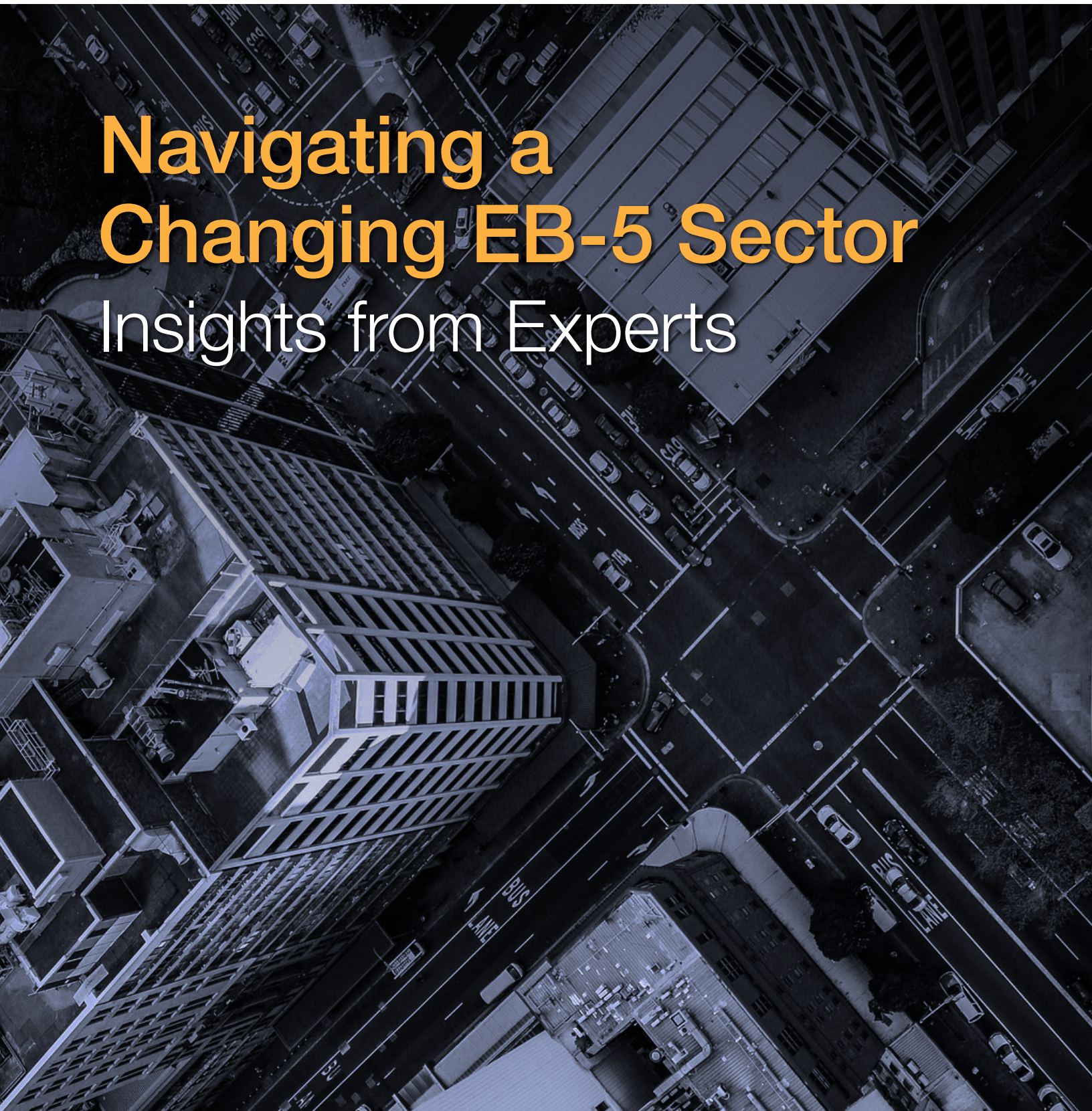
NES Financial℠



Navigating a Changing EB-5 Sector

Insights from Experts

Introduction

At NES Financial, we are fortunate to have the unique opportunity to work with many of the leading experts across the EB-5 ecosystem. Based on our experience in the sector, we have learned that one of the most important factors to a successful EB-5 project is to work with the right team. Our Medallion Partner Program recognizes firms that we believe embrace our vision of best practices and that we are comfortable recommending.

We are delighted to have the opportunity to share this, our first ever NES Financial eBook, *Navigating a Changing EB-5 Sector: Insights from Experts*. This eBook includes articles on a variety of pertinent industry topics with a wide range of perspectives from some of our Medallion Partners, including leading immigration attorneys, securities attorneys, economists, and business plan writers.

Articles touch on many of the current hot topics in the EB-5 industry. Our hope is that you will find the information contained here to be interesting, and if the opportunity presents itself, you will consider one of our Medallion Partners for your project.

This is the first of many eBooks that you can expect from us in the future covering current topics and trends as the EB-5 program continues to evolve.

Sincerely,

Reid Thomas

NES Financial Executive Vice President

Contents

Woo Hoo! The JOBS Act Means No More Securities Compliance in EB-5, Right? Not So Fast...

By: **Michael G. Homeier, Esq.**

2012's Jumpstart Our Business Startups (JOBS) Act was hailed in the EB-5 industry as meaning that the expensive, time-consuming, and complicated compliance with U.S. securities laws was now history. But while the JOBS Act removed some impediments to selling EB-5 investments, it did not eliminate the application of U.S. securities laws to EB-5.

Securities Law Marketing Limitations

An investment opportunity managed by someone(s) other than the investor generally constitutes a "security." To protect investors, offers and sales of securities are regulated by federal and state securities laws.

Those laws require that all securities offerings be registered with the government through a complex, lengthy, and expensive process, unless the offering is exempt. The two primary exemptions are Regulation D ("Reg D"), the "private offering exemption," and Regulation S ("Reg S"), for "exclusively overseas offerings."

