



Is your Regional Investment Center Free from Financial and Legal Conflicts of Interest and therefore a Truly Independent Fiduciary



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The elephant in the EB-5 living room is the fact that the vast majority of Regional Investment Centers are “affiliated” with their underlying projects and entities creating an environment fraught with conflicts of interest, diluted investor representation, and misalignment between the Regional Center and their EB-5 Immigrant Investors. The sum of which equals a challenged, or in some cases broken, fiduciary relationship.

Let’s first start by understanding what we mean by the term affiliated. EB-5 projects are based on a specific framework provided by USCIS, which includes two business entities: (i) the New Commercial Enterprise (NCE) which serves as the investment entity or fund in which EB-5 investors make their cash investment, and (ii) the Job Creating Entity (JCE) which is the actual project entity that will be creating jobs through a combination of construction and permanent jobs as described in the project’s economic report.

EB-5 investors are legally and financially connected to the NCE, which is the entity where their actual investment is made. As such the NCE will accept the EB-5 investors cash investment, make distributions, and return capital to the EB-5 investors at the end of their immigration process. The NCE is the guardian and fiduciary for investors.

The most common structure in the EB-5 industry is a subordinated loan from the NCE to the JCE that owns the project

and manages the work product and assets. Think of the JCE as the actual operating business that is developing and managing the real estate project. The JCE will have its own set of equity investors, a senior loan from a bank, a management company, operating partners, and other stakeholders. The NCE, therefore, is a lender that generally fits in between the senior bank and the equity investors in the project.

Returning to the term affiliated, while Regional Centers must be the creators and managers of the NCE since that is the direct connection to the EB-5 program and investors, they have the option to create, manage, or be financially connected to the JCE as well. This is, in fact, how the vast majority of EB-5 projects are structured in the EB-5 industry today.

When a Regional Investment Center has a legal, financial, or ownership interest in both the NCE and JCE, it is deemed to be affiliated and must be disclosed to USCIS and investors. One of the reasons this structure is prevalent is the fact that the majority of Regional Investment Centers were born of the real estate developer community and not of financial services or banking. Creating real estate projects by organizing and managing the necessary components, including the capital stack (the debt and equity financing required), is the traditional playbook for developers.

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The developer model works because each investor, or lender, is protecting its own interests and all parties understand the developer's role, financial incentives, motivations, and potential conflicts. Developers generate revenue and profit from two primary sources, management fees paid at various stages of development and operations, and then at the end when the property is sold. The exit is the material financial gain or upside for the developer as they will receive some form of profit share with the equity investors (commonly known as the General Partner interest, promote, or split). There are several structures and models used in the real estate industry.

How does this impact the EB-5 story? Regional Centers are often affiliated, meaning they are both the developer and subordinated debt lender - two disparate and opposing forces. It is one of the only places in business and finance where the same party is both the lender and borrower.

As the developer, the Regional Center has many constituencies: senior banks, equity investors, development partners, end users, management companies, and now EB-5 investors. They are also keenly aware of their own financial interests as they are often invested in the equity and then compensated heavily by fees and the eventual exit profit. The varied and diverse audiences, constituencies, and motivational drivers lead to one unified outcome, a real and likely potential for conflicts of interest.

What does this mean for EB-5 investors? It means you are one of many factors in that Regional Center's model. Your investment in the NCE is used alongside other capital to enable the project and fund their development business. It means the Regional Center has inherent conflicts between you and other investor classes, like the equity which could include their own capital; or, between you and their own profit incentives; or, between you and challenges or threats to the underlying project.

Who is the real priority? Who will they defend in the event of a problem or challenge? For whom are they truly a fiduciary? These are some of the questions no one can answer when such conflicts exist.

The Solution - unaffiliated structures in which the Regional Center is solely focused on the NCE and makes a loan to a truly independent JCE in which it has no legal or financial connection; just as any regulated bank would structure and manage a loan to a third-party borrower or real estate developer.

This approach brings the Regional Center and EB-5 investor into perfect alignment, as the financial incentives and drive towards a singular, successful outcome are united.

It is under this structure that a true and effective fiduciary relationship is founded, whereby the Regional Center protects, defends, and pursues the investor's interests unabated. This is the path for improved risk management and a focus on positive outcomes.

The message to EB-5 investors is clear. Deeply rooted in its history of developer-led Regional Centers, conflicts of

interest can and do exist in this industry. Caveat Emptor. Do your own due diligence and ask detailed questions.

However, there is a better way. Seek Regional Centers that are unaffiliated with the projects and, therefore, will serve as a true and independent fiduciary, focusing solely on you and your financial and immigration success. ▀

