IIUSA
Regional Center BUSINESS JOURNAL

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13TH ANNUAL IIUSA EB-5 INDUSTRY FORUM

SAN DIEGO, CA | MAY 21-23 | 2023

Conference Edition

IN THIS ISSUE:

Navigating EB-5 Visa Interviews: Documents to Bring as "Backpocket" Evidence

The Litigation and Settlement that Revitalized the EB-5 Program

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

Understanding EB-5 Visa Wasting and Its Impact on Chinese Investors - A Call for Justice

I-829X – A Proposal for Project Approvals for Job Creation Compliance

Carrasquillo Law Group PC

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CLG advises international and domestic clients with their business and legal needs in the United States, as well as worldwide clients with their international business and legal needs.

Our EB-5 Practice Group regularly assists Developers, Investors and Regional Centers on all aspects of the EB-5 Program.

- CORPORATE AND SECURITIES
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- REAL ESTATE AND FINANCE
- INTERNATIONAL TAX
- LITIGATION
- COMPLIANCE SERVICES

We bring our clients international perspective with a local understanding

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Table of **CONTENTS**

04 WELCOME

Letter from the Editor
IIUSA Editorial Committee

05 EVENT HANDBOOK

05 Thank You 2023 Sponsors
06 Meet Our 2023 Sponsors
12 Hotel Map
14 Schedule of Events
19 Panels & Speakers

22 Navigating EB-5 Visa Interviews: Documents to Bring as "Backpocket" Evidence

25 The Litigation and Settlement that Revitalized the EB-5 Program

31 USCIS Regional Center Site Visits

34 EB-5 Origins: Meet Roberto Contreras IV

36 The "Teeth" Behind the EB-5 Reform and Integrity Act: An Overview of Penalties for Non-Compliance

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

43 Understanding EB-5 Visa Wasting and Its Impact on Chinese Investors - A Call for Justice

46 How Regional Centers Can Demonstrate Compliance with Securities Broker-Dealer Laws

50 Regional Center Oversight Obligations and the RC Affiliation Agreement: Key Provisions

57 No Stone Unturned - Strategic Approach for Securities Law Compliance Certification Under the RIA of 2022

60 I-829X – A Proposal for Project Approvals for Job Creation Compliance

64 EB-5 Funding 3.0: Considerations; Issues for Creating U.S. Based Lending Solutions to EB-5 Investors

IIUSA
INVEST IN THE USA

Letter from the Editor

Dear Readers,

Welcome to the latest edition of IIUSA's *Regional Center Business Journal*. As we move forward in 2023, we find ourselves reflecting on the EB-5 industry's dynamic landscape and its search for sure footing even now that we are one year into the implementation of the EB-5 Reform & Integrity Act of 2022. This edition aims to provide you with insightful content and resources to help you navigate the ongoing changes, challenges, and new opportunities in the world of EB-5.

This edition will be distributed in print at the 13th Annual IIUSA EB-5 Industry Forum which promises to be an invaluable platform for stakeholders to share ideas, discuss challenges, and explore innovative solutions. We have dedicated a special section in this edition to preview the key topics and speakers that will be featured at the event. We hope that the articles published here will not only help you make the most of the forum but also provide insights and takeaways that will inform your strategies and decision-making in the EB-5 space.

As the EB-5 industry continues to evolve, the *Regional Center Business Journal* remains committed to bringing you the latest news, trends, and analyses to help you stay ahead of the curve. We appreciate your support and look forward to serving the community in the years to come.

Sincerely,

Osvaldo (Ozzie) Torres
Editorial Committee Chair
IIUSA *Regional Center Business Journal*

IIUSA Editorial Committee

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SILVER

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HOUSTON EB5

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THANK YOU TO OUR 2023 EB-5 INDUSTRY FORUM SPONSORS

BREVET

The predecessor to Brevet Capital Management, LLC ("BCM") was founded in 1998, and BCM was founded in 2006. Co-founders Douglas Monticciolo and Mark Callahan are CEO/CIO and President of BCM, respectively. BCM was founded to replicate the investment strategies they had successfully developed at Goldman Sachs, Lehman Brothers, and Deutsche Bank. The firm expanded into investment management and began raising capital to invest in the loans it structured.

BCM's senior management team, led by Messrs. Monticciolo and Callahan, collectively averages over 25 years of industry experience developed at leading global financial institutions such as Goldman Sachs, Deutsche Bank, Lehman Brothers, Chase Manhattan Bank, PricewaterhouseCoopers, and Morgan Stanley.

Since 1998, Messrs. Monticciolo and Callahan and their team have structured, executed, or advised on more than $20 billion in client transactions.

Carrasquillo Law Group PC

Carrasquillo Law Group (CLG)is a boutique law firm consisting of a multi-disciplinary group of attorneys from various practice areas, offering our clients – both domestic and international – a deep level of advisory experience regarding both their business and legal needs.

Our attorneys come from large law firms and international practices and understand the needs of our entrepreneurial-minded clients.

CLG's practice areas include Corporate & Securities, Immigration, Real Estate & Finance, International Tax, Litigation and Compliance Services. The EB-5 practice group focuses on all aspects of the EB-5 program. We bring an international perspective with a local understanding to our clients.

CanAm Enterprises

With 35 years of experience promoting immigration-linked investments in the United States and Canada, CanAm has a long and established track record. Basing its business on a reputation of credibility and trust, CanAm has financed more than 60 project loans and raised $3 billion USD in EB-5 investments. To date, CanAm has repaid more than $2 billion investment capital, representing over 4,000 investor-families. CanAm exclusively operates seven USCIS-designated regional centers that are in the city of Philadelphia, the Commonwealth of Pennsylvania, the states of California, Hawaii, Florida, Texas, and the Metropolitan Region of New York. For more information, please visit canamenterprises.com

JTC

JTC Americas is the US division of JTC Group, a publicly listed, global professional services business with deep expertise in fund, corporate and private client services. JTC Americas is the industry leader in Specialty Financial Administration, providing purpose-built solutions for markets characterized by high administrative and regulatory complexity, elevated transaction security needs, and challenging compliance requirements. This includes tax-advantaged investments (1031 Exchange, Delaware Statutory Trust), Impact & ESG (EB-5, Opportunity Zones) and alternative investments in the US and abroad (AIFM, ManCo, Fund of Funds).

To learn more, visit jtcamericas.com.

LAW OFFICES OF ROBERT V. CORNISH, JR., P.C.

The Law Offices of Robert V. Cornish, Jr. PC were formed in January 2021 to service innovators in the global financial markets and those who invest in them. With offices in New York, Washington, Miami and Jackson Hole, the Firm handles EB-5 securities litigation matters in state courts, federal courts and arbitration tribunals in the USA and abroad.

CMB REGIONAL CENTERS

CMB Regional Centers, a leader in the EB-5 industry, is one of the oldest active regional center operators with 25 years of experience. More than 6,000 families from 103 countries have chosen to invest in one of CMB's 82 EB-5 investment opportunities. As of today, CMB has helped more than 5,100 investors receive I-526 approval, over 2,000 investors achieve I-829 approval to live and work permanently in the United States, and have returned capital to over 2,500 investors. There are very few regional centers that can come close to this level of success for their EB-5 investors and families.

blue road

ALBA Palm Beach is an EB-5 project being co-developed by BGI Companies and Blue Road. The project consists of the development of a 21-story, 55-unit luxury residential condominium located in West Palm Beach, on the intercoastal waterway. The project intends to raise $32,000,000 from up to 40 EB-5 investors.

FRAGOMEN
Private Client Practice

Fragomen is recognized as the world's leading corporate immigration services provider and adviser. The firm employs more than 6,000 immigration professionals and support staff located in 61 offices in 33 countries. Fragomen is structured to support all aspects of global immigration, including planning, efficiency, quality management, compliance, government relations, reporting, and case management and processing. These capabilities allow Fragomen to represent a broad range of clients, working together to facilitate the transfer of employees worldwide.

EB5 CAPITAL

EB5 Capital provides qualified foreign investors with opportunities to invest in job-creating commercial real estate projects under the United States Immigrant Investor Program (EB-5 Visa Program). As one of the oldest and most active Regional Center operators in the country, the firm has raised nearly a billion dollars of foreign capital across more than 30 EB-5 projects. Headquartered in Washington, DC, EB5 Capital's distinguished track record and leadership in the industry has attracted investors from over 70 countries. In addition to U.S. permanent residency, EB5 Capital offers real estate private equity investments and non-U.S. Citizenship by Investment Programs. Please visit www.eb5capital.com for more information.

golden gate global

Golden Gate Global is a leading EB-5 Regional Center in the United States with over 1,300 EB-5 investor families and over $650 million of capital invested in real estate projects with partners such as Lennar Corporation, JMA Ventures, Sacramento Kings, and Signature Development Group. GGG's EB-5 funds have created over 20,000 jobs. Across our affiliated companies, GGG manages over $1B in our investment platform, and service investors over 30 countries through rigorous project selection criteria and exceptional professionalism in our service delivery.

ManhattanRegional CENTER

Since January 2011, Manhattan Regional Center (MRC) has successfully helped hundreds of EB-5 investors by providing attractive projects in New York City. Under the leadership of its managing member, a prolific real estate developer, attorney, and financier with over 30 years of experience, MRC has a world-class team of seasoned professionals from the immigration law, banking, accounting, financing, construction development and management sectors, working together to achieve immigration and investment success for its investors.

AMERICAN LIFE INCORPORATED

Founded in 1996, American Life, Inc. operates the country's longest-established EB-5 Regional Center program, having helped over 3,000 investors and their families immigrate to the United States through its equity-based investment projects. American Life has completed more than 45 projects, and developed an EB-5 investor-owned portfolio of hotels, office, and industrial and commercial real estate worth over $1.5 billion.

NYSA EB-5

Nysa EB-5 specializes in EB-5-structured project financing, operating with an investor-centric, compliance-oriented service delivery model. Since 2014, we have been a recognized leader in the immigrant investor space, providing thought leadership to streamline processes and establishing standards that are now being adopted throughout the industry as best practices.

Whyte & Co.
Securities compliance

Surprised to learn that Whyte & Co. have been in the investment banking sector for over twenty-five years and the scope of our business? That is most likely because we like being small and independent. The firm has made the conscious decision to focus our efforts on gathering top talent, with the expertise to lead in every sector to best serve our clients. We let our performance speak for itself. With years of Securities Compliance experience and contacts around the globe, we base our success on results.

customers bank

Customers Bank, a wholly owned subsidiary of Customers Bancorp Inc. (NYSE: CUBI), is a digital-forward bank ranked by Forbes 2022 America's Best Banks. Its dedicated EB-5 banking group offers customized escrow agreements, accounts, and services to numerous EB-5 projects, and access to a comprehensive network of stakeholders, mitigating investor risks.

HOUSTON EB5

Certified by United States Citizenship and Immigration Services (USCIS) as an EB-5 Regional Center since 2011, Houston EB5 holds over a decade of experience and is one of the few regional centers to successfully assist clients from obtaining conditional residency to the repayment of investment with profits.

SAUL EWING LLP

Saul Ewing's EB-5 team represents a large number of regional centers, fund managers, banks, real estate developers and EB-5 foreign investors. The Firm handles corporate securities, tax related documentation, conduct project immigration and EB-5 compliance reviews, as well as file a large number of regional center and foreign investor petitions.

American Dream Fund (ADF) was founded in 2008. With a track record of success around the world, we are one of the most respected and experienced EB-5 Regional Center operators. ADF consists of reputable and experienced professionals with decades of experience in real estate investment and finance. We are proud to have been a part of the Association to Invest in USA ("IIUSA") leadership for nearly 15 years now.

Baker Tilly provides EB-5 consulting services that specialize in economic studies, business plans, regional center operational plans, and TEA analysis. Baker Tilly has successfully prepared over 1,200 economic studies and over 1,500 business plans that have resulted in over $1 Billion in EB-5 capital.

Successfully managing EB-5 projects requires a unique blend of legal, business, and political acumen. No other firm is as well situated to manage this process than Brownstein. Our team is on the front lines of policy and has specific experience overseeing some of the most significant EB-5 projects in the country, from energy infrastructure to hotels, to housing.

Since 2008, FirstPathway Partners has assisted hundreds of immigrant investors obtain U.S. residency through the EB-5 program. As one of few regional centers to have acquired I-829 approvals and redeemed full investor capital contributions, FPP ranks highest among the category of EB-5 industry achievement.

Fox Rothschild is a national law firm that delivers strategic and practical solutions for clients. Home to 1,000 attorneys and with more than 70 practice areas, Fox provides a broad range of legal services to meet our clients' needs. We understand today's competitive business environment and take a value-driven, business-minded approach to the law.

Green Card Fund is a USCIS approved Regional Center founded in 2009. GCF is a proven Regional Center with over $425M of EB-5 project development experience and 100% USCIS approval rate. With offices throughout the US and the world, our experienced team is eager to support our investors and partners

Since 2014, Green Truck has invested over $100 million to deploy environmentally compliant job-creating trucks. Through our Rural Green Truck project, immigrant investors have priority processing and can make secure and profitable investments in America's trucking industry. Our E2 visa program allows investors to direct and develop their own Green Truck franchise. At Green Truck Financial, our team of investment professionals is ready to help you and your family move quickly and securely to the U.S.

Klasko Immigration Law Partners' accomplished EB-5 team is led by Ronald Klasko, Daniel Lundy, and Anu Nair. Ron and Dan co-counseled the successful litigation that resurrected the regional center program. The firm files hundreds of I-526 petitions a year, structures hundreds of compliant projects, and is a leader in representing regional centers and investors with problematic EB-5 projects.

Kurzban Kurzban Tetzeli and Pratt P.A. ("KKTP") is a leading law firm in complex immigration litigation in the United States, including specializing in EB-5 litigation. KKTP has litigated over 50 federal immigration cases, argued in the Supreme Court and the lower federal courts, & obtained the only EB-5 circuit court precedent decision in Chang v. U.S., 327 F.3d 911 (9th Cir. 2003). KKTP successfully represents regional centers, developers, and investors in federal courts to review denials of I-526 and/or I-829 petitions, mandamus actions to obtain decisions in delayed cases, and represents individual investors who seek review of denied 1-829 petitions in removal proceedings before the immigration court.

Klingner Jazayerli LLP attorneys collectively have more than 25 years' experience representing individuals seeking U.S. permanent residency through EB-5 investment, as well as U.S. companies seeking EB-5 Regional Center designation to allow them to finance job creating projects. Rana Jazayerli, a founding partner of the firm, is a member of the IIUSA Best Practices Committee, and has participated in and moderated many EB-5 panels.

Makaan Regional Center is a leading USCIS-Authorized Regional Center based in Texas, dedicated to helping international investors successfully invest and immigrate to the United States through the EB-5 program. We have a proven track record of exceeding $350 million in multi-unit assets in Texas and are committed to expanding our reach nationwide.

PINE STATE® REGIONAL CENTER
A SUBSIDIARY OF ARKANSAS CAPITAL CORPORATION

Pine State Regional Center is a division of Arkansas Capital Corporation, an economic development corporation formed by Winthrop Rockefeller in 1957. Pine State is a well-known non-profit organization with a long track record of creating jobs and working closely with state and federal government agencies. The organization has an emphasis on manufacturing and infrastructure projects in rural areas, offering our investors prioritized USCIS processing.

TRISTANI LAW

Dennis Tristani is the Managing Attorney of Tristani Law, LLC. Mr. Tristani has counseled thousands of EB-5 clients on company organization and strategy, business plan preparation, complex source of funds issues, and redeployment and at-risk rules. He was selected as a "Top 5 Rising Star" by EB-5 Investors Magazine in 2020 and in 2022.

TORRES LAW
EB-5, Corporate, Securities & Media
www.torreslaw.net

Torres Law, P.A., is nationally recognized as a leading EB-5 corporate and securities law firm. Our core mission is to provide incisive no-nonsense advice, unparalleled service, and top tier work product. Since 2010 we have successfully counseled and guided numerous regional centers, developers and issuers through the ever-changing EB-5 landscape, including EB-5 sponsors engaged in hotel development, multi-family, senior living, mining, healthcare and franchise projects.

WA LAW GROUP, LLC
IMMIGRATION LAW FIRM

WA Law Group, LLC is a boutique immigration law firm located in Rockville, Maryland, focusing on investment and employment immigration with 100% Approval track record of I-526 and I-829 and only 4 RFE on Source of Funds (SOF) since 2007. The professionals at WA Law Group are trusted advisors for their clients: "we don't count billable hours for every email or phone calls with our clients so that we could take time to explain and assure them of their case progress." Immigration clients receive VIP treatment from our law firm.

WR Immigration

WR Immigration is a top-rated immigration law firm that provides strategic, client-centered services. Our high-touch approach and innovative technology create ongoing value for our clients. Our firm is one of the fastest growing immigration service providers worldwide, with more than 40 attorneys and 150 immigration professionals working out of 9 offices worldwide. We have filed over 4,000 petitions on behalf of EB-5 investors and are led by Bernard Wolfsdorf, a former President of the American Immigration Lawyers Association.

CA

CanAm Enterprises

EB-5 U.S. Immigration

CanAm Enterprises, with over three decades of experience promoting immigration-linked investments in the US and Canada, has a proven track record of success. CanAm has earned a reputation for credibility and trust from more than 6,000 qualifying investors around the world that collectively invested over $3 billion in 60+ EB-5 projects. To date, CanAm has repaid more than $2.19 billion in EB-5 capital to over 4,400 investor-families. CanAm operates eight USCIS-designated regional centers in Philadelphia, Pennsylvania, New York & New Jersey, California, Hawaii, Florida, Texas, Maryland, D.C., and Virginia.

For further information, please visit www.canamenterprises.com.

Why Choose CanAm

- 35-year track record of success for more than 6,000 investor families
- One of the top companies in green card approvals
- One of the top companies in capital repaid to immigrant investors
- EB-5 track record audited by a third party
- Operates an affiliate Broker-Dealer that complies with U.S. securities laws

*Included data audited by PKF as of December 31, 2022.

MEYER LAW GROUP
YOUR DREAMS.OUR EXPERTISE.TOGETHER

Meyer Law Group provides immigration legal services to corporations, small businesses, and start-ups. We guarantee unparalleled knowledge, unflagging quality, and long-term value to our clients. At MLG, we offer both immigrant and non-immigrant visa services, including the EB-5 Investor Visa. Visit our website, www.meyerlawgroup.us, to start your immigration process today.

OSP
O'BRIEN-STALEY PARTNERS

"O'Brien-Staley Partners (OSP) is a Minnesota-based investment manager focused on credit intensive assets. Since 2010 OSP has recapitalized loans with private sector capital across all asset classes including hospitality. In the process, OSP gained an understanding of the nuances of various federal programs including EB-5, NMTC, SBA 504, USDA, etc."

Metropolitan Commercial Bank.
The Entrepreneurial Bank Since 1999

Metropolitan Commercial Bank (parent company NYSE: MCB) provides a broad range of banking products and services to commercial enterprises, municipalities, and affluent individuals. Our EB-5/E-2 International Group serves EB-5 investors, developers, Regional Centers, government agencies, and the legal and consulting firms specializing in EB-5 and E-2. Metropolitan Commercial Bank is a New York State chartered commercial bank, a member of the Federal Reserve System and the Federal Deposit Insurance Corporation, and an equal housing lender.

ALC American Lending Center

American Lending Center (ALC) is a private non-bank lending institution and nationally recognized leader in small business lending. Headquartered in Irvine, California. ALC provides commercial loans to eligible small businesses nationwide primarily through Small Business Administration (SBA) programs. We have great passion for small businesses and believe that the success of the small business community is built on direct access to fast and flexible credit.

PENG & WEBER
U.S. Immigration Lawyers

Peng & Weber handles all aspects of EB-5 from setting up regional centers and projects to filing high volumes of investor petitions. Firm leaders, Elizabeth Peng and Cletus M. Weber, have both served on AILA's national EB-5 Committee, and Mr. Weber currently serves on the Board of Directors of IIUSA.

FRR IMMIGRATION

FRR is a Financial Services Corporate headquartered in Mumbai, India. It is primarily engaged in equities and foreign exchange broking; catering to both, retail and institutional investors.

Assisted by 70 highly qualified professionals, FRR operates under the regulations of the Reserve Bank of India (RBI) and the Securities Exchange Board of India (SEBI).

civitas

Civitas Capital Group is an alternative investment manager offering compelling, niche opportunities in U.S. real estate. Driven by relentless creativity, Civitas digs deeper to uncover opportunities that others miss.

