I-956 and the expiration of 120 days to permit the Department of Homeland Security to evaluate the compliance issues related to the new buyer and its principals pursuant to the Form I-956H that would be included in the Form I-956 filing.[6] The factors to be considered include the items set forth above and the following factors:

1. Due diligence on the pre-RIA projects still being sponsored by the RC;

2. The economic provisions related to prior sponsorships and any sharing of same that may be applicable. The purchase price for an existing RC could be a lump sum or term payment reflecting the existing projected revenues and expenses as well as new potential engagements as well;

3. Post-RIA projects being undertaken by the RC and the economic terms related thereto;

4. If the intended purchase of the RC's ownership interests is only partial, then the allocation of revenues and expenses for the new projects based upon a negotiated arrangement between the resulting owners on the basis of their ownership percentages and participation thereof;

5. Appropriate indemnification provisions from the RC related to the pre-RC projects;

6. Cross-indemnity provisions related to the sponsorship of new projects by the existing owner or the new owner;

7. Any special approval rights between the parties to sponsor new projects;

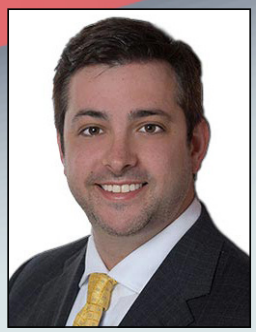
8. To the extent there is a 100% purchase of the RC ownership interests, addressing the 120-day waiting period and the ability of the sponsor to utilize the RC until ownership interests can be transferred. This includes the current owner/manager agreement to continue to sponsor the new project together with appropriate indemnifications related thereto; &

9. If the agreement does not result in a 100% acquisition thereof, addressing the service obligations relating to the sponsored projects, both pre-RIA and post-RIA.

As is apparent, any type of RC transaction post implementation of the RIA is a very complex process that must take into account several factors. There are still many unknown factors that must be considered and which are dependent upon market conditions, the future potential of the EB-5 program in general, and any additional rules and regulations that will subsequently be issued by USCIS.

6 Notably, the RIA states that the 120-day notice applies if a change in ownership or control of the RC "would result in individuals not previously subject to the requirements of [certain portions of the RIA] becoming involved with the regional center." As a result, it is possible that if individuals have already met the requirements of the Form I-956H, e.g., in prior Form I-956 filings, then the 120-day notice may not apply. This concept remains untested as of the date of this Article.

Reserved Visa Rules, Possible Future Visa Allocation, and Recommendations



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One of the biggest challenges for EB-5 investors and Regional Centers after the passage of the 2022 EB-5 Reform and Integrity Act (RIA) is understanding the impact of the "Reserved Visas" provisions on immigrant visa wait times. These reserved visas impact actual job creation requirements and the timing of repayment of EB-5 capital to immigrant investors. The relevant RIA provisions state:

"(I) IN GENERAL.—Of the visas made available under this paragraph in each fiscal year—

> "(aa) 20 percent shall be reserved for qualified immigrants who invest in a rural area;
>
> "(bb) 10 percent shall be reserved for qualified immigrants who invest in an area designated by the Secretary of Homeland Security under clause (ii) as a high unemployment area; and
>
> "(cc) 2 percent shall be reserved for qualified immigrants who invest in infrastructure projects.

"(II) UNUSED VISAS.—

> (aa) CARRYOVER.—At the end of each fiscal year, any unused visas reserved for qualified immigrants investing in each of the categories described in items (aa) through (cc) of subclause (I) shall remain available within the same category for the immediately succeeding fiscal year.
>
> (bb) GENERAL AVAILABILITY.—Visas described in items (aa) through (cc) of subclause (I) that are not issued by the end of the succeeding fiscal year referred to in item (aa) shall be made available to qualified immigrants described under subparagraph (A).

The two primary impacts of these provisions are (a) the incentive of a quicker visa number availability for new investments in qualifying areas or projects and (b) a reduction in the number of visas made available to pre-RIA EB-5 investors. It also changed the structure of the Visa Bulletin, which is issued each month by the U.S. Department of State ("DOS") to summarize the availability of immigrant numbers for applicants waiting to apply for immigrant visas at U.S. consulates and embassies abroad or to file for employment-based or family-sponsored preference adjustment of status with U.S. Citizenship and Immigration Services ("USCIS") and how Final Action Dates ("FAD") will advance.

This article seeks to update EB-5 stakeholders on the U.S. government's response to these provisions, provide insight on possible future visa allocation, and make recommendations so USCIS and DOS can best carryout congressional intent.

State Department Response

The May 2022 Visa Bulletin was DOS' first response to the RIA.[1] It created new EB-5 preference categories to account for the reserved visa allocations and listed each as "Current" because there is no approved Form I-526s for such investments, and therefore, no visa demand.

1 See Visa Bulletin for May 2022, available at https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html (last accessed August 8, 2022).

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October 2022 Final Action Dates for Employment-Based Immigrant Visa Categories

Employment-based	All Chargeability Areas Except Those Listed	CHINA - mainland born	El Salvador Guatemala Honduras	India	Mexico	Phillippines
1st	C	C	C	C	C	C
2nd	C	08JUN19	C	01APR12	C	C
3rd	C	15JUN18	C	01APR12	C	C
Other Workers	01JUN20	01SEP12	01JUN20	01APR12	01JUN20	01JUN20
4th	C	C	15MAR18	C	15SEP20	C
Certain Religious Workers	U	U	U	U	U	U
5th Unreserved (including C5, T5, I5, R5)	C	22MAR15	C	08NOV19	C	C
5th Set Aside: Rural (20%)	C	C	C	C	C	C
5th Set Aside: High Unemployment (10%)	C	C	C	C	C	C
5th Set Aside: Infrastructure (2%)	C	C	C	C	C	C

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The May 2022 Visa Bulletin also had two "unreserved" visa categories which distinguished (a) pre-RIA Regional Center EB-5 (I5 and R5) from (b) "direct" EB-5 (C5 and T5) and "all others," presumably post-RIA EB-5 that do not qualify under a reserved visa allocation. The June 2022 Visa Bulletin[2], first released on May 6, 2022, combined these two "unreserved" classifications into one, which includes all pre-RIA filings and any post-RIA, non-reserved immigrant visa applications, and this continues today, as shown below with the relevant portion of the October 2022 Visa Bulletin:

Next, on June 9, 2022, in response to questions by the American Immigration Lawyers Association ("AILA") DOS Liaison Committee, DOS indicated: "Pending petitions filed prior to the enactment of the EB-5 RIA will be adjudicated under the law in effect at the time of filing. Petitions approved prior to the enactment of the EB-5 RIA will retain the classification set by USCIS at the time of approval."[3] This means that no pre-RIA filings can take advantage of the reserved visa categories, despite being eligible based on an investment in rural or qualifying high unemployment area, as well as DOS' general policy to give priority to earlier-filed petitions. This statement is consistent with the description of the visa categories included in the June 2022 Visa Bulletin and each monthly Visa Bulletin since then.

Moreover, it appears that USCIS and DOS are not seeking to establish a process by which an investor could "upgrade" or "reclassify" or "port" a pending or approved petition filed pre-RIA to take full advantage in an investment in a rural or high unemployment area. As discussed below, we believe this decision is inconsistent with Congress' intent to use all available immigrant visas numbers because USCIS processing times will impact reserved visa numbers usage.

EB-5 Visa Numbers: Facts and Projections

After the RIA, the Immigration and Nationality Act now reads that the number of immigrant visas allocated to EB-5 each fiscal year will be the sum of (a) the new fiscal year's limit which is 7.1% of the worldwide employment-based annual limit – statutorily set at 140,000 (plus any unused Family-sponsored numbers from the prior fiscal year) plus (b) any unused reserved visa numbers carried over from the immediate prior fiscal year's applicable limits, and (c) the unused carried over reserved visas not required for use in the current fiscal year which can then be "made available" to the unreserved visa numbers limit. See the graphic below for illustration.

Reduced Annual Allocation in Future

In the past few years, as USCIS and DOS dealt with COVID-19 restrictions and staffing challenges that prevented issuance, a surplus of employment-based visa numbers became available due to unused family-based visa numbers "falling across" from the prior fiscal year. See 8 U.S.C. §§ 1151(c)(3)(C), (d)(2)(C).

The annual limit for employment-based visa use in FY 2021 was 262,288, nearly double the typical annual total. Overall, the two agencies combined to use 195,507 employment-based immigrant visas in FY 2021. DOS issued 19,779 employment-based immigrant visas, and USCIS used 175,728 employment-based immigrant visas through adjustment of status, more than 52% higher than the average before the pandemic. Unfortunately, 66,781 visas went unused at the end of FY 2021.

In the September 2022 Visa Bulletin DOS announced that the FY 2022 employment-based annual limit was 281,507. A total of 19,987 of these visa number were available under the EB-5 annual limit to EB-5, with 13,591 (68%) going to unreserved and 6,396 (32%) to reserved.

In FY 2023, which began on October 1,

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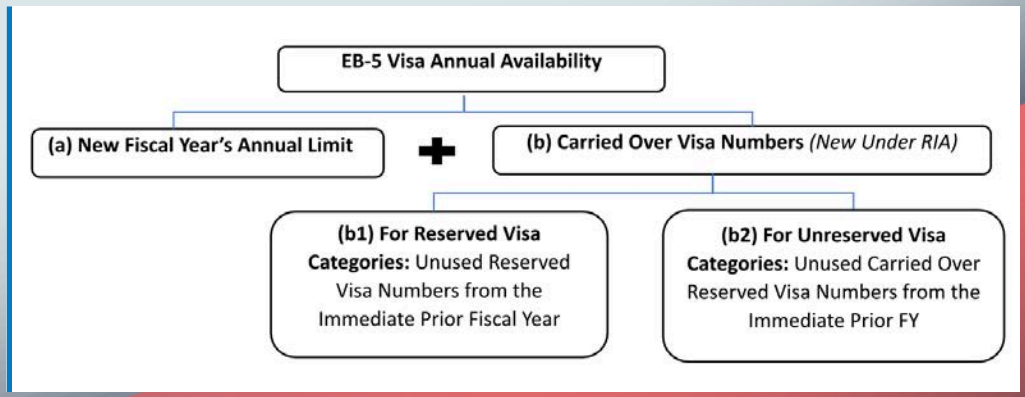

2 See Visa Bulletin for June 2022, available at https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2022/visa-bulletin-for-june-2022.html (last accessed August 8, 2022).

3 See Department of State/AILA Liaison Committee Meeting June 9, 2022, available at https://travel.state.gov/content/travel/en/News/visas-news/department-of-state-aila-liaison-committee-meeting-06-09-2022.html (last accessed August 8, 2022).

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2022, we estimate a new trend of the annual employment-based annual limit being much lower than in the two preceding fiscal years, based on increased number use under the family-sponsored annual limit. It is expected that for FY 2024 the employment-based annual limit will return to near pre-COVID levels, around 150,000 visas per year. See Table 1 to the right for the FY2022 EB-5 visa annual limit and our projections of annual limits in FY2023-2025:

Carried Over Visa Numbers

At this early stage in post-RIA implementation by USCIS, with few, if any, Form I-526 or I-526Es filed by those who qualify for reserved visa allocation, reserved visa number use will be impacted by how quickly USCIS adjudicates new petitions. The current Form I-526 processing time online is 76 months for Chinese petitioners and 52 months for petitioners from all other countries.[4] If USCIS' case processing information is to be believed, then cases filed in 2022 may not be approved for 4-6 years, with a 32% decrease in total EB-5 visa numbers available during this time to pre-RIA investors and little benefit, if any, to post-RIA investors. Further, in this scenario, DOS would have limited time to process these cases before the Regional Center program sunsets in 2027 again. This is undoubtedly not what Congress envisioned. Furthermore, even if Section 108 of the RIA does indicate that DHS "may not suspend or terminate the allocation of visas to the beneficiaries of approved petitions" filed before September 30, 2026, it does not signal how that allocation is to occur.

Even if USCIS implements priority processing of Forms I-526 and I-526E for investments in rural projects, or increases filing fees to adjudicate such petitions within 240 days, as the RIA directs, it's unlikely that any of the reserved visa numbers in FY 2022 would be used, which means that all of the 6,396 visa numbers that were made available to the reserved EB-5 categories in this fiscal year will be carried over to the same reserved categories in FY 2023. Importantly, the term "priority processing" is not defined in the RIA, so it is unclear of its impact on processing, should USCIS implement.

We estimate that the FY 2023 annual limit for EB-5 visas will be approximately 14,200, 4,544 of which would go to the reserved categories. With the 6,396 visa numbers carried over from FY 2022, the total number of reserved EB-5 visas available in FY2023 could be 10,940. See Table 2 below for more details.

However, post-RIA EB-5 applicants will not be able to benefit from the estimated 10,940 reserved visa numbers in FY 2023 unless their Forms I-526/I-526E receives a timely adjudication from USCIS. Unfortunately, given the current processing times, we estimate that very few post-RIA applicants could become documentarily qualified and eligible for reserved visa number final action in FY 2023. If that is the case, it's likely that the reserved visa numbers that carried over from FY 2022 would remain unused by the end of FY 2023, hence available to the "unreserved" categories as RIA directs.

If DOS continues to follow its long-time practice to maximize visa number use, it could be possible that the unused reserved visa numbers that were carried over from FY 2022

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Table 1: EB-5 Visa Annual Limit in FY 2022 by Category & Projections for FY 2023-FY 2025

	FY 2022	FY 2023*	FY 2024*	FY 2025*
Employment-Based Total	281,507	200,000	150,000	150,000
EB-5 Total (7.1% of EB Total)	19,987	14,200	10,650	10,650
Unreserved	13,591	9,656	7,242	7,242
Reserved	6,396	4,544	3,408	3,408
Rural (20% of EB-5)	3,997	2,840	2,130	2,130
High Unemployment (10% of EB-5)	1,999	1,420	1,065	1,065
Infrastructure (2% of EB-5)	400	284	213	213

** Data for FY 2023 and beyond are based on author's estimates.*
PLEASE NOTE - Carried over visa numbers are not included in the table above.

Table 2: EB-5 Visa Availability Projection for FY2023

	Annual Limit	FY 2022 Carryover	FY Total	Annual Limit	FY 2023* Carryover	FY Total
EB-5 Total (7.1% of EB Total)	19,987	-	19,987	14,200	-	14,200
Unreserved	13,591	0	13,591	9,656	5,766	15,422
Reserved	6,396	0	6,396	4,544	6,396	10,940
Rural (20% of EB-5)	3,997	0	3,997	2,840	3,997	6,837
High Unemployment (10% of EB-5)	1,999	0	1,999	1,420	1,999	3,419
Infrastructure (2% of EB-5)	400	0	400	284	400	684

** * Data are based on author's estimates on I-526/I-526E processing and visa usage.*

4 See USCIS Processing Times for Form I-526, available at https://egov.uscis.gov/processing-times/ (last accessed August 15, 2022).