Regulation D exempts private offerings not offered to the public. Private offerings cannot market securities using "general solicitation or advertising," defined as any advertisement, article, notice, or other communication published in any newspaper, magazine, or similar media, or broadcast over television or radio (or the internet). (Reg S is similar.)

This significantly hamstrings the marketing of offerings. Most companies lack exposure to potential investors and rely on introductions by others, such as brokers. With increasing numbers of competing investments, EB-5 issuers chafed at taking convoluted steps to find investors, while reining in over-eager (and expensive) brokers who might improperly advertise publicly overseas. It is easy to "over-market" and inadvertently turn an exempt private offering into an un-exempt (and unlawful) public one.

EB-5 and the JOBS Act — or Acts

Enter the JOBS Act, a set of six laws, styled Titles I through VI, combining a series of different proposals addressing the same broad theme of easing restrictions on small business capital raising. EB-5 issuers pay the most attention

to the revision of Reg D contained in Title II that markedly eases the fundraising process; however, two more of the six Titles have an EB-5 impact also.

A. Title II, the Access to Capital for Job Creators Act, eliminates the Reg D prohibition on general advertising, including the internet. This change greatly facilitates the offering and solicitation process.

To lawfully advertise under Reg D, (1) all investors must in fact be accredited, and (2) issuers must take reasonable steps to verify accredited investor status. Previously, accredited investors self-certified their status; now called Rule 506(b) of Reg D, this may still be done if no public advertising is used. But if the EB-5 issuer uses public advertising, it must claim exemption under Rule 506(c), which requires verification of accredited investor status by independent investigation. More projects are using the Rule 506(c) exemption and the vastly increased marketing it allows.

B. Title IV, the Small Company Capital Formation Act, increases offerings under Regulation A. Reg A is not a private placement as are Reg D offerings, rather it is a mini-registration, requiring the filing and approval of an offering statement by the SEC, delivery of an offering circular to prospective investors, and filing of periodic reports afterwards.

Reg A provided a simpler, less expensive process than full registration but was capped at $5M. Title IV increases the Reg A (now called Regulation A+) ceiling to either $20M or $50M in a 12-month period, with no restrictions on public advertising. Both unaccredited and accredited investors may participate.

The Reg A+ issuer is a registered company (although not a public issuer) and, beyond its initial filing obligations, has continuing filing obligations, including financial statements and periodic disclosures.

With the offering ceiling raised to $50M, EB-5 issuers may opt for the revised Reg A+ mini-registration either alone or with a companion Reg D (b) or (c) offering. The Investment Company Act of 1940 limits EB-5 Reg D offerings using a two-entity structure to a maximum of 100 investors ($50M). A Reg A+ companion offering to a Reg D allows raising another $50M, including, from unaccredited investors, carrying SEC "pre-approval," which can alleviate investor concern and improve marketability.

C. Title III, the Entrepreneur Access to Capital Act, is the "crowdfunding" rule allowing for pooling money raised in small amounts from large numbers of individuals via the internet. Title III allows raising up to $1M every 12 months (either $2,000 per investor or a percentage of income or worth, up to $100,000). Issuers must meet conditions, including filing and updating information, and advertising is restricted.

Crowdfunding offerings require upfront and ongoing disclosures and fees to funding portals and brokers, while fiduciary and other legal duties continue to be owed by issuers to a literal crowd of investors. For EB-5, the low ceiling (capped at $1M) leaves Title III as supplementary financing for small direct EB-5 funding projects.

Bottom Line: The Securities Laws Have NOT Gone Away

For EB-5, the JOBS Act provides significant, immediate easing of certain troublesome securities obligations, most notably the Reg D proscription of public advertising and the Reg A+ ceiling and exclusion of unaccredited investors. It made crowdfunding a real albeit small-scale option for smaller EB-5 projects.

The changes reflect a continuing securities regulation regime — not an ended one. The securities laws still apply, and their complicated and overlapping requirements create potentially punitive consequences for missteps even under the revised rules.

Even with expanded marketing, content remains strictly governed by the anti-fraud provisions. So, whatever the EB-5 issuer may now more broadly advertise, must still be accurate. The Reg D and A+ revisions only facilitate broader advertising to a larger audience of potential investors — they do not eliminate the obligation to provide full disclosure.

The JOBS Act is making EB-5 easier and enhancing success. EB-5 issuers should continue to work closely with their securities counsel to take advantage of the benefits and options provided under the JOBS Act while maintaining full compliance with the remaining securities obligations.

About the Author

Michael Homeier practices in the area of general business, securities, corporate, transactional, and business financing law (including EB-5 and Crowdfunding). With over 30 years' experience in the corporate and business transactional fields, both as in-house corporate counsel and with private law firms, Michael brings a deep level of legal knowledge and expertise to the Crowdfunding and EB-5 industries. Michael represents a number of Crowdfunding platforms and portals and regional centers in the EB-5 program and assists all of them with the structuring of their projects as well as the negotiation and drafting of business and securities documents relevant to Crowdfunding and EB-5 offering projects, including private placement memoranda (PPMs), investor procurement agreements, limited liability agreements, loan agreements, subscription agreements, investor questionnaires, regional center contracts, plus transactional and corporate documents.

About Homeier Law P.C.

Homeier Law P.C. is a law firm devoted exclusively to corporate and business transactional law, including securities (public and private, especially EB-5 and Crowdfunding). From offices in Los Angeles and New York City, Homeier Law P.C. represents a broad variety of clients, both domestically and internationally, from established and publicly-traded companies, to startup businesses and entrepreneurs in a wide range of industries. The firm's practice includes business finance, secured and unsecured lending, mergers and acquisitions, licensing, private and public securities, Crowdfunding, venture capital, new media, technology, e-commerce, and other general transactions. Homeier Law P.C. is a leader in EB-5 and Crowdfunding-related corporate and securities transactions, having represented clients on over 250 private offering projects to date.