GLOBAL NETWORKING & BUSINESS DEVELOPMENT

The **IIUSA EB-5 Event Passport Series** was developed to focus on key investor regions around the globe with a simple goal. Connect members with investors and service providers around the world while packaging the trips together to cut down on expenses and travel time. To date the series has provided business development platforms for our members throughout Latin America, India, the Middle East and Africa with new trips just on the horizon.

We invite you to learn more about our planned 2023 stops and sponsorship opportunities below. To discuss in further detail please email **info@iiusa.org** or call **(202) 795-9667**.

2023 REGIONAL SERIES

INCLUDE

Q1 | LATIN AMERICA
Bogota | Medellin | Buenos Aires | São Paulo

Q2 | SOUTH/EAST ASIA
HCMC | Seoul | Tapei | Hong Kong

Q3 | CHINA
Shenzhen

Q3 | INDIA
Chennai | Hyderabad | Bangalore | Surat

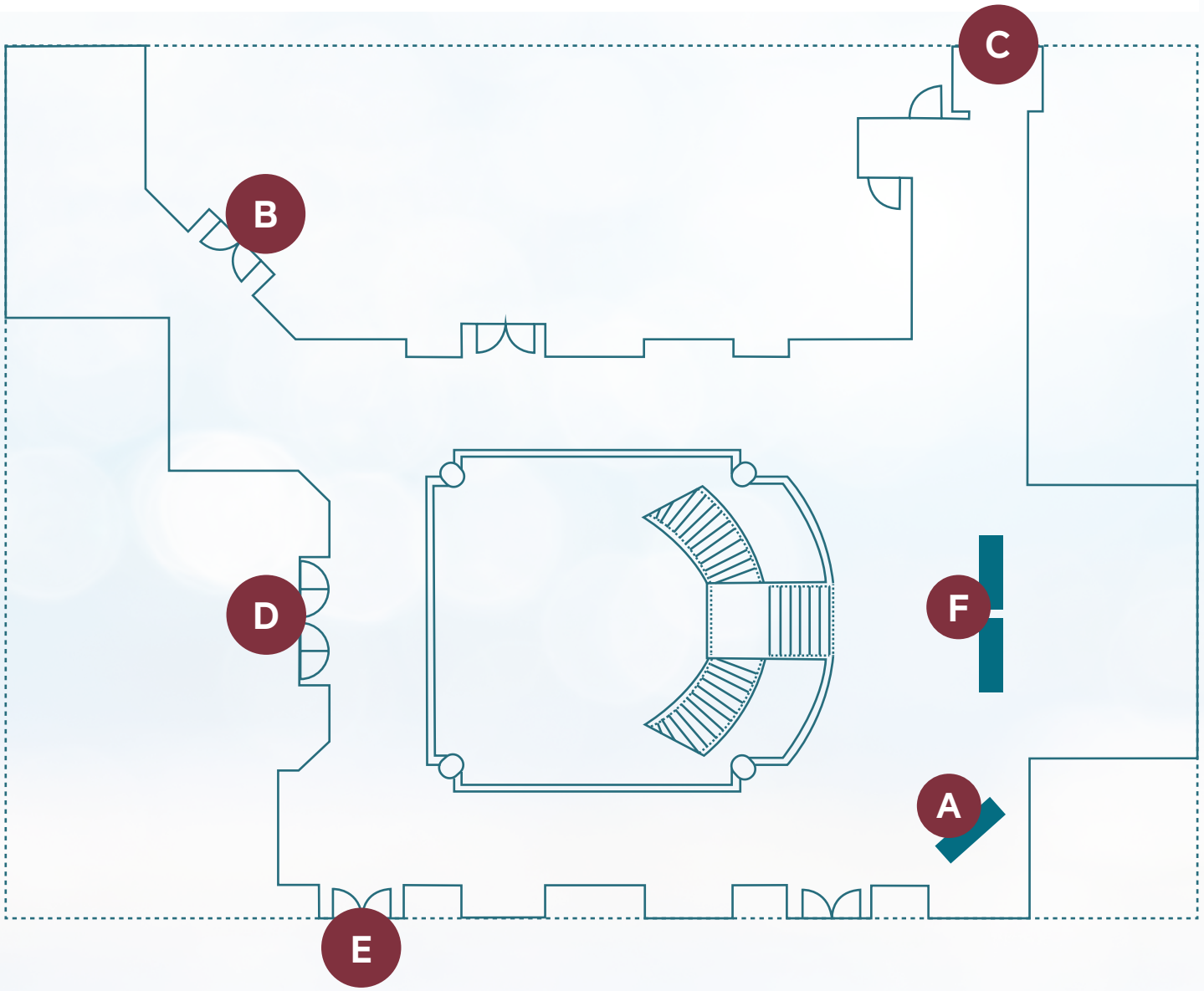
Q4 | NIGERIA
Abuja and Lagos

Available Sponsorships	Panel Role	Pre-Event Digital Distribution of Marketing Materials	Digital & Onsite Marketing	Access to Attendeee List	Tickets
10 Total Sponsorships Slots Available Per Event					
Gold	✓	✓	✓	✓	5
Silver			✓	✓	3

Pricing	Single City Event	Regional Series
Gold	$5,000	$17,500
Silver	$2,500	$7,500

EB-5 INDUSTRY FORUM
HOTEL MAP

IIUSA Constellation Exhibits



A. Registration

B. Reliance | Committee Meetings

C. Avalon | Breakout B

D. Sovereign | Committee Meetings

E. Constellation | General Session & Breakout A

F. Coffee Break

LOEWS

HOTELS

1. Resort Entrance Valet Parking
2. Concierge & Front Desk
3. Lobby & Retail Shops
4. Business Center
5. Commodore Ballroom
6. Constellation Ballroom
7. Avalon
8. Sunset Terrace
9. Bay Terrace
10. Pool Concierge
11. Grow Garden
12. Marina Terrace
13. Action Sports Rentals
    The Gondola Company
14. Citrus Garden
15. The Pointe
16. Bayside Suites

13TH ANNUAL IIUSA EB•5 INDUSTRY FORUM
SAN DIEGO, CA | MAY 21-23 | 2023

AGENDA

SUNDAY MAY 21

2:00 - 5:00pm	**REGISTRATION** Sponsored by **Civitas Capital**	
	IIUSA COMMITTEE MEETINGS (Committee meetings are for IIUSA members only)	
2:00 - 3:00pm	Public Policy Committe Reliance Room	Editorial Committe Sovereign Room
3:00 - 4:00pm	Membership & Investor Markets Committee Reliance Room	Best Practices Committee Sovereign Room
4:00 - 5:00pm	**LEADERSHIP RECEPTION** Invitation for Leadership Circle Members Only **Aurora Room**	
5:00 - 6:30pm	**WELCOME RECEPTION** Sponsored by **Carrasquillo Law** Marine Terrace	

MONDAY MAY 22

7:00am - 3:00pm	**REGISTRATION** Sponsored by **Civitas Capital**
7:00 - 8:00am	**NETWORKING BREAKFAST** Sponsored by **Klingner Jazayerli** **Constellation Foyer**
8:00 - 9:10am	**IIUSA Annual Membership Meeting** (IIUSA Members Only) IIUSA Officers and Board of Directors Elections Constellation Ballroom

MONDAY MAY 22

9:10 - 9:20am	**NETWORKING BREAK** Sponsored by **EB5 Capital** Constellation Foyer	
	CONSTELLATION BALLROOM	
9:20 - 9:25am	**Welcome Address**	Aaron Grau, IIUSA Executive Director
9:25 - 10:15am	**SESSION 1: KEYNOTE ADDRESS** Adam Mendler | *Entrepreneur, Leadership Expert, and Podcast Host*	
10:15 - 11:15am	**SESSION 2** IIUSA Advocacy Update: Continued Work on the Hill and Beyond	
11:15am - 12:15pm	**SESSION 3** EB-5 Policy: RIA 1 Year In	
12:15 - 1:00pm	**LUNCH** Sponsored by **Baker Tilly** Marine Terrace	
	CONSTELLATION BALLROOM	**AVALON ROOM**
1:00 - 2:00pm	**SESSION 4A** Onboarding New Investors in the New Era of EB-5	**SESSION 4B** Project Pipeline and the Current Economy
2:00 - 3:00pm	**SESSION 5A** RIA Securities Compliance	**SESSION 5B** Investor Markets and Project Marketing
3:00 - 3:15pm	**NETWORKING BREAK** Sponsored by **EB5 Capital** Constellation Foyer	
	CONSTELLATION BALLROOM	
3:15 - 4:15pm	**SESSION 6** RIA Compliance Policies and Procedures for Regional Center Operations	
4:15 - 5:15pm	**SESSION 7** Forms Forum: Practical Guidance for New EB-5 Forms	
5:15 - 5:30pm	**MEMBER RECOGNITION CEREMONY**	
6:00 - 10:00pm	**OFF-SITE RECEPTION** Hosted by **Brevet Capital and JTC Americas | The rooftop at Seneca Trattoria** *Transportation will be provided to/from the venue*	

AGENDA

TUESDAY MAY 23

8:00 - 11:00am	**REGISTRATION** Sponsored by **Civitas Capital**
8:00 - 9:00am	**IIUSA PAC BREAKFAST** Invitation Only **Reliance Room**
8:00 - 9:00am	**NETWORKING BREAKFAST** Sponsored by **Klingner Jazayerli** **Constellation Foyer**
	CONSTELLATION BALLROOM
9:00 - 10:00am	**SESSION 8** The Waiting Game: Processing Times, Visa Availability, and Set Asides
10:00 - 11:00am	**SESSION 9** EB-5 in the Courts: A Look at Current & Recent Litigation
11:00am - 12:00pm	**SESSION 10** Sustainment Period and Redeployment
12:30 - 2:00pm	**IIUSA BOARD OF DIRECTORS MEETING** Invitation Only **Reliance Room**

MEET THE SPEAKERS


K. David Andersson
Green Truck Financial


Rogelio Carrasquillo
Carrasquillo Law Group


Robert Cornish
Law Offices of
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Jay Mehta
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James Sozomenou
Metropolitan
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Abteen Vaziri
Brevet Capital


Robert Whyte
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Atlantic American
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American Life

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Tristani Law

Mitch Wexler
Fragomen

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KEYNOTE SPEAKER
ADAM MENDLER

Adam Mendler is an entrepreneur, writer, speaker, educator, and nationally-recognized authority on leadership.

Adam is the creator and host of the business and leadership podcast Thirty Minute Mentors, where he regularly elicits insights from America's top CEOs, founders, athletes, celebrities, and political and military leaders. He has interviewed more than 500 of America's most successful leaders and has written extensively on business and leadership, having authored more than 70 articles published in major media outlets including Forbes, Inc., and HuffPost. Adam co-founded The Veloz Group, where he helped build three different businesses in three different industries.

Adam draws upon his insights building and leading businesses and interviewing hundreds of America's top leaders as a keynote speaker to businesses, universities, and non-profit organizations. Adam teaches graduate-level courses on leadership at UCLA, serves on the board of UCLA's Master of Applied Statistics Program, is an emeritus member of USC's Board of Governors, and is an advisor to numerous companies and leaders. A Los Angeles native, Adam is a lifelong Angels fan and an avid backgammon player.

PANELS & SPEAKERS

SESSION 1 Keynote Address	**Adam Mendler** | Entrepreneur, Leadership Expert, and Podcast Host
SESSION 2 IIUSA Advocacy Update: Continued Work on the Hill and Beyond	**Katie Hazlett** | Commonwealth Strategic Partners **Aaron Grau** | Invest in the USA **Bill Gresser** | EB-5 New York State **Bob Kraft** | FirstPathway Partners **George McElwee** | Commonwealth Strategic Partners
SESSION 3 EB-5 Policy: RIA 1 Year In	**Adam Greene** | Peachtree Group **Lulu Gordon** | EB5 Capital **Joe McCarthy** | American Dream Fund **Abteen Vaziri** | Brevet Capital
SESSION 4A Onboarding New Investors in the New Era of EB-5	**Christian Triantaphyllis** | Jackson Walker **Roberto Contreras IV** | Houston EB5 **David Enterline** | WTW-Taipei Commercial Law Firm **Darrell Sanders** | American Life Inc. **Mitch Wexler** | Fragomen
SESSION 4B Project Pipeline & the Current Economy	**Rush Deacon** | Pine State Regional Center **K. David Andersson** | Green Truck Financial **Jonathan Bloch** | Brownstein Hyatt Farber & Schreck **George Griffin** | NYSA Capital **Thomas Martin** | Baker Tilly
SESSION 5A RIA Securities Compliance	**Michael G. Homeier** | Law Office of Michael G. Homeier **Robert Cornish** | Law Offices of Robert V. Cornish, Jr. **Ronald Fieldstone** | Saul Ewing **Robert Whyte** | Whyte & Co. **Mike Xenick** | InvestAmerica

SESSION 5B
Investor Markets & Project Marketing

Brandon Meyer | Meyer Law Group
Jay Mehta | FRR Immigration
Natalia Polukhtin | Global Law Practice
James Sozomenou | Metropolitan Commercial Bank
Leo Zhou | American Lending Center

SESSION 6
RIA Compliance Policies & Procedures for Regional Center Operations

Jill Jones | JTC Americas
Rogelio Carrasquillo | Carrasquillo Law Group
Eren Cicekdagi | Golden Gate Global
Noreen Hogan | CMB Regional Centers
Osvaldo F. Torres | Torres Law

SESSION 7
Forms Forum: Practical Guidance for New EB-5 Forms

Robert C. Divine | Baker Donelson
Rana Jazayerli | Klingner Jazayerli
Cletus Weber | Peng & Weber
Jinhee Wilde | WA Law Group

SESSION 8
The Waiting Game: Processing Times, Visa Availability, and Set Asides

Lee Y. Li | Invest in the USA
Christine Chen | CanAm Enterprises
Suzanne Lazicki | Lucid Professional Writing
Kyle Walker | Green Card Fund

SESSION 9
EB-5 in the Courts: A Look at Current & Recent Litigation

Joseph Barnett | WR Immigration
David Hirson | David Hirson & Partners
Daniel B. Lundy | Klasko Immigration
John Pratt | Kurzban Kurzban Tetzeli & Pratt

SESSION 10
Sustainment Period & Redeployment

Edward Beshara | Beshara PA
Winnie Ng | Manhattan Regional Center
Bernard Rojano | Xecute Business Plan Solutions
Daniel Ryan | Atlantic American Partners
Dennis Tristani | Tristani Law

EB5 CAPITAL

15 YEAR ANNIVERSARY

Established in 2008, EB5 Capital provides qualified foreign investors with opportunities to invest in job-creating commercial real estate projects under the United States Immigrant Investor Program (EB-5 Visa Program). As one of the oldest and most active Regional Center operators in the country, the firm has raised nearly a billion dollars of foreign capital across more than 30 EB-5 projects. Headquartered in Washington, DC, EB5 Capital's distinguished track record and leadership in the industry has attracted investors from over 70 countries. In addition to U.S. permanent residency, EB5 Capital offers real estate private equity investments and non-U.S. Citizenship by Investment Programs.

Navigating EB-5 Visa Interviews:

Documents To Bring As "Backpocket" Evidence

Jinhee Wilde
CEO and Founder | WA Law Group

After years of waiting for an I-526 immigrant petition for EB-5 investors to be approved, an applicant finally gets the notification from the consulate that the immigrant visa interview is scheduled. What should be done to prepare for that all important interview? Of course, there are the usual documents, such as the medical reports and the police clearance to prepare, as in all other immigrant visa interviews. One would also need to show any previous visa history, such as previous applications for a visitor visa (B1/B2), student or intern/exchange visas (F-1, M-1, J-1) or other work visas (H1B, L-1, O-1), positive or negative.

In addition to the above, there is EB-5 specific information and documentation an applicant should know and prepare. The EB-5 visa category is for a foreign investor to invest in a new, U.S. commercial enterprise to create 10+ permanent, full-time jobs. There have been many derogatory articles describing the EB-5 program as the "golden visa" program and suggesting that the wealthy foreigners are "buying" visas. In order to get the I-526 approved, the applicant had to prove to USCIS that the investment was actually made into that new commercial enterprise and that the funds were sourced legally. Because EB-5 is an investment immigration program, applicants should know and understand something about the business in which they invested. It could be unwise to show the consular officer that they invested in EB-5 project/business just to get the immigrant visa, i.e., "buying a visa."

The main purpose of the EB-5 interview is to verify supporting documentation in the underlying petition and to make sure that the investor is not subject to any grounds of inadmissibility. While USCIS has already adjudicated the petition, the interviewer has the authority to ask anything about the petition that he/she wishes. Some consular posts have even tried to adjudicate the entire I-526 petition de novo. That being said, most officers will usually focus on the applicant's general familiarity with the project and the terms of their investment, inadmissibility grounds, and their civil documents.

Applicants should know and should be able to explain - at least summarily - about the project or business in which they have invested. They also should be able to explain how they have gathered the funds and path-of-funds movements. In other words, they should know what was in their I-526 filings to be consistent at the interview. While Consular officers try to complete the interview in a timely manner, discrepancies between records and an interviewee's answers could cause a delay, or even denial, in issuing a visa.

However, each EB-5 petition (I-526) filed consists of thousands of pages of documents – I feel so bad for all the trees we kill in order to submit each EB-5 petition – and it will be hard for applicants to explain the contents of these thousands of pages to the consular officer. Therefore, it is prudent for applicants to obtain from their immigration attorney, or in some cases a migration agent with whom they worked, to provide you with a chart of the money flow or summary of the source and path of funds that could be easily reviewed by the consular officer. Further, if the investment was made through a limited partnership or similar entity associated with a Regional Center, it would be helpful for the Regional Center or the investment enterprise to provide applicants with an Executive Summary of the project that is no longer than a page so that they could readily understand and inform the consular officer – bullet points of the project summary would be even better. Salient features of the project in that summary should include how the jobs will be created and the expected number of jobs to be created, total capital to be raised, EB-5 portion of the entire capital stack, how many investors, EB-5 investors' role in the business (i.e. management and/or policymaking functions) and what type of business it is, the nature of the project, and occasionally officers will ask if applicants know what their funds were used for. Thus, a review of the business plan is essential, and the applicant should also obtain from the regional center (or NCE) a comprehensive update of the current status of the project before the interview, as updates are likely required since the I-526 was submitted several years earlier.

Also, as is the case in all immigrant visa interviews, the consular officer will also ask questions about the applicant's background, verify and update all information provided in the application process, and review any health-related issues that may have implications for inadmissibility. There are a number of reasons applicants can be found inadmissible, including criminal violations, past unauthorized entry to the U.S., fraud, misrepresentation of immigration facts, health reasons and other reasons. Even relatively minor crimes (e.g., shoplifting) can make someone inadmissible as they are considered crimes of moral turpitude.

Long story short, the purpose of the U.S. Consulate interview (immigrant visa interview) is to decide if the applicant and any dependent family members are eligible for immigrant visa issuance. The interview will consist of file assessment and questions to determine admissibility to the U.S. While the purpose of the interview is not to "re-adjudicate" the approved I-526 petition, the Consular officer may ask general questions to confirm eligibility for the EB-5 classification, which is likely to include questions about the EB-5 investment, e.g., how much did the applicant invest, what is the name of the project and where is it located, and how the petitioner obtained the funds to invest in the EB-5 project, and whether the investment includes a guaranteed return.

As long as the applicant answers are truthful and consistent with what is already in the I-526 petition file and he or she is otherwise admissible to the U.S., the immigrant visa should be "granted", and the EB-5 investor and their family could start on their journey in the U.S. as a permanent resident.

Continued On Page 24

It is prudent for applicants to be prepared for the discussion of such general topics by reviewing and having available at the interview, for example:

- The cover letter filed with USCIS for the I-526 petition;
- The business plan for the project – it would be helpful to obtain a one-page summary of the business plan;
- A copy of the I-526 petition that was filed;
- Bank statements to show that funds were transferred out of escrow to EB-5 project or other proof and summary of source and path of funds prepared by your attorney or the migration agent;
- Information provided by the regional center project (certificate, K-1s, project updates);
- All original documents submitted to NVC, including original birth certificates, marriage certificates, etc.; and
- Personal information including details of your employment history, police records, dependents, family connections etc.