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would be made available to the "unreserved" categories in FY 2023, providing a much-needed relief, albeit not sufficiently enough, given the current visa backlog for pre-RIA investors. For example, assuming only 630 visas are required in FY 2023 out of the 6,396 visa numbers that were carried over to the reserved categories from FY 2022, 5,766 unused carried-over visas could be allocated to the "unreserved" categories throughout FY 2023 in order to "maximize visa number use." In this case, pre-RIA investors who have been waiting in the backlog could receive a total of 15,422 visa numbers in FY 2023 (see Table 2 above).

In the future, with USCIS adjudicating more post-RIA Form I-526/I-526E petitions, more reserved visa numbers will be put into use and less will carry over to the next fiscal year.

Based on our calculations, and assuming an average of 3 visa numbers are used per Form I-526E, if USCIS approves more than 710 Forms I-526/I-526E associated with a rural project or 355 petitioners invested in a high-unemployment project or 71 investors for infrastructure projects, DOS would need to eventually establish an FAD for each such category because the reserved visa demand exceeds the applicable annual limit.

Impact of Per-Country Caps

Additionally, under the "per country" caps, no individual country may receive more than 7% of the total number of visas made available in a fiscal year. See 8 U.S.C. § 1152(a)(2). This includes 7% of any reserved visa category, which limits the benefit of the incentive of a quicker visa number allocation.

For countries where there is heightened infrastructure to attract EB-5 capital, like China, Vietnam, India, and South Korea, it's possible there is enough demand for reserved visa exceeds the low supply. Such countries could potentially benefit from the use of "otherwise unused" numbers, which would be made available in priority date order without regard to foreign state of chargeability, but it's clear the 7% per county cap impacts the efficacy of these RIA provisions.

EB-5 stakeholders should note (and disclose) that just because an investor's priority date is current at the time of I-526E filing does not mean that he/she will not be subject to a visa backlog or the establishment of a final action date at some point.

When will a Final Action Date be Established?

Based on USCIS' self-imposed "lapse", there is pent up demand for new EB-5 petitions, and USCIS is likely to see a glut of new Form I-526E filings now that Form I-956F receipt notices are being produced regularly. As discussed above, due to USCIS processing times, it is likely that DOS will not need to establish a Final Action Date for the reserved categories in FY 2023 and even possibly until the second half of FY 2024. This assumes that the historical USCIS processing times stay relatively consistent with the new reserved petitions. However, if there is priority processing implemented or expedited petition approvals, an FAD could be imposed earlier in FY 2024.

However, when DOS has visibility of increased number use and demand levels of the reserved visas, it will likely need to impose an FAD of mid-to-late 2022, the likely time period when a significant number of Forms I-526E will have been filed. If countries like China and Vietnam dominate these new filings, DOS could impose an FAD for only those nationals, but keep the "Rest of World" current. Further, depending on the number of Forms I-526E, the FAD is likely to move forward slowly to account for the large number of filings – just as it did with mainland China for September 2015 and December 2015, when there was a surge of filings before possible Regional Center program termination.

Conclusion and Recommendations on Reserved Visas

The RIA's reserved visa provisions open up a number of questions for EB-5 stakeholders. Below are our recommendations related to reserved visas that can be used as talking points when discussing RIA implementation with USCIS and DOS.

1. DOS should reconsider its decision to not make reserved visa numbers available to immigrant investors who filed Forms I-526 pre-RIA based on investments in rural areas or high unemployment areas.
2. DOS should allocate the reserved numbers that were carried over from the preceding fiscal year available for use first to allow for maximum use of all visa numbers in a current fiscal year. This would then allow any unused reserved numbers based on the current year's annual limit to be carried over for potential use in the next fiscal year.
3. Should there be insufficient demand for reserved visa numbers during the current fiscal year, DOS should make any unused carryover reserved visa numbers from the previous fiscal year available for use in the unreserved category during that fiscal year.
4. USCIS should publicly disclose the number of filings of each EB-5 visa category as well as country of chargeability per visa category, so DOS and the public can have visibility for demand as early as possible.
5. DOS should disclose the same detailed information in #4 above in their "Annual Waiting List at NVC as of November 1 of each year" report.
6. DOS and USCIS should allow the same petition to wait in multiple lines for visa number allocation (i.e. rural, high unemployment, unreserved, etc.) as long as the petition is eligible. Although this may be difficult from an operational perspective, such action will help reduce USCIS and DOS workload significantly and maximize visa number usage for all categories in a fiscal year.

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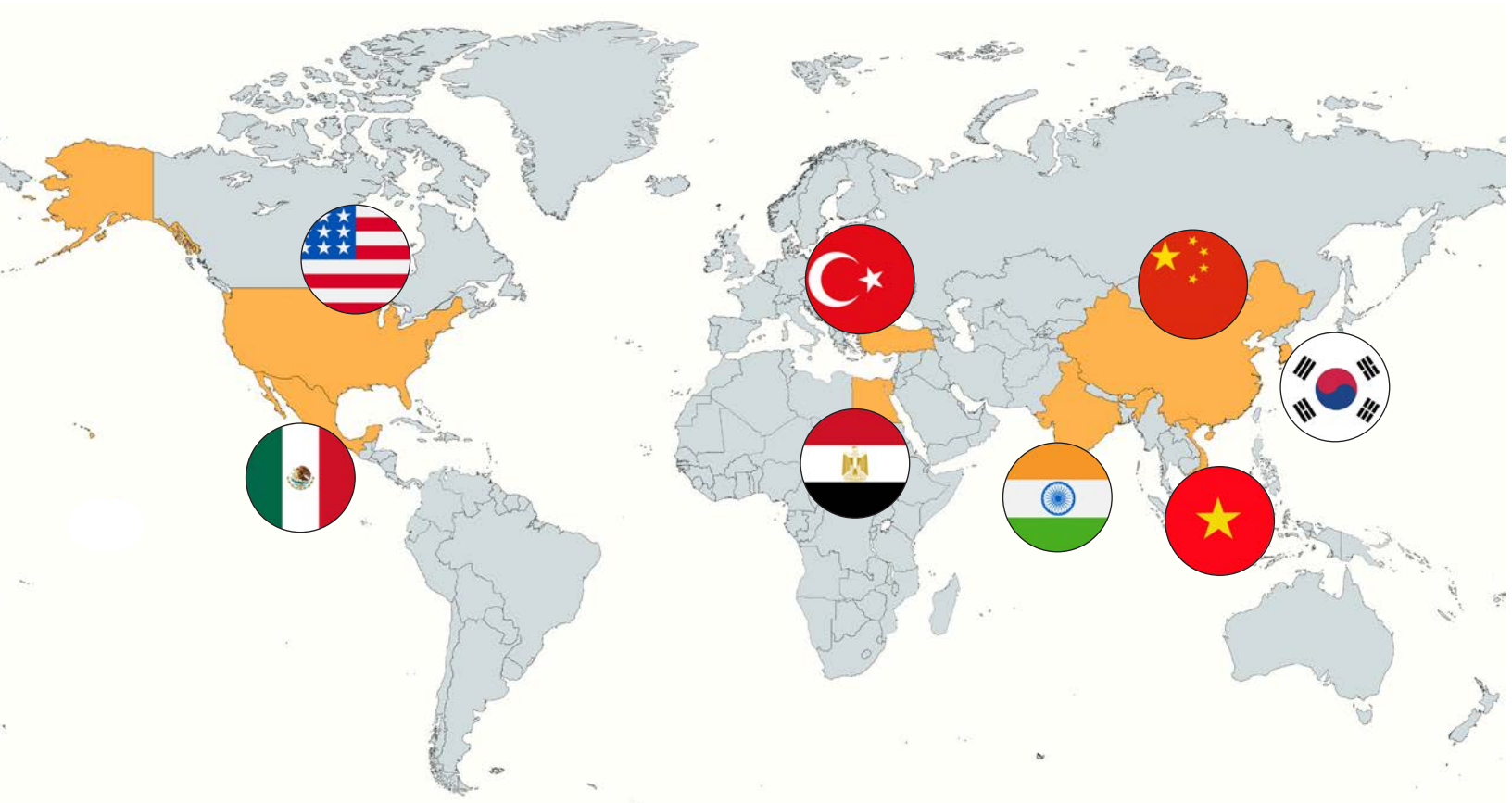

Headquartered in Washington, DC, EB5 Capital provides qualified foreign investors with opportunities to invest in job-creating commercial real estate projects under the United States EB-5 Visa Program. As one of the oldest and most active Regional Center operators in the country, we have raised nearly a billion dollars of foreign capital across more than 30 EB-5 projects. Our growing 30+ person team speaks 15 languages and has traveled to nearly 100 countries. We believe our collective diversity and cultural experience enhance our competitive advantage when serving our investors from more than 70 countries.

Please visit www.eb5capital.com for more information.

EB-5 Concurrent Filing

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Among its myriad of changes to the decades-old EB-5 immigration investor program, the EB-5 Integrity and Reform Act of 2022 (the "Reform Act") contains a noteworthy provision that allows applicants to concurrently file an EB-5 investor petition and an adjustment of status application. This ostensibly streamlined new process has sparked some controversy, as some legal and business professionals have debated whether it presents more risks than benefits for applicants. The rule change seems intended to serve the Reform Act's overall goal of simplifying the procedures to create more jobs by providing permanent residence to investors seeking to contribute wealth to the U.S. economy. While there are drawbacks to the option of concurrent filings, we find that on balance it can offer significant benefits to EB-5 applicants who are present in the U.S. on non-immigrant status and wish to obtain permanent U.S. residency.

The U.S. Citizenship and Immigration Services ("USCIS") administers the EB-5 immigrant investor program ("EB-5 Program"), allowing investors (along with their spouses, and their unmarried children under the age of 21) to file for a U.S. permanent residency (otherwise known as a "Green Card"). To file, persons must meet several requirements. According to USCIS, a filer must "make the necessary investment in a commercial enterprise in the United States[1]"; and must "plan to create or preserve 10 permanent full-time jobs for qualified U.S. workers.[2] Underneath the umbrella of the EB-5 Immigrant Investor Program, first signed into law in 1990, the "Regional Center Program…sets aside EB-5 visas for participants who invest in commercial enterprises associated with regional centers approved by USCIS."[3].

On March 15, 2022, President Joe Biden signed the Reform Act as part of his all-encompassing $1.5 trillion "Consolidated Appropriations Act." Congress reauthorized the EB-5 Regional Center Program for five years, ending on September 30, 2027. Along with the reauthorizing the Program, the Reform Act made numerous changes intended to modernize the EB-5 Program and reduce the occurrence of fraud. Most interestingly, an amendment to Section 245 of the Immigration and Nationality Act (8 U.S.C. 1255) allows concurrent filing of initial EB-5 petitions and applications for adjustment of status ("AOS").

To be considered for permanent residency under the EB-5 program, an EB-5

1 EB-5 Immigrant Investor Program." USCIS, 2 Aug. 2022, https://www.uscis.gov/working-in-the-united-states/permanent-workers/eb-5-immigrant-investor-program.
2 Ibid
3 Ibid

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investor must submit either Form I-526, the Immigrant Petition by Standalone Investor or Form I-526E, the Immigrant Petition by Regional Center Investor.[4] In the past, investors had to wait for USCIS to approve their I-526 applications before they filed with a different agency – the U.S. Department of State – to commence residency under the EB-5 Program. Applicants outside the U.S. are required to apply for an immigrant visa at a U.S. embassy or consulate, while applicants within the U.S. (who entered the U.S. lawfully) may be eligible to adjust their statuses from non-immigrant to immigrant by filing Form I-485 (Application to Register Permanent Residence or Adjust Status) without leaving the U.S. Only upon approval of the second application could an investor begin conditional U.S. residency as a first step to achieving permanent, unconditional U.S. residency after satisfying the job-creation requirements of the EB-5 Program.

Though concurrent filing is not new in other employment-based immigration categories, it is new to the EB-5 Program. Until now, EB-5 applicants present in the U.S. on non-immigrant visa (NIV) status have often been unable to make progress toward their immigration goals, including establishing U.S. professional or academic careers, while the long-awaited responses from USCIS and then the Department of State were pending. Although, USCIS will not approve an I-485 until the underlying basis (I-526 or I-526E) is approved; if an investor files the AOS before his/her NIV status expires, the investor can remain in the US after NIV expiration with the pending AOS. Furthermore, the investor can file for Work Authorization (Form I-765) and Employment Authorization (Form I-131) at the same time as I-485 for the interim benefits, and therefore work and travel while their I-526 or I-526E remain pending. This allows investors to remain in the United States lawfully and pursue their economic prospects while awaiting approval with some risks as noted below.

It is crucial to be aware of the time to file according to the Visa Bulletin, and the dates as listed under Date of Filing (DFF) and Final Action Date (FAD). First, only investors who have current priority dates under the Visa Bulletin are eligible to file for AOS under this rule. Second, to note, is the application of the Child Status Protection Act (CSPA) as it applies to concurrent filings. The CSPA protects children who will be turning 21 by freezing the age of the child if the AOS is filed by a certain date. However, there is no age freezing under CSPA for children who file AOS applications under DFF as only the FAD protects the age of the child under the CSPA. According to the USCIS manual, the applicant's CSPA age calculation is dependent on visa availability according to the Final Action Dates chart. Applicants who file based on the Dates for Filing chart may not ultimately be eligible for CSPA if their calculated CSPA age based on the Final Action Dates chart is 21 or older. Therefore, since only the FAD can freeze the age of a derivative child this rule must be taken into consideration when investors are filing with derivative children who are close to turning 21 years of age.

This provision particularly affects investors in the U.S. on non-immigrant visas, such as E-2, F-1, H-1B, L-1. For students filing under F-1 status, this could be very advantageous by allowing them to stay in the U.S. a bit longer after graduation to explore and finalize investment opportunities. In other cases, this measure may give foreign workers who plan to file an EB-5 petition freedom from their current employers. Because the EB-5 visa does not require applicants to present a U.S. employer as a sponsor,[5] workers are free to pursue different roles, companies, fields, and even entrepreneurship more easily.

Concurrent application does not benefit investors outside the U.S. because they are not eligible for adjustment of status. Under current law, they must wait until receiving I-526 petition approval before applying for an immigrant visa at a U.S. embassy or consulate. Nevertheless, it has become increasingly common for aliens in the U.S. on non-immigrant status to seek permanent residency through the EB-5 program. Most of these individuals should be eligible to apply for an adjustment of status and potentially benefit from concurrent registration.

Filing the I-485 and I-526 forms concurrently minimizes total wait time. This new rule addresses one of the largest setbacks for potential investors in recent years—indefinitely delayed processing times. Prior to this new regulation, investors were required to complete their I-526 process before applying to adjust their status. Depending on the country of origin, the wait time for the prior process could exceed two years. Filing concurrently empowers the petitioner to plan and accept opportunities sooner than they otherwise would have been able to do.