The Emergence of Rule 506(c)

By: **Jor Law, Esq.**

Most EB-5 capital raises are securities offerings. In the United States, securities offerings must be registered with the Securities Exchange Commission (SEC) and possibly the states the offering impacts unless an issuer can claim an exemption from registration. In the EB-5 space, the two most common securities exemptions historically relied upon are Regulation S (Reg S) and Rule 506(b)[1] of Regulation D (Reg D). With the passing of the Jumpstart Our Business Startups Act (JOBS Act), however, a new Rule 506(c) of Regulation D was implemented. Rule 506(c) may be a particularly useful exemption for issuers in the EB-5 space.

Reg S

Reg S exempts offers and sales of securities "that occur outside the United States" from needing to register under federal law. It does not provide for any state law exemption, so an issuer that relies on Reg S as an exemption still has to comply with securities laws affecting registration at the state level. Reg S is popular because, other than the fact that investors must be not be "U.S. Persons," there are almost no other qualifications required of investors. Also, Reg S has no limitation on general solicitation or advertising of the offering. Downsides to Reg S are primarily that it cannot be used in the U.S. (including any activity which might "condition" the U.S.), U.S. Persons may not invest, and state laws are not preempted.

Rule 506(b)

Rule 506(b) was and still remains the most commonly used securities exemption for U.S. offerings. It is no surprise that it also is widely used in the EB-5 industry. The primary advantage of Rule 506(b) is that state laws for securities offered pursuant to the provisions of Rule 506 are preempted by federal law. In other words, issuers that offer securities under the exemption afforded by Rule 506(b) are also exempt from registration under the various state blue sky laws.[2] Additionally, there is no maximum limit on the amount of money that can be raised under a Rule 506(b) offering. Rule 506(b), however, comes with an important drawback: issuers cannot generally solicit or advertise their offerings and may only approach friends, family, and those who have pre-existing substantive relationships with

[1] Prior to implementation of Title II of the JOBS Act, Rule 506(b) was commonly known as Rule 506.

[2] Note, however, that the preemption does not affect all types of securities or all types of person. Additionally, while an issuer may not have to register or qualify the securities under the various states' blue sky laws, it may still be required by some states to pay certain fees and make notice filings.

them. In addition, Rule 506(b) offerings generally require that investors be "accredited investors," a federally-defined term.[3] In EB-5, that generally means investors with high income or net worth.

Rule 506(c)

Rule 506(c) became effective only on September 23, 2013, and as a result of its young age, hasn't seen widespread adoption in the EB-5 industry yet. Rule 506(c) retains almost all of the benefits of Rule 506(b) but with two notable differences. The first is a significant advantage in that general solicitation and advertising of the offering is allowed. The second is a disadvantage in that all investors that end up investing must be verified as accredited investors using federally-prescribed "reasonable steps." However, that disadvantage is less noticeable in the EB-5 industry where most investors can easily demonstrate that they are accredited investors and are already accustomed to providing background information for their immigration petition.

While there may still be reasons to conduct simultaneous[4] Reg S and Rule 506(c) offerings, issuers can also use only a Rule 506(c) exemption and still generally solicit overseas. Especially for issuers in those states where there is no equivalent Reg S exemption, Rule 506(c) may be the only practical exemption to use. Rule 506(c) is an extremely useful and powerful tool for issuers conducting EB-5 raises. The emergence of Rule 506(c) in the EB-5 space is inevitable as issuers turn to it to unlock the power it provides.

About the Author

Jor Law practices corporate and securities transactional law in Los Angeles and is a founding shareholder of Homeier Law P.C. and founder of VerifyInvestor.com. Jor is particularly well-known for his unparalleled expertise in alternative finance, including EB-5 finance and crowdfunding, both industries where he is recognized as one of the foremost influential transactional attorneys in the world. Jor is licensed to practice law in California and New York. For three consecutive years, Jor was recognized by Super Lawyers magazine as one of "Southern California's Super Lawyers – Rising Stars," placing him among the top 2.5% of the best up-and-coming attorneys in Southern California. Using a completely objective model to evaluate attorneys, Avvo rated Jor as a "Superb" attorney, the highest available rating offered by Avvo. Jor is frequently sought out as a speaker internationally on the topics of capital raising, investing, EB-5 finance, securities, and other corporate matters relevant to attorneys, entrepreneurs, and investors.

About VerifyInvestor.com

VerifyInvestor.com serves as the resource for accredited investor verifications trusted by those who insist on safety and reliability. These verifications are required by federal laws for generally solicited Regulation D, Rule 506(c) capital raises. In the EB-5 industry, regional centers, project principals, broker-dealers, migration agents, and immigrant investors have been relying on VerifyInvestor.com as the compliance solution for their accredited investor verification obligations.

[3] Up to 35 non-accredited investors may invest in a Rule 506(b) offering, but generally most issuers avoid non-accredited investors as the compliance burden increases.
[4] An issuer may simultaneously conduct offerings under Reg D and Reg S, and they will not be integrated if properly conducted.

The Overlooked Role of the USCIS in EB-5's Future

By: **Joseph McCarthy**

With the flurry of proposed legislative reforms introduced and debated at the close of 2015 and the more recent Congressional hearings at the outset of 2016, Congress has been prominently positioned at the center of the EB-5 reform spotlight. However, in crucial months leading up to the September 30, 2016 reauthorization of the EB-5 regional center program, the greatest ally to the long term longevity of the program may be the United States Citizenship & Immigration Services (USCIS or "the Service").