The applicant also should be prepared to discuss the following about themselves and the EB-5 investment project/business:

- The name and description of the new commercial enterprise that they invested in
- Relevant dates related to the filing and approval of the petition
- The current status of the project
- The source and path of funds for the investment (where did the money come from and how was it transferred to the United States from abroad)
- Documentation showing that funds were released from escrow
- Any responses to any of the security questions in the DS-260 visa application
- Any factor that may make the applicant inadmissible

The Litigation and Settlement that Revitalized the EB-5 Program

Lulu Gordon
General Counsel | EB5 Capital

After almost a year of limbo for the industry, the EB-5 Reform and Integrity Act of 2022 ("RIA") was signed into law. Less than two months later, USCIS upended the legislation and derailed the industry via a website alert. The only viable solution was litigation. Here is the story of that litigation with all of its twists and turns and the important result it achieved.

Continued On Page 26

THE ROLLER COASTER RIDE

1. Revival: Enactment of the EB-5 Reform and Integrity Act of 2022

Despite ongoing efforts by EB-5 industry stakeholders to secure full reauthorization of the EB-5 Program (the "Program"), on June 30, 2021, Section 610(b) of the 1992 Appropriations Act (the "Act") lapsed. This section specified the number of visas to be set aside for the Program. The preceding section, Section 610(a) of the Act, which authorized the Program's existence and did not have a sunset provision, remained in effect. At the time, USCIS took the position that the Program had "sunset" without distinguishing between the two sections and would accept no new filings[1]. In addition, it took a "pencils down" approach to pending petitions. The industry was in Program limbo; however, regional centers' contractual and fiduciary obligations remained.

An interminable eight months later, RIA was signed into law on March 15, 2022, offering a collective sigh of relief for the industry. For the first time since 2015, the industry had a multi-year reauthorization. Most regional centers had been treading water for the last year, and the lapse of the Program, combined with the economic impact of Covid-19 on many projects, had been very difficult, if not devasting. The industry was ready to get back to work on May 14 when the new legislation became effective. Whatever flaws the bill might have, at least we were back in business, or so we thought.

2. Dead on Arrival: Deauthorization

On April 11, 2022, the first day of the IIUSA Annual Conference in Orlando (which was in person for the first time in 3 years), USCIS unceremoniously, and in total disregard of the Administrative Procedures Act, deauthorized all existing regional centers. The agency posted an announcement on its website proclaiming that all currently existing regional centers were deauthorized and would need to apply for designation once USCIS issued the new form.

[R]egional centers previously designated under section 610 are no longer authorized. The EB-5 Reform and Integrity Act of 2022 requires all entities seeking regional center designation to provide a proposal in compliance with the new program requirements, which will be effective on May 14, 2022. We will provide further guidance to entities desiring to be designated as regional centers under the new Program[2]

It was a staggering blow. A sense of dread settled over the industry, particularly because of USCIS' prior pattern of policymaking hindering the Program. If regional center designation applications required USCIS approval before a regional center could operate under RIA, this could mean years of delay before regional centers could return to business. At the time, USCIS' median adjudication time for I-924 regional center applications was 22 months[3]. In an effort to avoid such an outcome, IIUSA submitted a proposal to USCIS for an expedited designation method for previously approved regional centers.[4]

3. Tactical Decisions / Preparing for Battle

• Marshalling Forces

At the conference, EB5 Capital discussed a potential lawsuit with a group of friendly competitors. Our firm wanted well-established and well-respected regional centers that were geographically diverse, representative of the industry, IIUSA members – and willing to share the considerable expense of the litigation. Four or five seemed like a good number – enough to share the cost burden but not so many as to make consensus on strategic decisions difficult. Along with EB5 Capital, four regional centers stepped up – Civitas Capital Group, Golden Gate Global, CanAm Enterprises, and Pine State Regional Center. IIUSA also agreed to join as an organizational plaintiff. IIUSA represented a broad spectrum of the regional center industry, and its presence would bolster the case for the nationwide relief we intended to seek. EB5 Capital, Civitas, and Golden Gate Global were all long-time clients of Klasko Immigration Law Partners, and as such, the group naturally turned to Ron Klasko to handle the litigation, along with Paul Hughes of the McDermott Will & Emery firm. Ron Klasko is one of the preeminent immigration attorneys in the country, and Paul Hughes is a highly skilled federal court and U.S. Supreme Court litigator. They, individually and collectively, had an exemplary track record of successfully challenging the U.S. Department of Homeland Security ("DHS") actions that did not comply with the law. Ron arrived at the IIUSA conference after the USCIS alert was out. On the plane, he scribbled notes of the potential arguments for a lawsuit. Ron, Brian Ostar, and I attended the IIUSA board meeting on the last day of the conference. Our purpose was to obtain the board's approval for IIUSA to serve as the organizational plaintiff in our case. Ron brilliantly presented his arguments to the board. The regional center plaintiffs had agreed that IIUSA, as a non-profit, would not be expected to contribute to the legal fees and costs. The IIUSA board approved our request, so in a matter of days, we had our dream team.

Organizational Plaintiff

An organization can establish representative standing by showing that at least one of its members has standing, that the interests at stake are germane to the organization's purpose, and that neither the claim nor the relief requires participation of the organization's individual members.

There was much work to be done and the need to move forward quickly. It was agreed that to streamline the process, I would serve as plaintiffs' liaison with outside counsel, participating in and representing the plaintiffs with counsel in the day-to-day strategy decisions and preparation of pleadings, getting group input, and reporting back to the group on strategy and case progress. All plaintiffs participated in important strategic and cost decisions.

• When to strike?

One short week later, on April 19, 2022, USCIS announced it would host a stakeholder call on April 29, 2022, about the implementation of the RIA. We decided to wait until after the stakeholder call to file our case. We had hoped they might announce an expedited process for previously approved regional centers as had been proposed by IIUSA. We thought any litigation on the topic would chill their willingness to engage or consider other options. We would file sometime after the stakeholder call, if necessary. The USCIS stakeholder call confirmed the industry's worst fears. All regional centers were required to file anew for designation, with a new form – not currently available – and wait to proceed with any new projects.

[1] Statutory authorization for the EB-5 Immigrant Investor Regional Center Program ended at midnight on June 30, 2021. ...Due to the sunset in authorization for the Regional Center Program, we will reject the following forms received on or after July 1, 2021.

[2] Approved EB-5 Immigrant Investor Regional Centers, USCIS.gov, 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 (Feb. 17, 2022).

[3] https://egov.uscis.gov/processing-times/historic-pt

[4] https://iiusa.org/blog/iiusa-submits-letter-to-uscis-in-regards-to-regional-center-re-designation/

Continued On Page 27

In the meantime, on April 22, the Behring Regional Center ("Behring") filed a complaint in the Northern District of California for a temporary restraining order ("TRO") and declaratory relief – and subsequently filed a motion based on violations of the Administrative Procedures Act ("APA") Behring Regional Center LLC v. Mayorkas et al. Case Number 3:22-cv-02487 (the "CA Case").[5]

Administrative Procedures Act
The APA requires that the notice of proposed rulemaking include "(1) the time, place, and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

• Attack On Two Fronts

Did a second lawsuit add value? For many reasons, the answer was yes. Our plaintiffs' group included five regional centers and the industry trade association. Since we would seek industry-wide relief, this broader representation would be helpful. Just filing a second suit would put more pressure on USCIS to consider settlement and would also give the industry a second bite at the apple if things did not go well in the CA Case. In addition, we would put forth additional arguments not raised in the Behring pleadings.

• Choosing The Best Battlefield

Our next decision was where to file the case[6]. Given the breadth of jurisdictions the plaintiffs' regional centers covered, we had many options. We narrowed it down to a district court in the 5th Circuit and the D.C. Circuit. After a thorough analysis - and a gut check – we selected the D.C. Circuit, drafting the complaint, and follow-on motions began soon thereafter.

4. A TKO on the TRO?

In the CA Case, the parties agreed to convert the motion for a temporary restraining order ("TRO") into a preliminary injunction motion ("PI").[7] Unfortunately, the May 10 hearing did not go well[8], and the industry uttered a collective groan. Judge Vincent Chhabria, the Judge presiding over the CA Case, seemed inclined to rule against Behring. He determined that the record was insufficient to issue a preliminary injunction. The Judge offered to convert the hearing back to a TRO and rule or allow supplemental briefings and evidence to be presented by the parties. It was up to the plaintiff to decide. It was clear to all who attended (including industry members listening remotely) that the TRO would be denied. Wisely Behring agreed to forgo a decision on the TRO. Further briefing would be provided to the Court, and Judge Chhabria would schedule another hearing if necessary.

5. A Friend Indeed: The Amicus

One of the reasons we decided to proceed with a second suit was to ensure a second bite at the apple. However, an adverse ruling in the Behring case could also negatively impact our case. We agreed with the Judge that the record was incomplete. Furthermore, we thought critical legal arguments were missing – arguments we would raise in our D.C. litigation. Since the Behring case was well ahead of ours, we concluded that we should seek leave to file an amicus curiae brief and an opportunity to participate in the second PI hearing if scheduled. This was an unexpected turn of events and expense for our plaintiffs' group. Counsel for Behring was amenable, and the government did not oppose. As an organizational plaintiff, IIUSA seemed the best choice to serve as the amicus curiae party. On May 23, we filed our motion[9] for leave to file an amicus curiae brief and appear at any hearing supporting the plaintiff, and on May 24, Judge Chhabria granted our motion. In parallel, we filed our complaint, EB5 Capital et al. vs. DHS et al., in the District Court for the District of Columbia on May 24 (the "DC Case" or the "EB5 Capital et al. Case").[10]

Amicus Curiae
Amicus Curiae literally translated from Latin is "friend of the court". Generally, it is referencing a person or group who is not a party to an action but has a strong interest in the matter and who requests to provide legal submissions so as to offer a relevant alternative or additional perspective regarding the matters in dispute.

6. Fasten Your Seatbelts: Hearing on Preliminary Injunction Motion Round 2

The parties in the CA Case filed supplemental briefs, as did IIUSA as amicus curiae, and the Court scheduled a second hearing on the preliminary injunction motion for June 2. Our counsel was invited to participate in the hearing.

Judge Chhabria opened the hearing as follows:

Okay. I don't even know where to begin. I guess I'll say that, you know, when I first started looking at this case, I thought that it was a relatively easy win for the Government. And now I am finding it very very difficult, both on the merits and on the other Winter factors.[11]

With the additional briefing – including our amicus brief – it appeared the Judge was about to do an about-face - but not without some twists and turns along the way.

The hearing was 2.5 hours long and a masterclass in the Socratic method. Judge Chhabria posed every possible resolution to the parties to hear their arguments. Our arguments included the usual suspects for an APA claim and many technical statutory construction arguments from the text of the RIA. The mutual esteem and respect between Judge Chhabria and Paul Hughes were apparent. Together they concluded that the only correct statutory interpretation was that Congress did not repeal the Program and did not intend for existing regional centers to be terminated. However, the Judge was concerned about his authority to set aside agency action in a motion for temporary relief[12]. He wanted to get this right. Perhaps he could only return regional centers to the pre-RIA limbo while USCIS underwent a proper APA process.

[5] Case 3:22-cv-02487-VC (N.D. Cal.), Document 1.

[6] Attorneys will consider many factors to determine in which circuit to file a case when their clients have standing to file in more than one circuit. These factors may include: the precedential decisions in the district court and circuit court in similar cases, the likelihood of being assigned to a favorable or unfavorable judge based on prior decisions, who appointed the district circuit court judges in the circuit, the local rules for the district court that may impact how quickly motions will be heard and how quickly the case may get to trial. Ultimately, they must reach a conclusion as to which circuit their client is more likely to prevail, if not in the district court, then at least on appeal. No matter how careful the analysis, they don't get to pick the judge, and the judge assigned will most definitely impact the outcome.

[7] A temporary restraining order, or TRO, is similar to a preliminary injunction in that it is a pre-trial court order that enjoins or mandates another party's conduct. However, it is different in that TROs are more urgent and may be issued without notice to the other party. In federal court it can only last 14 days absent an agreement or extension. A party may seek a preliminary injunction when they will suffer irreparable harm—that is, they will be harmed in a way that a money judgment cannot fix—while awaiting a final resolution of the lawsuit. Preliminary injunctions may only be only issued after both parties are noticed for hearing and given an opportunity to be heard. To obtain a preliminary injunction in federal court, a party must meet the "Winter" factors by establishing that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)

[8] Case 3:22-cv-02487-VC (N.D. Cal.), Document 39.

Continued On Page 28

Mr. Hughes offered that the Court did have legal authority based on 5 U.S.C. Sections 705 and 706[13]. While Judge Chhabria seemed to agree, he then offered to convert this motion to an expedited summary judgment motion to alleviate his concerns about the Court's authority to provide nationwide temporary relief. Alternatively, he offered that he could order relief solely for Behring. The government argued that the monopoly created by relief for only one regional center was not in the public interest. Judge Chhabria suggested USCIS could fix that problem by offering the same relief to all other regional centers. Ultimately the parties did not agree to convert to an expedited summary judgment. The Judge requested additional briefing by the parties and IIUSA on the Court's authority to provide a nationwide injunction.[14]

Socratic Method

Name after the Greek philosopher, Socrates, The Socratic method is a form of cooperative argumentative dialogue between individuals (often teacher and student), based on asking and answering questions to simulate critical thinking and to draw out ideas and underlying presuppositions.

7. Excuse Me While I Intervene: IIUSA as Intervenor

At the June 2 hearing, the government indicated to our counsel that it would appeal any preliminary injunction in the plaintiffs' favor. At this point, we believed our participation in the CA Case was essential to a win for the industry. We would not be able to participate in additional briefings, an appeal, or settlement negotiations if we were not an actual party to the case. We decided that IIUSA was the appropriate intervenor; it could best represent the industry as an organizational plaintiff and the industry trade association. In addition, should the Judge decide to provide relief only to the plaintiffs, all IIUSA members would be entitled to that relief.

On June 5, we filed IIUSA's voluntary dismissal in the D.C. Case[15]. On June 6, we filed IIUSA's motion to intervene in the CA Case along with our brief supporting the plaintiff's preliminary injunction motion.[16] [17]

The government opposed our motion to intervene and changed its position on singular relief for Behring Regional Center in its Section 705 brief[18]. Now, more than ever, IIUSA's intervention was crucial. As stated in our motion to intervene:

The specter of individualized interim relief solely for Behring Regional Center would be devastating to IIUSA's members and the Regional Center Program, only compounding the harm to the industry caused by USCIS's unlawful action. … That is why IIUSA seeks to intervene here: IIUSA must protect the interests of its members and the EB-5 industry for which it advocates.[19]

8. Life after Death: An Industry-wide Preliminary Injunction

On June 24, Judge Chhabria issued an industry-wide preliminary injunction[20], and an industry-wide collective cheer resounded. Several key factors swayed the Judge. First, the government admitted that Section 610(a) did not sunset, meaning regional centers had been authorized all along – despite Section 610(b) lapse.[21] Therefore, RIA did not create a brand-new Program, starting from scratch, and the government committed a legal error in deauthorizing all regional centers without going through the APA process. In addition, plaintiffs were likely to prevail on the merits, as USCIS would have to show that the legislation specifically deauthorized all existing regional centers - something it could not do. And, importantly, based on 5 U.S.C. Section 706, the Court had the authority to set aside agency action as temporary relief pending final review. Judge Chhabria stated:

It would make no sense to afford relief to just Behring, while allowing the agency to continue to treat more than 600 other existing regional centers as deauthorized. Although district courts retain equitable discretion to fashion injunctive remedies narrowly, it would be unfair to cabin the relief to Behring alone. If the agency were enjoined from deauthorizing only Behring, the firm would receive a windfall: It would be the only designated regional center in the United States. Foreign investors eager to apply

[9] Case 3:22-cv-02487-VC (N.D. Cal.), Document 45.
[10] Case 1:22-cv-01455-APM (D.C.) Document 1.
[11] Case 3:22-cv-02487-VC (N.D. Cal.), Document 58.
[12] It is common practice to seek a summary judgement in the alternative when filing for a preliminary injunction to avoid this problem. Behring had not done so.
[13] Case 3:22-cv-02487-VC (N.D. Cal.), Document 58 at 110.
[14] Case 3:22-cv-02487-VC (N.D. Cal.), Document 53; Case 3:22-cv-02487-VC (N.D. Cal.), Document 54; and Case 3:22-cv-02487-VC (N.D. Cal.), Document 55

Continued On Page 29

for EB-5 visas would likely flood Behring with Capital, leaving the other 600-plus regional centers throughout the United States on the bench. But many of those regional centers are not sitting idly by. Invest in the USA, an amicus in this case, has moved to intervene on behalf of over 100 regional centers throughout the country.

In any event, such limited relief would be difficult to square with Section 706 of the APA, which authorizes courts to "set aside" unlawful agency actions. 5 U.S.C. § 706(2). Where a reviewing court determines that agency actions violate the law, "the ordinary result" is that the action is "vacated," and not that the "application to the individual petitioners is proscribed." [22]

Intervention

Intervention is a procedure to allow a nonparty, called intervenor, to join ongoing litigation. Under Rule 24(a) of the Federal Rules of Civil Procedure, intervention allows a person who is not a party to an action, who has interest are not adequately represented by one of the parties to join the case. This is called "intervention of right". Under Rule 24(b), the court at its discretion may join a person to an action if the proceeding will affect them directly and if intervention is otherwise appropriate under law. This is callled "permissive intervention".

9. California, Here We Come: The DC Case is Transferred to the Northern District of CA

On July 5, Judge Amit P. Mehta of the District Court for the District of Columbia sought to transfer the DC Case sua sponte for consolidation with the CA Case. We did not oppose, and Judge Chhabria scheduled a case management hearing to discuss how the case would proceed.

We filed a case management statement for putative intervenor IIUSA, and the five regional center plaintiffs transferred from DC[23]. Our primary reason for continuing to have IIUSA intervene in the Behring case was to ensure we would have an opportunity to participate in any appeal of the preliminary injunction by the government.

As the Court is aware, IIUSA has a pending motion to intervene in Behring Regional Center. As IIUSA explained in its motion for intervention, it had initially joined the EB5 Capital complaint, but it voluntarily dismissed its claims in that action and sought intervention here. IIUSA did so because its members would have been affirmatively harmed—over and above the injury inflicted by USCIS's unlawful action)—had this Court accepted the government's position that any interim relief entered "should be limited to Behring." IIUSA thus recognized it had considerable interests that no other party was positioned to protect. Further, IIUSA sought to participate in later proceedings before this Court and to have party status in the event any appeal should result, in view of the different arguments advanced by the parties. If the government were to appeal the Court's preliminary injunction order, IIUSA submits that it would be critical that it be granted intervention rights in Behring Regional Center, allowing its participation as a party. If the government were to appeal, it would likely repeat its argument requesting relief specific to Behring only, which could result in affirmative harm to IIUSA's members. More, IIUSA presents unique arguments. In IIUSA's view, accordingly, the importance of the pending motion to intervene turns on whether the government intends to appeal.[24] *[Internal citations omitted.]*

Alternatively, if the government could confirm there would be no appeal of the preliminary injunction, we asked that IIUSA be permitted to rejoin the EB5 Capital et al. Case now before Judge Chhabria. At the case management hearing on July 14, the government could not confirm that it would not file an appeal. On July 28, Judge Chhabria entered an order granting IIUSA's intervention in the Behring Case and set a briefing schedule for cross summary judgment motions in the joined cases, with a hearing on those cross motions scheduled for September 8.[25]

10. The Settlement

Settlement negotiations ensued almost immediately after the case management conference, even before the Court's July 28 order. There were many rounds of proposals and counterproposals. At this point, all plaintiffs in both cases united on the essential terms. Preexisting regional centers must be allowed to return to business filing I-956Fs for new projects without waiting for an I-956 approval. USCIS had to expedite receipt notices for I-956F filings so that investors could file I-526Es reflecting proof of the I-956F filing. Importantly, pre-RIA investors had to be protected even if their sponsoring regional centers did not file an I-956. The Court approved the settlement agreement on September 1, 2022[26]. The final terms accomplished this and more.

The settlement agreement also mandated quarterly meetings between representatives of plaintiffs and USCIS. We hoped that the quarterly settlement meetings would facilitate a smooth implementation of the settlement and RIA and perhaps could lead to an open dialogue and meaningful exchange between the industry and USCIS apart from these quarterly meetings. We continue to believe this is critical to the implementation of RIA and the long-term success of the EB-5 Program.

11. An Uneasy Peace: The Long and Winding Road Ahead

Where do we go from here? We don't expect the implementation road ahead to be smooth. It is a complex Program, and RIA has many implementation challenges. As an industry, we must continue pushing for a Program that fulfills the goals of economic development and job creation, supports an ethical and thriving regional center industry, and protects investors from harm. In an ideal world, we would accomplish this together through meaningful dialogue between industry and USCIS during RIA's implementation process. In our less-than-ideal world, further policy litigation is likely. We stand at the ready.