Another advantage of concurrent filing lies in its ability to increase flexibility for prospective investors. Before this bill, foreign workers were bound to their employers because their status relied on specific work visa classifications. Career changes only became possible after finding either a new employer to sponsor them or a new status to rely on. A lack of flexibility limited the range of roles an individual could pivot professionally. Additionally, there was minimal opportunity to pursue the fields of technology and start-ups out of fear of accruing unlawful presence here in the U.S. With the ability to file concurrently, interested investors can start making decisions about their lives and career with a more seamless timeline under their feet.

Despite the positive changes, there are also some potential disadvantages and risks of concurrent filing. One of the main risks of concurrent filing is the issue of immigrant intent, for those who entered the U.S. on a temporary visa such as a B-visitor's visa or F-student visa. For instance, if entering as

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4 The USCIS introduced the two versions of the initial petition in response to the Reform Act's distinction of "pooled" investments, which must be made under regional sponsorship, and single or standalone investments that may be made in a project without regional center sponsorship.

5 "How EB-5 Concurrent Filing Will Let Investors Live, Work, and Study in the US." The Economic Times,https://economictimes.indiatimes.com/nri/migrate/how-eb-5-concurrent-filing-will-let-investors-live-work-and-study-in-the-us/articleshow/93406858.cms?from=mdr.

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a visitor, one must retain that status, and not plan to file for a green card.

As a general rule, USCIS will refuse to evaluate admissibility for the first 60 days after entry under one of the temporary visa programs. This is because agency policy is that relatively abrupt efforts to change immigration status and/or conduct inconsistent with non-immigrant status within 60 to 90 days may constitute misrepresentation or visa fraud, and create a permanent bar to immigration benefits. We therefore strongly advise that investors who entered the U.S. under the visitor or student visas programs have a clear plan to enter, visit and go home at the time of entry, clearly proving that their intention was a non-immigrant one.

That said, the State Department will, after the 90-day period, consider a "changed circumstances" explanation in which there were specific circumstances that led to changing their minds after entry, and filing for a green card to prevent an adverse finding. We recommend that all petitioners who decide to file for AOS concurrent filing due to "changed circumstances" do so after the 90-day period; and that such "changed circumstances" should be one of expediency or urgency.

Another big issue that may arise under this rule, is when investors do not maintain their underlying status and a problem later occurs with their petitions. If an investor is no longer maintaining NIV status after filing (because EAD is being used) and AOS is then denied, they need to leave the country immediately. We therefore strongly advise all investors to act conservatively, if possible, and maintain underlying NIV status despite the EAD.

Another disadvantage is the processing times of obtaining the Employment Authorization Documentation (EAD or "Form I-765")) and/or Travel Authorization document (Form I-131). An EAD or I-131 could take six months or more to be approved in some cases, which would restrict the investor's ability to work or travel while these applications are pending. However, processing times have begun to decrease since COVID-19 delays last year.

Lastly, prospective investors must be aware of the even more recent change in how USCIS accepts concurrent applications. As of September 1, 2022, USCIS stopped taking combined fee payments when a Form I-526 or I-526E was filed in conjunction with Form I-485, Form 131, the Application for Travel Document, or Form I-765, the Application for Employment Authorization.[6] They are now requiring that petitioners submit a separate fee payment for Forms I-526 or I-526E. This may be an effort to properly account for all of the forms as USCIS irons out its implementation process. Prospective investors should note that submitting combined payments for I-526 or I-526E with either Form I-485, I-131, or I-765 will result in a rejection.

Securities Law Considerations

U.S. regulators and courts have firmly established that an offering of investment opportunities to EB-5 Program participants is an offering of securities and must comply with securities laws and regulations, both federal and state. The Reform Act focuses on compliance with securities laws by adding new requirements for regional centers to certify that all EB-5 offerings sponsored by them comply with all applicable federal and state securities laws.

The Securities Act of 1933 (the "Securities Act") broadly requires every offering of securities (which would include EB-5 offerings) either to be registered with the SEC – a costly, time-consuming and

6 EB-5 Immigrant Investor Program." USCIS, 2 Aug. 2022, https://www.uscis.gov/working-in-the-united-states/permanent-workers/eb-5-immigrant-investor-program.

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onerous process usually associated with IPOs – or else to be conducted under an available exemption from registration. Because most EB-5 offerings target persons outside the U.S., EB-5 issuers have typically relied on a broad exemption for offshore offerings under Regulation S under the Securities Act. However, Regulation S is not available for offerees or prospective investors who reside in or are physically located in the U.S., even those here on non-immigrant status. It is unavailable even if those investors leave the U.S. and submit their purchase agreement and purchase price while they are physically outside the U.S. Therefore, issuers offering or selling EB-5 investment opportunities to persons who reside in the U.S. on non-immigrant status or are located in the U.S., no matter where they are when they actually invest, must comply with another exemption from registration under the Securities Act.

For offers and sales of securities in the U.S. and to U.S. persons, the most useful exemptions from SEC registration are Rule 506(a) and Rule 506(b) of Regulation D. These exemptions allow an unlimited amount of capital to be raised. While they require careful compliance with specific requirements, they do not involve permits, approvals, or interaction with extensive agency procedures. SEC regulations expressly allow an issuer to conduct simultaneous offerings under Regulation S and Regulation D so long as each offering independently satisfies the requirements of its targeted exemption.

Both Rule 506(b) and Rule 506(c) restrict sales to "accredited investors."[7] An individual person (as are all EB-5 investors) is accredited if (1) he or she has more than $1 million in net assets (excluding principal residence), either individually or with the spouse, or (2) earned more than $200,000 in income in the previous two years, or $300,000 jointly with the spouse, and reasonably expects that same income in the current year.

U.S. residents seeking to invest under the EB-5 Program – who now may benefit from a concurrent application – are frequently college students or young persons who do not have personal wealth but may have wealthy parents or grandparents willing to provide funds for an EB-5 investment. In such cases, the young potential investor will not be accredited if he or she receives a loan of the $800,000 investment amount, or even a gift of that investment amount. Rather, the young investor must receive a gift that brings total net worth (including the value of the EB-5 investment) to at least $1 million.

7 While Rule 506(b) ostensibly allows up to 35 unaccredited investors, it applies onerous disclosure requirements when unaccredited investors are included. As a result, compliant Rule 506(b) offerings that include unaccredited investors are extremely rare.

The SEC has recently amended Regulation D to create additional categories of accredited investor for individuals, which may be helpful in some situations involving the wealthy family supporting the application of a less wealthy family member. Specifically, if the family has investments with value exceeding $5 million it may be able to qualify as a "family office," and a family member making the investment may qualify as a "family client" if the investment is directed by a person capable of judging its merits and risk. Before relying on this category of accreditation, the issuer should carefully confirm that the definitions of "family office" and "family client" in the Investment Advisers Act of 1940 are satisfied.

The recent amendment to Regulation D also extends accredited investor status to a person holding a professional certification, designation, or credential that the SEC determines to confer accredited investor status. As of the date of this article, the SEC has designated holders in good standing of the FINRA Series 7, Series 65, and Series 82 licenses as accredited in this category. While perhaps of limited applicability, this new category could benefit investors who are professional participants in the financial services industry.

As for the choice between the exemptions under Rule 506(b) or Rule 506(c), the selection will depend on the manner of the offering:

- Rule 506(b) allows investors to self-certify that they are accredited, but requires the offering to avoid any "general solicitation" – any advertising, any promotion through seminars open to the public, etc. Generally, prospective investors under Rule 506(b) must have a pre-existing relationship with the issuer (or else be introduced by a broker-dealer or similar promoter, who must be registered if U.S.), and must have self-confirmed their accredited status before the offering can be communicated to them.

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- By contrast, Rule 506(c) offerings permit public advertising and general solicitation (including internet advertising) to strangers with no pre-existing relationship, and allow offers to be made to persons who may not be accredited, so long as every actual purchaser is *verified* as accredited. Verification of accredited investor status will require a review of personal financial information, but it may permissibly be outsourced to a confidential third-party accreditation agent at relatively low cost.

Further, before electing to conduct an offering under Rule 506(b), issuers should consider that common marketing methods in EB-5 could risk violating the prohibition on general solicitation. In particular, if a simultaneous offshore offering under Regulation S conducts seminars, or advertises in publications, through broadcasting, or on the internet, great care must be taken that these activities are exclusively directed outside the U.S. and no U.S.-located person invests after being exposed to these marketing methods.

By contrast, while Rule 506(c) requires the extra step of investor verification, it avoids any worry about "blowing the exemption" through inadvertent exposure to general public solicitation in the offshore marketing. For example, many EB-5 issuers have received an inquiry from a U.S. resident who was unintentionally reached through offshore marketing and wishes to invest. This potential investor, even if accredited, must be refused if the issuer is relying on Rule 506(b)—but (if accredited) could be accepted under Rule 506(c).

Both Rule 506(b) and Rule 506(c) require the issuer to file a report on Form D with the SEC within 15 days after the first sale through the offering. This report is relatively simple and brief, but navigating the SEC's electronic reporting system is difficult. While offerings under these Reg D exemptions are generally also exempt from state securities laws (often called "blue sky laws"), most U.S. states require (a) a filing of the SEC Form D with authorities of the state where the securities are sold (and, in some cases, the state where the issuer is domiciled), and (b) payment of a fee (usually $500 or less, but sometimes as much as $1,000), usually within 15 days of the first sale in the state. It is relatively easy to satisfy these state requirements by uploading the Form D to the Electronic Filing Depository ("EFD") maintained by the North American Securities Administrators Association ("NASAA"), but the applicable requirements cannot be ignored.

Conclusion

While the option to file concurrently is new to the EB-5 community, its effects are promising. Immigrant investors, EB-5 project sponsors and the professionals who advise them must be mindful of the potential pitfalls and extra compliance measures that go hand-in-hand with the benefits of concurrent applications for investors in the U.S. If successful at streamlining the EB-5 investment process and attracting new investors, these new measures will be beneficial to immigrant investors and EB-5 project sponsors.

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American Dream has a strategic network of global partners to facilitate a smooth immigration process to the United States through the EB-5 Investor Program. Having operated since 2010 within Sub Saharan Africa, American Dream's portfolio of projects includes successful commercial and residential properties with long-term growth. Through tailored services and hands on communication, you will not only secure your wealth in one of the leading countries in the world, but you will also secure Green Card status for your family. This is your gateway to live a full USA lifestyle connected to better healthcare, education and robust career growth.

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EB-5 Origins

Getting to know members of the EB-5 community and what led us all to this niche field.

MARISA MARCONI
FOUNDER AND LEAD CONSULTANT,
PINNACLE PLAN WRITING

Introduction

We're all familiar with the scene. It's a cocktail party, family gathering, non-EB-5 conference, or similar scenario with people outside our industry, and the typical introductions and small talk is exchanged. "What do you do for work?" someone asks you. You lead with the easy, "I'm a [lawyer, economist, writer, broker, agent, developer, fill in the blank]" and follow up with the tricky "that specializes in the EB-5 market." We all have a stock explanation for the inevitable questions that follow about what the program is, what our role is, and how positively the program and immigrant investors affect the country and economy. They listen, politely. And then without fail, the response: "Wow, that is so niche! How did you get into that field?!"

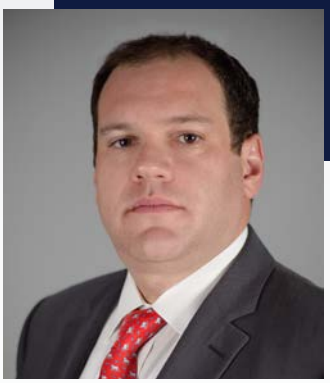
Well. How did you get into this field? As a relatively small industry, most of us are familiar with one another in our professional roles and where we fit into the universe of EB-5, but we aren't as familiar with how we all got here. While the industry is becoming more visible and influential, "EB-5" wasn't a booth at career fairs for most of us and very few of us started our careers with EB-5 as the destination.

The road to EB-5 for most was winding and everyone knows road trips make for great stories. So, in this, a new recurring series for the *Regional Center Business Journal*, we dive into those stories and explore [dramatic pause] our "EB-5 origins."

Meet Brian Ostar

President of EB5 Capital

Adventure, hustle, hard work, and a little bit of "right place, right time"



Brian Ostar is a well-known figure in EB-5: he is the President of EB5 Capital, a former IIUSA Membership Chairman, and is very active in the industry. I have the pleasure of serving with him on the Journal's editorial committee, where he is arguably one of, if not the, most well-prepared member in our meetings, with bulleted lists and ideas for articles, and an enviable antivenom to the work overload and exhaustion the last year has wrought. Prior to serving with Brian on the committee, I knew of him, but did not know him well and welcomed the opportunity to interview him for the inaugural article of this series.

Given his background – which is heavy with EB-5 work and real estate – I was surprised to learn that Brian started out as a teacher. After earning his undergraduate degree from Cornell University in 2003, he moved back to New York City (he is originally from Long Island) and landed a position as a middle school teacher in Brooklyn's Sunset Park neighborhood as part of one of the earliest cohorts of the NYC Teaching Fellows. What started as a short-term plan led to a five-year career that included serving as his school's union representative by his third year – a position usually reserved for senior teachers with tenure.

Looking for a change of pace and adventure at 27, he and some friends decided to take the only reasonable path in such a situation – move to China! The 2008 Summer Olympics was being held in Beijing, which was the first time China hosted the event, and it seemed like China was the place to be. They quit their jobs and set off for Hangzhou, China, to work as American ELL teachers, a job that was in high demand. "It was the best time of my life," he recalled. "We weren't making much money, but we were meeting amazing people, having fun, and traveling all over Asia."

After a year as a university teacher, Brian started exploring different jobs, which was a very natural course for an American living there. At the time, job mobility came easy as an American and English speaker, but for unconventional reasons. One notable position (shockingly omitted from his professional biography) involved doing "quality control" for a German Halloween costume company that manufactured its goods in China. "I tried on costumes to make sure the fitting worked for European and American men," he chuckled. He eventually landed a job tutoring students at an International School. While tutoring

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isn't the most obvious entry to professional networking avenues, it meant direct contact with students' parents, most of which were influential expatriates with business interests in China. Without intention, Brian found himself on a networking path that would be a fortuitous first step on his road to EB-5.

Ever dynamic and affable, with an improving proficiency in Mandarin, Brian was pegged as an asset by one such parent who was active in the economic boom in China that was in full swing in the late aughts. In 2009, Brian transitioned into a managing role at his consulting firm, working on a contract with Sinopec to re-design 50 gas stations in Zhejiang province. This role naturally involved Brian's attendance at business dinners, where he rubbed elbows with executives and high-level government (party) officials in the country's oil and gas sector. It was at one such dinner that a contact approached Brian about immigration to the U.S. and asked him to research the options that might be available for his family.

Into the rabbit hole he dove and after a week of research, he found the EB-5 program.

At the time, EB-5 was just entering the radar in China and, while there were regional centers making in-roads through trips, it did not seem to Brian that anyone in the industry was on the ground and entrenched in China with connections to prospective investors. "I said, 'Hey, I have some people here in China that would gladly invest $500,000', and the reaction I got was 'Holy – , you're an American on the ground in China?!'"