Since the introduction of draft bill S.1501, titled the American Job Creation and Investment Promotion Reform Act by Senators Grassley (R-IA) and Leahy (D-VT), Congressional reform of the EB-5 program has drawn most of the public attention. Long-term program reforms and objectives of the USCIS, the government agency most directly responsible for administering the EB-5 program, have largely been overshadowed, though not absent. In both committee testimony and public correspondence with Congressional leadership, Department of Homeland Security Secretary Jeh Johnson left no doubt that the USCIS supports robust legislative modifications to improve operational capacity and program integrity. As the midpoint of 2016 approaches, amidst unprecedented EB-5 growth and national attention, the USCIS appears poised to step out of the shadows and proactively introduce targeted, limited EB-5 reforms to address stakeholder and government demands.

Shifting Program Priorities in the Modern Era of EB-5: Job Creation to Program Integrity

After years of relative obscurity, EB-5 investment sky-rocketed as conventional capital sources remained largely unavailable after the collapse of the financial market in 2008. The rapid acceleration of EB-5 investment presented the USCIS with an extensive and complex EB-5 caseload involving economics, law, business, finance, securities, and banking that progressively created a bottleneck due to vague guidance, mounting case volumes, limited staffing, and at times, inconsistent adjudication. To foster job creation, the USCIS in 2012 initiated incremental improvements to streamline case administration and clarify regulatory interpretations. The Service realigned the EB-5 program into the broader Immigrant Investor Program (IPO) and relocated its office from the California Service Center to Washington, D.C. In a series of small and large-scale public meetings, the IPO committed substantial time and resources to open a dialogue with EB-5 stakeholders. The stated objective of the dialogue was for the USCIS to enact improvements

that maximized economic productivity, job creation, and increased domestic capital investment without sacrificing program security and integrity. An early, well-known byproduct of the new public collaboration is the May 30, 2013 Policy Memorandum (PM-602-0083), which attempted to clarify the agency's policies for adjudicating EB-5 applications and petitions (the "May 2013 Policy Memo").

The USCIS has consistently expanded staff in order to reduce processing times, decrease the existing case backlog, and improve adjudication performance and predictability. During the April 2016 stakeholder call, they announced the Immigrant Investor Program Office employs 126 staff and is on track to have 171 employees by the end of 2016. However, the expansion of the USCIS' IPO office is still dwarfed by the explosive growth of EB-5 regional centers and immigrant investor visa applicants, whose numbers have increased dramatically since 2008.

Further, changes at the IPO were not limited to the staff level. In late 2013, the USCIS announced that the new head of the USCIS Immigrant Investor Program Office would be Nicholas Colucci. Director Colucci previously served as Associate Director of the Department of Treasury's Financial Crimes Enforcement Network (FinCEN), Analysis and Liaison Division, and his background served as early evidence of shifting priorities toward national security concerns, fraud prevention, and the financial integrity of EB-5 capital.

In February 2016 testimony before the Senate Judiciary Committee, Director Colucci reiterated the Service's commitment to administer the EB-5 program earnestly through specialized staff devoted solely to the program, the creation of a Fraud Detection and National Security EB-5 Division (FDNS EB-5), and its increased efforts to regulate a quickly growing regional center program. To accomplish these objectives, the USCIS expanded collaboration with federal agency partners such as the United States Securities and Exchange Commission (SEC), the U.S. Immigration and Customs Enforcement (ICE), the Federal Bureau of Investigation (FBI), U.S. Department of State, and U.S. Attorney's Offices. While progress has been made, the USCIS has indicated that work remains and that Congressional action is required.

Is 2016 the Year of the USCIS?

Unable to pass EB-5 legislative reform by the end of 2015, Congress instead extended the EB-5 program 'as-is' through September 2016. With the uncertainty of Congressional reform, the USCIS has taken the initiative to address certain pressing issues. Recently, the USCIS announced its IDEA Community campaign to collect additional input on EB-5 regulation/policy changes, specifically seeking comment on:

1. *Minimum investment amounts, which have remained constant since 1991 but could be increased by the USCIS.*
2. *The TEA designation process.*
3. *The regional center designation process, including but not limited to the exemplar process and the designation of the geographic scope of a regional center.*
4. *Indirect job creation methodologies.*

Not coincidentally, many of these subjects overlap with key elements of the legislative reforms that were previously proposed in Congress. Independent from IDEA community campaign, the USCIS has announced its intention to

address program integrity issues by implementing additional reforms:

1. *Expanding the audit program for regional centers, thereby increasing random EB-5 project site visits.*
2. *Introducing I-829 petitioner interviews which will begin this year. Initial interviews will be conducted virtually, and interviewees may be accompanied by counsel, regional center representatives, and/or regional center counsel.*
3. *Increasing the number of embedded Fraud Detection and National Security EB-5 staff by more than a factor of two and more than tripling the number of overseas verification requests sent to posts in support of combatting fraud.*
4. *Removing EB-5 regional centers for failure to comply with EB-5 program requirements (as noted by the increasing number of regional center terminations).*
5. *Expanding security checks (e.g. the Bank Secrecy Act data collected by FinCEN) to cover regional center businesses and certain executives participating in the EB-5 program, thereby strengthening the overall EB-5 vetting process.*
6. *Drafting potential regulatory changes to clarify the eligibility requirements and provide additional tools, to the extent allowed by statute, to strengthen the integrity of the program.*
7. *Working closely with Congress up to the next sunset date for regional center program reauthorization (September 30, 2016). The USCIS will prepare guidance for two potential sunset scenarios. Either the Regional Center program lapses but Congress indicated its intention to reauthorize it, or Congress indicates its intention to let the regional center program lapse permanently.*

Most recently, the USCIS published a notice of proposed rulemaking in the Federal Register inviting public comment on the proposed U.S. Citizenship and Immigration Services Fee Schedule. The USCIS explained that it had conducted a comprehensive fee review after refining its cost accounting process and determined that current fees do not recover the full costs of the services it provides. Adjustments to the fee schedule as it applies to the EB-5 program are summarized as follows:

1. *A New Form I-924A (to be titled "Annual Certification of Regional Center"); Fee: $3,035.*
2. *Form I-924 application for regional center designation or amendment; Fee increases from $6,230 to $17,795.*
3. *Form I-526 immigrant petition; Fee increases from $1,500 to $3,675.*
4. *Form I-829 petition to remove conditions; Fee: $3,750.*

The USCIS has invited public comment through July 5, 2016 in order to collect data and assess the economic impact the new fees would have on regional centers, but the overall increases in fees would presumably better fund the Service to implement integrity measures and avoid program controversy.