ACKNOWLEDGMENTS

This litigation was a roller coaster ride with many procedural twists and turns; As a former litigator, it was both exhilarating and a privilege to work with Ron Klasko and Paul Hughes as an integral part of their litigation team. I want to thank Behring Regional Center and its counsel, Laura Reiff, and the Greenberg Traurig litigation team for collaborating on this significant endeavor. I am grateful that EB5 Capital fully supported me in undertaking the time-consuming role of plaintiffs' liaison and that IIUSA agreed to serve the vital role of organizational plaintiff. Finally, I am honored that our fellow plaintiffs, Civitas, Golden Gate Global, CanAm, and Pine State, trusted me as their liaison. Above and beyond the excellent outcome, working with bright and dedicated colleagues from these other regional centers was extremely rewarding. EB-5 is a very competitive industry, and to have five top-notch competitors act as one for the benefit of the industry was truly remarkable. We continue to maintain these valuable relationships as we venture forward in the post-RIA world, working together to implement the settlement and sharing ideas and strategies for the road ahead.

[15] Case 1:22-cv-01455-APM (D.C.), Document 14
[16] Case 3:22-cv-02487-VC (N.D. Cal.), Document 56.
[17] Case 3:22-cv-02487-VC (N.D. Cal.), Document 56-3.
[18] Case 3:22-cv-02487-VC (N.D. Cal.), Document 54 at 2.
[19] Case 3:22-cv-02487-VC (N.D. Cal.), Document 56 at 1-2.
[20] Case 3:22-cv-02487-VC (N.D. Cal.), Document 63.
[21] Case 3:22-cv-02487-VC (N.D. Cal.), Document 63 at 10 nt. 3. The court noted: "Although it doesn't matter for purposes of this motion, the agency's treatment of the regional centers during the grey zone period seems strange in light of its current interpretation of section 610. If the agency is correct that section 610(a) remained operative while section 610(b) did not, this would mean that the Secretary of State remained under an obligation to "set aside visas for a pilot program" that "shall involve a regional center." If this statutory obligation remained (with only section 610(b)'s designation of a specific number of visas becoming inoperative), it's not clear how UCSIS could legitimately have refused to process new visa applications that came through the regional centers."
[22] Case 3:22-cv-02487-VC (N.D. Cal.), Document 63 at 12.
[23] Case 3:22-cv-02487-VC (N.D. Cal.), Document 69.
[24] Case 3:22-cv-02487-VC (N.D. Cal.), Document 69 at 2.
[25] Case 3:22-cv-02487-VC (N.D. Cal.), Document 85.
[26] Case 3:22-cv-02487-VC (N.D. Cal.), Document 48.

Continued On Page 30

Settlement Terms

1. Previously authorized regional centers retain their authorization.

2. To maintain authorization, previously authorized regional centers must file and I-956 amendment (previously filed I-956's would meet this requeriment) by December 29, 2022, along with the filing fee to maintain authorization.

3. Previously authorized regional centers need not wait for USCIS approval of their I-956 and many immediately file I-956Fs.

4. If a regional center does not receive a formal receipt notice within ten calendar days of delivery of an I-956F filing to USCIS, an investor may use other forms of proof of the I-956F filing in their I-526E petition, such as a lockbox receipt, cashed check, or credit card charge provided by the regional center to the investor. An investor must then interfile the formal receipt notice once received by the regional center.

5. The failure of a previously approved regional center to file an I-956 application or amendment will not, standing alone, be a basis for USCIS to deny an investor's I-526 or I-829 petition.

6. Within 21 days of the settlement, USCIS will update its website, FAQ's and instructions to conform to the terms of the settlement agreement.

7. All new RIA forms would be considered interim and allow for comment.

8. By December 1, 2022, USCIS will update its forms to conform to the settlement.

9. For two years, USCIS representatives will meet quarterly with representatives of the plaintiffs to discuss issues relating to the implementation of the settlement.

USCIS Regional Center Site Visits

Pam Ellis
Senior Vice President | CMB Regional Centers

Mariana Gomez
Senior Vice President | EB5 Capital

The passage of the EB-5 Reform and Integrity Act of 2022 ("RIA") brought about many changes to the EB-5 program. Several of these changes renewed and enhanced the focus on reporting, program compliance, and transparency. The RIA also established the EB-5 Integrity Fund to provide USCIS with the resources needed to conduct more frequent and consistent regional center and project audits, amongst several other goals. However, USCIS conducting in-person audits of regional centers and their sponsored projects is not new. These initiatives have existed for many years, but in 2018 USCIS commenced the process of conducting formal, in-person, compliance reviews. In this article, CMB Regional Centers and EB5 Capital will offer their firsthand experience with these audits. CMB Regional Centers will share their insights from one of the earliest USCIS compliance reviews focused on its CMB Export, LLC regional center. EB5 Capital will share their recent experience with respect to project site visits associated with I-829 adjudications.

Continued On Page 32

REGIONAL CENTER AUDITS: PREPARATION, PREPARATION, PREPARATION.

By Pam Ellis, Senior Vice President, CMB Regional Centers.

Even today, very few regional center operators have experienced an in-person regional center compliance review from USCIS. What's more, until a regional center operator receives a formal Notice of a USCIS Compliance Review outlining specific requests, it is hard to anticipate the parameters. But preparation for a USCIS audit does not begin with the receipt of the notice; it truly begins when a company files its Application for Regional Center Designation, previously the form I-924 and now the form I-956. With each application, even pre-RIA, an aspiring regional center was required to outline and describe its organizational structure, operating procedures, and regional center administration. These requirements have now been enhanced under the RIA. The compliance review creates an opportunity for USCIS to confirm, in-person that each regional center is practicing what they have promised.

Receiving any notice from USCIS can be intimidating when you are given a very short window to prepare or respond. In August of 2018, CMB received a notice stating that USCIS representatives would be visiting our office in two weeks and provided a data collection list of items to have available for their review. Naturally, and as we would recommend, our first call was to our immigration counsel to inform them of the notice, request that they advise on our preparation, and be present during the visit. It was also incumbent upon our team to clear our schedules and make ourselves available for the planned two-day visit regardless of any prior commitments. Being prepared and making the process smooth for USCIS is imperative, not only to maintain your regional center's designation but, most importantly, to help maintain and ensure a successful immigration path for your investors.

Under the direction of Pat and Noreen Hogan, our team developed a plan to present information to USCIS above and beyond their written requests. Although the compliance review was focused on our CMB Export, LLC regional center alone, we believed it was necessary to outline the history of CMB's 15 designated regional center designations. In part, this background information allowed us to note that by auditing the practices of one of the CMB Regional Centers, USCIS was actually auditing the practices of all our regional centers. For those companies with multiple regional center designations, this also highlights the importance of maintaining consistency in applications by which each regional center is established. With little understanding of what additional information could be sought by USCIS, our best course of action was to rely upon our own best practices.

Upon the arrival of the two USCIS field officers, we welcomed them to our office and introduced them to our staff, and toured them through our building, meeting team representatives from various departments along the way. We settled into our conference room, where we began several presentations, taking most of the first day's visit. Throughout our presentations, the USCIS field officers were engaged, took notes, and asked great questions. It was clear that this was a new concept for the field officers and somewhat of a learning experience that would guide their questions in future compliance reviews of other regional centers.

Our initial presentation covered our history and company structure and provided the opportunity to highlight Pat Hogan's involvement in EB-5, which precedes the EB-5 Regional Center Program and the 1997 federal designation of CMB Export. It was important to us to note what sets CMB apart from any other regional centers USCIS may have visited, as not all regional centers are created equally and do not fit into the same box. From our perspective, providing this information helped guide the conversations with USCIS representatives by giving them an understanding of our structure and the evolution of our practices which have paralleled, and in many instances, preceded the evolution of the EB-5 program.

Throughout the visit, additional presentations were made highlighting the activities of each of our company's departments, featuring the management teams that oversee each department. A unique characteristic of CMB is that we have teams in-house that perform several functions that are often outsourced by other regional centers or vertically integrated regional centers/ developers. Presentations were made by CMB's project development, financial analytics, economics, project compliance, legal, client relations, securities compliance, and IT teams. Each department was prepared to provide a high-level overview of their department and provided hard copy items they felt necessary to share. We understand that not all regional centers are structured to this level of sophistication; however, outlining these departments within our company and noting their best practices proved important to a successful compliance review. Many regional centers are simply not structured to include these teams in-house and rely upon several outsourced components that may or may not be available on short notice to provide feedback during a compliance review. Many regional centers often rely on migration agents and referral relationships to be the source of communication with their clients and have very few practices in place to administer guidance and information to clients as they proceed through their immigration process. One should question and should be prepared for what could be requested by USCIS and be able to outline the efficiencies and effectiveness of these structures during a compliance review.

Lastly, a final presentation was prepared as a case study of one of CMB's then-recent offerings. We walked the USCIS field officers through the life cycle of an EB-5 offering, from vetting a potential project, underwriting, securities compliance, legal, offering of the partnership, subscription, acceptance as a Limited Partner, accounting practices such as the transfer of investment funds and limited partner financial statements, communication practices such as limited partner notices, project updates, project financial reporting, immigration document preparation for I-526 and I-829 filing templates, as well as the return of capital process, wrap up and dissolution of a partnership. This was done by reviewing the physical documentation of these processes as well as the tracking of information within our database that allows our teams to pull various reports on our over 6,000 individual investors that may be required for reporting purposes. This segment was crucial in providing the field officers with the best possible understanding of our operation and the full path that each investor takes from a process standpoint beyond the immigration cycle alone.

We wrapped up the on-site visit by early afternoon on the second day. A few weeks later, we received a confirmation letter that the USCIS had completed their compliance review and no further action was required. Since that time, we have included the confirmation letter in various USCIS filings, most recently with our I-956 Regional Center applications. Throughout the compliance review, we were confident in our practices and were able to provide meaningful responses to each of their questions. The USCIS field officers were respectful, inquisitive, and not at all confrontational. It was clear that their goal was to confirm that we practiced what we promised and that we had systems in place to properly vet and continuously administer each of our or offerings and their respective investors.

Continued On Page 33

As a regional center, CMB has consistently pushed for greater transparency. We were one of the first, if not the first regional centers to subject ourselves to third-party auditing beginning in 2014. We do believe that our well-developed best practices and culture of transparency allowed our company to easily navigate the compliance review process. However, as the program evolves, we expect that future USCIS audits will also evolve, and should USCIS see flaws within the operations of other regional centers during these audits, their standards and the depth of their questions will likely increase. As mentioned above, preparation shouldn't start when the Notice of Compliance Review is received. The best practices highlighted with the establishment of each regional center should already be at the heart of your day-to-day operations. If they are, a USCIS audit of any kind should be a simple process.

PROJECT SITE VISITS: HOW TO PREPARE FOR THE UNEXPECTED.

By Mariana Gomez, Senior Vice President, EB5 Capital.

Founded in 2008, EB5 Capital has successfully funded 30+ EB-5 real estate projects, has fueled economic development throughout the United States, and has created thousands of new jobs for American workers. Interestingly, it was just late last year that EB5 Capital had its first experience dealing with a project site visit. We have many projects near USCIS's headquarters, so we had been expecting and planning for site visits long before one actually occurred. However, EB5 Capital's recent project site visits involved two of our hotel projects in California, followed by another one of our hotel developments in New York City. While all three visits had many things in common, the inspections were also unique in their process.

All site visits were conducted by officers of the USCIS' Fraud Detection and National Security Directorate, who identified themselves as such at the time of the call and visit. Each of the site visits was announced via phone call to EB5 Capital; however, you should not necessarily expect 24-hour notice as the regional center may be informed about a visit just a few hours prior to the inspection. And, unlike regional center audits, there is no advance notice as to what the officer will be seeking. All the site visits were made in the context of an I-829 petition review but not necessarily the first I-829 petition filed in connection with the specific project being inspected. All the site visits lasted a relatively short period of time and involved officers taking pictures of the project and asking questions regarding job creation and operations.

EB5 Capital partners with experienced and highly reputable developers seeking EB-5 project financing through our regional centers and EB-5 offerings. We fully disclose to our development partners the possibility and implications of one or more project site visits by USCIS representatives during the life of the development. Moreover, we require full cooperation from our developer partners before, during, and after a project site visit, and we require that they direct all inquiries by USCIS officers to EB5 Capital. We suggest all regional center operators follow this practice as it will reduce the risk of surprises and help prevent unnecessary delays or complications that may result from on-site workers or employees providing inaccurate or incomplete information to officers during their visit.
At the time of inspection, construction for all three of our projects was complete, and the hotels were open to the public and fully operational. USCIS representatives were greeted by front desk employees who ultimately connected the officers to the respective hotels' General Managers. EB5 Capital was not present during the site visits, and we do not believe it is imperative that a regional center representative attends the inspection as long as clear directions have been provided to on-site workers or employees on how to respond and proceed in the event of a project site visit. If sufficient notice is provided, it would certainly be preferable to have one of our team members present.

Of the three site visits we have mentioned, one of them ended after the USCIS officer left the project site with no further communication. The other two involved post-visit phone and/or email communications between EB5 Capital and the USCIS officers. In the post-visit communications, USCIS officers requested certain information and documents about each respective I-829 petitioner and their projects. The interactions with both officers were very pleasant and even somewhat informal. After the site visits, we consulted with our immigration counsel regarding the site visits and follow-up requests. We fully cooperated in providing responses and sought to foster a cooperative exchange with the USCIS officers. As a regional center operator, EB5 Capital performs all critical functions in-house, including deal sourcing, due diligence and project analytics, finance, IT, and marketing. While we have outside counsel oversee our deal, offerings, and immigration compliance, even those documents are initially drafted in-house. We make certain our team knows our projects, our project documentation, our investors, and our best practices. We have all the information we need at our fingertips.

It is unclear whether the USCIS officers who visited the respective projects received and had the opportunity to review each petitioner's file, as some of the documents and information required after the project site visits had already been provided to USCIS as part of the I-829 submission. In addition, the nature and scope of some of the inquiries led us to quickly realize that officers of the Fraud Detection and National Security Directorate may not be as well versed on EB-5 specific matters as one would anticipate. In the event of a project site visit, expect and be ready to clearly outline the role of the regional center and the project developer/operator with respect to managing the project, as well as tracking and reporting relevant EB-5 information, particularly as it relates to job creation.

Over the years, EB5 Capital has developed strict Standard Operating Procedures that involve ongoing and timely collection and storage of information and documents from the developer about the EB-5 project. We strongly encourage all regional center operators to pay attention to these practices, as well as preemptively assign clear roles and responsibilities within their teams. Best practices in these areas will enable a regional center to effectively and efficiently address questions and requests that may arise after a project site visit. Although there is room for training and improvement by USCIS, overall, we have been satisfied with the site visit process and the post-visit results, which have included speedy I-829 approvals.

In our view, each project site visit offers regional centers a chance to show USCIS and other EB-5 stakeholders the compliance measures in place and the tangible positive impacts achieved by the EB-5 Program. Both regional center audits and project site visits are unique opportunities to feel proud of what we are building and the way we are building it. We welcome and support all initiatives and ongoing efforts by USCIS developed in the context of the RIA to oversee the implementation of the EB-5 Program and ensure its long-term sustainability.

EB-5 Origins:

Meet Roberto Contreras IV

Managing Director of Houston EB-5 Regional Center

Marisa Marconi
Founder and Lead Consultant | Pinnacle Plan Writing

Continued On Page 35

Even at age 32, Roberto Contreras IV has more history with EB-5 than many. Professionally, he has cultivated a name in the industry as the Managing Director of Houston EB-5 Regional Center and, last year, became the youngest member of IIUSA's Board of Directors. But Roberto's EB-5 story is not just a story of his career, but the story of his family.

Roberto's father, Roberto Contreras III, was a direct EB-5 investor in the early years of the program, launching a stone import and fabrication business that ultimately grew into a $350 million nationwide company and created more than 1,200 jobs in the United States. After gaining citizenship and then selling the company in 2009, Contreras III turned his focus to real estate and launched Houston EB-5 in 2011 with a commitment to providing other EB-5 investors with a viable path to their own American dreams.

It was a mission that Roberto was poised to take on, and could have immediately adopted, if not for his drive to define his own path and purpose. "I am my father's son and I wanted to blaze my own trail," he explained. After graduating from Swarthmore College in 2012, Roberto moved to Beijing to start a tech company. "I was young and idealistic. I think I was also very prideful." But EB-5 – and family - was never far away. While pursuing funding for his own venture, Roberto also met with agents and clients in Beijing to facilitate fundraising for his father's development company and Houston EB-5's first project.

Ultimately, Roberto's tech venture failed to gain steam, but his experience and time in China gave him a fresh perspective on building a career and life. "We learn growing up that America is a meritocracy, but when you go abroad, you realize that relationships and the platform that you do or don't have matter." This clarity allowed him to return to a familiar path on his own terms and find his purpose. "I was like 'I should just be doing what's right in front of me.' I had enjoyed [real estate development] all along. And that's when I realized that this is my calling." He pivoted to focus on EB-5 and the regional center's activities, opening offices in Beijing and Shanghai and raising capital for more than a dozen projects before returning to Houston in 2017.

In my interview with Roberto, we explored the usual topics for a "spotlight" article – professional highlights, Houston EB-5's track record, education, and interests – but each topic inevitably led to the same key themes: family, responsibility, hard work, and duty. "My family owes everything to this country and program," Roberto explained. "The more you are given, the greater responsibility you have to take care of others." It is clear this ethos colors his approach to everything EB-5 from deal structuring ("I hope everyone defers compensation until the project is a success"), to the responsibility to investors ("For some investors, this is everything to them. To us in the early 90's, it was everything."), to the integrity and viability of the program ("what we do has repercussions on our reputation, both individually and as a country").

More than duty and responsibility, though, Roberto has a passion for his family, work, and the program that is both earnest and refreshing. He continues to work closely with his father at

Houston EB-5, is a father of three, and is surrounded by extended family who have called Houston home for three generations. "It's the ultimate blessing. To feel like what you're doing is meaningful and are in a place where you feel like you belong," he concluded. "I just hope that my kids feel like they can take risks [too] and that they will be backed up." He meant it as a reflection of his own path and that of his family, but I couldn't help but see the parallel to EB-5 investors and their pursuit of their own place in America. And through that lens, it's easy to see why Roberto's passion and purpose run so deep.

The "Teeth" Behind the EB-5 Reform and

Integrity Act: An Overview of Penalties for Non-Compliance

R. William Cornelius[1]
Attorney | Torres Law

As many are by now aware, the EB-5 Reform and Integrity Act of 2022 (the "RIA") imposes stringent oversight and compliance obligations upon regional centers and requires those regional centers to have in place policies and procedures designed to shape EB-5 industry participant behavior.

Though the RIA includes numerous provisions that are intended to help ensure compliance and promote accountability, those integrity efforts may only be as effective as the RIA's enforcement provisions can compel.

This article explores the sanctions and other penalties for which regional centers, new commercial enterprises ("NCEs"), and job-creating entities ("JCEs") may become subject for violations of the RIA, which help give some "teeth" to the RIA's integrity and compliance measures and allow USCIS to better self-regulate the EB-5 Program to some extent.

[1] R. William Cornelius, Esq. is an attorney at Torres Law, P.A., a South Florida law firm specializing in corporate and securities law matters. Mr. Cornelius has extensive transactional law experience and has been actively engaged in the EB-5 arena over the past eight years representing regional centers, projects and issuers through the corporate structuring, migration broker and offering process to maximize marketability, compliance and funding success.

Continued On Page 38

SANCTIONS FOR INCONSISTENT ACTIVITY AND ANNUAL STATEMENTS

Under the RIA, a regional center may be subject to sanctions if USCIS determines that the regional center is conducting itself in a manner inconsistent with its designation, which the RIA expressly states includes any willful, undisclosed and material deviations by NCEs from their filed business plans.

Though the RIA makes clear that material deviations from filed business plans would fall under the umbrella of "inconsistent activity," it remains to be seen just how broadly USCIS could apply this concept. Without further guidance or a clear precedential record of past transgressions and the sanctions imposed with respect thereto (both by USCIS and the courts), regional centers would be well advised to err on the side of reasonable, good-faith caution in order to protect their designations and avoid USCIS sanctions.

Even if the application in this context remains broad and/or unclear, the RIA does explicitly contain a list of possible sanctions available to USCIS for a regional center engaging in activity inconsistent with its designation.