Recognizing the opportunity, Brian began working with immigration agencies – many of whom were brand-new to EB-5 - and running seminars to connect and promote the growing EB-5 industry in the U.S. with the burgeoning market of investors in China. "It was kind of like having a front row seat to the evolution of the China market," said Brian. While there were only 12 or so designated Regional Centers in

2009, one such early industry pioneer with whom Brian connected was Angelique Brunner, CEO & Founder of EB5 Capital, who would later serve on IIUSA's Board of Directors from 2014 to 2018.

Unbeknownst to Brian, this was the beginning of what would be a 12-year and counting career in the industry. He joined IIUSA in 2010, "when it was still a list-serve" and soon thereafter moved back to the United States, working with Angel at EB5 Capital in its early years and serving a formative role in its growth. Upon arriving in Washington, DC, Brian quickly enrolled at Georgetown University to study Real Estate Finance, earning his Masters.

The rest of Brian's career is well-documented in his official bio and has been recounted numerous times as he has been introduced as a panelist and speaker at expos and conferences over the years. Today, Brian is the President of EB5 Capital, which now has approximately 40 staff members across the world, has completed 32 EB-5 projects, and has nearly 2,000 investors under its belt.

Brian lives with his wife and two sons in Northern Virginia where he is also well-known as a valued member of the community, coach for his kids' sports teams, and member of the Board of Trustees for the Gesher Jewish Day School.

Thanks to Brian for sharing his origin story – and humorous anecdotes about the travails of 20-somethings job-hopping across China.

Do you have an interesting EB-5 origin story you would like to share? Contact education@iiusa.org for consideration to be featured in a future edition of the RCBJ.

EB-5 MISSION: STILL POSSIBLE

Notable Trends in the EB-5 Market for Russian Investors

NATALIA POLUKHTIN, ESQ.
FOUNDER AND PRINCIPAL, GLOBAL PRINCIPAL

NATALIA PRONINA
VP OF INVESTOR RELATIONS, EB5 CAPITAL

The long-awaited reauthorization of the EB-5 Program in March of 2022 naturally kicked off discussions about trends in the main EB-5 markets across the globe. For the past several months, considering the political and economic crisis in Russia, the leading EB-5 industry players have been wondering if this is the end of such a promising EB-5 market, the market which produced at least 200 investors in 2019 alone and has been demonstrating the increasing popularity of the EB-5 Program since 2018. Despite a gloomy prognosis fueled by geopolitical and economic turmoil in the region historically comprised of Russian-speaking investors, the demand for EB-5 from Russia, Ukraine, and Kazakhstan not only still exists, but is now stronger than ever.

With economic sanctions following the Russian invasion of Ukraine in February 2022, the Russian retail industry declined, foreign investment virtually disappeared, and access to foreign technology diminished. While economists are still gauging the long-term consequences of the sudden disruption of economic processes in Russia, one immediate effect is already clear – the mass migration of people with professional skills and capital out of Russia. How many of these Russian migrants will be attracted to the EB-5 visa program for

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resettling in the U.S.?

Russian Citizens Are Leaving and Taking Their Capital with Them

Media reports indicate that during March 2022 alone, at least 300,000 people relocated from Russia to neighboring countries, to ensure uninterrupted operation of their commercial and professional activities.[1] Many business owners had to quickly adjust to the new economic environment by opening subsidiaries in new jurisdictions to secure supply to their Russia-based companies. Cryptocurrency and stock market traders immediately experienced effects of restrictions on transactions in foreign currencies and wire transfers to and from banking institutions outside of Russia. Tech sector professionals, with their ability to work remotely, relocated as quickly as possible after facing difficulty with collecting payments from customers abroad due to Russian banks being "blacklisted." As usual, those people with the greatest means and resources tend to leave first, and they take their businesses and capital with them.

According to the Henley Global Citizens Report,[2] based on available information, including official immigration data and information on real estate purchases by millionaires, more than 15,000 millionaires are expected to leave Russia before the end of 2022. The Report estimates that the total number of the High-Net-Worth Individuals (HNWI) leaving Russia by the end of the year will account for at least 15% of Russia's millionaire pool. Ukraine is also experiencing an exodus of HNWI's, with a record 2,800, representing 42% of the country's millionaire population, leaving the country this year, as reported by Henley. Communications with our current investor clients, prospective investors, and partners in Russia and Ukraine indicate that the current crises triggered a significant wave of wealth relocation.

From Temporary to Permanent Relocation

At this time, it is hard to predict whether wealthy Russian and Ukrainian individuals who recently left their home countries will entertain the idea of an eventual return to their native countries. After the first wave of relocations during the early months of the Ukrainian war, it appears that moving to neighboring countries was considered a temporary solution. Most regions readily accessible from Russia and Ukraine do not provide the most favorable business environment, entrepreneurial opportunities, or the desired lifestyle to the individuals who have moved to neighboring countries. Many HNW families, after initially settling in the UAE, Georgia, Armenia, and Turkey, are refocusing their efforts towards more permanent immigration strategies. Therefore, the EB-5 program has become relevant to these individuals.

The trend of using "temporary relocation" as a stepping stone before settling down permanently elsewhere is not a new one for Russian citizens. It has long been the strategy in the E-2 visa context, since Russia is not a part of a bilateral treaty that would afford foreign investors a right to conduct business in the U.S. on a temporary visa.[3] Turkish or Grenadian Citizenship by Investment (CBI) Programs became extremely popular options, as those are often seen as the first step towards obtaining an E-2 visa to the U.S. However, the new trend that has been evolving in recent months is to utilize a temporary relocation for consolidation of capital in a "friendly" jurisdiction, with a permanent immigration goal in mind.

Even those investors who previously disregarded the U.S. as a permanent residence now see it as a more attractive option, especially with the USD strengthening its position in relation to the EUR. The effects of political and economic turmoil on European countries have prompted Russian HNWI's to explore opportunities in the U.S. for their families. Moreover, the volatile business environment in Russia has produced a generation of entrepreneurs quite adaptive to the sudden changes in governmental policies, as well as being very resourceful in asset protection. For those who considered 2022 a tipping point in their decision to emigrate, the EB-5 Program became the ultimate solution combining immigration strategy with the preservation of their capital.

From Russia, With Love (and Money)

As it was prior to the reauthorization of EB-5, the major condition imposed on EB-5 petitioners is the requirement that their investment capital must be proved to have been obtained lawfully by the investor.[4] Russian originated capital is one of the most difficult to document for EB-5 petitioners due to wide-spread corruption among government officials, sanctioned banks and large corporations, and a cloudy tax system. Even with legally obtained capital, issues still arise when transferring the money out of Russia. In the current political and economic reality, an explanation as to how capital was obtained in Russia and remitted to the new commercial enterprise requires not only a deep understanding of financial documents, but also an ability to navigate a rapidly changing global environment.

Earlier this year, we noted a common misconception that Russian citizens are no longer permitted to participate in the EB-5 Program, or to apply for any type of U.S. visa. That false perception was probably rooted in many strong political messages delivered by world leaders regarding the intent to exclude all Russian citizens from participation in any CBI programs. Luckily, this "blanket" approach was not implemented by any country and the participation of Russian citizens in immigrant investment programs is still being adjudicated on a case-by-case basis. As USCIS resumed adjudication of I-526 petitions after the regional center program reauthorization, immigration practitioners consistently report on approvals of the petitions submitted by Russian citizens

1 Kantchev, Georgi; Gershkovich, Evan; Chernova, Yuliya (2022-04-10). "Fleeing Putin, Thousands of Educated Russians Are Moving Abroad". The Wall Street Journal; available at https://www.wsj.com/articles/fleeing-putin-thousands-of-educated-russians-are-moving-abroad-11649583003 (last accessed August 10, 2022)

2 Henley Global Citizens Report (2022, Q2); http://henleyglobal.com/publications/henley-global-citizens-report/2022-q2 (last accessed August 10, 2022)

3 INA §101(a)(15)(E)

4 8 CFR §204.6(j)(3)

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prior to the lapse of the EB-5 Program, thus indicating that investors with clear and well-documented sources of capital are still welcome.

Another concern common among both law practitioners and regional centers is that Russian citizens, even with legally sourced capital, would not be able to deliver their funds to an EB-5 project's account due to the new draconian currency control regulations. However, recent experience suggests that, given the general distrust in their national economy and banking system, many Russian HNWI's previously chose jurisdictions outside of their home country to keep their savings and, thus, may already have funds outside of Russia to use for purposes of investment through the EB-5 program.

Even without anticipating future investment transactions, a significant number of Russian investors preemptively adopted a practice of maintaining banking accounts abroad, sometimes, in the countries where they have a second citizenship or residence. According to *Forbes*' research, more than 40% of Russian-born billionaires have at least one other passport (6% have two or more).[5] USCIS seems to generally accept that investment funds may be wired through a banking institution located outside of the country of an EB-5 investor's primary domicile. Of course, wiring money from a bank outside of Russia does not dispose of the requirement to document a path of the funds from origination to the investment enterprise. It is well established that in adjudication of EB-5 cases, USCIS verifies compliance with the requirements that serve valid government interests – preserving the integrity of the EB-5 program by confirming that the funds utilized are not of suspect origin. Nevertheless, despite the challenges presented, Russian investors can be served by competent advocates and reputable regional centers in their endeavor to accomplish immigration goals, while preserving their capital.

5 McEvoy, Jemima. Why Israel Became A Safe Haven For Russian Billionaires; https://www.forbes.com/sites/jemimamcevoy/2022/04/28/why-israel-became-a-safe-haven-for-russian-billionaires/?sh=4dedf556ef77 (last accessed August 10, 2022)

It may be too early to predict what share of the EB-5 market will be claimed by Russian investors in 2022 and 2023. However, one thing is already evident: Russian investors are exploring available long term immigration options and as a result have a stronger interest in the EB-5 program than ever before.

Natalia Polukhtin, attorney at Global Practice (Scottsdale, AZ), specializes in employment-based immigrant and non-immigrant visa categories. She published several articles on integration of non-traditional sources of funds, such as cryptocurrency, into immigration process. Natalia is a recipient of multiple professional awards, including Top 25 EB-5 Attorneys and an industry recognition from Invest in USA (IIUSA). She is a long-standing member of the Executive Council of the Immigration Law Section of the State Bar, a blogger, and an author of the first-ever Russian language comprehensive guide to business immigration to the U.S.

Natalia Pronina, VP Investor Relations – Russia & Eastern Europe at EB5 Capital (Bethesda, MD), a $850+ million commercial real estate investment firm. Since 2008 EB5 Capital has been providing international investors a path to obtain U.S. residency and citizenship through carefully selected EB-5 investment opportunities. EB5 Capital is one of the few Regional Centers in the industry with a track record of over 30 projects who have taken investors through the entire immigration process and returned funds across multiple transactions. To date, EB5 Capital has a 100% success rate for project approvals.

COLEEN DANAHER
VP BUSINESS DEVELOPMENT, JTC AMERICAS

BIDHYA DHUNGEL
CPA, EB5 CAPITAL

MIKE XENICK
CEO, INVESTAMERICA

Understanding Audits & Fund Administration under the Reform & Integrity Act

The EB-5 Program has an over 32-year history during which it has generated billions of dollars in foreign investment, created hundreds of thousands of jobs and has drawn much needed capital and vital improvements to communities in need. Unfortunately, the program remains controversial, due In large part to bad actors, bad publicity, program abuses and cases of fraud.

The introduction of the EB-5 Reform and Integrity Act of 2022 (the "RIA"), supported by IIUSA, is intended to reduce the risk of fraud and other abuses. This law has numerous requirements, restrictions, and additional supervisory responsibilities for regional centers. One of the new requirements in the RIA is that New Commercial Enterprises (NCEs) are now required to use an independent-fund administrator to provide oversight and track the disbursement of EB-5 capital, and thereby improve transparency, security, and reporting compliance. NCEs may obtain a waiver from the fund administrator requirement if the financial statements of the NCE and affiliated job creating entity ("JCE") are audited by an independent accounting firm.

While using independent fund administrators, and independent auditors should help improve EB-5 Program integrity, these two options are very different processes. The purpose of this article is to shed some light on the differences, the benefits, and advantages of each.

An Overview of Fund Administration

Broadly speaking fund administration is the execution of all the "back-office" functions necessary to support an investment fund. These functions include fund accounting, financial reporting, investor on-boarding and communications, capital calls, distributions, monitoring investment compliance, and

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so on. Fund administrators are a critical intermediary between fund managers and investors.

Independent companies specializing in fund administration began to appear as an industry group after the 1997 Taxpayer Relief Act. Initially the growth in the use of independent fund administrators was driven by fund managers that benefited from the expertise and efficiencies of the fund administrator. Outsourcing the back-office administration provided cost benefits and also allowed fund managers to focus on their core business. However, the financial crisis in 2008, including the Madoff scandal discovered in 2008, highlighted the risks of fraud when independent fund administration was not used. Prior to 2008, less than 10% of hedge fund managers used independent fund administrators, after 2008, this percentage increased to 90%.[1]

Sophisticated investors understand that an independent fund administrator is closely involved with the regular activity of the fund. The fund administrator improves transparency, security and compliance and dramatically reduces the potential for fraud since any discrepancies in money movement, account balances, investor on-boarding, or financial statements are identified and resolved immediately.

Fund administration in EB-5 involves monitoring, tracking, and recording of investor money in segregated accounts. The monitoring and tracking begin with the deposit of the funds into a subscription escrow account. This is the beginning of the audit trail that every EB-5 investor will need for a successful I-829 petition to remove conditions on their visa. The fund administrator continues this oversight and tracking from release of capital to the NCE separate account and then to the JCE for use in the job creating project. During the investment period, the fund administrator continues to track supporting evidence demonstrating that the investor's funds remain at risk until the end of the investor's conditional residency period. As capital is the returned to the NCE by the JCE, the fund administrator tracks the return of capital to the investor.

The fund administrator will ensure that all disbursements are appropriate and in accordance with all applicable NCE and JCE agreements, will approve all transfers of funds from the NCE to the JCE and serve as a cosignatory on the accounts for those transfers.

Examples of fund administration and cosignatory requirements include, but are not limited to, the following:

- Capital flow reporting of investor's capital over the entire project lifecycle
- Document storage for job creating enterprise expenses
- Monthly statements for each stage: subscription, investment, and settlement
- Storage for relevant documents
- Entity formation and operating agreement storage
- Evidence of fund movement, and funding confirmation letters
- Verification that requests for transfers are compliant with control policies
- Approve/Cosign transfers with a written or electronic signature
- Upload transfers and supporting documentation to portal
- 24/7 portal access for project owners, investors, and other interested parties

Another critical component of the RIA is communication, security, and investor transparency. The independent fund administrator will provide notification to EB-5 investors of the status of their capital as well as a full audit report of the movement of their capital. The document portal provided by the fund administrator will also provide project sponsors and USCIS access to the documents retained on the portal during the entire lifecycle of the NCE.