Conclusion

The USCIS has again resumed the mantle of program change proponent. The motivation for action likely stems in part to a combination of legislative stalemates, public censure, and critical Government Accountability Office and policy think-tanks reports; though it would hardly be fair to characterize the impetus for USCIS-led reform as novel or strictly external. What is less clear, however, is how much can be done and how soon. The sunset of the EB-5

regional center program is again looming, and because of recent headlines highlighting more alleged large-scale fraud in the program, the chorus of 'no reauthorization without reform' is the loudest it has ever been. And unlike last year, much of Congress' attention will likely be impacted by the current presidential election.

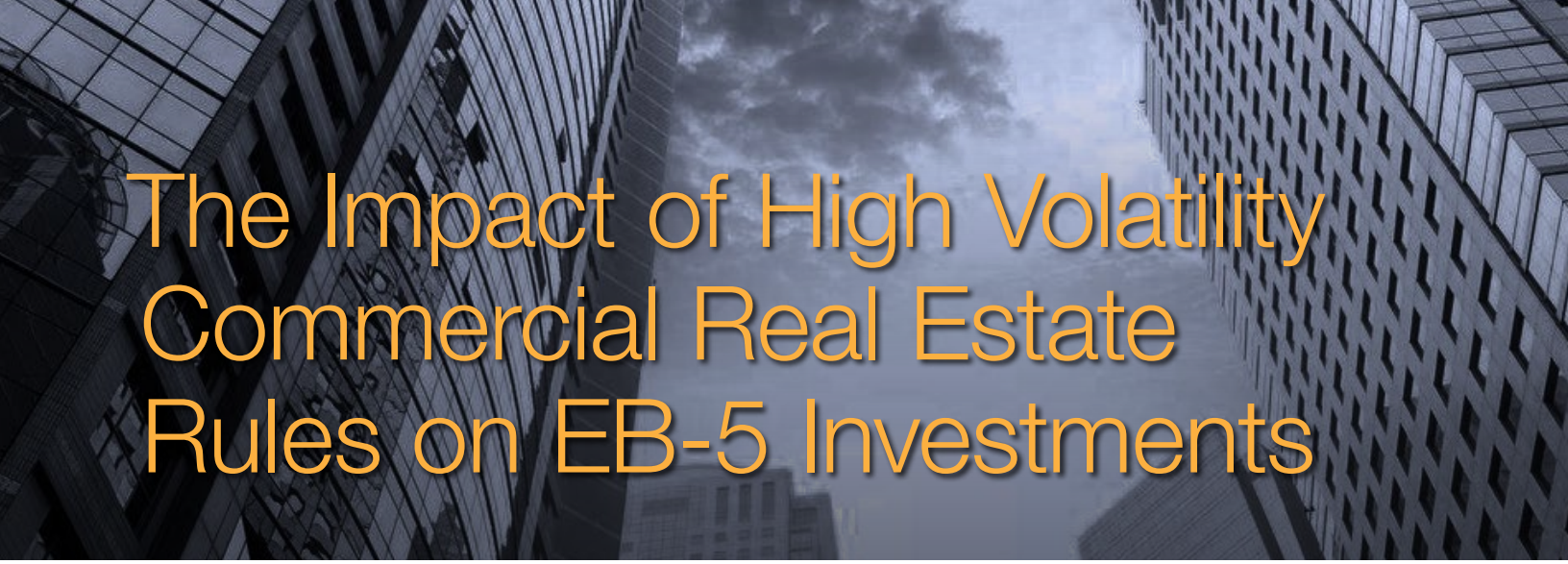
Nevertheless, the USCIS appears poised to selectively address the more limited reforms within its authority. While these reforms may fall short of the objectives sought in the sweeping legislation introduced in 2015, these changes will further broaden integrity and transparency objectives. More importantly, these changes may be crucial to moving the EB-5 program in the direction necessary to give stakeholders, overseas investors, and elected leaders greater confidence in the future of EB-5.

About the Author

Joseph McCarthy is a founding partner of McCarthy Nehring PS and American Dream Fund, an operator of multiple EB-5 Regional Centers nationwide. McCarthy's primary area of legal expertise is immigration law, including all facets of EB-5 immigration. Through his involvement in EB-5, he has been involved in EB-5 capital deployment of greater than $800 million in job-creating enterprises. In his role as an attorney, McCarthy is a member of the American Immigration Lawyers Association (AILA) and served for four years as the Legislative Committee Chair for the Association to Invest in USA (IIUSA), a national trade association of EB-5 Regional Centers and service providers responsible for leading EB-5 reform in the United States Congress. McCarthy is a widely recognized speaker about EB-5 immigration law both domestically and in China. He frequently speaks about EB-5 to developers and business professionals, government officials, attorneys, and individuals interested in immigrating through the EB-5 program. For his work in EB-5, he was acknowledged by the **Los Angeles Business Journal** as one of the *"Who's Who in Real Estate,"* **EB-5 Magazine** as a *Top 10 EB-5 Attorneys in Specialized Fields*, and by **NES Financial** as a **Medallion Program Partner**. McCarthy also serves on the Editorial Board for the **EB5Investors Magazine** and recently authored multiple chapters of the **EB-5 Handbook**.

About McCarthy Nehring

McCarthy Nehring is a Los Angeles and Seattle-based law firm that has represented more than 50 regional centers nationwide, including preparing initial applications for regional center designation and preparation of their project materials. Although the firm's primary practice area is EB-5, it also has experience advising clients in the areas of business, including partnership agreements, commercial leases, and intellectual property licenses and agreements, and real estate, including leasing, construction, and debt/equity structure and financing.



