FOIA Litigation Update:

Trends in Source of Funds Issues

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Over the past two years, IIUSA has collaborated with Kurzban Kurzban Tetzeli & Pratt (KKTP) on litigation under the Freedom of Information Act (FOIA) aimed at uncovering changes and trends in the IPO's adjudication of source-of-funds issues. During that time, we have obtained and analyzed over 5,000 pages of documents. This article highlights what we learned (and what suspicions we confirmed) through this ongoing FOIA case.[1]

USCIS TARGETS INVESTOR USE OF "CURRENCY SWAPS" TO EXCHANGE FUNDS

"Currency swaps," sometimes called "informal value transfers," are a popular way to exchange local currency into U.S. dollars and then transfer those funds to the United States to make an EB-5 investment. In a currency swap, an investor transfers local funds to a third party, who in turn transfers U.S. dollars held in the United States (or another country without currency restrictions) to the investor or the investor's new commercial enterprise. Currency swaps have historically been used by investors from countries with restrictions on currency export (such as China and Vietnam) because they facilitate EB-5 investments without the need to transfer funds directly out of a country with currency export restrictions.

In 2017, EB-5 attorneys began to see a spate of Requests for Evidence (RFE) for investors who used currency swaps.[2] Despite the longstanding popularity of this method of currency exchange, USCIS for the first time began asking investors to prove not only the lawful source of their EB-5 funds, but also to show the lawful source of funds for any third parties that helped with a currency swap. In many cases, these requests were for investments made many years prior. Investors who were unable to prove the lawful source of the third party's U.S. dollars then faced I-526 petition denials.

We now have evidence that these RFEs and denials resulted from an affirmative decision within the IPO to change policy on cases involving currency swaps. An internal USCIS email dated February 2017, titled "Informal Money Transfer/3rd Party Currency Swap/Informal Value Transfer," describes a "new direction we are taking when it comes to IVTs [Informal Value Transfers]." The email explains that the IPO, "[b]ased on discussions with FDNS [Fraud Detection and National Security], IPO Leadership and OCC [Office of Chief Counsel],...will be rolling out" new currency-swap "guidance to the floor."

From: Weatherl, Tsa M
To: Egan, Paul J; Mason, Christopher A; Sarapu, Christine M; Nogueras, Benjamin A; Watkins, Jonathan L; Hamilton, Laura J; Nguyen, Phil H; Rodriguez, Luis A
Cc: Leckenby, David M; Garfield, Reed R
Subject: Informal Money Transfer/3rd Party Currency Swap/Informal Value Transfer
Date: Thursday, February 23, 2017 1:20:07 PM
Attachments: RFE Template Language for 3rd Party Money Exchange (OCC Edits 2-2-17) Final Doc 2-22-17.docx
3rd Party Money Exchange Examples (OCC Edits 2-17-17) Final TMW 2-22-17.docx
Form I-526 Templates-Topics per Section of Law Final 22217.docx
image002.png

Hi BCs,

You probably noticed that this topic is on the agenda and I'm sure you saw my email sent out to the floor letting everyone know that the working group has completed its review of the cases submitted to the IVT email box. Based on discussions with FDNS, IPO Leadership and OCC, we will be rolling out the attached guidance to the floor.

I wanted to give you visibility into this new direction we are taking when it comes to IVT and would like to meet with you to discuss this matter before the guidance goes out officially to the floor to ensure we are all on the same page. Can we coordinate a meeting on **Monday February 27th** to discuss?

For today's interdivision meeting I've asked FDNS' Adam H to give the backstory as to why we are moving in a new direction and I will let the AOs know that written guidance will be coming out shortly. I will also thank everyone for referring their cases to the IVT box. We had some AOs that were extremely consistent about referring their cases. AOs will also be informed that they can speak with their SAO should they have additional questions after receiving the written guidance and of course, I'm always available for questions as well.

Thanks,

TEAM

Tsa Marie Weatherl

Team All-Star: Doing Big Things
USCIS-Immigrant Investor Program (IPO)
Supervisory Adjudications Officer (SAO)
(b)(6) Office:

This new guidance includes the instruction that "[w]hen a petitioner uses a third-party to effectuate the transfer of his or her funds that involves a 'swap' of funds, adjudication officers may find that there is insufficient evidence to demonstrate that the capital invested belonged to the petitioner, and/or the capital invested was derived—directly or indirectly—from lawful means." It also advises adjudicators to request licensing and registration information for any currency exchangers, as well as evidence as to how the third-party currency exchangers acquired the U.S. dollars used as part of the currency exchange.

These internal records obtained through the FOIA litigation vindicate the frustration of EB-5 practitioners who decried USCIS's retroactive application of new currency-swap guidance to existing EB-5 cases—even while USCIS repeatedly insisted in federal court filings that there was no change in policy.