While there does not appear to be any bright line rule with respect to violations and associated penalties, the RIA does provide for a graduated set of sanctions based on the severity of the violations, which could include each of the following.[2]

1. **Fines equal to not more than 10 percent of the total capital invested by alien investors in the regional center's NCEs or JCEs directly involved in such violations;**
2. **Temporary suspension from participation in the EB-5 Program (which may be lifted if the individual or entity cures the alleged violation);**
3. **Permanent bar from participation in the EB-5 Program for one or more individuals or entities associated with the regional center, NCE, or JCE; and**
4. **Termination of a regional center's designation.**

Though suspension, disbarment and termination could alone deter bad conduct by industry participants, it is USCIS' authority to levy fines of up to 10% of the total capital invested that arguably packs the hardest punch, particularly since such fines cannot be paid using investor capital (meaning the individuals and/or entities that engaged in such violation would be required to pay those fines from their own pockets, either at the entity or personal level, or both).

In addition to sanctions for inconsistent activity, USCIS also has authority to sanction regional centers for violations of their annual reporting requirements. While it appears that USCIS would have discretion over the scope of sanctions it may impose for violations related to annual statements, the RIA removes any discretionary element for such sanctions and does in fact require USCIS to sanction regional centers if a regional center either: (1) fails to file its annual statement; or (2) knowingly submits (or causes to be submitted) a statement, certification or any information submitted in connection with an annual statement that contains an untrue statement of material fact. Since regional center submissions contain much information provided by others (NCEs, JCEs, persons "involved" with the regional center, direct and third-party promoters and more), regional centers risk penalties derivatively based on inaccurate or incomplete (or worse) information they receive and rely upon from others.

Since annual statements provide a key oversight mechanism for USCIS, they also serve as a potential pitfall for regional centers, who must be careful to ensure compliance by their various NCEs and JCEs so as to not knowingly submit annual statements that could expose the regional center to potential sanctions.

SECURITIES LAWS COMPLIANCE

Another key oversight mechanism available to USCIS is the ability to sanction and/or suspend regional centers due to their failure to comply with applicable securities laws. Under the RIA, USCIS may suspend or terminate the designation of any regional center, or impose other sanctions against the regional center, if the regional center, or any parties associated with the regional center that the regional center knew or reasonably should have known.[3]

1. **are permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction in connection with the offer, purchase, or sale of a security or the provision of investment advice;**
2. **are subject to any final order of the Securities and Exchange Commission ("SEC") or a state securities regulator that (a) bars such person from association with an entity regulated by the SEC or a state securities regulator or (b) constitutes a final order based on a finding of an intentional violation or a violation related to fraud or deceit in connection with the offer, purchase, or sale of, or investment advice relating to, a security;**
3. **or submitted, or caused to be submitted, a certification as to securities laws compliance that contained an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.**

This provision is significant not only because it allows USCIS to police securities violations (which would be separate from and in addition to securities enforcement mechanisms available to securities regulators such as the SEC), it also grants to USCIS the right to both suspend or permanently bar participation under the EB-5 Program and impose other sanctions, which could include the assessment of fees.

REDEPLOYMENTS, AUDITS AND PAYMENT OF FEES

In contrast to the aforementioned sanctions, where USCIS seemingly possesses at least some discretion with respect to violations, there are certain instances where the RIA grants USCIS less discretion and instead requires USCIS to terminate the designation of a regional center in connection with certain violations.

For example, the RIA states that USCIS shall terminate the designation of a regional center if USCIS determines that an NCE has violated any of the RIA's capital redeployment provisions (including, without limitation, where the NCE did not execute its business plan without material change or did not create a sufficient number of jobs to satisfy the job creation requirements

[2] See 8 U.S.C. §1153(b)(5)(G)(iii).
[3] I.d. at (I)(vi).

Continued On Page 39

for all investors in the NCE).[4]

Additionally, the RIA requires USCIS to terminate the designation of a regional center that fails to consent to an annual audit or deliberately attempts to impede any such audit.[5]

USCIS also has the ability to impose a reasonable penalty for the failure to pay fees to the Integrity Fund. Any penalties imposed by USCIS in connection with the failure to make such payments would themselves be deposited into the Integrity Fund, which USCIS may utilize to further compliance efforts with respect to immigration laws, to detect and investigate fraud or other crimes, and to conduct audits and site visits (including where at least a third (1/3) of which would be used for investigations based outside of the United States).[6]

Furthermore, USCIS is required to terminate the designation of any regional center that does not make the required payments within 90 days after the due date.[7]

BAD ACTORS AND FRAUDULENT ACTIVITIES

Under the RIA, USCIS may suspend or terminate the designation of any regional center, or the participation under the EB-5 Program of any NCE or JCE, if USCIS determines that such entity.[8]

1. **knowingly involved either (i) a person lacking bona fides under subsection (H) of the RIA[9] or (ii) a person that is not a U.S. national or lawful permanent resident, or a representative of a foreign government, by failing, within 14 days of acquiring such knowledge, to (A) take commercially reasonable efforts to discontinue the prohibited person's involvement or (B) provide notice thereof to USCIS;**

2. **failed to provide an attestation or information requested by USCIS in connection therewith in compliance with the RIA; or**

3. **knowingly provided any false attestation or information in connection therewith as required under the RIA.**

While the sanctions authorized with respect to these "bad actors" would be limited to the entities that have engaged in any of the above listed prohibited activities, USCIS has the discretion to suspend or terminate the designation of any regional center that knowingly permits the involvement of these so-called bad actors.

Since USCIS requires persons involved with the NCE and JCE to file an I-956(H) to confirm their bona fides, regional centers again risk penalties based on inaccurate or incomplete information they receive from others (including parties the regional does not control). This could be particularly problematic where USCIS could interpret that I-956(H) filings serve as an affirmation that no other persons are in fact involved other than those affirmatively disclosed in an I-956(H).

As a result, a regional center could be exposed to potential liability due to both material misstatements and/or omissions in current filings as well as liability for a third party's failure to file an I-956(H) that would have otherwise been required by the RIA.

Based on this potential liability, regional centers must be careful to conduct appropriate due diligence and other factual inquiries in order to uncover all involved persons and their respective backgrounds to ensure that all appropriate filings are made with USCIS.

Importantly, if the regional center, NCE, or JCE fails to discontinue the prohibited person's involvement with the regional center, NCE, or JCE, as applicable, within 30 days after receiving such notification, the entity will be deemed, for the purposes of the RIA, to have knowledge that the involvement of such person with the entity violates the RIA, thus subjecting such entity to potential suspension or termination under the RIA.

In addition to penalties for the inclusion of bad actors, the RIA requires USCIS to deny or revoke the approval of a petition, application or benefit if USCIS determines such petition, application, or benefit is contrary to the national interest of the United States or was predicated on or involved fraud, deceit, intentional material misrepresentation, or criminal misuse. Furthermore, if a regional center, NCE or JCE has its designation or participation in the EB-5 Program terminated for reasons relating to public safety or national security or for reasons relating to fraud, intentional material misrepresentation or criminal misuse, any person associated with such regional center, NCE, or JCE, including an alien investor, shall be permanently barred from future participation in the EB-5 Program if USCIS determines, by a preponderance of the evidence, that such person was a knowing participant in the conduct that led to the termination.

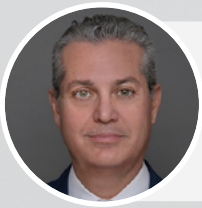
From a practical perspective, these penalties could serve as a death sentence for regional centers and industry operators, particularly since there is little information available to assess whether USCIS' determination in such regard could later be overturned by the courts. In addition to the time, effort and expense associated with challenging USCIS decisions, a regional center, NCE or JCE may also sustain reputational damage or a loss of goodwill by virtue of an adverse determination by USCIS, even if it were able to overcome the associated stigma in the long run.

CONCLUSION

Ultimately, the RIA requires issuers to remain vigilant in their policies and procedures to avoid exposing themselves to penalties for some of the common pitfalls discussed in this article. Even without further clarification on how USCIS may impose penalties and sanctions (which will likely be very slow in coming, and very costly if resulting from litigating against the agency), regional centers, NCEs, and JCEs should seek the assistance of knowledgeable and experienced financial and legal professionals to ensure they are well advised and take meaningful steps to comply with applicable provisions of the RIA so they can avoid the consequences described herein.

[4] I.d. at (F)(v)(II).
[5] I.d. at (E)(vii)(III).
[6] I.d. at (J)(iv).
[7] I.d. at (J)(iv)(II).
[8] I.d. at (H)(iv).
[9] Under the RIA, persons lacking bona fides include persons that: (i) were found to have committed a criminal or civil offense involving fraud or deceit within the previous 10 years, a civil offense involving fraud or deceit that resulted in liability in excess of $1,000,000, or a crime for which the person was convicted and sentenced to a term of imprisonment of more than one year; (ii) are subject to a final order of a state securities commission (or similar agency or officer performing similar functions), a state authority that supervises or examines banks, savings associations or credit unions, a state insurance commission (or similar agency or officer performing similar functions), an appropriate Federal banking agency, the Commodity Futures Trading Commission, the Securities and Exchange Commission, a financial self-regulatory organization recognized by the Securities and Exchange Commission, or the National Credit Union Administration, which is based on a violation of any law or regulation that either (a) prohibits fraudulent, manipulative or deceptive conduct, or (b) bars the person from association with any of the foregoing, appearing before any of the foregoing, engaging in the business of securities, insurance or banking, or engaging in savings association or credit union activities; (iii) is engaged in, has ever been engaged in, or seeks to engage in, certain prohibited activities, including amongst others, (a) illicit trafficking in control substances, (b) espionage, sabotage or theft of intellectual property, (c) any activity related to money laundering, (d) terrorism, or (e) human trafficking or human rights offenses; or (iv) is, or during the preceding 10 years has been, included on the Department of Justice's List of Currently Disciplined Practitioners, or during the preceding 10 years, has received a reprimand or has otherwise been publicly disciplined for conduct related to fraud or deceit by a state bar association of which the person is or was a member.

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

Continued On Page 41

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).

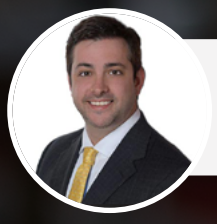
Continued On Page 42

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.

Understanding EB-5 Visa Wasting and Its Impact on Chinese Investors – A Call for Justice



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Much has been written about the success of raising EB-5 capital from China-mainland national investors in the 2010s, the resulting immigrant visa backlog and imposition of a Final Action Date (FAD) in the Visa Bulletin, and the ensuing impact on the EB-5 community, including age-outs for derivative child beneficiaries and the extensive redeployment of billions in capital.

This article examines the slow movement of the China EB-5 FAD in recent years, the impact of the EB-5 Reform and Integrity Act of 2022 (RIA) on the China EB-5 FAD, and how a group of concerned immigrant investors have fought to advance the China EB-5 FAD date through judicial intervention.

Continued On Page 44

THE CHINA EB-5 FINAL ACTION DATE

In the May 2015 Visa Bulletin, after determining that demand from mainland-China for the EB-5 visa would exceed the annual numerical limit for FY 2015 set by Congress, the U.S. Department of State (DOS) first established a China-mainland born EB-5 FAD of May 1, 2013. Nearly eight years later, in May 2023,[2] the "unreserved" China EB-5 FAD is now only at September 8, 2015, demonstrating an FAD date advancement of less than 2.50 years.

As of May 1, 2023,[1] only investors who submitted a Form I-526 before September 8, 2015 can move forward with their immigrant visa processing. Although the China EB-5 FAD had previously advanced as far forward as December 22, 2015,[3] it retrogressed in October 2022[4] and will likely only advance as far as January 1, 2016 by the end of FY 2023 (September 2023), as reflected in Chart B's Date for Filing, which is a prediction of where the State Department expects the FAD to be by the end of the FY 2023, on September 30, 2023.

Additionally, as demand for EB-5 visa numbers has risen from the rest of the world (ROW), the number of "leftover" visas being available to mainland-China EB-5 investors has declined, which reduces how quickly the China-mainland born EB-5 FAD date may advance. Under the Immigration and Nationality Act, after a country uses its 7% "per country" allocation, it may only use "otherwise unused visas" from other countries if DOS determines there is insufficient ROW demand. But as USCIS works through Form I-526 petitions filed in 2019, that demand will increase, leaving fewer EB-5 visa numbers to mainland-China EB-5, further reducing the rate at which the China EB-5 FAD can advance. The following chart documents the percentage use of EB-5 visa numbers under the annual limit by mainland-China investors over the past seven fiscal years.

Fiscal Year	% of EB-5 Visa Number Use by Mainland-China Investors
FY 2014	85%
FY 2015	83%
FY 2016	75%
FY 2017	75%
FY 2018	48%
FY 2019	45%
FY 2020	43%
FY 2021	53%
FY 2022	56%

THE REGIONAL CENTER LAPSE AND THE RIA

In summary, the RIA includes "reserved" visa provisions that will further reduce the number of visas made available to pre-RIA investors, and it will prolong the delay caused by the China EB-5 FAD in the new "unreserved" visa category[5], or to simplify, the old EB-5 waiting line. DOS has indicated that pre-RIA petitions "will be adjudicated under the law in effect at the time of filing" and not qualify for the reserved visa category. This is also USCIS' position, as indicated in a recent court filing related to retroactively applying the reserved visas to pre-RIA investors.[6]

While the new legislation allows for the "reserved" visas to "carryover" to the next fiscal year, it appears that if those unused carryover visas are not used during "by the end of [each] succeeding fiscal year," those visas will no longer be available to EB-5 investors (neither will they "fall up" to the EB-1 visa category). Instead, these visa numbers will be wasted, as the State Department alleges that they can only be recaptured through further congressional action. This is despite the fact that Congress has already made clear that all authorized visas allocated each fiscal year should be used, as confirmed by its "fall-up," "fall down," and "fall across" provisions related to the use of immigrant visas. See 8 U.S.C. §§ 1151, 1152, and 1153.

In this context, there is particular concern as to USCIS' processing times on newly filed Forms I-526/I-526E for the reserved visa categories. If USCIS' online processing times are accurate, and if it will take nearly 58.5 months for a Form I-526 adjudication, countless thousands of the "reserved" visa numbers could go unused, unless DOS allocates them now for general availability and to the unreserved (C5, T5, I5, R5) visa categories, for which there is a substantial backlog for China-mainland investors. Making the determination early in the fiscal year to increase the allocation to unreserved visas, in particular when IPO has not yet adjudicated any reserved visa petition cases, should be the DOS' top priority to ensure that all available visas are used and not wasted. In particular, there are 6,396 visas that could be used in FY 2023 to reduce the backlog of the over 38,000 China-mainland investors stuck at the National Visa Center, waiting for a visa to become available.[7]

Adding salt to the wound, despite enactment of the RIA on March 15, 2022, the U.S. Consulate in Guangzhou, China that processes most Chinese EB-5 visas, had issued less than 1,000 immigrant visas to Regional Center investors during the first quarter of processing thereafter (that is, by the end of July 2022).

Continued On Page 45

JUDICIAL INTERVENTION

When it was apparent during early summer months of 2022 that EB-5 mainland-China investors were not getting scheduled for immigrant visa interviews, even after the Regional Center lapse ended, WR Managing Partner Bernard "Bernie" Wolfsdorf and his partners Joey Barnett and Vivian Zhu began researching legal strategies to ensure the U.S. government followed the law and allocated visa numbers to ensure none would be wasted (like the nearly 16,000 visas, or about around 84%, of EB-5 visas allocated in FY 2021[8]) and to try and prevent as many derivative child age-outs as possible under the law. Many Chinese investors filed EB-5 petitions to provide an opportunity to their children to "live the American Dream" only to discover that because the EB-5 China Final Action date had backlogged, they were unable to "freeze" their children's age under the Child Status Protection Act ("CSPA")

Working with experienced federal litigator and former DOJ employee, Brad Banias, a complaint was filed in the District Court for the District of Columbia on behalf of over 300 Chinese nationals who sought to enjoin DHS and DOS to take actions to reduce the wait times for EB-5 visas, including, but not limited to, USCIS transferring the approved Form I-526 case to DOS, DOS "authorizing" an immigrant visa number upon receipt from USCIS, and DOS processing the immigrant visa applications within 6 months and schedule interviews with in accordance with the plain meaning of the statute.[9] A motion for a preliminary injunction was filed shortly thereafter.

Within a week of filing the lawsuit in early August 2022, the U.S. Consulate in Guangzhou, China ramped up and began scheduling substantially more EB-5 immigrant visa interviews. 2,296 of the 4,060 issued to China-mainland nationals abroad in FY 2022 were issued in September 2022 alone[10], suggesting that the U.S. Consulate in Guangzhou did have capacity to issue more EB-5 visas than it had been normally. Sadly, in the next two months, Guangzhou issued a much smaller number of EB-5 visas, as described in the table below, and sadly, derivative children have continued to age-out as a result of EB-5 visa wasting.

Month	Number of I5 (Regional Center, TEA) Visas Issued by U.S. Consulate at Guangzhou
June 2022	140
July 2022	639
August 2022	546
September 2022	2,296
October 2022	75
November 2022	229
December 2022	116
January 2022	73
February 2023	473

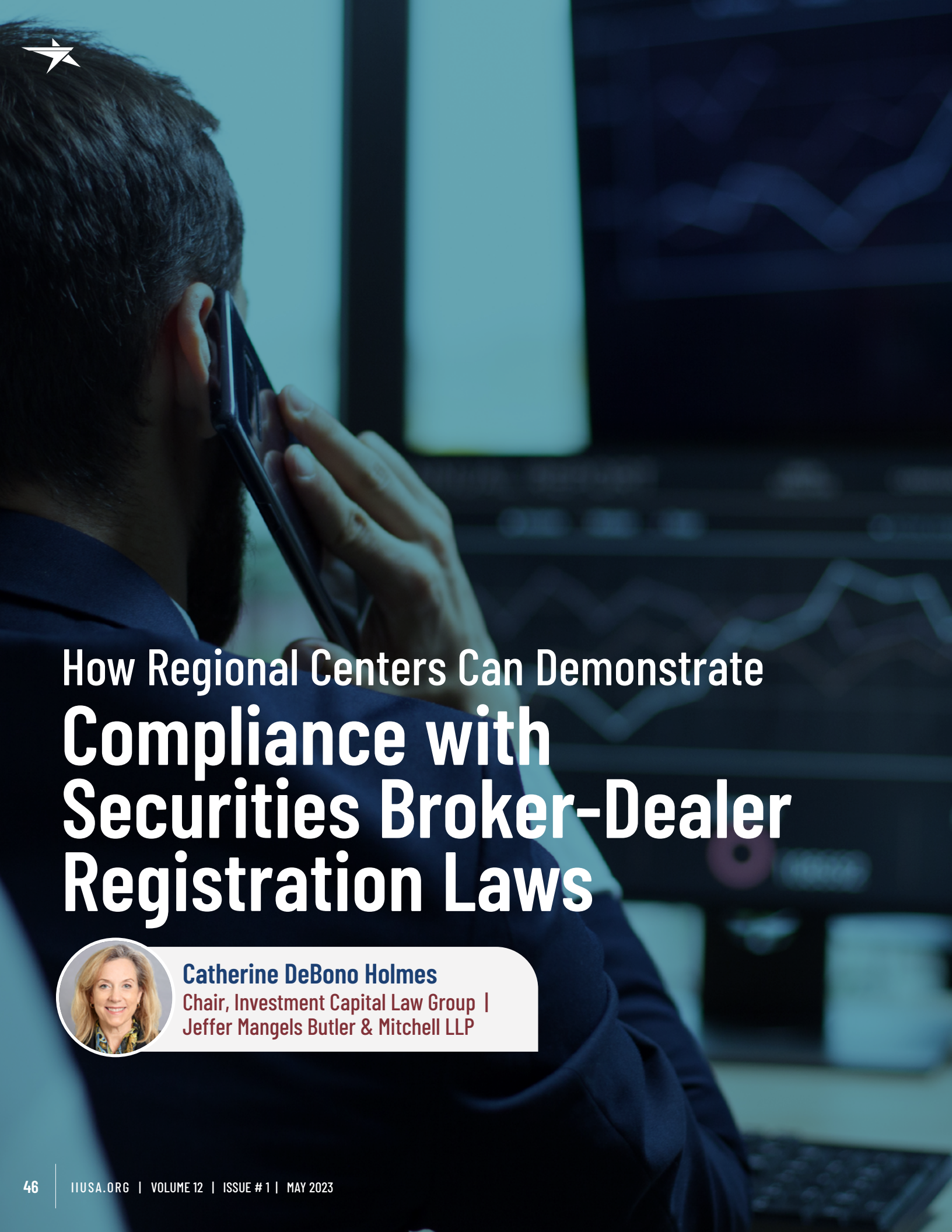
The District Court judge denied plaintiffs' motion for a preliminary injunction on September 29, 2022, and that decision has now been appealed to the D.C. Circuit of Appeals.[11] In particular, plaintiffs argue that the lower court erred by holding DOS does not have a duty to assign any available EB-5 visa number immediately upon receipt of an approved EB5 petition from DHS under § 1154(b), which, again, states DHS "shall . . . approve the petition and forward one copy thereof to the Department. The Secretary of State shall then authorize the consular officer concerned to grant the preference status." Plaintiffs also argued on appeal that the lower court erred by determining plaintiffs would not be irreparably harmed without such an order and the equities favored refusing such orders.