An Overview of Financial Statement Audits

A financial statement audit is a thorough examination of a company's financial records by independent auditors to ensure the financial statements (generally, income statement, balance sheet, changes in stockholder equity, and cash flow statement) are a fair representation of the company's financial performance during a set time period, usually a calendar or fiscal year. Audits are performed by Certified Public Accounting (CPA) firms in accordance with Generally Accepted Auditing Standards (GAAS) set by The Auditing Standards Board, a subset of the American Institute of Certified Public Accountants (AICPA). Publicly traded companies are required by law to be audited annually by an audit firm registered with the Public Company Accounting Oversight Board (PCAOB). While there is no federal law requiring privately held companies to be audited, many undergo audits due to debt covenants with banks, requirements from investors or shareholders, or various compliance requirements.

During an audit engagement, most of the audit procedures are aimed at detecting and correcting *material* errors. Materiality, in this context, refers to a benchmark used to evaluate misstatement or errors in financial reporting. The magnitude of a material error is such that it might affect the judgment and decision-making of the financial statement

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1 Private Equity Legal & Compliance Digest https://www.centaurfs.com/wp-content/uploads/2017/08/PE-Firms-Increasingly-Turn-to-Administrators-as-Regulatory-and-Investor-....pdf

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readers. The audit procedures are designed to capture and review transactions that are at or above the designated materiality level. Hence, the scope of an audit is limited. Additionally, sampling is widely used in an audit for selecting and reviewing transactions, which leads to a possibility that a fraudulent transaction will not be selected in the auditors' sample and, therefore, will go undiscovered, especially if it falls below the materiality threshold. Therefore, an independent audit may not identify all incidents of fraud.

Generally, audit engagements are performed in three phases: planning, fieldwork, and reporting. During the planning phase, auditors gain an understanding of the industry and the environment in which the company operates as well as perform walk-throughs of the internal controls in place to identify and assess the risk of material misstatement. Based on the findings in the planning stage, a detailed audit plan is developed which entails determining the nature, timing, and extent of testing to be conducted during fieldwork. During the fieldwork stage, auditors select samples of transactions for testing, gather and corroborate information, trace amounts to underlying supporting documents, and seek third party confirmation for certain material items, such as revenue or accounts receivable. Upon evaluating the results of the testing performed, the auditors determine whether the financial statements of the company present fairly the financial results and financial position of the company as of the date of the financial statements, and report their findings in the form of an audit opinion.

Upon completion of the audit, an audit opinion is issued and will fall in one of four categories. An *unqualified opinion* (often called a "clean" opinion) indicates that the financial reports are fair and accurate and free of material misstatement. A *qualified opinion* indicates that the financial statements are presented fairly with specific exceptions that are further outlined in the audit report. An *adverse opinion* indicates that the auditors found material misstatements in the company's financial records due to fraud or error and often indicates a serious lack in internal controls. The fourth and last audit opinion is a *disclaimer opinion* which is not an actual opinion, but a declaration that an opinion could not be assessed due to lack of cooperation from management or inadequate financial records.

How to Choose which Method to Use for EB-5

Fund administration and financial statements audits are two very different methods of mitigating the risk of fraud. It is perhaps hard to understand why the RIA presented a choice of one or the other, as they each have unique roles and benefits for Regional Centers, NCEs, JCEs and ultimately, investors.

As described above, fund administration is a very comprehensive tool that is integrated into an EB-5 fund's transaction infrastructure before the fund-raising process begins, then through a variety of complementary tracking, control, administrative and approval mechanisms, it provides a roadmap of checks and balances throughout the entire duration of an EB-5 offering. This holds all of the EB-5 entities involved in a transaction accountable, which is especially important for offerings that may have common ownership, and therefore conflicts of interest, among the various Regional Center, developer, NCE and JCE entities. Having this third-party oversight is designed to provide comfort and transparency to the investor, which is a crucial element in creating an environment of trust that the flow of funds is occurring as intended, and that the investor's capital investment is being protected before, during and after the transaction has been consummated.

While fund administration is arguably a preventative tool, a financial statements audit is mainly an evaluative and reporting tool that analyzes financial transactions after they have occurred. An audit is also an extremely important instrument to examine whether the financial results that are reported by a

transaction or entity are a fair representation of what actually did happen. As noted above, financial audits are guided by regulatory organizations with procedures, guidance and testing methods that accounting firms have utilized for decades. Getting an unqualified audit opinion provides assurance to investors that there is a higher degree of review and support for a company's financial statements. However, a full financial audit can be expensive, and may require additional time and effort for the NCE and JCE to prepare for the audit.

Among hedge funds and private equity funds, the common practice is to use both fund administration and financial statement audits. Using both does not entirely eliminate the risk of fraud or losses, but these controls do deter some fraudulent conduct and can detect fraud more readily when it does occur.

When due diligence firms and broker-dealers examine an EB-5 offering to determine the strengths and weaknesses of the offering, the presence of both a third-party fund administrator AND an independent auditor provides a much stronger comfort level than if only one of the tools have been implemented.

If the EB-5 industry as a whole desires to increase the integrity and reputation of EB-5 financing in the U.S. capital markets (and the media), there is a strong argument for choosing both independent fund administration and financial statements audits. While utilizing both will increase the costs of EB-5 offerings, the combined benefits of both will not only strengthen the ultimate outcome and integrity of EB-5 transactions, but it will also strengthen the perception of the EB-5 industry in the long run.

Who Are "Promoters" And What Requirements Apply To Them Under The EB-5 Reform And Integrity Act?

CATHERINE DEBONO HOLMES
PARTNER, JEFFER MANGELS BUTLER & MITCHELL LLP

The EB-5 Reform and Integrity Act of 2022 (the "Reform Act") added new requirements that apply to a broad category of persons designated as "promoters" under the Reform Act, and imposes a number of regulatory responsibilities on all such persons. This article discusses the scope of the term "promoter" under the Reform Act, and the general regulatory requirements that apply to those persons. As of the date of this article, US Citizenship and Immigration Services ("USCIS") has not issued any regulations with respect to promoters and the specific requirements that will apply to such persons.

Who are promoters?

Section K of the Reform Act refers to:

> *"Direct and third party promoters (including migration agents) of a regional center, any new commercial enterprise, an affiliated job-creating entity, or an issuer of securities intended to be offered to alien investors…."*

However, there is no specific definition of the term "promoter" in the Reform Act, beyond the clear inclusion of "migration agents," a term itself not defined in the legislation. Since the intent of the Reform Act is, among other things, to incorporate compliance with securities laws, it would be expected that USCIS would interpret the term "promoter" in a manner similar to that of the Securities and Exchange Commission ("SEC"). Nonetheless, a closer review of the requirements that apply to promoters under the Reform Act indicate that it is likely the term promoter was intended by Congress to have a different meaning than that used by the SEC, and that under the Reform Act, a promoter is intended to mean any person who receives compensation in connection with soliciting persons to invest in offerings of securities subject to the Reform Act.

How is "promoter" defined by the SEC?

SEC Rule 501(a), which is part of SEC Regulation D ("Regulation D") under the Securities Act of 1933, as amended (the "Securities Act"), defines the term "promoter" as follows:

> *" '**Promoter**' includes:*
>
> *"(i) Any person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding and organizing the business or enterprise of an issuer; or*
>
> *"(ii) Any person who, in connection with the founding and organizing of the business or enterprise of an issuer, directly or indirectly receives in consideration of services or property, or both services and property, 10 percent or more of any class of securities of the issuer or 10 percent or more of the proceeds from the sale of any class of such securities. However, a person who receives such securities or proceeds either solely as underwriting commissions or solely in consideration of property shall not be deemed a promoter within the meaning of this paragraph if such person does not otherwise take part in founding and organizing the enterprise" (emphasis added).*

Who would be a promoter if the SEC definition was followed?

Based on the definition of "promoter" under SEC Rule 501(a), the term promoter under the Reform Act would include any person who receives consideration equal to or ownership of 10 percent (or more) of a class of securities of an

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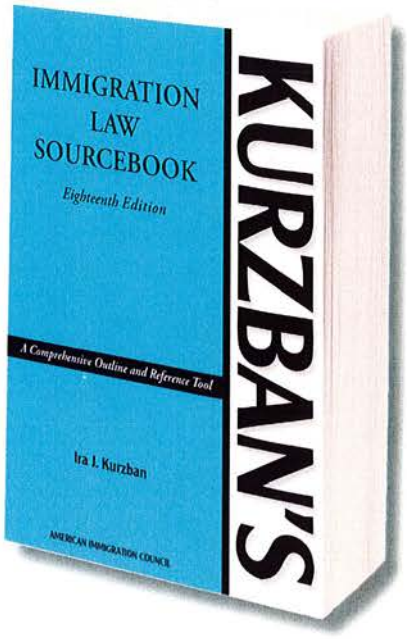

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issuer in connection with founding or organizing the business or enterprise of an issuer of securities. However, the Reform Act refers to a "promoter of a regional center, any new commercial enterprise, an affiliated job-creating entity, or an issuer of securities intended to be offered to alien investors." Read literally, that would mean that "promoters" under the Reform Act include any person who receives compensation equal in value to or ownership of more than 10% of the securities of any of the regional center, the new commercial enterprise, or an affiliated job-creating entity. That would include potentially the founders, officers, directors, and managers who receive enough compensation from the regional center, new commercial enterprise, or affiliated job-creating entity, as well as the 10% owners of any of the regional center, new commercial enterprise, or affiliated job-creating entity. (Note: it is unclear under the Reform Act whether the new commercial enterprise is the same as the "issuer of securities intended to be offered to alien investors," or this is just a duplicate reference to new commercial enterprise, since the new commercial enterprise is the entity that offers securities to alien investors under the EB-5 Program, and the term "issuer" is frequently cited in the Reform Act in addition to but distinct from the term "new commercial enterprise" including (but not only) in the Section K reference to "promoters.")

Would an independent foreign agent, finder, or migration agent be excluded from the definition of promoter under the SEC definition?

According to SEC Rule 501(a), the definition of promoter excludes persons who receive underwriting commissions if they do not also take part in founding or organizing the enterprise. This would exclude foreign agents, finders, and migration agents (mentioned in Section K of the Reform Act but not Rule 501(a)) who are not also owners or do not also take part in the founding or organizing any of the regional center, new commercial enterprise, or affiliated job-creating entity (or any other issuer of securities offered to alien investors – whatever that may mean).

How can this definition of promoter be clarified under the Reform Act?

Since the Reform Act refers to "Direct and third party promoters (including migration agents)….", one would expect that Congress intended to include independent (non-founding or -organizing) migration agents, finders, and broker-dealers in the definition of promoter. However, until more specific rules and standards are issued, it is unclear what the definition of promoter is under the Reform Act.

What are the requirements that apply to promoters under the Reform Act?

According to Section K of the Reform Act, the Secretary of Homeland Security is required to prescribe rules and standards to oversee promotion of any offering of securities relating to the EB-5 Regional Center Program, including: (i) registration with USCIS; (ii) certification by each promoter that it is not ineligible to participate as a promoter under Section H(i) of the Reform Act (the disqualification provisions); (iii) guidance for accurately representing the visa process to foreign investors; and (iv) guidelines describing permissible fee arrangements under applicable securities and immigration laws. No such rules or standards have been proposed as of the date of this article. However, the Reform Act does require that

> *"Each petition filed under section 204(a)(1)(H) shall include a disclosure, signed by the investor, that reflects all fees, ongoing interest, and other compensation paid to any person that the regional center or new commercial enterprise knows has received, or will receive, in connection with the investment, including compensation to agents, finders, or broker dealers involved in the offering, to the extent not already specifically identified in the business plan filed under subparagraph (F)."*

In addition, the Reform Act also requires that:

> *"Each regional center, new commercial enterprise, and affiliated job-creating entity shall maintain a written agreement between or among such entities and each direct or third-party promoter operating on behalf of such entities that outlines the rules and standards prescribed under clause (i)." (Section K(iii); emphasis added.)*

This means that the regional center, new commercial enterprise, and job-creating entity are required to have an agreement with each promoter that outlines all of the rules and standards that the Secretary of Homeland Security is required to prescribe – but which have not been prescribed as of the date of this article.

How can regional centers, NCEs and JCEs comply with the Reform Act before the Secretary of Homeland Security issues any regulations allowing registration of promoters or guidance on compliance requirements?

Until the Secretary of Homeland Security provides a definition of the term promoter, it would be wise to assume that all persons who receive any form of compensation in connection with an EB-5 offering will be considered promoters. This will require that the regional center, new commercial enterprise, and affiliated job-creating entity have a written agreement with each such person that includes: (i) the amount of compensation to be paid to such person, by whom, and when; (ii) a representation that the person is not prohibited from acting as a promoter under Section H(i) of the Reform Act; (iii) a requirement that the promoter's compensation be specifically described to each investor for whom the promoter is paid; (iv) a requirement that the promoter will comply with the rules and standards that are prescribed by the Secretary of Homeland Security, including that the promoter will register with USCIS promptly following the date that USCIS provides a form for registration; and (v) a right of the regional center, NCE or JCE to terminate the agreement, without payment of any compensation, if the promoter does not fulfill its obligations as required under the applicable rules and standards as those may be clarified, modified, or expanded in the future. This is admittedly an imperfect solution, but until rules are prescribed for promoters, there are no other means of attempting to comply with the requirements of the Reform Act with respect to promoters.

Jacqueline Do

CEO & FOUNDER OF WORLDWIDE PATH

Jacqueline Do is CEO and founder of Worldwide Path – an immigration services company, where she grow her professional and personal brand. She has 7 years of experiences in the industry. Before that, Jacqueline has nearly ten-years experiences of working for expensive brands such as Johnson & Johnson, Kuehne + Nagel, Halliburton Oil & Gas.

Jacqueline also has amassed a totally 30 million dollars in funding for EB5 investments and Worldwide Path became fastest growing firm in providing immigration services and the company's success case climbed steadily.

She was also recognized by top lawyer firms as well as regional centers that praised her for her commitment to ethical practice. With all of her deep experience, she loves finding ways for investors to tell their stories to make the case successful.

Jacqueline moved to California and established Worldwide Path USA with a mission for creating a trustworthy expanding to satisfy investor's oversea assistance.

NEW JOB CREATION AND TEA RULES IN THE EB-5 REFORM AND INTEGRITY ACT OF 2022: ANALYZED AND EXPLAINED

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The EB-5 Reform and Integrity Act of 2022 (RIA) reinstated the Targeted Employment Area (TEA) rules instituted by USCIS in the EB-5 Immigrant Investor Program Modernization rule in November 2019, and implemented several new regional center project job-creation rules. The TEA rules require designation by USCIS and requires high unemployment TEAs to count only directly adjacent census tracts to the project tract. The new job-creation rules allow counting direct job creation for projects with construction periods less than 24 months, but also places limits on the percentage of total jobs allowed for indirect job creation.