All documents obtained through the FOIA lawsuit are accessible on KKTP's website. Scan the QR to access the site

[1] See IIUSA v. USCIS, No. 22-cv-2687 (D.D.C.).
[2] See, e.g., Jennifer Hermansky, Third Party Currency Swaps: Considerations for RFEs, 6 IIUSA Business Journal 38 (Oct. 2018).

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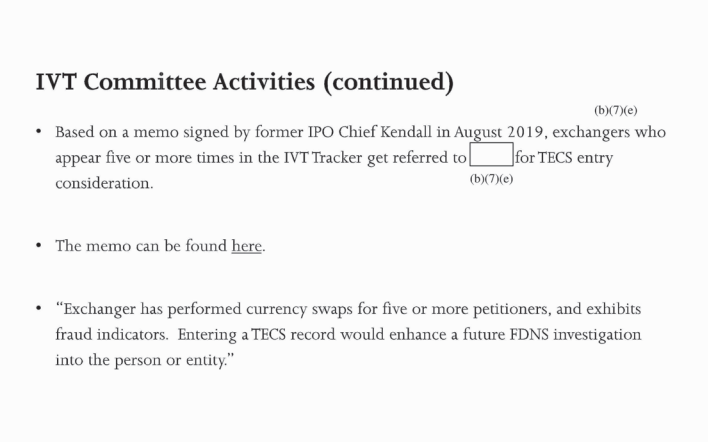
Other key findings involving currency swaps include the following:

- **USCIS now has substantial internal guidance and officer training on currency swaps.** Among other things, adjudicating officers are instructed to request proof: (1) of how third-party currency exchangers acquired the U.S. dollars used as part of a currency-exchange transaction; (2) that the EB-5 investor entered into an agreement with the third party assisting with the currency swap; (3) of the full path of funds from the investor to the exchanger, and vice versa; and (4) of licensing documentation for the exchanger (if a claim is made that the exchanger is licensed). Consistent with the denials received by some investors, USCIS instructs its officers that affidavits alone are insufficient and that cases will be denied when a third-party exchanger is unable or unwilling to cooperate.

- **The IPO created an "IVT Tracker" to keep tabs on currency exchangers.** USCIS developed an "IVT Tracker"—a new addition to the agency's internal tracking software for EB-5 matters. IPO adjudicators at both the I-526 and I-829 stages are now required to input information about third-party currency exchangers into the IVT Tracker.

  According to a guidance memorandum issued in 2019, any currency exchanger that appears in the IVT Tracker more than five times is referred for possible entry into law-enforcement databases. The IPO is also developing (or by now has already developed) automatic alerts that ping adjudicators when a currency exchanger has been used multiple times by other investors.



IVT Committee Activities (continued)

- Based on a memo signed by former IPO Chief Kendall in August 2019, exchangers who appear five or more times in the IVT Tracker get referred to (b)(7)(e) for TECS entry consideration.
- The memo can be found here.
- "Exchanger has performed currency swaps for five or more petitioners, and exhibits fraud indicators. Entering a TECS record would enhance a future FDNS investigation into the person or entity."

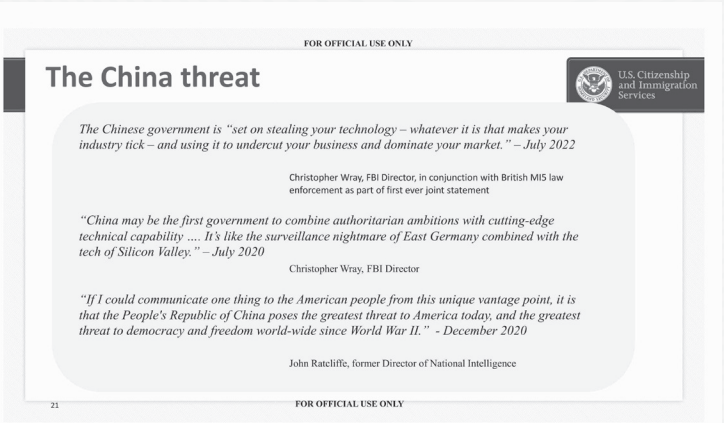
- **USCIS works with other law enforcement agencies on currency-swap guidance.** Material obtained through the FOIA litigation shows that USCIS established an "IVT Working Group" that worked closely with various law-enforcement agencies on currency-swap issues, including the Department of Treasury's Financial Crimes Enforcement Network; ICE's Homeland Security Investigations; the IRS; and the Department of State. According to the FOIA materials, these agencies "expressed an interest [to USCIS] in investigating currency exchangers to evaluate possible violations of money laundering laws, and their predicate offenses; wire fraud, mail fraud, structuring and bulk cash smuggling."

In short, it is clear from the FOIA documents that scrutiny that currency swaps face from the IPO is not going away anytime soon.