Plaintiffs continue to prosecute their claims in district court, where the government has argued that the lawsuit should be dismissed due to mootness and a failure to state a claim. Plaintiffs have disagreed and argued that the defendants' failure to stop their challenged conduct will cause more EB-5 visa number waste in FY 2023 and that they continue to be harmed by waiting indefinitely. Additionally, despite the government's claims when fighting the motion for a preliminary injunction in September 2022 that the U.S. government was likely to use all EB-5 visa numbers for FY 2022, the State Department's Report of the Visa Office 2022[12] has recently confirmed that over 2,700 EB-5 visa numbers were lost to EB-5 visa applicants forever. These lost visas could have been authorized to mainland-China investors, reducing the visa backlog, and pushing the China EB-5 FAD forward. Moreover, had the FAD been moved forward, this would also have allowed hundreds of derivative children to file their DS-260s with the National Visa Center, or for some in the U.S., to file their adjustment of status application with USCIS, and thereby have their age "frozen" until completion of the visa process.

CONCLUSION

It is time to stop EB-5 immigrant visa wasting. There must be a commitment by the U.S. government, including DHS-USCIS and DOS, to protect the China-mainland born EB-5 immigrant investors who made good-faith "at risk" investments. Congress and the executive branch need to act now to ensure that investors get the deal they bargained for. Hopefully the Courts will side with the Chinese investors and provide justice in accordance with the law to the 38,000 Chinese investors waiting patiently in line. Many of these put their life savings into the EB-5 investment, to have the opportunity to live the American Dream with their children. The U.S. has given Temporary Protected Status (TPS) to over 400,000 deserving undocumented, but should not forget the tens of thousands who are trying to follow the rules but are being forgotten.

[1] https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2015/visa-bulletin-for-may-2015.html
[2] https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2023/visa-bulletin-for-may-2023.html
[3] https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2022/visa-bulletin-for-september-2022.html
[4] https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2023/visa-bulletin-for-october-2022.html
[5] See Reserved Visas Rules, Possible Future Visa Allocations, and Recommendations, available at https://iiusa.org/wp-content/uploads/2022/09/Reserved-Visa-Article-FINAL.pdf
[6] See Delaware Valley Regional Center et al v. U.S. Department of Homeland Security et al. 1:23-cv-00119 (D.D.C) ("[R]ead in the context of 8 U.S.C. § 1154(a)(1)(H)(i), the definition of "infrastructure project" contained in 8 U.S.C. § 1153(b)(5)(D)(iv), applies to post-RIA investments made in accordance with 8 U.S.C. §§ 1153(b)(5)(E) & (F), not pre-RIA investments such as those made by Plaintiffs.").
[7] https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingList/WaitingListItem_2022.pdf
[8] https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2021AnnualReport/FY21_TableV_Part3.pdf
[9] See 8 U.S.C. § 1154(b)(Upon receipt of an approved visa petition, the "Secretary of State shall then authorize the consular officer concerned to grant the preference status."
[10] https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/MonthlyIVIssuances/SEPTEMBER%202022%20-%20IV%20Issuances%20by%20Post%20and%20Visa%20Class.pdf
[11] See Bo Li, et al v. Antony Blinken, 1:22-cv-02331-TSC (D.C. Cir).
[12] See https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/annual-reports.html



How Regional Centers Can Demonstrate

Compliance with Securities Broker-Dealer Registration Laws

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Under the EB-5 Reform and Integrity Act of 2022 ("**RIA**"), Regional Centers are required to annually certify their own compliance and compliance by designated third parties that participate in offerings sponsored by Regional Centers with the federal and state securities laws, including compliance with exemptions from broker-dealer registration for the persons who participate in solicitation of investors for the offerings sponsored by regional centers. One of the key components of the RIA is a focus on Regional Centers' responsibility for certifying compliance by employees and agents of new commercial enterprises ("**NCEs**") and job creating entities ("**JCEs**") with federal and state securities laws. This article focuses on one aspect of compliance with those securities laws, which is the requirement that all persons who participate in an offering of securities must be registered as representatives of a registered securities broker-dealer, or must comply with an exemption from such registration.

WHO IS REQUIRED TO REGISTER AS A SECURITIES BROKER-DEALER?

Section 15 of the Securities and Exchange Act of 1934, as amended, requires that all persons engaged in the business of brokering securities be registered as securities broker-dealers, or as registered representatives of a registered securities broker-dealer. The Securities and Exchange Commission ("**SEC**") has a detailed description of the factors it considers relevant to a determination of whether a person is a "broker" required to register with the SEC on its website **(https://www.sec.gov/about/reports-publications/investor-publications/guide-broker-dealer-registration),** stating that each of the following individuals and businesses (among others) may need to register as a broker, depending on a number of factors:

- **"finders," "business brokers," and other individuals or entities that engage in the following activities:**
    - Finding investors or customers for, making referrals to, or splitting commissions with registered broker-dealers, investment companies (or mutual funds, including hedge funds), or other securities intermediaries;
    - Finding investors for "issuers" (meaning entities issuing and selling their own) securities), even in a "consultant" capacity;

Continued On Page 48

- investment advisers and financial consultants;
- persons that act as "placement agents" for private placements of securities;
- persons that effect securities transactions for the account of others for a fee, even when those other people are friends or family members; and
- persons that act as "independent contractors," but are not "associated persons" of a broker-dealer.

In order to determine whether any of these individuals (or any other person or business) is a broker, the SEC looks at the activities that the person or business actually performs. There are a number of federal court decisions and SEC no-action and interpretive letters that analyze these activities to determine when an individual analyses of various activities in the decisions of federal courts and our own no-action and interpretive letters. Here are some of the questions that the SEC and courts consider important to a determination of whether a person is acting a broker:

- Does the person participate in important parts of a securities transaction, including solicitation, negotiation, or execution of the transaction?
- Does the person's compensation for participation in the transaction depend upon, or is it related to, the outcome or size of the transaction or deal?
- Does the person receive any other transaction-related compensation?

A "yes" answer to any one of these questions indicates that the person may need to register as a broker.

ARE THERE GUIDELINES THAT CAN BE FOLLOWED TO ESTABLISH THAT A PERSON IS NOT REQUIRED TO REGISTER AS A REPRESENTATIVE OF A SECURITIES BROKER-DEALER?

The SEC has adopted Rule 3a4-1 as a safe harbor exemption from registration as a securities broker-dealer for the officers, directors, and employees of an issuer of securities, or the officers, directors, and employees of the manager or general partner of the issuer, who participate in securities offerings conducted on behalf of the issuer. The Rule 3a4-1 exemption is often referred to as the "issuer exemption," although the exemption is actually for individual persons associated with the issuer. For clarity, the exemption is referred to here as "Rule 3a4-1" or the "Rule." If the conditions of the Rule are met, then the persons who meet the conditions are themselves exempt from registration. Because this is a safe harbor, there is no absolute requirement that the requirements of the Rule be strictly met or registration is automatically required. Rather, persons who do meet the safe harbor conditions will automatically be exempt from registration, and persons who do not meet the conditions will require further analysis to determine if they would be required to register. Therefore, if a Regional Center can demonstrate that the persons who participate in each offering of securities sponsored by the Regional Center do meet the conditions of Rule 3a4-1, that will mean that those persons are not required to be registered as securities broker-dealers

WHAT ARE THE CONDITIONS REQUIRED TO BE MET UNDER RULE 3A4-1?

There are three conditions required for every person who relies on the Rule 3a4-1 exemption from registration, which are as follows:

(1) the person is not subject to any statutory disqualification, as that term is defined in section 3(a)(39) of the Securities and Exchange Act of 1934 (which lists disciplinary events that would disqualify a person similar to the disqualification events under Regulation D),

(2) the person is not compensated in connection with his or her participation by the payment of commissions or other remuneration based either directly or indirectly on transactions in securities (often called "transaction-based compensation"); and

(3) the person is not at the time of his or her participation, and was not, at any time within 12 months of the date of his or her participation, an associated person of a U.S. registered broker or dealer.

In addition, every person who relies on the Rule 3a4-1 exemption must meet at least one of the following additional conditions:

A. Other duties, and participation in solicitation activities no more than once every 12 months. The person meets the following additional conditions: (i) the person primarily performs duties other than solicitation activities; and (ii) the person participates in solicitation activities for no more than one offering every 12 months; or

B. Participation in limited offering activities. The person participates in the following non-solicitation types of activities: (i) communications with foreign brokers or dealers or U.S. registered broker-dealers; (ii) preparing and delivering written communications not including oral solicitation of a potential purchaser; (iii) responding to inquiries of potential purchasers in a communication initiated by the potential purchaser, using information contained in offering documents prepared for a specific EB-5 investment offering, and (iv) performing ministerial and clerical work involved in effecting transactions in EB-5 investments.

HOW CAN A REGIONAL CENTERS DEMONSTRATE THAT THE REQUIREMENTS OF RULE 3A4-1 ARE MET BY EACH PERSON AFFILIATED WITH THE NCE?

One way for a Regional Center to demonstrate compliance with the Rule 3a4-1 exemption for persons who participate in securities offerings sponsored by the Regional Center is to adopt written guidelines for compliance with the Rule 3a4-1 exemption, and require that all persons involved in those offerings each review and annually certify in writing that they meet the guidelines. The Regional Center should retain those certifications in the compliance records of the Regional Center, which will be available for review by USCIS or the SEC.

Continued On Page 49

CAN RULE 3A4-1 BE RELIED UPON BY PERSONS WHO ARE INDEPENDENT CONTRACTORS, AGENTS, OR CONSULTANTS, BUT NOT OFFICERS, DIRECTORS, OR EMPLOYEES OF THE NCE?

No, Rule 3a4-1 is only available for officers, directors, and employees of an issuer of securities or of its manager or general partner. The exemption cannot be used for independent contractors, agents, or consultants. Those persons will be required to show that they do not participate in the activities that are considered brokering activities, and that they are not paid compensation for participation in the offering that is dependent on or related to the amount of proceeds raised in the offering. Regional Centers should further consider that any persons who do receive compensation in connection with a securities offering sponsored by the Regional Center would be required to register as a "promoter" by filing the I-956K Registration for Direct and Third Party Promoters. Any such persons who are U.S. residents or doing business in the U.S. would likely come under greater scrutiny by USCIS and the SEC to determine if their activities did require registration as securities broker-dealers. It is therefore highly recommended that any type of compensation arrangements for any persons who are not qualified to rely on the Rule 3a4-1 exemption not be tied in any way to the proceeds raised in any securities offering sponsored by the Regional Center.

IS THERE AN EXEMPTION FROM REGISTRATION FOR NON-U.S. AGENTS WHO PARTICIPATE IN SECURITIES OFFERINGS OUTSIDE THE U.S.?

The SEC has historically taken the position that non-U.S. persons who (i) do not do business in the U.S. and (ii) do not solicit U.S. residents in securities offerings are not required to be registered in the U.S. as securities broker-dealers. This is not provided in any specific SEC rule, but the history of the SEC's enforcement of the securities broker-dealer registration requirements (also applicable to EB-5 offerings in particular) indicates that this is the position of the SEC with respect to these offerings. Specifically, the SEC has brought a number of enforcement actions against U.S. persons who received compensation in connection with EB-5 offerings, even for solicitation of investors outside the U.S. However, the SEC has not brought any such enforcement actions against any non-U.S. persons who do not do business in the U.S. and do not solicit potential investors in the U.S. These non-U.S. persons are not required to meet the conditions of Rule 3a4-1, but they should be required to represent in their written agreements with NCEs that they are not U.S. persons, do not do business in the U.S. and will not solicit investors in the U.S. Many of those non-U.S. persons will likely need to carefully consider registration with USCIS as Promoters (as discussed above) even if not required to register in the U.S.

Regional Center Oversight Obligations and the

RC Affiliation Agreement: Key Provisions

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It is difficult to reasonably refute that "[r]unning a regional center will be much more demanding"[2] after passage of the EB-5 Reform and Integrity Act of 2022 (the "**Reform Act**").[3] Among other material changes, the Reform Act requires regional centers ("**Regional Centers**") to provide detailed annual statements that include certifications confirming compliance with applicable laws, including federal and state securities laws, records relating to each commercial project, an accounting of all investor capital and a description of material litigation. Clearly "[t]hese new [Reform Act] obligations will cause regional centers and the new commercial enterprises ("**NCE**") to assert more contractual control over developers and charge more for their services and risk."[4] Consequently, a thoughtful and properly drafted regional center affiliation agreement (the "**RC Agreement**") will be necessary—as it has always been—to ensure Regional Centers can properly oversee and enforce compliance measures with respect to the commercial projects they sponsor.

This article (i) explores the essential investment "oversight" obligations of Regional Centers as set forth in sample pre-Reform Act Regional Center designation letters[5] issued by the U.S. Citizenship and Immigration Services ("**USCIS**"), (ii) examines whether such pre-Reform Act oversight obligations are similar to those under the Reform Act and (iii) summarizes the key provisions that should be considered by the parties to the RC Agreement

AN INTRODUCTORY RETROSPECTIVE

It is irrefutable that the Reform Act imposes new obligations on Regional Centers. Arguably one of the main purposes of the Reform Act was to codify existing U.S. Citizenship and Immigration Services ("**USCIS**") rules, policies and pronouncements, especially relating to a Regional Center's responsibilities with respect to compliance with securities laws. The impetus for the Reform Act was rooted in preventing fraud and abuse, which came to light in a handful of Securities and Exchange Commission actions and other court cases relating to EB-5 projects. The gravamen of the complaint in those actions and cases almost invariably involved allegations of securities laws violations, including the diversion or misappropriation of EB-5 investor funds. The Reform Act attempts to clamp down on such potential abuses by expressly requiring Regional Centers to ensure that the EB-5 projects they sponsor comply with applicable securities law, as to which Regional Centers must certify in their initial applications and on an annual basis thereafter. In other words, Regional Centers must monitor and oversee the investments they sponsor in their approved geographic or economic zone (the "**Economic Zone**").

But are the Reform Act oversight requirements truly different from the responsibilities that pre-Reform Act Regional Centers were charged with to oversee investments? An examination of the sample Regional Center designation letters we reviewed from 2007 to 2018 makes clear that pre-Reform Act Regional Centers were always required to "monitor" and exercise "oversight" responsibility regarding the EB-5 investments they sponsored in their Economic Zone. For instance, in an amended designation letter issued in 2007, the following paragraph appeared under the heading "Designee's Responsibilities Inherent in Operation of the Regional Center":

> **Therefore, in order for USCIS to determine whether your regional center is in compliance with the above cited regulation, and in order to continue to operate as a USCIS approved and designated regional center, your administration, oversight, and management of your regional center shall be such as to monitor all investment activities under the sponsorship of your regional center, and to maintain records, data and information on a quarterly basis in order to report to USCIS upon request year to date for each Federal Fiscal Year1, commencing with the current year as follows:**

A similar requirement to "monitor" appears in the following excerpt form a 2010 designation letter:

> **Therefore, in order for USCIS to determine whether your Regional Center is in compliance with the above cited regulation, and in order to continue to operate as a USCIS approved and designated Regional Center, your administration, oversight, and management of your Regional Center shall be such as to monitor all investment activities under the sponsorship of your Regional Center and to maintain records, data and information on a quarterly basis in order to report to USCIS upon request ...**
>
> **3. Be prepared to explain the following:**
>
> **A. How the Regional Center is actively engaged in the evaluation, oversight and follow up on any proposed commercial activities that will be utilized by alien investors.**
>
> **B. How the Regional Center is actively engaged in the ongoing monitoring, evaluation, oversight and follow up on any investor commercial activity affiliated through the Regional Center that will be utilized by alien investors in order to create direct and/or indirect jobs through qualifying EB-5 capital investments into commercial enterprises within the Regional Center.**

The following designation letter issued in 2014 contains similar requirements relating to the monitoring of the EB-5 investment:

> **As provided in 8 CFR § 204.6(m)(6), to ensure that the regional center continues to meet the requirements of section 610(a) of the Appropriations Act, a regional center must provide USCIS with updated information to demonstrate the regional center is continuing to promote economic growth, improved regional productivity, job creation, and increased domestic capital investment in the approved geographic area. Such information must be submitted to USCIS on an annual basis or as otherwise requested by USCIS. The applicant must monitor all investment activities under the sponsorship of the regional center and to maintain records in order to provide the information required on the Form I-924A Supplement to Form I-924.**

Continued On Page 52

A more recent designation letter, this one issued in 2018, also refers to the investment monitoring requirement, but goes a bit farther by reinforcing the obligation to comply with applicable laws and warns that the failure of the NCE or job creating entity ("**JCE**") to also comply with all laws relating to investment offerings may be cause for USCIS to issue a notice of intent to terminate the Regional Center:

> Each approved regional center must continue to demonstrate that there are sufficient management, oversight and administrative functions in place to monitor **all investment offerings** and activities under the sponsorship of the regional center. **The failure of an associated new commercial enterprise or job creating entity to comply with all laws and regulations related to such investment offerings and activities may result in the issuance by USCIS of a notice of intent to terminate** the regional center designation.

What is most curious about the aforementioned 2018 letter is the clear admonition that the acts of NCEs and JCEs, even if apparently unaffiliated with the Regional Center, could result in the termination of the Regional Center's designation. The Reform Act clearly codifies that notion.[6]

In summary, the designation letter provisions noted above make it abundantly clear that Regional Centers were always required to evaluate, oversee and monitor EB-5 related activity they sponsored. As noted in the sample designation letter from 2007, that responsibility was "inherent" to, and part and parcel with, engaging in the promotion and effectuation of EB-5 investment activity. After all, Regional Centers were tasked with creating and/or sponsoring investment opportunities for foreigners for the purpose of creating jobs for American workers. Endowed with that responsibility surely must also have imposed the concomitant obligation to ensure compliance with applicable laws by requiring that Regional Centers monitor and oversee that same EB-5 investment activity. Did some rogue actors disregard their fundamental Regional Center obligations to oversee and monitor? Apparently so, but that did not erode the plain meaning of the words contained in designation letters. As such, it stands to reason that responsible Regional Centers that understood and abided by their regional center designations never needed the Reform Act to coerce compliance or reinforce their oversight responsibilities—most always did. Unfortunately, however, other Regional Center operators feigned ignorance or otherwise skirted the law—and to the extent the Reform Act now better induces outlier Regional Center operators to undertake their oversight responsibilities in a serious manner, the playing field should be evened. As was required in each of the designation letters examined above, the Reform Act now codifies the essential EB-5 investment oversight obligations imposed on all Regional Centers, each of which must under the Reform Act "[...] use commercially reasonable efforts to **monitor and supervise compliance** with the securities laws in relations [sic] to all offers, purchases, and sales of, and investment advice relating to, securities made by parties associated with the regional center...".[7]

ANATOMY OF THE POST REFORM ACT RC AGREEMENT

Whether representing a mature Regional Center or one just starting out, a well drafted RC Agreement is an essential document that must be carefully considered and properly drafted. The RC Agreement is typically entered into among (i) Regional Center, (ii) the NCE, as the issuer of the securities to be subscribed for by the EB-5 investors and (iii) the JCE or project entity, usually in its capacity as the borrower of the NCE's loan or recipient of the NCE's equity investment, in either case, utilizing the pooled EB-5 investors' funds subscribed for in the NCE.

