



Navigating EB-5 Compliance:

Fund Administrators vs. Annual Audits



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The Reform and Integrity Act of 2022 (RIA) promulgated several new requirements for the operators of regional centers and new commercial enterprises (NCEs or EB-5 Funds) who raise money under the EB-5 Program. One key reform in Section Q of the RIA bolsters transparency and compliance by establishing EB-5 Fund Administrators. EB-5 Funds are required to either retain (i) an EB-5 Fund Administrator or (ii) an accountant to audit their annual books.

This article will examine the pros and cons of these options and offer insights to EB-5 Fund managers as they choose between them. Since compliance is critical in this industry, the choice between an annual audit and a fund administrator can greatly affect both regional centers and investors.

PROACTIVE COMPLIANCE V. RETROACTIVE REVIEW

Section Q tasks fund administrators with confirming that every disbursement flowing out of the EB-5 Fund is compliant with the fund's offering documents (e.g., Private Placement Memorandum, Business Plan, Economic Analysis) and governing documents (e.g., LLC Operating Agreement or Limited Partnership Agreement). Fund administrators must also be a co-signatory on the EB-5 Fund's escrow and/or operating bank accounts and digitally approve all disbursements before funds are released.

The United States Citizenship Immigration Service (USCIS) reviews and approves an EB-5 Fund's offering and governing documents in connection with its I-965F application. If an EB-5 Fund adheres to its USCIS approved plan for job creation, compliance issues should be minimal when investors seek to remove conditions from their conditional green cards, via the I-829 filing. Thus, a fund administrator provides "statutory guardrails" that help an EB-5 Fund remain compliant.

However, unexpected challenges can arise once development on the job-creating enterprise (JCE or Project) begins. Developers may need to make adjustments, which can lead to compliance risks if the changes materially deviate from the USCIS-approved plan. In these cases, a capable fund administrator can identify potential issues before problematic expenditures are made and collaborate with the project developers, fund managers, and attorneys to find a compliant solution.

On the other hand, auditors review a year's worth of expenses to confirm that funds were spent in line with the EB-5 Fund's financial records. While auditors are well-versed in Generally Accepted Accounting Principles (GAAP), they may lack the immigration expertise needed to determine if an expenditure meets the job creation requirements of the EB-5 program and/or is consistent with the documents in the I-956G. For instance, if the NCE and JCE are affiliated,

an auditor may not know that a construction consultant's verification is required for all EB-5 Fund expenditures. Typically, auditors are not conducting a review that considers the underlying immigration compliance of a Fund's expenditures.

Even if an accounting firm is familiar with the immigration issues surrounding an EB5 Fund audit, if they discover a problem, they will be raising issues after the money has been spent and fixing the issue could be difficult.

EASIER COMPLIANCE WITH REGIONAL CENTER AND INVESTOR FILINGS

In addition to approving disbursements, fund administrators collect and maintain written evidence that trace the flow of funds throughout a project's life cycle. They also retain documentation verifying that expenditures were disbursed into and utilized by the Project, such as third-party invoices. This allows fund administrators to generate a "Job Creation Report" detailing all of an EB-5 Fund's job creating expenditures, accompanied by all relevant supporting documentation.

Under the RIA, every regional center must submit an I-956G filing each year, reporting its annual activities to USCIS. The I-956G requires information on each EB-5 Fund, including the following:

- Total EB-5 capital invested into the Project
- Evidence that investor capital has been fully committed to the Project
- Documentation of the Project's progress; and
- Evidence of Job Creation

The Job Creation Report produced by fund administrators can satisfy items (i), (ii) and (iv) above and partly addresses item (iii), making it easier for regional centers to complete their I-956G filings.

Similarly, each investor must submit evidence with their I-829 application to remove conditions from their green card, showing that their investment created at least 10 jobs. Again, the Job Creation Report can provide evidence that (i) investor money flowed into the Project, (ii) it was deployed by the Project in a compliant expenditure and (iii) at least 10 jobs were created as a result.

EASIER COMPLIANCE WITH REGIONAL CENTER 5-YEAR AUDIT

The RIA requires that every regional center must undergo a comprehensive audit by USCIS at least once every five years. The 5-year audit involves a higher level of scrutiny than the annual audit discussed in this article. USCIS requests numerous documents in connection with its audit including:

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- **Investor Subscription Agreements**
- **Wire transfer confirmations tracing the flow of funds per investor for the complete project life cycle (i.e., from Escrow to NCE to Project)**
- **Monthly bank statements for all NCE's and affiliated JCE's for 24 months**
- **methods utilized to track investor data, investments, and investment performance**

In contrast, relying solely on an NCE's annual audit for the regional center's five-year audit may not be sufficient. Auditors generally review wire transfers and bank statements but are not equipped to produce a comprehensive Job Creation Report. This means that EB-5 fund managers using an auditor may face challenges in gathering all the necessary documentation for the USCIS audit within the two-week deadline.

Indeed, USCIS requests many documents during its audit process that are unrelated to fund administration (e.g., the history of the center, organizational charts, marketing plans, investor communications, etc.). However, EB-5 Fund managers benefit from being able to outsource a significant portion of the USCIS audit document production if they use a fund administrator instead of an auditor.

POTENTIAL MARKETING BENEFITS

Some Fund Administrators and other professionals have been touting the benefits of retaining a fund administrator over an auditor. Fund administrators provide proactive guardrails that help deter fraud, maintain immigration compliance and facilitate the drafting of the investor's I-829 filing.

This is a compelling case for EB-5 fund administration that fund administrators have been taking overseas to agents and investors directly. We believe that migration agents/investors are beginning to take notice of whether a fund administrator has been retained by an EB-5 Fund, and some have even requested the client list of EB-5 fund administrators.

Admittedly, there is only anecdotal/testamentary evidence at this time that a marketing benefit might exist. While this potential marketing benefit is still largely unproven and should not be the primary reason for choosing a fund administrator, it is something EB-5 Fund managers can consider when evaluating their options.

SELECTING THE RIGHT FUND ADMINISTRATOR

There are several EB-5 Fund Administrators available, but it is important to select one that aligns with your specific needs. When evaluating fund administrators to determine if they can provide all the benefits outlined in this article, here are key questions to ask:

- **What is the experience level of the principals? Are they familiar with EB-5 and Section Q of the RIA? Do they have relevant backgrounds in immigration, real estate, or corporate law?**
- **Are they compiling records for both the regional center's I-956-G filing and five-year audit and the investors' I-829 filing requirements?**
- **Is their system user-friendly and compliant with statutory guidelines?**
- **Do they understand your business concerns while minimizing operational disruption, including quick onboarding, reasonable fees, fast disbursement approvals, and seamless banking integration?**

CONCLUSION

While both fund administrators and auditors fulfill the compliance requirements of the RIA, they offer very different services and benefits. Fund administrators provide more proactive support by monitoring fund disbursements and ensuring compliance throughout the project's lifecycle. This can prevent issues from arising, rather than addressing them after the fact, as is the case with annual audits.

Given that fund administrators and auditors are typically comparable in price (unless USCIS requires a more extensive audit of the JCE, which is far more expensive), EB-5 Fund managers should carefully weigh the pros and cons of each option. By prioritizing proactive compliance and considering the broader regulatory benefits, EB-5 Fund managers can set themselves up for success in this evolving landscape. ■