USCIS TARGETS CHINESE INVESTORS AND FUNDS SOURCED FROM CHINESE TECH COMPANIES

Another trend confirmed through the FOIA litigation is that the IPO is targeting Chinese investors for extra scrutiny—particularly investors who acquired their EB-5 funds from Chinese technology companies.

One IPO training slide, titled "The China Threat," reveals the IPO's general attitude toward China. The slide consists entirely of quotes from U.S. law enforcement, including the FBI Director Christopher Wray, accusing the Chinese government of "stealing…technology…and using it to undercut [American] business" and describing China's actions as "the surveillance nightmare of East Germany combined with the tech of Silicon Valley." The slide also quotes a former Director of National Intelligence describing China as "the greatest threat to America today, and the greatest threat to democracy and freedom world-wide since World War II." The slide says nothing about how these comments relate in any way to EB-5 adjudications. But this "China Threat" label does little to instill confidence that Chinese investors' cases are being impartially adjudicated.



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The China threat

U.S. Citizenship and Immigration Services

The Chinese government is "set on stealing your technology – whatever it is that makes your industry tick – and using it to undercut your business and dominate your market." – July 2022

Christopher Wray, FBI Director, in conjunction with British MI5 law enforcement as part of first ever joint statement

"China may be the first government to combine authoritarian ambitions with cutting-edge technical capability …. It's like the surveillance nightmare of East Germany combined with the tech of Silicon Valley." – July 2020

Christopher Wray, FBI Director

"If I could communicate one thing to the American people from this unique vantage point, it is that the People's Republic of China poses the greatest threat to America today, and the greatest threat to democracy and freedom world-wide since World War II." - December 2020

John Ratcliffe, former Director of National Intelligence

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Indeed, the FOIA results also show how animus toward China manifests itself in concrete EB-5 policy. For example, internal agency emails reflect a "Management Directive" issued to IPO adjudicators, instructing them to scrutinize the record for ties to the Chinese Communist Party. In addition, the IPO has developed a "Source of Funds from Unlawful Entities Working Group." The purpose of that working group is to "address sources of funds from unlawful companies, and more specifically, technologies companies on our radar"—including "entities highlighted in IPO and FDNS trainings."[3]

Other parts of the FOIA results show that major Chinese technology companies—including Huawei Technologies Co., Ltd. and its subsidiaries—are being targeted by USCIS. This explains, in large part, why EB-5 practitioners have seen unprecedented scrutiny for investors who sourced their funds through perfectly lawful employment from bona fide Chinese tech companies like Huawei.

[3] IIUSA recently filed a new FOIA request aimed at uncovering the policy developed by this "Unlawful Entities Working Group."

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USCIS APPLIES THE WRONG STANDARD FOR SOURCE OF FUNDS ISSUES IN I-829 ADJUDICATIONS

Other IPO trainings uncovered through the FOIA litigation target the adjudication of source-of-funds issues in I-829 petitions. These trainings instruct I-829 adjudicators to accord "deference" to source-of-funds determinations made at the I-526 petition stage. They advise, however, that such deference can be overridden if the adjudicator uncovers a "mistake of law or fact" in a favorable source-of-funds decision made at the I-526 stage. Under this guidance, when an I-829 adjudicator determines that "deference" is unwarranted, officers are instructed to conduct a new source-of-funds analysis—guidance which may well explain a recent uptick in adverse source-of-funds denials at the I-829 stage.

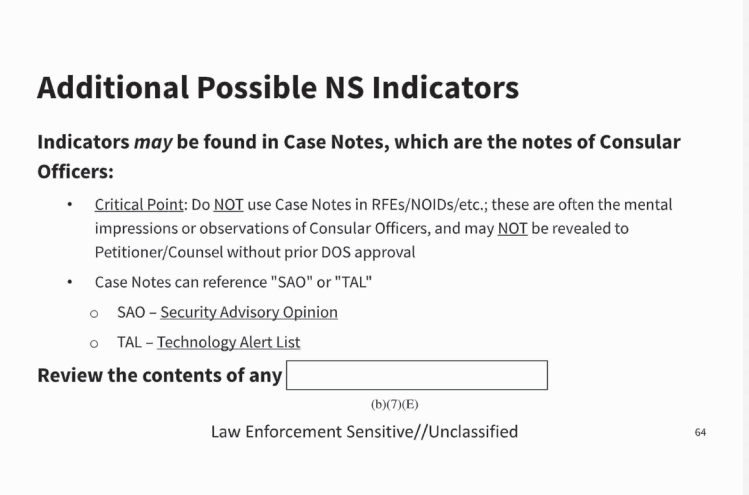
This IPO guidance seemingly skirts a clear regulatory restriction on source-of-funds scrutiny at the I-829 petition stage. According to a longstanding regulation, an I-829 petition may be denied for source-of-funds reasons only when it becomes "known" to the government that the investor's funds were obtained through unlawful means.[4] This standard requires more than just a finding that the original source-of-funds record was legally or factually deficient in some way (as USCIS's "deference" policy would seem to permit). Rather, the regulation's plain meaning requires some new affirmative knowledge on the part of USCIS that the funds were illicitly sourced. While the IPO training cites this regulation, it otherwise fails to discuss the limitations the regulatory text imposes on adjudicators who wish to second-guess favorable source-of-funds determinations made at the I-526 petition stage.