The Impact of High Volatility Commercial Real Estate Rules on EB-5 Investments

By: **Mark A. Katzoff, Arren Goldman,** and **Gregory L. White**

NES Financial is saddened by the sudden passing of Gregory White on June 11th. Greg was very intelligent, extremely warm, and highly respected in his field. Our thoughts and prayers are with his family, friends, and colleagues.

Investments made by EB-5 funds (New Commercial Enterprises or NCEs) are typically structured as loans to the job-creating enterprise (JCE). It is also common for such investments to be made in connection with construction projects which also have a senior loan from a commercial lender providing the bulk of the so-called construction financing. Rules adopted in recent years with respect to how banks must treat High Volatility Commercial Real Estate (HVCRE) loans have implications for the structuring of EB-5 investments. This article provides a brief summary of the implications of the HVCRE rules and potential ways to address them.

Loans that finance the acquisition, development, or construction of real property (ADC) prior to the replacement of such loans with permanent financing (for example, following completion of a project) may be HVCRE loans. HVCRE loans are deemed riskier than other loans and require banks to maintain greater reserves. The greater reserve requirements, in turn, can result in higher borrowing costs. **In general, for ADC loans, in order to avoid HVCRE status, the project must meet the following criteria:**

1. *A loan to value ratio not exceeding the maximum level allowed, generally 80% for a construction loan.*
2. *The borrower has contributed capital to the project of at least 15% of the real estate's appraised "as completed" value* ***prior to*** *the funding of the bank loan. Capital can include cash, cash paid for land (but not any appreciated value thereof), unencumbered assets, and out-of-pocket payment of development expenses.*
3. *All contributed capital and any capital generated by the project, i.e., net operating income, must remain with the project until the senior loan is repaid in full or replaced by permanent financing. This requirement must be a covenant in the senior loan documents.*

These rules have the following impact on EB-5 loans:

1. *The senior lender may have an incentive to reduce the amount of the ADC loan to the borrower to achieve a favorable loan to value ratio.*

2. *Since capital must remain with the project for the duration of the senior financing, there would not be cash available for the JCE to make interest payments on a loan from the NCE or to make prepayments of principal to fund return of capital to EB-5 investors who either have their I-526 petitions rejected or their I-829 petitions fully adjudicated prior to the end of the terms of the NCE loan.*

One potential solution is the creation of a wholly-owned subsidiary of the NCE (Borrower Sub) to which the NCE would loan the funds received from the EB-5 investors. The Borrower Sub could then use the loan proceeds to make an equity investment in the JCE.

This approach limits the debt incurred at the JCE level (thus lowering the loan to value ratio). **However, it also raises the following issues:**

1. *As the Borrower Sub would be structured as the parent of the JCE, the senior lender may also want to limit debt incurred at the parent level and, accordingly, may resist the creation of a loan from the NCE to Borrower Sub.*
2. *The equity contributed by the Borrower Sub to the JCE would have to remain in the JCE for the life of the senior loan. As a result, the JCE could not make distributions on the contributed equity to the Borrower Sub, and the Borrower Sub would not have resources to repay the loan from the NCE.*

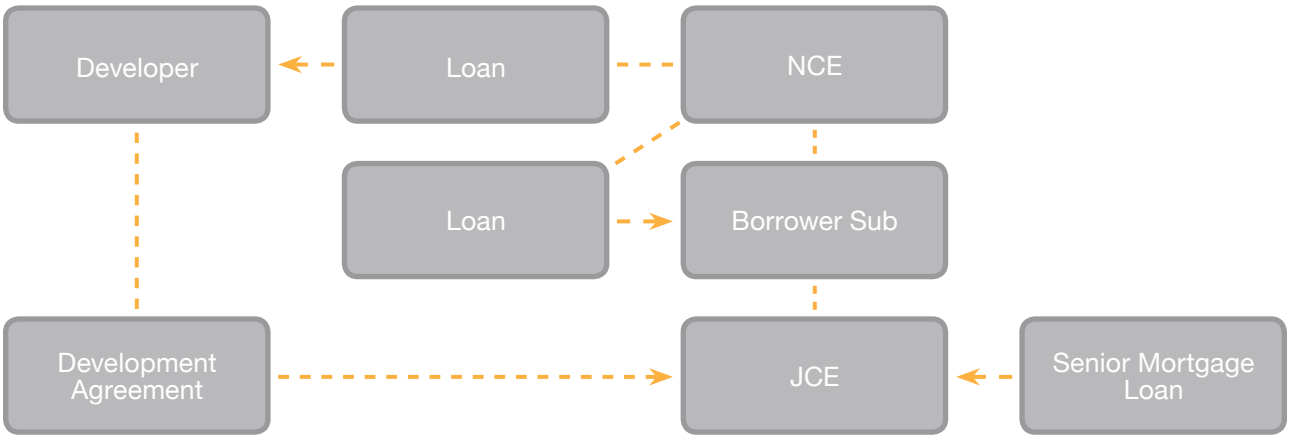
Another alternative would be for the NCE to loan the funds received from the EB-5 investors to an affiliated developer entity which could use the proceeds to pay development costs on behalf of the JCE under a development agreement, in turn being reimbursed for such costs by the JCE. **This approach could offer the following benefits:**

1. *As the developer would not be an owner of the JCE, this avoids the parent of the JCE incurring debt and should satisfy this lender concern.*
2. *Since the developer would not be contributing equity to the JCE, the JCE should not be restricted in reimbursing the developer for the expenses advanced.*

This approach also has some potential drawbacks:

1. *The total development costs would need to be at least equal to the total EB-5 funds proposed to be invested. This is after the case, however. This should be "built-in" to the bank documentation.*
2. *The senior lender would need to approve the reimbursement of expenses.*
3. *In order to fund the interest payments on the EB-5 loan from the NCE to the developer, the development agreement would have to provide for reimbursement of the advanced expenses with interest, and the payments would need to synchronize with the timing of required payments on the EB-5 loan.*

The chart below illustrates the two potential structural alternatives:



If the structural alternatives are not feasible for the project for whatever reason, the JCE may be able to persuade the senior lender to nevertheless make an HVCRE loan, but this would likely drive up the interest costs of the loan due to the additional reserve requirements.

