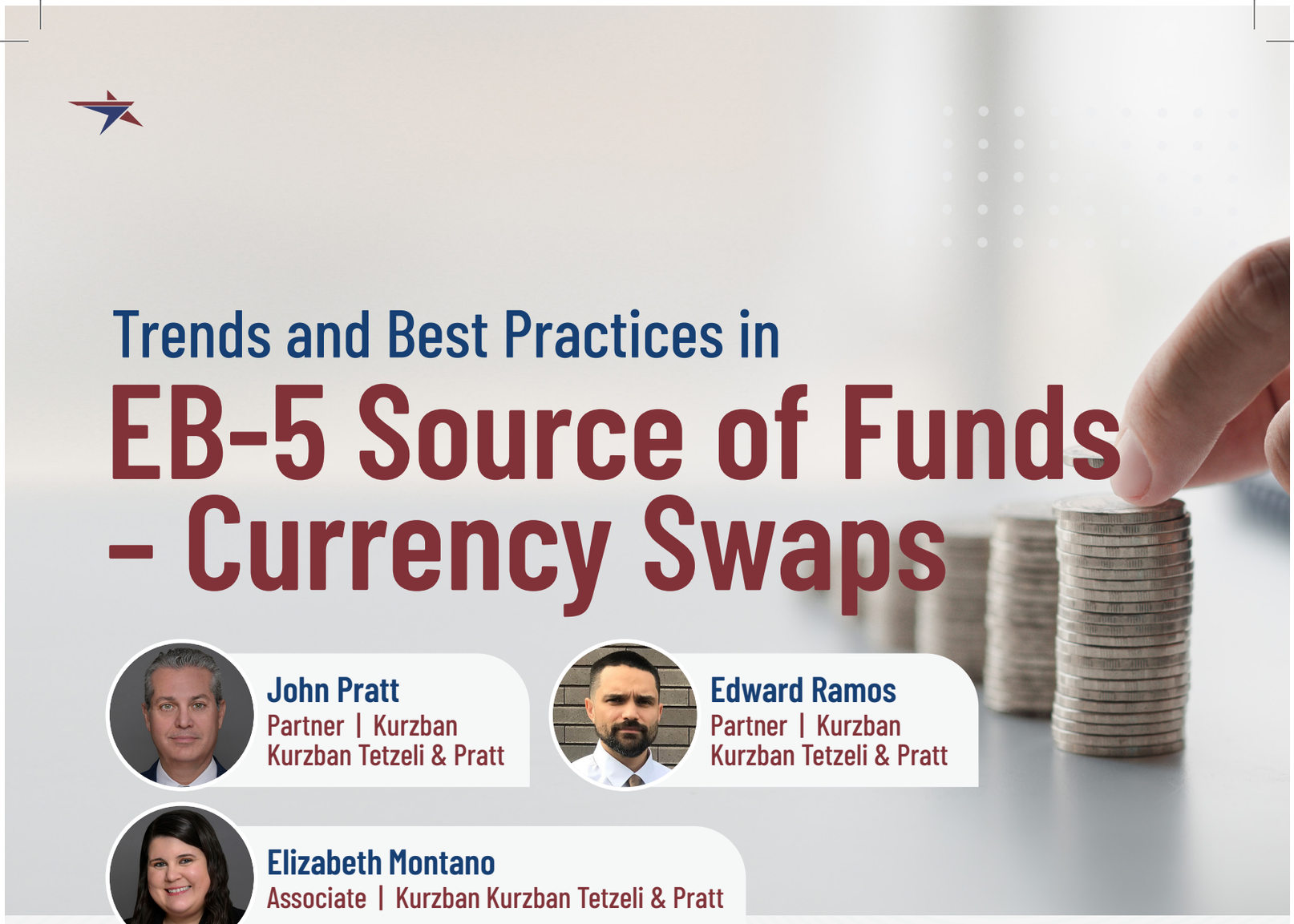
Trends and Best Practices in EB-5 Source of Funds – Currency Swaps



