



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.<sup>1</sup> 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,<sup>2</sup> 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.

<sup>1</sup> 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.

<sup>2</sup> At the time this article was written, no meaningful USCIS EB-5 Stakeholder engagement has occurred to clarify the RIA.

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## 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. 