A typical RC Agreement, whether pre or post the Reform Act, should, among other things (i) evidence the Regional Center's grant of the right of the NCE to conduct EB-5 Program investment activity within the Economic Zone; (ii) recite the compensation payable to the Regional Center for its agreement to permit the NCE to operate with its Economic Zone for the purposes of promoting EB-5 Program activity; and (iii) memorialize the obligations of the Regional Center, NCE and JCE to comply with the provisions of EB-5 Program, including with USCIS rules, policies and pronouncements, record keeping requirements and securities laws compliance, etc.

While well drafted pre or post Reform Act RC Agreements will contain many similar provisions, the intent of the table below is to highlight the essential provisions that are necessary to aid compliance with the Reform Act:

[1] Osvaldo Torres is the principal at Torres Law, P.A. and a 1987 graduate of the University of Pennsylvania Carey Law School. Mr. Torres focuses on complex corporate transactions, including EB-5 related securities offerings, offerings for real estate and other funds, financing transactions and mergers and acquisitions. Since 2010, he has been immersed in EB-5 work, successfully representing regional centers, projects and issuers with their corporate structuring and securities offerings matters. His work has included offerings for hotel, multi-family and senior living developments, franchise operations and others. Mr. Torres chairs IIUSA's Editorial Committee and is also a member of its Leadership, Public Policy and Nominations committees. The author is grateful for the inciteful input on this article from R. William Cornelius and Nathalie Perez Vargas, both valued members of Torres Law, P.A.
[2] Robert C. Devine, https://www.bakerdonelson.com/analysis-of-new-eb-5-reform-and-integrity-act-of-2022
[3] See the EB-5 Reform and Integrity Act of 2022, Div. BB of the Consolidated Appropriations Act of 2022, Pub. L. 117-103, 136 Stat. 1078 (March 15, 2022).
[4] Devine, *supra* note 2.
[5] A "designation letter" is the letter USCIS issues upon its approval of Form I-924, Application For Regional Center Designation Under the Immigrant Investor Program (which under the Reform Act has been replaced by Form I-956, Application for Regional Center Designation).
[6] 8 U.S.C. §1153(b)(5)(I)(iv)
[7] 8 U.S.C. §1153(b)(5)(I)(iii)

Continued On Page 54

HEADING	SUBSTANCE OF PROVISION/COMMENTS
Access to the EB-5 Program or Affiliation Rights	*The Regional Center hereby agrees that it shall sponsor the Project for participation in the EB-5 Program as provided herein. The Regional Center will review and conduct a due diligence analysis of the following documents to verify their underlying compliance with the RIA: (i) the Project Business Plan; (ii) the offering documents proposed to be used to solicit investment from foreign investors under the EB-5 Program for the Project (including the Memorandum); (iii) the loan documents between the Company and the Borrower (the "Loan Documents"); (iv) fund administration agreements and other documents necessary for compliance with the RIA and other laws, regulation, and policy; and (v) any and all filings with USCIS with respect to the Project.* **COMMENT:** Often this clause may refer to granting "affiliation" rights to the Project, which is substantively similar.
Compensation or Affiliation Fees	***Initial Fee:*** *An initial, non-refundable fee of $30,000, payable upon the execution of this Agreement by wire transfer of immediately available funds to RC (the "Initial Fee"), subject to refund if the RC does not otherwise sponsor the Project for any reason whatsoever prior to the NCE's acceptance of its first EB-5 investor.* ***Per Investor Fee:*** *(i) $5,000 for first eight (8) EB-5 Investors; and (ii) $2,500 for each EB-5 Investor thereafter (as applicable, the "Per Investor Fee"). The Per Investor Fee shall be payable by wire transfer of immediately funds to RC within ten (10) business days upon the earlier of such EB-5 Investor's capital contribution being (i) released from escrow, if applicable, or (ii) invested in the Project.* ***Annual Fee:*** *An annual fee of thirty (30) basis points (the "Annual Fee") on the amount invested in the JCE/Project, with same to be determined on a monthly basis based upon the amount of the invested capital at such time. The Annual Fee shall be payable within ten (10) business days following the end of each calendar quarter by wire transfer of immediately available funds to RC. The Annual Fee shall continue to be paid until all of the EB-5 Investors have received the return of their investment in the NCE, with the Annual Fee being based upon the outstanding amount of the Capital Contributions of the EB-5 Investors in the NCE.* **COMMENT:** Compensation may obviously vary and could include three elements: (i) an initial or "gate" fee; (ii) a one-time per investor fee and (iii) an annual fee usually expressed as a percentage of the loan or investment amount made in the JCE. Based solely on the RC Agreements we have drafted or have reviewed, the fees could range: (i) 10,000 to $50,000 for the initial fee; (ii) $2,000 to $7,500 for the per investor fee; and (iii) 0.10% to 0.50% for the annual fee. Some deals do not include all three types of fees and as such the pricing combinations and amounts will vary.
Increased or New Fees	*In the event that any additional or increased fees, expenses, contributions, costs, or other additional expenditures (annual, quarterly, one-time, or any other frequency), including any oversight or regulatory fees, are incurred by the RC as a result of any USCIS or any other governmental action including, but not limited to, new, amended or revised legislation in connection with the EB-5 Program, new or revised U.S. federal law and the rules established and administered by USCIS, guidelines, requirements, or any other applicable law (the "Regulatory Fees"), such Regulatory Fees shall be divided, pro rata, in equal shares, on an annual basis among the NCE and any other third parties with projects sponsored by the RC. These fees, if any, shall be in addition to all other fees listed herein. In the event that any Regulatory Fees are incurred by the RC, the RC shall provide an invoice to the NCE with respect to the NCE's share of such Regulatory Fees.* **COMMENT**: Given the recent "surprises" surrounding USCIS' announced fee additions or increases, an essential provision of the RC Agreement is the Regional Center's right to pass through any increased or additional fees that USCIS may impose. Usually, such fees are shared ratably amongst the active NCEs affiliated with the Regional Center.
Integrity Fund	*Pursuant to the Act, the RC shall make a contribution of $20,000 (or $10,000 if the Regional Center has 20 or fewer EB-5 Investors at the end of the Fiscal Year), to an EB-5 Integrity Fund administered by USCIS. The obligation to pay this contribution will be shared pro rata, in equal shares, by the NCE and all other third parties with projects sponsored by the RC (the "EB-5 Integrity Fund Contribution"). The NCE shall be responsible for its pro rata portion of the EB-5 Integrity Fund Contribution, regardless of the date of this Agreement and whether the NCE has subscribed EB-5 Investors.* **COMMENT:** The RC Agreement should address the new Integrity Fund contribution. Again, this fee would likely be shared ratably amongst the active NCEs affiliated with the Regional Center.

Continued On Page 55

HEADING	SUBSTANCE OF PROVISION/COMMENTS
Reimbursement of Expenses	*A NCE shall reimburse RC for all actual and reasonable legal fees and expenses incurred by it in connection with its review of the Transaction Documents (as defined below), which amount has been fixed at $15,000 and shall be payable upon the execution of this Agreement by wire transfer of immediately available funds to RC (the "Compliance Review Fee"). For the avoidance of doubt, the Service Fees do not include the expenses relating to the (i) preparation and filing of the RC Filings (as defined in Section 4 below) or (ii) cost to engage, as required by the Act, (A) an independent auditor and (B) an independent construction consultant, as applicable, the cost of each of which expenses shall be borne by, and be the sole obligation of, NCE.* **COMMENT:** Another critical provision that addresses the costs to process the instant Project, namely the expenses related to the preparation and filing of Form I-956F. In this case, the Regional Center requires a "Compliance Review Fee" as well, which would be in addition to the preparation and filing expenses relating to the I-956F. This review fee will vary by deal. Because the Regional Center is tasked with ensuring that the proposed EB-5 project meets the EB-5 Program requirements, it makes sense for the Regional Center pass through the compliance/due diligence review fee.
Associated Persons	*Of special importance on the Regional Center Affiliation Form is the section entitled, "Persons in Positions of Substantial Authority," which requests certain identifying information about all persons of in positions of substantial authority involved with the RC Affiliate, the job-creating entity (the "**JCE**"), and parent and subsidiary entities of the RC Affiliate and JCE, accurately and without omission (collectively, the "**Associated Persons**"). Unless otherwise defined in the EB-5 Regulations, a position of substantial authority is one in which the person holding the position is, directly or indirectly, involved in to making operational or managerial decisions over pooling, securitization, investment, release, acceptance, or control or use of any EB-5 capital that was procured under the EB-5 Program.* **COMMENT:** The Reform Act requires Regional Centers to focus on and provide disclosure relating to those persons that have substantial authority in connection with the EB-5 project. As such the RC Agreement could benefit from incorporating a pertinent clause. As a reminder, an individual may be in a position of substantive authority, and therefore an Associated Person, if the person serves as a principal, representative, administrator, owner, officer, board member, manager, executive, general partner, fiduciary, agent, or similar position for the RC Affiliate or the JCE.
Fund Administration	*Unless the RC Affiliate elects to obtain audited financial statements, the RC Affiliate shall utilize the services of an independent third-party fund administrator (a "Fund Administrator") and the Regional Center must approve the Fund Administrator as a condition of Affiliation. The Regional Center, in its sole but reasonable discretion and in accordance with the EB-5 Regulations, may approve a Fund Administrator that is either (a) a certified public accountant, (b) a licensed attorney, or (c) a firm, such as a commercial bank or escrow service, deemed by the Regional Center to be qualified to provide EB-5 fund administration services. Unless the RC Affiliate elects to obtain audited financial statements, all funds from the RC EB-5 Investors must first be received into an account controlled by the Fund Administrator. The RC Affiliate shall, to the extent applicable, obtain from the Fund Administrator periodic detailed financial reports which show the receipt from, transfers, expenditures, and subsequent return of capital to the RC EB-5 Investors. Such reports shall promptly be provided to the Regional Center (if applicable). Notwithstanding the foregoing, the RC Affiliate may, at its sole discretion and in accordance with the EB-5 Regulations, provide the Regional Center with audited financial statements of the RC Affiliate, prepared by a certified public accountant in accordance with the Generally Accepted Auditing Standards of the United States, in lieu of utilizing a Fund Administrator.* **COMMENT:** In light of the Reform Act's requirement regarding the inclusion of a Fund Administrator, unless the requirement is waived, it makes sense to address it in the RC Agreement. Here the Regional Center has the right to approve the Fund Administrator, which makes sense to ensure that a reputable firm will properly perform the function.
Certificate of Compliance	*The Company shall deliver to Regional Center every year, no later than November 15, a certificate of compliance ("Certificate") wherein the Company will certify, on behalf of itself and all affiliates, directors, officers, employees, agents, and representatives that to its knowledge, they have complied with all laws, so that, pursuant to the requirements of the RIA, Regional Center may also certify compliance with all laws. The Company will make any reasonable changes to the Certificate requested by Regional Center so as to ensure compliance with the RIA.* **COMMENT:** Another important provision given the Regional Center's obligation to certify compliance with laws. This hopefully allows the Regional Center to "piggy back" on the certifications made by the NCE and JCE and possibly shield the Regional Center from liability.

Continued On Page 56

HEADING	SUBSTANCE OF PROVISION/COMMENTS
Promoters	*The use of direct and third-party promoters, as defined in the EB-5 Regulations ("Promoters"), by the RC Affiliate, the JCE or any affiliated entity, for the purpose of offering an investment in the RC Affiliate to potential RC EB-5 Investors shall at all times be in compliance with the EB-5 Regulations.* **COMMENT:** Perhaps one of the more controversial or difficult provisions from the Reform Act to comply with (and especially monitor and enforce) due to the lack of guidance and the apparent breadth of the clause, and so another worthwhile provision to include to spark awareness and compliance.
Cooperation with Regional Center Audits	*Pursuant to the EB-5 Regulations, USCIS shall periodically conduct an audit of the Regional Center. The RC Affiliate agrees, to the extent practicable, to cooperate with the Regional Center by providing information to the Regional Center and USCIS.* **COMMENT:** Self-explanatory and useful reminder.
Site Visits	*Either the Regional Center or USCIS may notify the RC Affiliate of its intent to perform an in-person inspection (a "Site Visit") at the Project's location. Performance of a Site Visit may require the JCE or an affiliate of the JCE to grant access to one or more representatives of the Regional Center or USCIS. There is no limit to the number or frequency of Site Visits which may be performed; provided, however, that the Regional Center (i) may only conduct a Site Visit upon providing fifteen (15) days prior written notice to RC Affiliate and JCE and (ii) shall be limited to one Site Visit per calendar year. The policies and procedures for Site Visits are more fully described in Exhibit E. All costs incurred by the Regional Center in connection with a Site Visit shall be borne by the Regional Center. The RC Affiliate's failure to grant full access to the Project or otherwise reasonably cooperate with a Site Visit shall, after written notice thereof and an opportunity to cure, constitute a breach of this Agreement by the RC Affiliate.* **COMMENT:** This may be considered a fairly aggressive provision because it gives the Regional Center almost unfettered rights to perform site visits, which would be in addition to USCIS' right to conduct site visits. On the other hand, there is nothing wrong with "kicking the tires." One may actually learn something about the project and as such a key element to keep the honesty.

No Stone Unturned

Strategic Approach for Securities Law Compliance Certification Under the RIA of 2022

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Continued On Page 58

The history of U.S. securities law is a fascinating journey through the evolution of financial regulation and investor protection. From the devastating stock market crash of 1929, which sparked the creation of the Securities Act of 1933, to the Enron and WorldCom accounting scandals that led to the passage of the Sarbanes-Oxley Act in 2002, the story of U.S. securities law is one of constant adaptation and refinement in response to changing economic and financial landscapes. But the history of U.S. securities law is not just a dry recounting of legislative milestones. It is a tale of greed and malfeasance, of valiant efforts to hold wrongdoers accountable and protect everyday investors, and of the ongoing struggle to create a fair and transparent financial system. Amidst this complex landscape of financial reform, the EB-5 Immigrant Investor Program (the "EB-5 Program") evolved with the passing of the EB-5 Reform and Integrity Act of 2022 (the "Reform Act") last year. This legislation brought significant changes to the program, including the requirement for regional centers to certify compliance with federal and state securities laws.

Pursuant to the Reform Act, the Secretary of Homeland Security is now responsible for ensuring that all regional centers seeking approval or amendment are following the laws governing securities in the United States and any states in which they operate. In order to prove compliance, regional centers must certify annually that they have policies and procedures in place to confirm compliance with securities laws by all parties associated with the regional center. If any instances of noncompliance are discovered in the previous fiscal year, the regional center must report on the activities leading to the noncompliance and actions taken to remedy it. The certification must also affirm that, to the best of the certifier's knowledge, the regional center and all parties associated with it are currently in compliance with the securities laws following a thorough due diligence investigation. This requirement helps ensure that EB-5 offerings are conducted with transparency and fairness, and helps protect investors from fraudulent or deceptive practices.

THE IMPORTANCE OF SECURITIES LAW COMPLIANCE

In line with these principles, securities laws also play a key role in the EB-5 Program to further ensure investor protection and market integrity. Securities laws play a vital role in safeguarding the interests of investors, maintaining the integrity of the market, and ensuring the stability of the economy. By requiring issuers to disclose accurate and complete information about the investment and its potential risks, these laws create a level playing field for all market participants and help to build trust and confidence in the financial system. They also help to prevent market manipulation and other illegal activities, helping maintain the reputation of the market as a fair and trustworthy place for investors. Adhering to the principals of transparency and fairness is a fundamental responsibility for all companies operating in the financial industry, including regional centers, new commercial enterprises, and job creating entities participating in the EB-5 Program.

REGIONAL CENTER CONSIDERATIONS FOR CERTIFYING COMPLIANCE

Ensuring compliance with securities laws is crucial for EB-5 regional centers, and is a non-negotiable requirement that must be factored into business planning and risk mitigation strategy. When certifying compliance with securities laws, regional centers must take several important considerations into account. These include understanding and overseeing any applicable exemptions from registration with the Securities and Exchange Commission (SEC) and other state and federal securities regulators, ensuring complete and accurate disclosure of all material information to potential investors, making sure that the investments offered are suitable for the investors to whom they are marketed, implementing policies and procedures to prevent fraud, and maintaining ongoing compliance through regular audits and corrective actions as necessary. It is essential for regional centers to thoroughly understand and carefully follow these considerations prior to certifying compliance with the securities laws.

MONITORING FOR COMPLIANCE

Ensuring compliance is not a one-time effort, it's an ongoing process of monitoring for compliance and taking corrective actions when necessary. There are several ways regional centers can monitor for compliance with securities laws. One way is to establish internal controls and procedures to ensure that all securities transactions and activities comply with relevant laws and regulations. This might include having a designated compliance officer or team responsible for monitoring compliance, implementing policies and procedures to ensure compliance, and providing training to personnel on securities laws and regulations. Another way to monitor for compliance is to conduct regular audits or reviews of subscriptions and marketing activities to identify any potential issues or non-compliant behavior. This might involve reviewing investment records, examining employee communication and other relevant documents, and testing internal controls to ensure that they are operating effectively. It is also important to stay up-to-date on relevant securities laws and regulations, which may change over time. This might involve subscribing to legal updates or bulletins, attending industry conferences or

Continued On Page 59

seminars, or consulting with legal counsel. It is also important to have a process in place for addressing any compliance issues that are identified.

POLICIES AND PROCEDURE – REQUIREMENT AND CONSIDERATIONS

Taking proactive steps to address compliance issues serves as a shield against future concerns, which includes communicating and implementing the compliance plan. In fact, the Reform Act requires regional centers to implement policies and procedures to ensure compliance with securities laws. This includes conducting due diligence to confirm compliance in any state where securities are sold, the issuer is based, or investment advice is provided by the regional center or its affiliates. To effectively implement these procedures, there are several key considerations to keep in mind.

Procedures should be clear and easy-to-understand and avoid jargon or technical terms that may confuse personnel. The procedures should also be specific and detail exactly what personnel should do in specific situations, helping them understand their responsibilities, and enabling them to follow the procedures properly. Additionally, the procedures should be consistent with the regional center's overall compliance policy and other related policies, helping personnel understand the overall compliance framework and how their actions fit into it. It is also important to regularly update the procedures to reflect changes in the law or in the regional center's operations, ensuring that they remain timely and relevant.

Proper training is also critical for compliance with these procedures. Personnel should be educated on how to follow the procedures through training sessions, written materials, or other forms of communication. To ensure that these procedures are being followed, the regional center should have a system in place for tracking and monitoring compliance, such as regular internal audits or reviews. The procedures should also outline the consequences for personnel who fail to follow them, which may include disciplinary action, to ensure that the regional center's compliance policies are understood and followed.

CONCLUSION

With the Reform Act bringing significant changes to the EB-5 Program, including the requirement for regional centers to demonstrate compliance with federal and state securities laws, it is more important than ever for regional centers to revisit their compliance strategy. By following these laws, regional centers can avoid disciplinary action, ensure fairness and transparency in their offerings, protect investors from fraudulent or deceptive practices, and contribute to the stability and well-being of the financial system and economy. Maintaining compliance with securities laws is not just a responsibility for regional centers - it's crucial for the overall integrity of the EB-5 Program. It's no small task, but it's an essential one for the success of the EB-5 Program.

I-829X – A Proposal for

Project Approvals for Job Creation Compliance

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The EB-5 Reform and Integrity Act of 2022 ("RIA") enacted on March 15, 2022, introduced important changes to the EB-5 Regional Center Program ("EB-5 Program"). Among the improvements introduced by the RIA were several provisions intended to offer faster processing to EB-5 investors.

The RIA included precise mechanisms for improving the processing of initial petitions for EB-5 classification of investors, now referred to as Form I-526E Immigrant Petition by Regional Center Investor ("Form I-526E petitions"). These expressly include a system for project-level approvals[1] and the duty of U.S. Citizenship and Immigration Services ("USCIS") to "prioritize" processing of I-526E petitions based on investments in rural areas.[2] The RIA also includes ambitious goals for future visa processing timelines across all applications and petitions associated with the EB-5 Program under Section 106 of the RIA, aptly titled "Timely Processing," and requires USCIS to prepare and deliver to Congress a study of USCIS filing fees and fee adjustments that may be necessary to issue decisions within 90 to 240 days after receiving an application or petition.[3]

In contrast to the specific provisions related to faster processing of Form I-526E petitions, the RIA only makes reference in Section 106, which is non-binding, to faster processing for the I-829 to remove an investor's conditions on lawful permanent residence.