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Once a backwater in EB-5 adjudications, "source of funds" issues have become ever-more common in recent years as U.S. Citizenship & Immigration Services (USCIS) has significantly expanded the scope of its inquiry. From shifts in the way USCIS adjudicates cases on "currency swaps," to USCIS's increasing demands for a near impossible level of evidence, to scrutiny of source of funds issues at the I-829 stage, to USCIS's examination of the source of funds of non-EB-5 investors in projects, the source of funds landscape has become a minefield.

In this article, we focus on the first major trend: the way USCIS adjudicates the lawful source of funds requirement as it relates to cases involving "currency swaps"—a common method for EB-5 investors to exchange and transfer currency. The article describes the areas USCIS focuses on in such cases, outlines the current state of litigation challenging some aspects of these trends, and provides practice pointers for stakeholders to avoid source of funds related denials in cases involving currency swaps.

BACKGROUND ON SOURCE OF FUNDS REQUIREMENT

The requirement that investor funds derive from lawful sources has been a part of the EB-5 Program since the first regulations implementing the program were promulgated in 1991. The requirement is embodied in two regulations: (1) the regulation defining "capital," which says that assets do not qualify as "capital" for EB-5 purposes if they were "acquired, directly or indirectly, by unlawful means (such as criminal activities);[1]" and (2) the regulation explaining the evidence EB-5 investors must present to show that they have "invested, or [are] actively in the process of investing, capital obtained through lawful means."[2]

In 1998, the Immigration and Naturalization Service—USCIS's predecessor agency—published four precedential EB-5 decisions.[3] Three of the four cases applied the source-of-funds requirement to deny the investor petitions. In Matter of Izummi, the agency found that the applicant failed to show the lawful source of his investment funds where the applicant "failed to document the source of the hundreds of thousands of dollars in his bank accounts," what his "level of income" was, or even "where the[] funds originated."[4] Similarly, in Matter of Soffici, the applicant claimed to have acquired money through the sale of a house and business, but provided "[n] o documentation, such as a sales contract or deed establishing [their] ownership and price" of either the house or the business.[5] And in Matter of Ho, the agency held that the investor failed to show a lawful source of funds where the "the wire-transfer receipt" for the EB-5 investment did not show "from what bank account(s) the funds originated,"[5] there was no evidence that the investor or his spouse actually sold any of their assets to make an EB-5 investment, and the investor submitted no evidence to establish that he actually "engaged in [his claimed] occupation" or "his level of income."[6]

Each of these decisions represents a fairly straightforward failure on the part of the investor to document the origins and

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path of their EB-5 investment. For many years, USCIS decisions largely tracked this precedent, denying I-526 petitions only in cases where the investor's failure to document the origins and path of their EB-5 investment was straightforward—i.e., where the record contained significant inconsistencies in the source of an investors' funds or where the record contained major evidentiary gaps like those in the precedent decisions.

But this is no longer the reality. Over the past approximately five years, USCIS has made dramatic, expansive changes to its internal policies and procedures regarding source of funds adjudications in various respects, both at the I-526 and the I-829 stages. One major area where it has done so is in cases involving "currency swaps."

CURRENCY SWAPS AND USCIS'S ADJUDICATORY SHIFT

EB-5 investors from countries with restrictions on currency export, including Vietnam and China, have long relied on "currency swaps" (or "informal value transfers") to move their assets to the United States and make their EB-5 investment. In a currency swap, an investor contracts with a local third party—an individual or a business—that holds assets in U.S. dollars outside the investor's country. The investor provides the third party with local currency in their home country, and the third party then transfers the equivalent amount in U.S. dollars to the investor's account in the United States, or directly to the NCE on the investor's behalf.