USCIS ACCESSES OTHER AGENCY DATA TO ADJUDICATE SOURCE OF FUNDS ISSUES

We also know from the FOIA litigation that IPO adjudicators are trained to look beyond the four corners of the EB-5 record when adjudicating source-of-funds issues. Adjudicators, for example, are trained to query Department of State databases. including the Consolidated Consular Database (CCD)—a database containing nonimmigrant visa applications. IPO adjudicators are instructed to use CCD information to screen for national-security concerns on the part of the EB-5 investor (or others implicated in the source-of-funds chain). Such concerns include: (1) employment history at sensitive companies like Huawei or its affiliates; (2) work for governmental entities of interest, including entities associated with the Chinese Communist Party or military apparatus; and (3) the use of official passports, which would indicate ties to foreign governments.

Officers are also instructed to scour investors' answers to questions on the DS-160 (nonimmigrant visa application) for inconsistencies with the employment history reported in their EB-5 petitions. Any inconsistencies may result in the issuance of an RFE or NOID and could ultimately result in a denial if not satisfactorily addressed.[5]

Finally, officers are instructed to hide the ball when it comes to concerns uncovered through a consular officer's notes. Specifically, policy guidance to IPO adjudicators states that while consular officer notes make give rise to national-security indicators, those notes "may NOT be revealed to Petitioner/Counsel without prior DOS approval" and therefore an officer should "NOT use Case Notes in RFEs/NOIDs/etc."



Additional Possible NS Indicators

Indicators *may* be found in Case Notes, which are the notes of Consular Officers:

- Critical Point: Do NOT use Case Notes in RFEs/NOIDs/etc.; these are often the mental impressions or observations of Consular Officers, and may NOT be revealed to Petitioner/Counsel without prior DOS approval
- Case Notes can reference "SAO" or "TAL"
  - SAO – Security Advisory Opinion
  - TAL – Technology Alert List

Review the contents of any [redacted]

(b)(7)(E)

Law Enforcement Sensitive//Unclassified 64

The obvious consequence of such guidance is to encourage pretextual denials, and it is unclear how such guidance is consistent with binding USCIS regulations that require all non-classified material that forms the record of proceeding (including adverse evidence) to be disclosed to a visa petitioner.[6]

THE USE OF CRYPTOCURRENCY TRIGGERS EXTRA SCRUTINY

Finally, the FOIA materials revealed the IPO's struggle to adjudicate cases involving cryptocurrency. The FOIA documents reveal that for a time, all cases involving cryptocurrency were shelved while the IPO worked with USCIS's Office of Chief Counsel to develop its cryptocurrency policy. As of May 2021, all cases involving cryptocurrency are "disseminated to designated adjudicators" forming part of a "designated team." The FOIA results also contain training that cautions officers that cryptocurrency can be used to hide the sources and flow of funds and can be used by criminal actors. Moreover, as of the agency's May 2021 guidance, any case involving cryptocurrency requires "supervisory concurrence" before an approval or denial can be issued. It is clear, therefore, that cryptocurrency cases will continue to endure additional security.

However, FOIA results do provide some positive signs. For example, slides from a June 2021 "case discussion" show at least one case involving cryptocurrency that was approved when the investor was able to present (1) a purchase history on the Coinbase platform, (2) a complete sale history statement from Coinbase, (3) a declaration attesting to the gains made on the increase in the cryptocurrency's valuation, and (4) tax returns showing that all requisite taxes were paid on the financial gains.

CONCLUDING THOUGHTS

IIUSA and KKTP's FOIA litigation on source-of-funds issues has confirmed the suspicions of EB-5 practitioners: this area continues to be a hotbed of policy changes for the IPO—sometimes in ways that conflict with the law and due process. The FOIA is a powerful tool to illuminate these important issues, and KKTP looks forward to its continued collaboration with IIUSA so that regional centers, EB-5 investors, and other EB-5 stakeholders can better understand the policy that guides EB-5 adjudications.

[4] 8 C.F.R. § 216.6(c)(2).
[5] For this reason, EB-5 counsel may wish to request copies of all DS-160s filed by the EB-5 investor or any other individuals whose employment history is implicated in the source-of-funds analysis. If these records are no longer available, they may be requested from the Department of State through a Freedom of Information Act request.
[6] 8 C.F.R. § 103.2(b)(16)(i).