TEAs

The TEA rules are familiar to most in the EB-5 area as they were implemented in 2019. The rules require first that USCIS adjudicate the status of TEAs (rather than individual states as was predominantly the case previously); and second that only directly adjacent tracts to the project tract can be considered for TEAs. The directly adjacent requirement severely limits the geographic area that can be considered, in some cases, to just a few city blocks. This requires TEAs to be determined by economic conditions near the project site and not in the surrounding area where the labor force might also be recruited. Even though the labor force to staff the construction at a site in, say, downtown Los Angeles could come from 10-20 miles away, the new law focuses only on a very small geographic area near the project site, rather than where the employees might come from.

Job Creation

The new job creation rules in the RIA are contained in full text in the following three subparagraphs:

INA 203(b)(5)(e)(IV) INDIRECT JOB CREATION.- (I) IN GENERAL.- The Secretary of Homeland Security shall permit aliens seeking admission under this subparagraph to satisfy only up to 90 percent of the requirement under subparagraph (A)(ii) with jobs that are estimated to be created indirectly through investment under this paragraph in accordance with this subparagraph. An employee of the new commercial enterprise or job-creating entity may be considered to hold a job that has been directly created.

INA 203(b)(5)(e)(IV)(II) CONSTRUCTION ACTIVITY LASTING LESS THAN 2 YEARS.- If the jobs estimated to be created by construction activity lasting less than 2 years, the Secretary shall permit aliens seeking admission under this subparagraph to satisfy only up to 75 percent of the requirement under subparagraph (A)(ii) with jobs that are estimated to be created indirectly through investment under this paragraph in accordance with this subparagraph.

INA 203(b)(5)(e)(V)(II)(cc) CONSTRUCTION ACTIVITY JOBS.- If the number of direct jobs estimated to be created has been determined by an economically and statistically valid methodology, and such *direct jobs* are created by construction activity lasting less than 2 years, the number of such jobs that may be considered direct jobs for purposes of clause (iv) shall be calculated by multiplying the total number of such jobs estimated to be created by the fraction of the 2-year period that the construction activity lasts.

These new rules are aimed specifically at job-creation estimated with economic models such as *IMPLAN* or *RIMS II* for regional center projects and do not apply to *direct* EB-5 projects at all. The following three points describe *our interpretation* of the new rules more succinctly (note that as of the date of this article, USCIS has not provided their guidance, policy manual or interpretation of the job creation language in the RIA):

1) (Indirect + induced) jobs in regional center projects cannot count for more than 90% of the total job count, or alternatively, the direct job count must be at least 10% of the total job count.

2) If the construction period of a project lasts less than 24 months, indirect jobs cannot count for more than 75% of the total job count, or alternatively, the direct job count in such cases must be at least 25% of the total job count.

3) If the construction period of a project lasts less than 24 months, the direct job count from construction must be limited by multiplying the original direct job count by the fraction of the 24-month period that the construction lasts.

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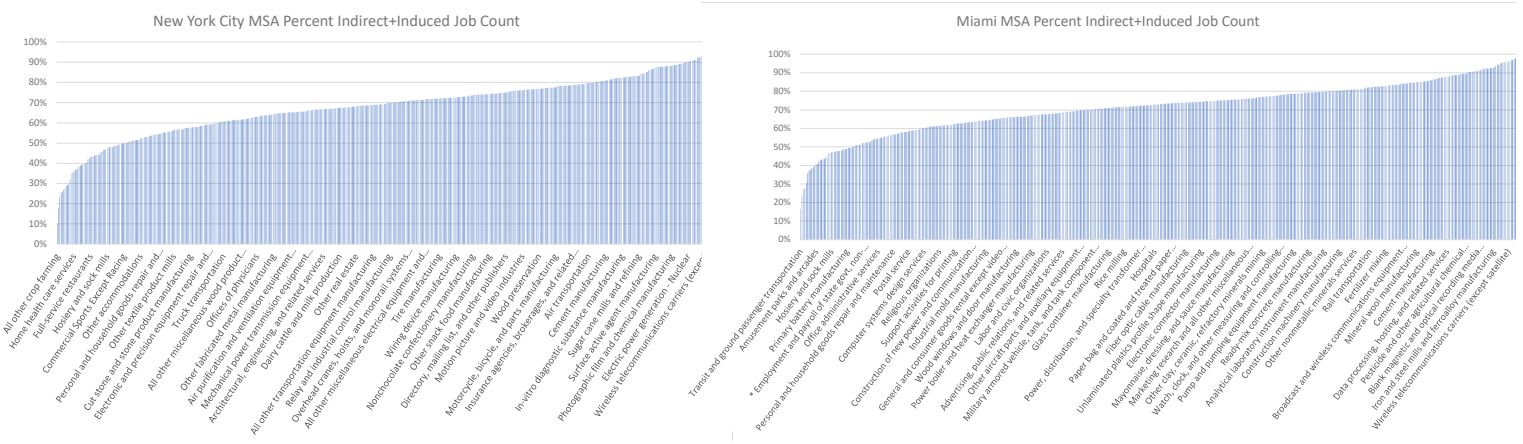
FIGURE 1: NEW YORK CITY AND MIAMI MSA *IMPLAN* MULTIPLIERS PERCENT INDIRECT + INDUCED



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In the remainder of this article, we analyze each of the three items above in more detail. We also raise questions about the interpretation of the new rules in the final section of the article.

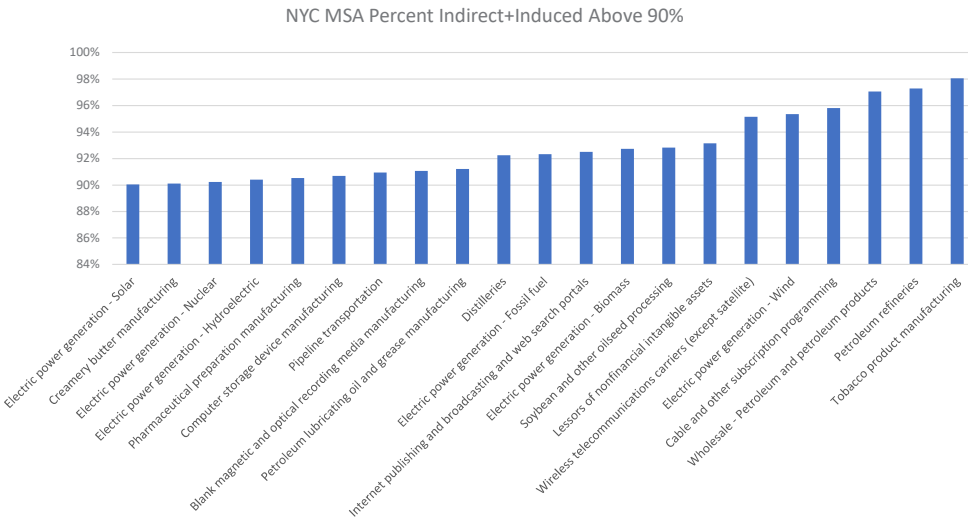
1) Indirect + Induced Job Count Cannot Exceed 90% of Total Job Count

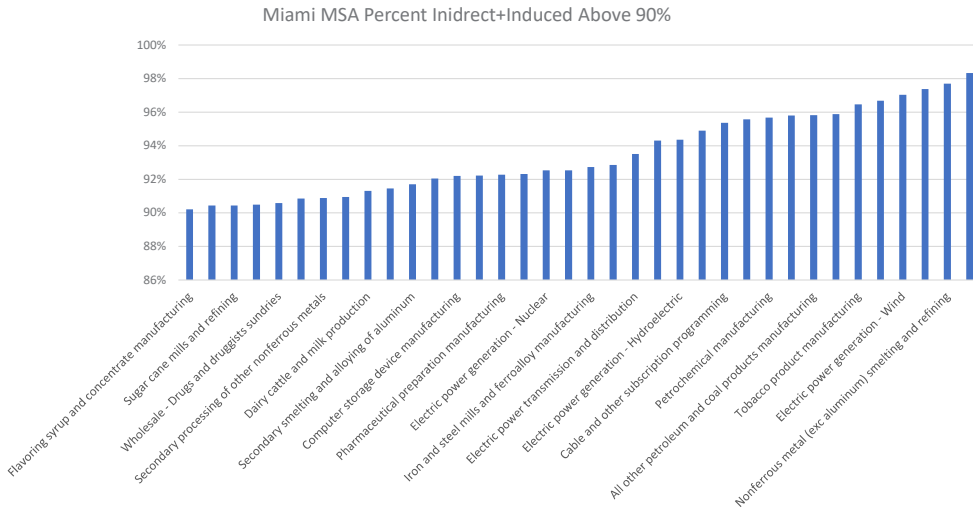
Based on our interpretation of the RIA, this requirement will seldom have any impact for EB-5 job creation estimates for two reasons: 1) few industries in the U.S., whether in the EB-5 area or not, have an (indirect + induced) job threshold as high as 90% relative to the total size of the total multiplier (direct + indirect + induced) effect, and 2) the main industries which are the focus of EB-5 projects, such as hotels, condominiums, office buildings, multi-family residential housing, restaurants, etc., have a much more even split between direct and (indirect + induced) multipliers.

Figure 1 illustrates the (indirect + induced)/ total multiplier ratios in the New York City (NYC) and Miami, FL Metropolitan Statistical Areas (MSA) using the 540+ industries in *IMPLAN* (IMPLAN Group, LLC) for model data year 2019. It is clear for both areas that very few industries reach the 90% mark of (indirect + induced) to total. Looking at the averages for all multipliers in each area, the ratio of (indirect + induced)/total is 66.4% for the Miami MSA and 61.5% for the NYC MSA.

So, what are the industries that have indirect job creation greater than 90%? Figure 2

FIGURE 2: NEW YORK CITY AND MIAMI MSA *IMPLAN* MULTIPLIERS PERCENT INDIRECT + INDUCED GREATER THAN 90%





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illustrates these industries for the same NYC and Miami MSAs. The NYC area has far fewer industries than the Miami area having (indirect + induced)/total multiplier ratios over 90%. What we see in both the NYC and Miami MSAs is predominantly manufacturing, electrical power generation and petroleum industries, i.e., industries, typically run with machinery and few on-site workers. More importantly, we see none of the traditional EB-5 industries as mentioned above.

2) For Construction Less than 24 Months, Indirect Jobs Must Be 75% or Less of the Total Job Count

Figure 3 illustrates the (indirect + induced)/ total multiplier ratios for the NYC and Miami MSAs. We see that except for Wholesale goods sellers and Management of Companies near the top of each table, most of the traditional EB-5 industries have the indirect to total ratio less than 70-75%. Note also that all the construction sectors in both tables in Figure 3 are less than 75%. This is significant because most of the jobs created in economic model-based job creation in the EB-5 industry come from construction-related activities and not operations. This of course implies that even if construction is less than 24 months, the 75% constraint will not be an issue, at least on its own, because most of the construction industry sectors as well as the operations sectors have indirect to total ratios much less than 70%!

3) For Construction Less than 24 Months, Direct Jobs Must be Calculated as the Original Direct Job Count Multiplied by the Fraction of the 24-month Period that Construction Lasts

When the new RIA was first passed, few seemed to comment on the fact that, throughout the entire history of EB-5, direct jobs could not be counted at all for economic model-based job calculations if the construction period was less than 24 months. Therefore, this addition to the RIA of being able to pick up some direct job creation for shorter construction periods appears to be a boon to the industry for many smaller projects. A simple example of item 3) is the following: if the original direct job count is 100 jobs and the construction time period lasts 12 months, the number of direct jobs the project could count is 12/24×100 or 50 jobs.

FIGURE 3: COMMON EB-5 INDUSTRIES (INDIRECT + INDUCED)/TOTAL MULTIPLIER RATIOS IN THE NEW YORK CITY AND MIAMI MSA

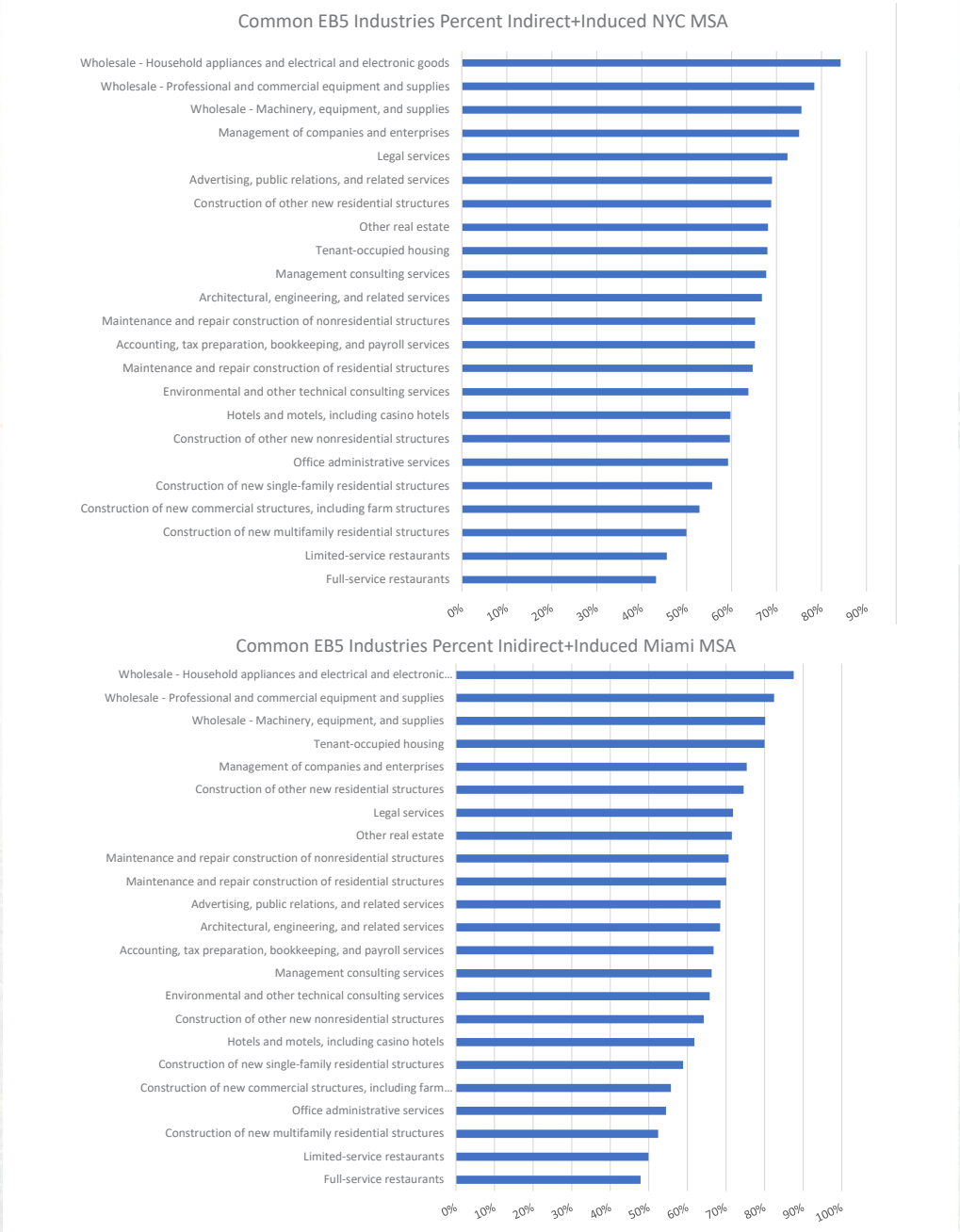

Figure 4 shows the result of applying the construction time period limits on common construction multipliers in the NYC and Miami MSAs. The figures show the *total* multiplier for construction activity after applying the construction time ratio on the *direct* effect component of the total multiplier as the construction time period falls from 24 months to just 3 months.