The challenge is that the RIA does not set out specific mechanisms by which USCIS can achieve the processing goals set out in Section 106. Unfortunately, a clear path forward for reducing I-829 processing times is sorely needed. At present, average USCIS processing time for I-829 processes has grown to approximately 61.5 months (over 5 years) according to USCIS data.[4]

This article proposes such a program-wide solution: USCIS should use its regulatory authority to create a project-level approval process for new commercial enterprises sponsored by Regional Centers to obtain USCIS approval of the business plan and job-creation elements of a capital investment project for I-829 petitions. Our proposal seeks to mirror the I-956F Application for Approval of an Investment. The benefits of such a system include: (a) faster processing of I-829 petitions; (b) paperwork reduction, and (c) for a streamlined procedure for USCIS to deal efficiently with project-level questions relating to execution of regional center sponsored new commercial enterprise business plans and related job-creation elements, which frequently are outside the control of individual I-829 petitions.

SUMMARY OF THE RIA PROVISIONS

The RIA provides a clear solution to visa processing delays in connection with the petition to obtain initial conditional permanent residence.

Form I-526E petitions are helped forward by the requirement that regional centers file an application for a project approval (Form I-956F, Application for Approval of an Investment in a Commercial Enterprise) prior to accepting any investor capital or filing any I-526E visa petitions. Additionally, Form I-526E petitions connected with investments in rural areas are granted priority processing. The RIA also proposes the goal that any Form I-526E petitions connected with investments into targeted employment areas should receive 120-day processing. Finally, Form I-526E petitions are given the benefit of being able to incorporate by reference project investment documents previously submitted in the Form I-956F Application for Approval of an Investment by using a certification, thereby reducing paperwork.

RIA also requires the Department of Homeland Security ("DHS") to "complete a study of fees charged in the administration of the program"[5] by the first anniversary of enactment of the RIA.[6]

The end-game of the fee study is found in Section 106(b): the fee adjustment is intended to support an ambitious reduction in processing times for key applications and visa petitions across the EB-5 Program.[7] According to the statutory goals, applications for I-965F project approvals are intended to be reduced to within 180 days[8], which is to be reduced to 90 days[9] if the capital investment project is located in a targeted employment area.[10] Petitions for initial classification as an EB-5 Regional Center Investor (Form I-526E) are intended to be processed within 120 days[11] if connected with an investment into a targeted employment area, and 240 days[12] if connected with other investments. Petitions for removal of conditions (Form I-829) are intended to be processed within 240 days.[13]

These provisions in the RIA are a recognition that reasonable, predictable timelines for processing applications and visa petitions under the EB-5 Program are important to transparency of USCIS adjudications, helping to boost confidence in the EB-5 Program from regional center stakeholders and investors. It is also an acknowledgement that USCIS processing delays in the EB-5 Program – which on average are presently in the range of 3 years for I-526 petitions and 5 years for I-829 petitions – undermine the reputation of the EB-5 Program and impede its ability to attract job-creating investments.

There are nevertheless important differences in the RIA's treatment of I-829 petitions to remove conditions on lawful permanent residence in comparison to I-526E petitions which establish eligibility to acquire initial conditional lawful permanent residence. Form I-829 petitions for removal of conditions are not granted priority processing for investments in rural areas, and are not granted an estimated reduction in processing times for investments in targeted employment areas under RIA Section 106(b). And, the RIA does not set out a process for regional centers or new commercial enterprises to seek project-level approval of the business plan and job-creation elements of a capital investment project in connection with the I-829 petitions of investors.

The key reference in the RIA to this issue is set out in INA Section 203(b)(5)(F)(ii), which provides that a business plan approval is

[1] See INA Section 203(b)(5)(F). This application is now known as Form I-956F Application for Approval of an Investment in a Commercial Enterprise.
[2] See INA Section 203(b)(5)(E)(ii)(I) ("shall prioritize the processing and adjudication of petitions for rural areas").
[3] USCIS in fact issued a new proposed rule on January 3, 2023, ostensibly to comply with the requirements of RIA Section 106. The proposed fee increase seeks to spike USCIS filing fees for I-829 processes by approximately 154%, setting new fees at $9,525, up from the current $3,750 fee.
[4] In response to lengthy delays, petitioners have pursued mandamus complaints in federal court to receive USCIS processing action on their I-829 petitions. Filing mandamus in federal court is not, however, a program-wide solution for the I-829 process.
[5] See RIA, Section 106(a).
[6] Though the fee study should have been prepared by March 15, 2023, USCIS has not released any information regarding the study to the public and has not issued any public comments regarding the existence or content of the fee study.
[7] See RIA, Section 106(b)(1).
[8] See RIA, Section 106(b)(2).
[9] See RIA, Section 106(b)(3).

Continued On Page 62

intended to be binding on the process for removal of conditions on permanent residence under INA Section 216A, absent fraud, misrepresentation, criminal misuse, public safety and national security, material change, discovery of negative evidence of eligibility or material mistake of fact or law.[14]

The solution offered by the RIA is that I-829 petitions will be streamlined because the approval of a Form I-956F approval of an investment in a new commercial enterprise is intended to be binding on the I-829 process of individual investors. Yet, this solution, though promising on its face, does not address how USCIS will evaluate and adjudicate important elements required for approval of an investor's I-829 petition, all of which are project-related.[15] For example, INA Section 203(b)(5)(F)(ii) does not prescribe how USCIS will verify deployment of capital from the new commercial enterprise to the job creating entity and funds administration, and does not prescribe how USCIS will conduct verification of job creation. The issue of redeployment is also omitted, though it is clearly necessary for I-829 adjudication, as set out in INA Section 203(b)(5)(F)(v), which requires redeployment of capital to comply with the at-risk requirements of the EB-5 Program, under threat of termination of the regional center for failure to comply with the redeployment rules set out in the RIA.[16] Similarly, site visits to the regional center, new commercial enterprise and job creating entity are also required by the RIA, and presumably would have to be completed before I-829 adjudication.[17]

The only reference to a potential solution to these issues set out in RIA is the potential for DHS to create a procedure for amendment of an approved I-956F Application for Approval of an Investment in a New Commercial Enterprise. Now found at INA Section 203(b)(5)(F)(iii), the provision grants DHS authority to create procedures to amend an approved I-956F application, and requires amendments to be submitted "not later than 30 days after any such changes." However, although documents filed with a Form I-956F are incorporated by reference into the record of associated I-526E petitions, no such provision is made in connection with associated I-829 petitions.

Thus, despite the attractive solution offered by the RIA, there is no specific tools provided to place into USCIS' toolkit for achieving the targeted 240-day processing timeline for I-829 petitions set out in RIA Section 106(b)(5).

PROPOSAL FOR FORM I-829X – PROJECT APPROVAL OF JOB CREATION COMPLIANCE

The core proposal presented in this article is simple: based on the statutory authority set out in INA Section 203(b)(F)(iii), USCIS should create by regulation a process for project-level approval of job creation compliance to be filed by

Continued On Page 63

regional centers with evidence certified by the new commercial enterprise. This process, referred to here as "Form I-829X," is intended to parallel the Form I-956F Application for Approval of an Investment in a New Commercial Enterprise.

The I-829X application would be filed by the regional center and new commercial enterprise to reflect the reality that, in I-829 petitions connected with new commercial enterprises sponsored by regional centers, the regional center and new commercial enterprise are key sources of the evidence submitted with each investor's I-829 petition. The regional center and new commercial enterprise are, in fact, generally the primary source for evidence of good faith execution of the business plan and job creation undertaken by the job creating entity.

Yet, despite their key roles relating to job-creation and compliance of the investment with the EB-5 Program, the current USCIS process for I-829 adjudication provides no direct role for regional centers and the investor's new commercial enterprise. Form I-829 petitions are filed by individual investors only, leaving the petitioner in the incongruous first-person position of relaying and defending information about the capital investment project, economic study of job creation, and the management of funds by the job creating entity(ies), as well as attesting to the truth and accuracy of all of the information presented. The current version of Form I-829 dated 12/08/21, even goes so far as to ask the individual I-829 petitioner a question about the job creating entity that is so broad that a team of lawyers would be hard-pressed to answer: the I-829 form asks the petitioner to answer "yes" or "no" to a host of questions regarding the ownership, management and business operations of any job creating entity connected with the capital investment project, and whether any the "partners, managers or other persons with … a similar position of authority" for any job creating entities has been the subject of criminal or civil proceedings relating to fraud or "unlawful activity."[18]

Clearly the regional center, new commercial enterprise and job creating entity are better positioned to speak directly on these matters of business plan execution, fund management and job creation. A role for regional centers and new commercial enterprises is therefore proper in the EB-5 Program in relation to the I-829 process to remove an investor's the conditions on permanent residence.

The content of the proposed I-829X application for job creation compliance would flow organically from the current type of project evidence included in an I-956F application for Approval of an Investment in a New Commercial Enterprise and an investor's I-829 petition for removal of conditions on lawful permanent residence. The I-829X application would include, for example, specific evidence confirming the execution of the capital investment project, as well as evidence verifying the accuracy of the data applied in any economic study of job creation. Moreover, the proposed I-829X application would be able to provide evidence relating to one of the key innovations in the RIA, the control on funds administration by the new commercial enterprise and job creating entity(ies). And the proposed I-829X process could address redeployment of capital, thereby complying with the rule in INA Section 203(b)(5)(F)(v).

Such evidence could be incorporated by reference to an individual investor's I-829 petition, omitting thousands of pages of project documents from the I-829 petition, and providing a very needed reduction in paperwork in the I-829 process.

The timing of the proposed I-829X application would be conditioned on two factors. The first is the need for the new commercial enterprise to have evidence of compliance with the job creation requirements of the capital investment project. In the absence of such evidence, immediate adjudication of a Form I-829X application for job creation compliance could be detrimental to investors by causing premature analysis of job creation by USCIS, and lead to an administrative burden on USCIS resources by causing USCIS to review unfinished capital investment projects.[19] The second is the need for the I-829X application to be filed concurrently with or precede the date of the first I-829 individual petition for removal of conditions on permanent residence connected with a new commercial enterprise.

USCIS should also provide an express procedure for supplementing the record of an I-829X application to address evolving facts related to, for example, additional job creation concordant with progress of execution of a business plan, redeployment of capital after filing of the I-829X application, or changes to the organization structure, business operations or management of the job creating entity. Any supplements to the record of an I-829X application could be used by individual investors to satisfy the job creation requirements of the EB-5 Program during the 1-year extension of conditional lawful permanent resident status provided in INA 216(c)(3)(B)(ii).[20]

The proposed I-829X procedure would also support the undertaking of USCIS site visits. The evidence submitted in the I-829X application would provide essential information to the examiner engaging in a site visit.

From the investor's perspective, an approved Form I-829X offers the benefit of greater certainty of complying with the job creation requirements of the EB-5 Program and provides a clear path towards faster I-829 adjudication. The investor's I-829 petition would incorporate by reference the content of the I-829X application, and could thus focus on the investor's evidence of sustaining the investment in the new commercial enterprise and maintaining conditional lawful permanent resident status.

CONCLUSION

The proposed I-829X application fills an important gap in the EB-5 Program by mirroring for I-829 petitions the system for project-level approval of capital investment projects, as set out in the Form I-956F procedure required by INA Section 203(b)(5)(F). Not only will it provide greater certainty to regional centers and investors, it will also address a clear need in the adjudication procedures of the EB-5 Program that has the potential to enable USCIS to achieve the ambitious processing timelines set out in the RIA.

[10] Targeted employment areas are defined in INA Section 203(b)(5)(D)(viii). Targeted employment areas are comprised of rural areas or high unemployment areas as defined in the RIA, but exclude infrastructure projects.
[11] See RIA, Section 106(b)(5).
[12] See RIA, Section 106(b)(4).
[13] See RIA, Section 106(b)(6).
[14] See INA Section 203(b)(5)(F)(ii), subparagraphs (I) through (V), inclusive.
[15] See INA Section 216A(c)(B)(i), referencing a procedure by which "…the Secretary determines that the facts and information contained in a petition submitted under paragraph (1)(A) are true…."
[16] See INA Section 203(b)(5)(F)(v)(II).
[17] See INA Section 203(b)(5)(F)(iv).
[18] See Form I-829, Part 7, Question 7, Page 7 (edition date 12/08/2021).
[19] On the other hand, I-829 approval of individual investor petitions is not dependent on completion of job creation sufficient for all investors.
[20] Under INA Section 216(c)(3)(B)(ii), an investor is granted an additional 1-year period to provide evidence of compliance with the job creation requirements of the EB-5 Program, so long as the investor timely files Form I-829 and files a subsequent application verifying job creation within 30 days after the third anniversary of the investor's conditional lawful permanent residence.

EB-5 Funding 3.0:

Considerations & Issues for Creating U.S. Based Lending Solutions to EB-5 Investors

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Veterans of the EB-5 industry understand that with each EB-5 cycle, new issues arise that require novel solutions. Anyone who's been monitoring the industry the past few years has noticed an emerging paradox – many investors want to invest after the program re-emerged after 18 months in limbo but are unable due to difficulties faced by the increased investment amount combined with lack of liquidity, currency restrictions, or oftentimes, both. The novel solution that a handful of Regional Centers and issuers have embarked upon is as simple as it is audacious: Why not create a U.S. lender to issue loans directly to EB-5 investors? As explored below, not only is this happening in real-time, this creative alchemy is also made possible through a combination of recent legal developments, market realities, and a uniquely mature EB-5 industry that's able to fashion a solution. The need for these types of programs will implore the EB-5 industry to engage in an internal dialogue to consider creating similar solutions that will enable them to work hand-in-hand with their investors.

U.S.-based lending programs are no longer an exotic fantasy or a simple marketing advantage. It's arguably a very real need that must be addressed for any issuer hoping to effectively raise EB-5 capital in today's environment. There are three main drivers that have made this possible: (1) Zhang v. USCIS, (2) the 2022 EB-5 Reform & Integrity Act, and (3) a clear need from the EB-5 market itself.

ZHANG V. USCIS REMINDS US "CASH" ISN'T A FOUR-LETTER WORD

Zhang v. USCIS was a landmark decision but it was notable because it shed clear light on several commonsense issues that the industry had been noisily arguing for years: cash invested is cash (not indebtedness) and, absent evidence of fraud in lending, it is not USCIS' place to question a lender's risk tolerance or business transactions.[1] Zhang made it clear that USCIS' role isn't that of an underwriter. Nor should they be. While the implications of Zhang are better explored in a separate article, what is clear is we can now issue secured or unsecured loans to EB-5 Investors to use their EB-5 investment.

THE RIA & U.S. BASED LENDERS

The EB-5 Reform and Integrity Act of 2022 ("RIA") only reinforced Zhang v. USCIS. Under the RIA, the definitions of lawful capital are more generous if one is a "bank" and its source of funds is presumed to be legitimate without having to provide burdensome source of funds documentation. While the term "bank" isn't clearly defined by the RIA,[2] as a best practice, people should be ready to provide financials or source of funds for the liquidity used to lend to investors. (Whether it's through the parent company's credit lines or similar source).

EB-5 INVESTORS & THE NEED FOR A LIFEBOAT

EB-5 investors are sounding a cry for help where there's a clear desire to invest, but they need help from issuers and Regional Centers to help fund capital contributions in new commercial enterprises. This has occurred for several reasons:

- **Increased Investment Amount**: EB-5 investment has increased 40% from $500,000 to $800,000
- **Domestically:** Laid off people need to invest now, or people can't close on an alternative loan in time, people have stock portfolios but don't want to liquidate in a down market
- **Overseas:** For overseas investors, investors have sufficient funds, but run into currency restrictions and lack of realistic and practical transfer mechanisms
- **Raising Interest Rates and Fees for Exchanges:** Within a few years, interest rates have skyrocketed from 3 to 4% to 6 to 8%. Currency exchanges went from 1 to 2% to 5%+. Few years ago, nobody would touch this concept because there simple wasn't any need. Now? it's different.

GENERAL ISSUES & RISKS TO CONSIDER

While the final structure will vary depending on an issuer's particular needs, below are common basic building blocks to creating a U.S. based EB-5 lending facility. In our experience advising clients with structuring lending facilities, the main issues at the outset are the same as any other business consultation:

What is the underlying goal? Who is the target market?

Once the fundamental "why" issues are addressed, there are a number of legal, compliance, and business risks to consider, including:

- **Amount to lend EB-5 investor?**
- **Procuring appropriate lending licenses? Consider jurisdiction of the "lender" and the location of the borrowers. Are licenses required? Are there exemptions for licensure?**
- **Associated fees? Origination, closing, interest rate? Escalators?**
- **Collateral? Secured or Unsecured?**
- **Sufficient liquidity for the EB-5 lender. Consider if the goal is to scale. One will quickly run into a problem if the lending program is too successful. .**
- **Professional underwriting process? Should be similar to a professionally syndicated loan**

To be clear: regardless of how these loans are structured, all EB-5 laws and regulations must be obeyed. This includes that the EB-5 investor must invest the full amount, that he/she must own the entire NCE LP unit/share or LLC membership Interests, the funds are legitimately derived, and the loan must be legitimately issued.

[1] In Zhang v. USCIS, Plaintiffs challenged USCIS' denials of their I-526 petitions based on USCIS' interpretation that it viewed the loan proceeds not as cash investments but as "indebtedness" and required the loans to be secured by the petitioners' own assets. The D.C. district court concluded (and has since been reaffirmed by the appellate court) that USCIS's interpretation as erroneous because it was not consistent with the ordinary and natural meaning of cash. The court distinguished USCIS's interpretation that cash obtained from a third-party loan and then invested in an EB-5 enterprise constituted indebtedness from a situation where the investor is indebted to the enterprise itself. The definition of "capital," at issue here, is defined in the EB-5 regulations as the asset actually being contributed to an EB-5 enterprise, not the means in which that asset was obtained.

[2] At the time this article was written, no meaningful USCIS EB-5 Stakeholder engagement has occurred to clarify the RIA.

Continued On Page 66

CASE STUDIES & EXAMPLES

The motivation for creating U.S.-based lenders can vary from company to company, but there are obvious situations where creating one would shift markets and create game-changing solutions. Sometimes it's investors whose stock is tied up with stock portfolios that don't want to sell in an ugly market. Others are stuck in China or Vietnam and see rollercoaster property values and banks hesitant to issue any loans.

For instance, is the goal to target investors who can afford half now and want to borrow the rest to invest? Or is it those with short-term liquidity issues and need to borrow funds? Taken a step further, if you are a vertically integrated EB-5 group and would have made an $8M equity investment anyways, is it worthwhile to consider whether to create a lender that would bridge some of the funds to the investors with the goal of them paying it off within 2 or 3 years? (Yes, yes, and yes). Lenders have ultimately taken different approaches to structuring these programs. It makes sense to spin off a separate entity but some have decided to lend only to domestic investors (to minimize risk of collecting on defaults). Some have decided to issue loans for more than half the investment amount, while others would prefer not to issue loans greater than the initial invested capital.

Because this is an emerging area, Regional Centers and issuers are advised to be ready to address any inquiries or questions from investors or USCIS. For example, even though USCIS should not be requesting information about the source of funds for a licensed lender, it would still be an advisable best practice to have easily digestible source of funds if a Request For Evidence is issued. Some have healthy, ample war chests and balance sheets and can issue loans themselves. Others simply tap into the credit lines of their parent companies and pass on the costs to their investors/borrowers. Each situation will vary depending on the situation of the Regional Center and the issuer.

CLOSING THOUGHTS

It is somewhat extraordinary that this discussion of Regional Centers and issuers creating their own U.S.-based loan programs is possible. EB-5 is at an intersection in our industry's history where there is a need and an ability to fulfill that need. What this discussion reflects is that the EB-5 industry has evolved into a much more mature program. It'd be hard to believe that this article would even be considered back in 2013 or the wild west days of EB-5.

Now, it's no surprise that the Regional Centers and issuers who are creating these programs see their role and their relationship with their investors much differently than their colleagues even five years ago. These discussions can only happen because the industry now has experienced veterans who have navigated several deal cycles (both EB-5 and economic) and have successfully completed projects, repaid investors, and forged on-going investment relationships with them. The overarching theme for creating these programs is that they address a clear problem that their investors are struggling with and have sufficient resources and creativity to literally put their money where their mouths are.

Rather than completing offering documents and hoping their agents or networks refer prospective investors, the new breed of Regional Center see an emerging need, have legal justification, and possess the financial resources to proactively create solutions for their investors.

Instead of a mom-and-pop outfit who wish to raise $100M off a rendering and a dream, our industry has established veterans who have successfully gone through several EB-5 deal cycles with multiple projects, institutional asset/investment managers, hedge funds, and wildly creative and brave trailblazers. The legal, ethical, and creativity boxes are checked off, and it is exciting to see what new solutions the industry will create for EB-5 investors in the future.

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