For many years, USCIS placed little scrutiny on these types of "currency swaps." But, as others have documented,[7] that changed in early 2017 when USCIS began issuing an avalanche of requests for evidence (RFEs) and notices of intent to deny (NOIDs)—and eventually denials—in such cases. The issues USCIS has since raised take the following form:

Proving the lawful source of the third-party currency exchanger's funds. Prior to 2017, USCIS generally did not ask for evidence about how the third-party currency exchanger in a currency swap acquired its assets. Now, however, USCIS regularly demands that investors prove how currency exchangers acquired the U.S. dollars used to effectuate the currency swap. Most recently, USCIS has required investors to prove not only that the third-party had enough funds from lawful sources to effectuate the currency swap, but where the specific U.S. dollars used as part of the swap came from.

Proving that the currency swap itself is lawful. USCIS now also regularly asks for evidence that the currency swap was lawful as a matter of local law. USCIS therefore routinely asks for evidence that the currency exchanger had a money-exchange license, or if not, evidence that the currency swap was legal under the law of the local jurisdiction where it occurred.

Proving the "path of funds" within the internal accounts of the currency exchanger. Riffing on the "path of funds" requirement USCIS imposes on investors to trace their funds back to a lawful source, USCIS now also demands evidence to show the path the funds took through the currency exchanger's accounts. That is, investors are asked to prove each step in the currency-transfer process within the internal accounts of the currency exchanger.

LITIGATION CHALLENGING CURRENCY SWAP POLICIES

Facing denials involving currency swaps, some investors have taken their cases to federal court. While there are several cases awaiting decisions, at least one case involving currency swaps has been decided. In that case[8], an investor used a "currency swap" to exchange and transfer money to the United States, and USCIS denied the petition based on the investor's failure to show that the third-party currency exchanger's funds were lawfully sourced.

To challenge this decision, the investor raised a host of arguments—all of which were rejected by the court.

First, the court rejected the investor's argument that the EB-5 statute[9] does not mention a lawful source-of-funds requirement and, as a result, USCIS exceeds its statutory authority in imposing one; instead, the court held that USCIS's imposition of such a requirement is consistent with the statute and a reasonable interpretation of it.

Second, the court rejected the investor's argument that requiring investors to prove a third-party's lawful source of funds was a substantive rule that required USCIS to go through "notice and comment" procedures, which it had not done; instead, the court held that the requirement is simply an interpretation of existing precedent.

Third, the court rejected the investor's argument that USCIS's policy was impermissibly retroactive, in part because the investor's I-526 petition was filed in 2018—after the shift in USCIS's policy on currency-swap cases.

Finally, the court rejected the investor's argument that USCIS's policy on currency-swap cases was arbitrary and capricious when compared to its much more liberal policy regarding the alternative "friends and family" method (sometimes called the "ten friends" method)[10], because, according to the court, no evidence was presented that USCIS actually treats the two methods differently.

Ultimately, after holding that USCIS was permitted to inquire into third-party currency exchanges, the court found the evidence insufficient to establish that those funds were lawfully sourced, and so affirmed the I-526 denial.

Despite this setback, hope for progress through litigation is not yet lost. For one thing, Nguyen is not binding precedent and has been appealed to the Ninth Circuit. For another, several other cases challenging currency-swap denials are pending in other circuits[11], and Nguyen itself did not address many of the arguments raised in those other cases. Moreover, Nguyen itself preserves a possible retroactivity argument for cases filed before 2017. Finally, IIUSA has pending litigation under the Freedom of Information Act to uncover more details about USCIS's policy shift[12]—evidence which may help uncover more details about USCIS's policy shift and support lawsuits in federal court. One thing is clear: Nguyen is not the federal courts' last word on this important area of litigation.