In short, the HVCRE rules impose additional challenges on structuring an EB-5 investment in a commercial real estate project but none that should prove insurmountable with proper planning.

About the Authors

Mark Katzoff is senior counsel in the Corporate practice at Seyfarth Shaw LLP and is a member of the firm's Capital Markets and EB-5 practices. Mr. Katzoff's EB-5 practice focuses on the securities and compliance aspects of EB-5 offerings, including compliance with the Investment Company and Investment Advisers Act and the broker-dealer provisions of the Securities Exchange Act. His capital markets practice includes representation of both venture capital funds and emerging companies in structuring private equity investments. His practice in general corporate and contractual matters includes preparation of joint venture and licensing agreements. Mr. Katzoff also advises broker-dealers with regulatory compliance matters.

Arren Goldman is a partner in the Real Estate group at Seyfarth Shaw LLP. Mr. Goldman concentrates his practice in commercial real estate transactions. Mr. Goldman represents lenders, developers, owners, and investors in a variety of complex real estate financing transactions, including EB-5 matters. Additionally, Mr. Goldman represents loan servicers in connection with a wide array of loan servicing matters, including transfer of ownership matters (such as non-permitted equity transfers and loan assumptions), property substitutions, and leasing-related matters. Mr. Goldman also works on commercial leasing and real estate development matters as well as real estate acquisitions and dispositions. Throughout his career, Mr. Goldman has closed numerous acquisition, permanent, interim/bridge, construction, and mezzanine loans. He also has led teams that have closed over $100 million in mortgage

loans, secured by various properties around the country, for securitization in the capital markets and has worked on syndicated and participation loan transactions.

Gregory White was a Corporate partner at Seyfarth Shaw LLP and served as co-chair of the firm's EB-5 Immigrant Investment practice and steering committee member of its Capital Markets practice. Mr. White was involved in the structuring of various EB-5 financing transactions and was a frequent lecturer on EB-5 securities, finance, and compliance issues. He also represented corporations, private equity funds, and venture capital firms in financing, technology, and M&A transactions. A large part of his practice included equity and debt financings for both issuers and investors across a number of industries, including hospitality and resorts, alternative energy, real estate and infrastructure development, telecommunications, mobile technology, healthcare and healthcare technology, and e-commerce. In addition to representing such companies in fundraising transactions, Mr. White's work for these clients included representation in connection with corporate partnering, joint ventures, and strategic alliances, as well as licensing, marketing, distribution, service, support, outsourcing, and other agreements.

About Seyfarth Shaw LLP

Seyfarth Shaw has more than 850 attorneys and provides a broad range of legal services in the areas of labor and employment, employee benefits, litigation, corporate, and real estate. With offices in Atlanta, Boston, Chicago, Houston, London, Los Angeles, Melbourne, New York, Sacramento, San Francisco, Shanghai, Sydney, and Washington, D.C., Seyfarth's clients include over 300 Fortune 500 companies and reflect virtually every industry and segment of the economy. A recognized leader in delivering value and innovation for legal services, Seyfarth's acclaimed SeyfarthLean client service model has earned numerous accolades from a variety of highly respected third parties, including industry associations, consulting firms, and media. For more information, please visit *seyfarth.com*.

The Importance of the EB-5 Business Plan

By: **Phil Cohen**

In an environment where lawyers, economists, and other professionals play important roles, it is easy to think of a document like a business plan to be of secondary importance. In the world of EB-5, one should bear in mind that the business plan is a critical part of the process. In many ways, the business plan functions as a core of both the package being submitted to the USCIS as well as the marketing package. From the USCIS perspective, the business plan must reflect and comply with the laws and other directives governing the program, it must be consistent with the securities offering documents, and it must substantiate the inputs used in the economic impact report. As a result, the EB-5 business plan varies in many ways from regular business plans.

From a marketing (to EB-5 investors) perspective, the business plan is the document that presents the critical information that overseas marketers and investors look for to assess the soundness of the investment from both a business perspective and from an EB-5 perspective.

The USCIS and Your Business Plan

Some brief research into EB-5 will reveal that the USCIS has issued guidance in terms of what should be contained in a business plan. Many in the industry will refer to Matter of Ho (a precedential decision by AAO which outlined EB-5 business plan requirements), although there have been many clarifications, memoranda, and RFEs (requests for further evidence) which have elucidated program requirements since that time. Additionally, the USCIS can be inconsistent in its interpretation or application of the guidance, although this has been improving. As an example, one relatively recent evolution has been an increased focus on substantiation of the claims and projections in a business plan, prompting the increased use of feasibility studies and market studies.

Ultimately, a deep understanding of the program's requirements and nuances can be of infinite value in ensuring a smooth approval process. On the other hand, if a business plan does not hit all the right notes, one can expect to receive an RFE asking for more information or substantiation, which will cost in terms of money and lost time. Many in the industry have observed that more deficient plans tend to receive disproportionately large RFEs.