Taking the industry sector "Construction of new multifamily residential structures" which is in the middle of the first panel for NYC as an example, the total multiplier starts at 18.43, or 18.43 total jobs created per $1 million dollars spent in this sector. The components of this multiplier are 9.22 direct jobs created per $1 million spent, leaving 18.43-9.22=9.21 (indirect + induced) jobs remaining in the full multiplier. As we apply the construction time ratio to the direct multiplier component only, that component falls causing the total multiplier to fall as well. As the construction period falls 3 months from 24 months to 21,

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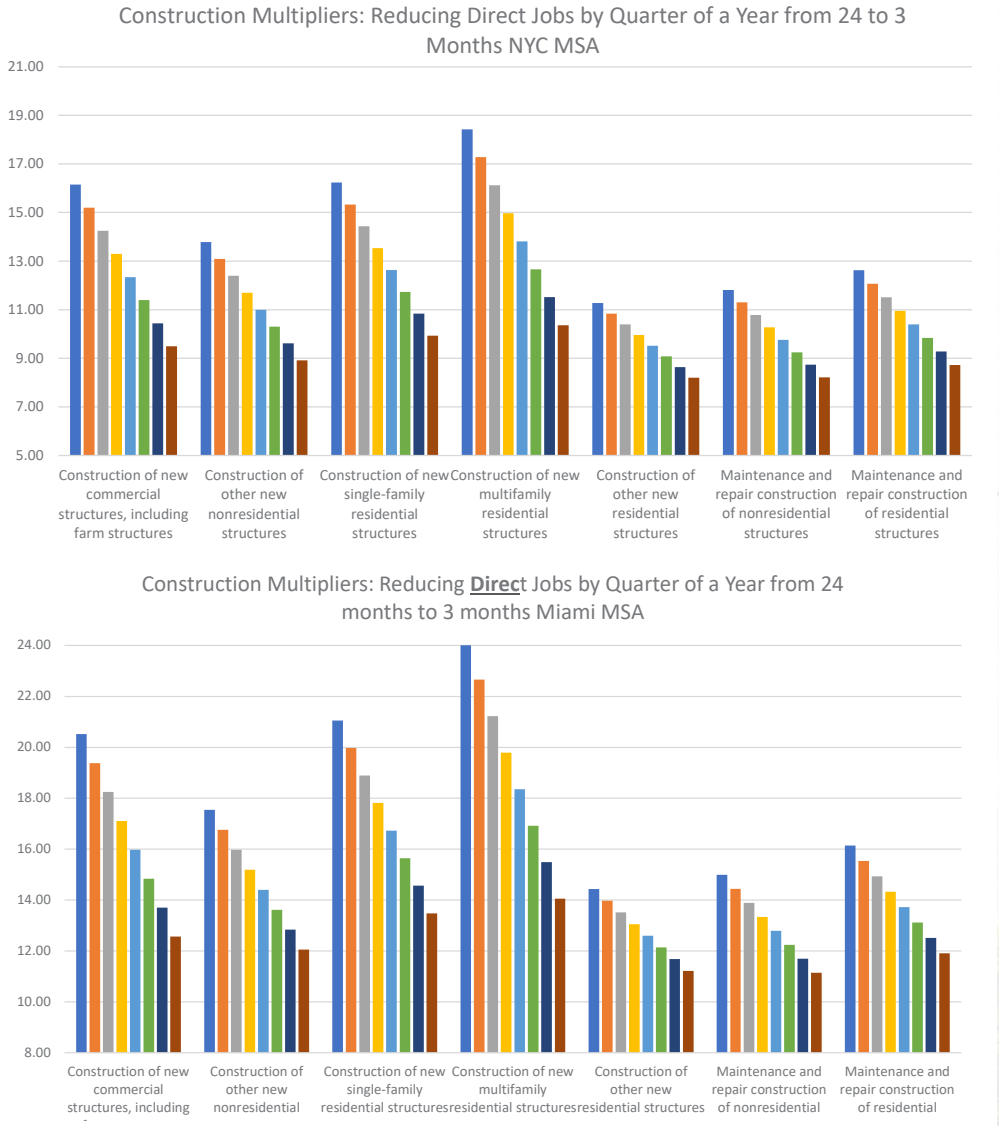
FIGURE 4: COMMON EB-5 CONSTRUCTION INDUSTRY TOTAL MULTIPLIERS IN THE NEW YORK CITY AND MIAMI MSA AS THE CONSTRUCTION PERIOD IS REDUCED



jobs from construction lasting less than 24 months. As we show below, when the construction period is less than 24 months, causing direct jobs to be limited by the ratio of the construction period to 24 months, the interaction of these two rules can place further limits on total job creation by limiting both direct jobs and (indirect + induced) jobs.

Figure 5 shows a hypothetical construction multiplier in the far right part of the chart of 20 jobs per $1 million in construction spending with 25 months of construction time period. In this hypothetical, the direct effects and (indirect + induced) effects multipliers are each 10 jobs per $1 million dollars spent with the direct effect multiplier shown in blue in the chart and indirect in orange. As the duration of construction decreases, moving from right to left in the chart, the direct jobs are cut proportionally as required by the ratio of the construction time in months to 24. For the next 16 months the direct multiplier is reduced but the indirect multiplier remains at 10 jobs per $1 million. When the construction period is less than 8 months, the direct job cut causes the ratio of (indirect + induced) jobs to total jobs to rise above 75%, which is disallowed by rule 2) above. Therefore, the direct job cuts combined with the 75% maximum indirect job constraint require additional cuts in indirect jobs to retain the 75% requirement. The indirect job cuts are shown in the chart as the green segments of the job count bars. The

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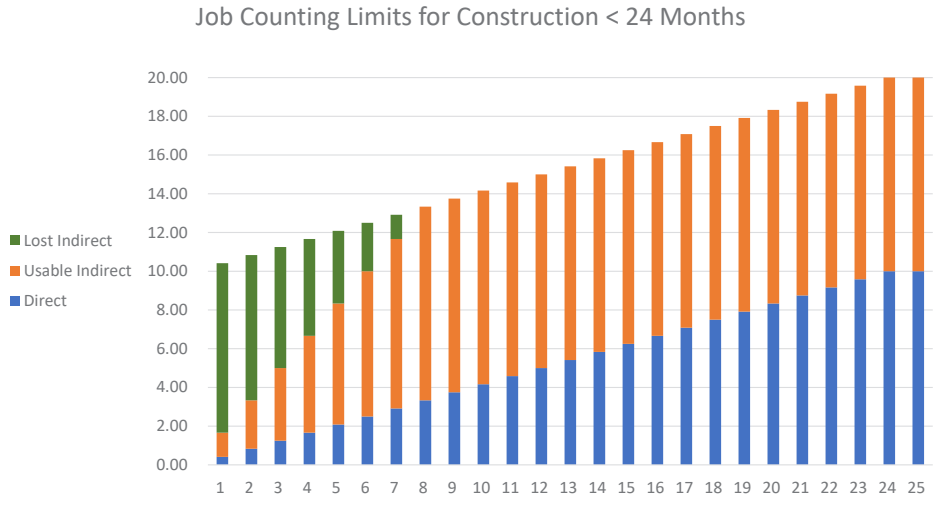
the direct multiplier falls from 9.22 to (21/24) x9.22=8.07 leaving the total multiplier at 17.48 jobs per $1 million spent. Continuing, if the construction period is only 18 months the direct multiplier falls to (18/24)x9.22=6.92 while the total multiplier falls to 17.28 jobs per $1 million spent. As one can see, this continues monotonically as the construction time period falls until the total multiplier reaches its lowest value of 10.36.

We indicated above that the 75% maximum (indirect + induced)/total job constraint is typically not an issue for most EB-5 projects on its own due to the ratios shown in Figure 3. However, it can be an issue when combined with the third main job creation rule in the RIA requiring a haircut of direct

FIGURE 5: THE INTERACTION OF THE 75% LIMIT ON INDIRECT JOBS FOR CONSTRUCTION SHORTER THAN 24 MONTHS



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total constraint can easily be calculated by multiplying the reduced direct job count by 4 to reach the maximum allowable job count. For example, when the construction length has fallen to 6 months, the original total job count *would have been* 12.5 jobs, but the ratio of indirect jobs to total 10/12.5 is now 80% and indirect jobs must be cut by 2.5 jobs from 10 to 7.5 to retain the ratio of indirect jobs to total jobs of 7.5/10=75%. The new maximum direct job count is (6/24)x10=2.5 direct jobs. Multiplying 2.5 direct jobs by 4 results in a maximum total job count of 10 (in orange) with an indirect job loss also of 2.5 (shown in green) to maintain the 75% indirect to total job count. This multiplication result stems from the 25% maximum direct job count, i.e., one in four, given that indirect jobs must be no more than 75%. Additionally, the indirect job count can be found by multiplying the direct jobs by 3, i.e., 2.5 direct jobs x 3 = 7.5 indirect jobs.

Applying the Rules in Real World EB-5 Projects

Although we have approached this analysis using *IMPLAN* multipliers to show the effects of the new rules on job creation, the practicing economist in the EB-5 field must make any adjustments to actual job creation figures in the economic report. To illustrate, we use the example of a multifamily construction project with $20 million construction in 2023, $500,000 each in architectural services and wholesale trade and $800,000 in management of companies. Rental income is assumed to be $1.5 million per year for the total complex in year 2024 and this project will be located in the Miami-Fort Lauderdale-West Palm Beach MSA.

Table 1 reports the results of this run in the IMPLAN model. The results indicate that if the construction period was 24 months or more the project could generate 499 jobs and support up to 49 EB-5 investors with a maximum potential EB-5 capital raise of $39.2 million (assuming the project is located in a TEA). Of course, we know that one cannot raise more in EB-5 capital than the project capital expenditures, but this result is relatively common in economic reports under the RIA due to the minimum investment amount per investor in a TEA increasing to $800,000.

TABLE 1: RESULTS FOR CONSTRUCTION AND OPERATIONS OF A $20M MULTIFAMILY CONSTRUCTION PROJECT IN THE MIAMI MSA

PROJECT ACTIVITY	IMPACT TYPE	EMPLOYMENT	LABOR INCOME	VALUE ADDED	OUTPUT
Construction 2023	Direct Effect	219	$14,236,736	$16,456,375	$21,026,096
	Indirect Effect	25	$1,402,071	$2,384,513	$4,440,838
	Induced Effect	228	$12,381,081	$21,295,424	$36,059,874
	Total Effect	472	$28,019,887	$40,136,312	$61,526,809
Apartment Rental 2024	Direct Effect	8	$178,543	$515,936	$1,468,244
	Indirect Effect	8	$368,666	$632,655	$1,314,052
	Induced Effect	12	$674,682	$1,141,811	$1,920,136
	Total Effect	28	$1,221,891	$2,290,403	$4,702,432
Totals		499	$29,241,778	$42,426,715	$66,229,241
Maximum Potential EB-5 Investors		49			
Maximum Potential EB-5 Capital		$39,200,000			

Moving on to the effect of the new rules, we first look at what percent of total jobs the (indirect + induced) jobs represent. Summing these figures in both the Construction and Rental panels of Table 1 results in a total of 273 (indirect + induced) jobs. Dividing this by the total of 499 results in the percent of (indirect + induced) jobs being 54.55% of the total, so we have no problem with rule 1) above that indirect jobs cannot exceed 90% of the total.

Assume that the construction period was less than 24 months, say 8 months. Now, the direct jobs from construction would need to be reduced to 8/24x219=73. The direct job count is now 81 (73+8) and the *original* indirect job count is 273 with the total job count now at 354 (81+273). However, now the indirect job count is too high resulting in more than 75% indirect jobs (273/354)=77.1%. We need to reduce the indirect job count which lowers the total job count. The new total jobs count can be calculated as 81x4=324, implying that indirect jobs are now 324-81=243 or using the other method mentioned above 81x3=243 and the total job count is now 81+243=324. Of course, the maximum of 32 EB-5 investors still results in $25.6 million or more than enough to fund this example project.

Remaining Questions

As the industry waits for further guidance from USCIS on the larger job creation items, the drafting of the RIA also leaves at least two additional open questions related to the job-count:

First, rule 2) indicates when the construction period is shorter than 24 months, no more than 75% indirect jobs are allowed. It is not clear if this constraint applies to all job creation from a project or only to construction jobs, which would then allow for up to 90% indirect jobs from operations. It also seems that if the rule did apply to both, jobs from construction and operations, that it would unfairly punish those projects without operations such as for sale single-family and multi-family housing where there is no rental income. This issue is also relevant for the second question below.

Second, rule 3) indicates a reduction in direct jobs by the fraction of the 24 month period for "jobs created by construction activity." What is clear from the example above is development or construction activity typically includes other items in addition to hard construction sectors such as architects & engineering, wholesale trade, management, FF&E and the like. Should this reduction in direct jobs be applied to all sectors in the development/construction category or only to the hard construction sector?

Until USCIS publishes regulations or, more likely, explores this issue in adjudications, practitioners should exercise caution in job-creation calculations and EB-5 offerings should include good job creation cushion to help mitigate risks during this period of uncertainty.

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IIUSA Leadership Circle Convenes for Strategy Session While the Association Continues Work Expanding the Benefits it Offers a Growing EB-5 Industry

QUINTON LEWIS
MEMBERSHIP DEVELOPMENT COORDINATOR, IIUSA

IIUSA is grateful for the support of its members, but there are still many organizations active in the EB-5 space that do not take advantage of the many benefits and opportunities that IIUSA offers. Read below to learn more about what the only Regional Center trade association is doing for you and how you can get involved. If you aren't already a member, consider joining IIUSA so your firm can enjoy the full benefits of membership. If you are a member, share this information with your partners and colleagues so that they might discover the impact that IIUSA has on the EB-5 industry. As an association, we are most successful in protecting and promoting the growth of EB-5 when we represent the full breadth of stakeholders in our industry.

IIUSA
INVEST IN THE USA

In March of this year, President Biden signed the omnibus appropriations bill containing the EB-5 Reform and Integrity Act of 2022 (RIA), giving the Regional Center Program ("the Program") new life. In early August, plaintiff representatives and USCIS agreed to a settlement, related to litigation over regional center designations under the new law, that allowed program stakeholders to retain their prior authorization and resume regular business. This newfound stability and structure in the Program were warmly welcomed by IIUSA members, EB-5 stakeholders, investors, and the communities that EB-5 serves.