BEST PRACTICES

Given that federal courts have yet to overturn USCIS's currency-swap policies, what can EB-5 stakeholders do to prevent

[1] 8 C.F.R. § 204.6(e)
[2] 8 C.F.R. § 204.6(j)(3)
[3] Matter of Izummi, 22 I. & N. Dec. 169 (Assoc. Comm'r 1998); Matter of Soffici, 22 I. & N. Dec. 158 (Assoc. Comm'r 1998); Matter of Ho, 22 I. & N. Dec. 206 (Assoc. Comm'r 1998); Matter of Hsiung, 22 I. & N. Dec. 201 (Assoc. Comm'r 1998).
[4] Matter of Izummi, 22 I. & N. Dec. at 195.
[5] Matter of Soffici, 22 I. & N. Dec. at 164–65.
[6] Matter of Ho, 22 I. & N. Dec. at 211.
[7] See, e.g., Kelly Goldthorpe & Matthew T. Galati, Moving the Goalposts Yet Again: USCIS Issuing RFEs on Currency Swap Cases, Departing from Years of Accepted Practice, EB-5 Marketplace (Apr. 15, 2017), https://perma.cc/VZ25-BQF7; Ye Xu, EB-5 RFEs and NOIDs Trend: Third-Party Currency Exchangers, 7 Att'y L. Mag. Minn., no. 8, 2018, at 20 (2018), https://perma.cc/JP8K-TWC3.
[8] Nguyen v. USCIS, No. 2:21-cv-01893-FLA-PLAX, 2022 WL 16895487 (C.D. Cal. Oct. 27, 2022).
[9] Notably, this case applied the pre-RIA version of the EB-5 statute as that was the statute in effect at the time the investor filed the I-526 petition.
[10] In that alternative method, an investor uses friends and/or family to move money out of the country.
[11] See, e.g., Truong v. USCIS, No. 1:21-cv-00316-RC (D.D.C. filed Feb. 4, 2021); Le v. USCIS, No. 1:21-cv-00501-KBJ (D.D.C. filed Feb. 25, 2021).
[12] Immigrant Invs. Ass'n, Inc. v. USCIS, No. 1:22-cv-02687-RBW (D.D.C. filed Sept. 7, 2022).

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RFEs, NOIDs, or denials? Here are some tips to consider:

- **Proper Vetting of Third-Party Currency Exchangers**. Because USCIS requires proving sources of funds for third-party currency exchangers, stakeholders must be prepared to prove that the U.S. dollars used at the end of the currency exchange were derived by the third-party from lawful sources. This, in turn, requires an investor to conduct substantial vetting of the third party. Investors and their counsel should consider retaining professionals in the investor's home country to conduct this vetting and request all documentation (bank account records, tax returns, etc.) before USCIS asks for it.

- **Ensure that the third party is licensed to exchange currency, or if not, that currency swaps are nonetheless lawful**. It is not enough for USCIS that the third-party's currency be sourced lawfully; investors must also prove that the exchange was lawful. If the third-party is licensed locally as a currency exchanger, the license itself should generally be sufficient. Otherwise, it would be advisable to secure an expert opinion letter from an attorney in the investor's country of origin to explain that the proposed method of swapping the currency (including specific details about the manner of the proposed swap) complies with local law.

- **Consider a formal contract to document the currency swap**. To prove the investor's path of funds, a contract documenting the currency swap is essential. Absent a formal agreement, USCIS may question whether the money invested in the NCE is really the investor's money (as opposed to that of the third-party currency exchanger). A formal contract also allows the investor to formally secure a promise of cooperation from the third-party to provide documentation and financial information that the third-party may not be accustomed to providing but is essential to secure an approval.

- **Don't use cash. In many countries, cash transactions are the norm.** But using cash to transfer currency to the third-party breaks the "path of funds" in a way that is virtually impossible to document to USCIS's satisfaction. All transfers should be made using banks or their equivalent.

USCIS's scrutiny on currency swaps is likely to intensify unless federal courts push back on its overreach. In the meantime, EB-5 stakeholders can proactively plan with currency exchange companies in advance to avoid I-526 denials.