Only days after news broke on the USCIS settlement agreement, members of the IIUSA Leadership Circle convened in Milwaukee, WI for a planned Leadership Summit with a new purpose and goal to analyze the outcome of the agreement and to plan actions that capitalize on the value and stability that it brings to the EB-5 industry. Leaders at the Summit also discussed short- and long-term strategies to grow IIUSA and strengthen its impact on the EB-5 community.

IIUSA is eager to use the momentum gained from the Leadership Summit to continue expanding upon the many benefits that it offers while continuing to cultivate a member base that best represents the EB-5 industry.

What's Next for IIUSA and EB-5?

As the only industry trade association for Regional Centers, IIUSA acts as the unified voice of EB-5. In parallel with the industry, IIUSA has experienced growth and success recently and looks to build on this momentum to ensure a bright future. With long-term security and established protections for regional centers, service providers, and foreign investors now in place, IIUSA members and staff continue building the resources that have allowed the organization to positively influence the EB-5 industry and the many beneficiaries of its investment capital.

Responsible for over $37 billion in foreign direct investment between 2008 and 2021,

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the EB-5 immigrant investor program has repeatedly proven its incredible value to an always-changing U.S. economy. While a large portion of this vital investment was handled by IIUSA members, several active EB-5-related operations that make up the rest of the industry only receive the indirect benefits of IIUSA initiatives. In the past five months, these indirect benefits have never been so apparent as IIUSA and its members have spent precious capital, both financial and political, to secure the passage of the reauthorization bill and the subsequent litigation settlement agreement. These monumental wins for IIUSA will stand as some of the most valuable in the Program's history and have created a future in the EB-5 industry for members and non-members alike.

How Can Your Organization Benefit Further from IIUSA?

The association admires the support and hard work that IIUSA members have contributed to the industry's success in this past year and beyond, but it also recognizes that many stakeholders in the industry have not yet made the decision to join our ever-growing IIUSA community. Because of the role IIUSA continues to play in the future of the EB-5 industry, the association has made plans to embark on an aggressive membership expansion initiative amongst EB-5 stakeholders, project beneficiaries, and like-minded organizations around the globe. It is through these concerted efforts that IIUSA will be able to grow the EB-5 Regional Center industry and further expand upon and improve the valuable benefits it offers to its diverse members.

While many of IIUSA's recent highlights focus on the advocacy achievements of the association, advocacy initiatives are only one of the many benefits that members of IIUSA enjoy. Since its inception in 2005, IIUSA has bolstered the value it provides on Capitol Hill by working tirelessly to provide its members with a variety of dynamic benefits that can be used by professionals at all levels of the EB-5 industry. Just a few of the key member benefits include:

Networking & Business Development Opportunities. IIUSA utilizes its strong reputation and influence in the top EB-5 markets across the globe to offer its members and others in the industry the opportunity to network with investors and EB-5 partners from many different countries. To date, IIUSA has hosted international events in China, Southeast Asia, India, Africa, Latin America, and the Middle East with many being revisited in the upcoming year. IIUSA also uses its strong role in the industry to constantly analyze emerging markets and examine whether these areas would be valuable to visit.

On the domestic front, the EB-5 Industry Forum will hold its 14th iteration next Spring. The multi-day conference has connected thousands of professionals from across the country and IIUSA looks ahead to what could be its most-attended event ever as we convene in San Diego in May 2023.

Engagement. IIUSA committees are tasked with some of the more important initiatives and issues in the EB-5 industry today. These committees, consisting of member representatives, lead the way in developing industry best practices, providing helpful insight into engaging with government entities and potential Allied Partners, and advising IIUSA staff on association operations and outreach.

Education. In addition to IIUSA's in-person events, the association also maintains an online EB-5 Education Library with several course offerings designed for all levels of professionals in the industry. These courses have been meticulously created by some of the most experienced leaders in EB-5 and can be used to train regional center or service provider employees. Many of the courses cover the program process and how regional centers operate, but some, like the IIUSA Investor Market Webinar Series, were developed to convey deep insights into some of the most challenging EB-5 markets.

Beyond the educational materials offered, IIUSA also focuses on EB-5 brand education and awareness. Educating the general public and government about the many benefits of Regional Center collaboration is a vital objective for IIUSA as the industry continues to grow. IIUSA will continue to stand as the premier source of information for all things EB-5 while dispelling common myths of the industry that negatively impact EB-5 professionals and beneficiaries.

Access to data. IIUSA members enjoy access to a multitude of exclusive data and analytical reports on USCIS processing times, approval rates, investor market analytics, visa demand and usage, and many other critical informational topics. Additionally, IIUSA supplies members with industry-leading resources that allow for quick identification of business partners, an easier route to conduct due diligence, and access to extensive targeted employment area (TEA) data.

Advocacy. IIUSA and its members have created a network of political resources and capital with the goal of executing critical advocacy initiatives on the federal level. With our experienced government affairs team, IIUSA has succeeded in fighting for the business interests of its members and the EB-5 industry through effective policy formation. None of these are more apparent than the recent reauthorization of the Program and the USCIS settlement agreement. Ultimately, IIUSA aims to target its advocacy efforts toward the permanent Congressional reauthorization of the EB-5 Regional Center Program.

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The EB-5 industry looks forward to a bright future as IIUSA leads the turn into a new era. After years of constant trials and tribulations, the association will expand and strengthen the resources that gave EB-5 this opportunity to survive and grow. As IIUSA builds on the value that it offers members and non-members alike, it's critical to understand that when the industry works together, great opportunities will continue to develop for EB-5 stakeholders across the globe. With the end of 2022 approaching fast, there truly is no better time for your firm to get involved in the many initiatives that will develop this industry for years to come. To learn more about membership or to complete a membership application please visit www.IIUSA.org. To talk to an IIUSA staff member give us a call at (202) 795-9667 or email info@iiusa.org.

Meet the Newest Members of IIUSA:

American Lending Center

Appalachian EB-5 Regional Center

Beyond Holding Company, LTD

BiF | Bluegrass International Fund Regional Center

Birch Capital LLC

California EB5 Investments

Chiesa Shahinian & Giantomasi PC

Citizen Pathway Investment, Co Ltd

Columbia International Finance

Concorde EB-5 Advisors, LLC

Customers Bank

Dalmore Group, LLC

Davies & Associates, LLC

Driftwood Capital

East Avenue Development

EB5 Florida Hotels & Investments Regional Center LLC

EB5 Global, Inc.

EB5Proxy.com

Florida Equity And Growth Fund Regional Center, LLC

Green Card Fund, LLC

Kido

KR Capital Partners

Law Offices Jacob J. Sapochnick

Law Offices of Marjan Kasra

Local Equity LLC

Mason's Immigration Services

Medical District Developments LLC

MidAmerican Global Ventures, LLC

Northern Rockies Regional Center

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Red Ledges

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Texas Growth Fund Regional Center, LLC

Tristani Law, LLC

Williams Global Law

Womble Bond Dickinson US, LLP

Worldwide Path

Xenoom Immigration Inc.

Checklist of Contents for Regional Center Compliance Policies and Procedures Manual Under the EB-5 Reform & Integrity Act

BY THE EB-5 SECURITIES ROUNDTABLE

[1] The EB-5 Securities Roundtable was initially organized by Kurt Reuss, the founder of eb5Marketplace, in 2014 and is an informal, independent group of EB-5 securities attorneys organized to facilitate best practices in the offerings of EB-5 securities. The EB5 Securities Roundtable is not affiliated with any EB-5 industry organization, regional center, offeror of EB-5 securities or job-creating recipient of EB-5 funds, and it receives no outside financial contributions. The following industry leading securities attorneys are its current members: Robert Cornish, Ronald Fieldstone, Lulu Gordon, Douglass Hauer, Catherine DeBono Holmes, Michael Homeier, Mark Katzoff, Charles Kaufman, Mariza McKee, Jay Rosen, Bruce Rosetto, John Tishler and Osvaldo F. Torres.

The EB-5 Securities Roundtable[1], a group of securities law practitioners with extensive experience in EB-5 securities offerings (the "**Roundtable**"), has developed the following checklist ("**Checklist**") of the major categories of policies and procedures that should be included in a regional center's Compliance Policies and Procedures Manual to conform to the requirements of the recently-codified EB-5 Reform and Integrity Act of 2022 (the "**EB-5 Reform Act**"). Each regional center ("**Regional Center**") may have their own policies and procedures for addressing these issues, but each Regional Center should address all of these categories in order to fully comply with the integrity provisions of the EB-5 Reform Act. Some Regional Centers may already have their own written standard operating procedures ("**SOPs**"), which may include some of the policies that would address these issues. In those cases, the Regional Center should review its existing SOPs to determine if all of the issues described in this Checklist are covered, and add in any issues that have not been covered. Alternatively, a Regional Center could adopt a separate Compliance Manual that addresses the additional issues, with the caveat that the SOP and Compliance Manual must be consistent.

The Checklist provided below is based on the Roundtable members' collective review and analysis of the issues that should be included in a comprehensive regional center compliance manual to maximize compliance with the EB-5 Reform Act. As of the date of this article, USCIS has not issued any detailed regulations or other guidance regarding the contents of the written policies and procedures required by the EB-5 Reform Act. It is possible that USCIS may include additional requirements, items that are not included in this Checklist. This Checklist is not intended to serve as legal advice, and is not a substitute for each regional center's review of its own internal policies and procedures with its own legal counsel. However, the Roundtable hopes that this Checklist will provide a helpful start for each Regional Center seeking to comply with the new requirements of the EB-5 Reform Act.

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Checklist of Contents for Regional Center Compliance Policies and Procedures Manual Under the EB-5 Reform & Integrity Act

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I. COMPLIANCE WITH SECURITIES LAWS

A. Securities Act of 1933 – describe policies for confirming exemption from registration of offering of securities of "New Commercial Enterprises" ("NCEs") and compliance with anti-fraud protections.

1. Regulation D

a. "Bad Actor" questionnaires from all executive officers, directors, promoters and control persons of Regional Center, "Job Creating Entity" ("JCE"), and NCE

b. Form D filing with SEC

c. Accredited Investor questionnaires (for SEC Rule 506(b) offerings)

d. Verification of Accredited Investor status (for SEC Rule 506(c) offerings

e. Internal controls to confirm that offerings are made in accordance with the applicable Reg D exemption (e.g. Rule 506(b) versus Rule 506(c)).

2. Regulation S

a. Legend regarding restrictions on resale in US in Private Placement Memorandum ("PPM") and governing document of NCE (Operating Agreement if an LLC, Limited Partnership Agreement if an LP).

b. Internal controls to confirm that offerings are made in accordance with the applicable Reg S exemption.

3. Anti-fraud protections

a. Describe due diligence procedures used by Regional Center to assure that offering documents do not contain material misstatements or omit to state material information, including:

i. Background checks on individuals and entities, including ownership of real property

ii. Site Visit

iii. Interviews with key management of NCE and JCE

iv. Reviews of project budget, project capital structure, development and construction timelines, projections, and any feasibility studies

v. Review of intended use of EB-5 funds

vi. Review of all fees and compensation payable to management and affiliates of NCE and JCE

vii. Review of all material contracts (loan agreements, employment contracts, construction contracts, etc.)

viii. Review of governing documents of all entities in chain of ownership of both JCE and NCE to determine ultimate ownership and control

ix. Verification of participation of legal, accounting, and economic professionals, and if not, why not.

x. Internal controls on disposition of funds, including authorized check signers, escrow agents, etc.

b. Describe certifications required from management of each NCE and JCE confirming accuracy of statements made in PPM and disclosure of all related party compensation, conflicts of interest, and project-specific risk factors.

B. Securities Exchange Act of 1934 – describe procedures to confirm legality of payment of compensation to brokers, agents, and finders.

1. Describe procedures to determine whether all persons to be paid compensation are exempt from registration as a securities broker-dealer.

2. Describe requirement that every NCE has a written agreement with all persons who will be paid compensation for introducing

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investors to NCE that includes necessary representations to establish that such persons are either registered broker-dealers or exempt from registration.

3. Describe requirements for officers, directors, and employees of the NCE or its control persons to be exempt from registration under the "issuer exemption" provided in SEC Rule 3a4-1.

C. Investment Company Act of 1940 – exemption of NCE from registration as investment company.

1. Describe required procedure that determines the NCE is exempt under Section 3(c)(1), 3(c)(5), or 3(c)(7), or per the affiliate financing subsidiary definition.
2. Describe required certification by NCE that it meets a required exemption.

D. Investment Advisers Act of 1940 – exemption from registration of NCE Manager as investment adviser.

1. Describe required confirmation that NCE Manager does not have "assets under management" of more than $100 million under SEC definition.
2. Describe required filing by each NCE manager, if necessary, of Part 1 of Form ADV to claim "exempt reporting adviser" status.
3. Include clear disclosure of conflicts of interest between and among all entities involved in deal.

E. State Securities Laws – exemptions from registration of NCE offering and of NCE manager as investment adviser under applicable state laws.

1. Describe requirement of each NCE to provide evidence of compliance with applicable state securities registration exemption of NCE offering (addressing both, if applicable):
   a. Regulation D notice filings; and
   b. Regulation S compatible exemptions.
2. Describe requirement that each NCE Manager provide documentation of state investment adviser registration exemption of that NCE manager.

II. COMPLIANCE WITH EB-5 PROGRAM REQUIREMENTS

A. Policies and Procedures Manual

1. Address the requirement that Regional Center will maintain and regularly review and update written Compliance Policies and Procedures Manual.
2. Provide for a Chief Compliance Officer (if desired), or else specify who is responsible for preparing, reviewing, approving, and (if appropriate) updating required procedures in Compliance Manual.
3. Describe procedures for detecting and correcting violations of Compliance Manual requirements.

B. Records Retention

1. Describe records maintenance and retention policies for all records required under the EB-5 Reform Act, including but not limited to electronic communications such as WeChat, e-mail, and other media.
2. Retain files holding copies of all marketing and advertising materials, including logs of distribution of PPMs.

C. Annual Reports

1. Describe policy for filing annual reports with USCIS.
2. Describe policies for obtaining annual certifications from each NCE and JCE sponsored by Regional Center.
3. Describe policies for providing annual certifications required to be provided by Regional Center to USCIS.

D. Fund Administration or Annual Audits

1. Describe policies for requiring third party fund administrator or annual audits of JCE or NCE.

E. Notification of Changes in Regional Center

1. Describe policies for notification of USCIS of changes in ownership or management of Regional Center.

F. Integrity Fund

1. Describe how payments will be set up to with the EB-5 integrity fund.

III. COMPLIANCE WITH FEDERAL LABOR LAWS

1. Describe policies and procedures for compliance with federal labor laws.

WR Immigration

ARE YOUR INVESTORS FRUSTRATED WITH USCIS PROCESSING TIMES?

Litigating government delays has become a necessary tool for EB-5 investors to get USCIS to take action in a reasonable amount of time.

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