A Window for Investors

Beyond getting USCIS approval, anyone seeking to raise funds under the program should also consider that the business plan is the first thing that marketers and investors consider when looking at EB-5 projects to represent or to invest in. In recent years, the EB-5 marketplace has become considerably more crowded, and those who present a well-considered and well-developed business plan are in a better position to stand out and to give both marketers and investors comfort in a given deal. Investors and agents have also become more sophisticated in their evaluation of EB-5 deals in recent years. Furthermore, recent negative news about a few projects under the program has prompted investors and agents to seek more substantiation and verification of business plan claims. When starting down the EB-5 road, project owners would be wise to get a bearing from their core advisory team and marketers on what the market looks for early on. Some examples of things to consider early on in the process from the investor's perspective include:

1. *The likelihood and timeliness of job creation (e.g. bridge loans can help ensure that the project moves forward more quickly).*
2. *Demonstrating stability over aggressive growth targets.*
3. *Favorable investor terms by market standards.*
4. *Third-party validation of the plan (e.g. using feasibility studies and validating construction costs).*
5. *A reasonable and verifiable capital stack by market standards.*
6. *Favorable investor position and EB-5 loan collateralization.*

Getting It Right the First Time

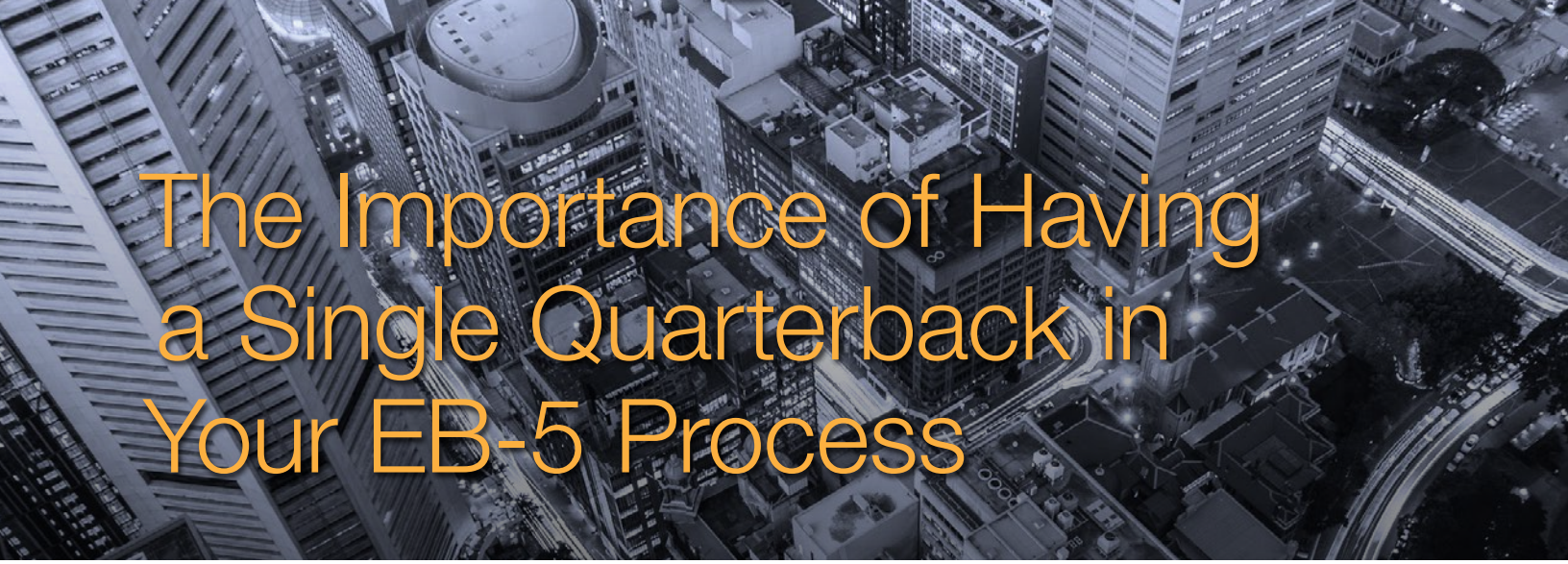
There is considerably more to the EB-5 program than many realize upon their preliminary investigations. Additionally, the landscape, both in terms of USCIS requirements and investor requirements, is in constant flux. Given the prominence, importance, and relative cost of the business plan, project owners are well advised to strongly consider working with reputable service providers who monitor the program at all levels, can play an active role in the advisory process, and can interact knowledgeably with the other professionals on the team. Reputation counts in EB-5. Ensuring that a project is well represented by its business plan and that it satisfies all stakeholder needs from the beginning is an important step toward achieving EB-5 success.

About the Author

Phil Cohen is the President of Strategic Element Inc., a company that focuses on developing EB-5 business plans, economic impact reports, and feasibility studies. Mr. Cohen has been active in the EB-5 industry since 2010 and has participated in the development of projects which have raised over $3 billion in EB-5 capital. Mr. Cohen is also the lead author of *The EB-5 Definitive Guide*.

About Strategic Element

Strategic Element offers business consulting services, primarily focused in the area of investment-based immigration. Since 2010, Strategic Element has developed a reputation for high quality work and integrity in its field. In addition to EB-5, Strategic Element also regularly works with legal professionals in the areas of L-1, E-2, and H1-B visas in the United States as well as PNP programs in intra-company transfers in Canada.



The Importance of Having a Single Quarterback in Your EB-5 Process

By: **Lauren Cohen**

Navigating EB-5 waters can be challenging and time-consuming. But assembling the right team of experts – including attorneys, analysts, researchers, economists, and business plan writers – can make all the difference for Regional Centers, project developers, business owners, franchisors, and even the investors. EB-5 experts can demystify the complex EB-5 process, paving the path for pain-free EB-5 approval. The right team will leverage its breadth of industry expertise and experience to guide business owners and investors in making the right choices for their needs and goals.

In the often daunting area of EB-5 and project development, having a single-source point-of-contact to "quarterback" the entire EB-5 process is essential. A quarterback plays the vital role of overseeing all project components, including Matter of Ho-compliant business plans, market feasibility studies, appraisals, economic impact reports, the multitude of required legal documentation, the filing process, and even fundraising coordination.

The quarterback should have strong relationships with the parties that are essential to the overall success of the EB-5 process and should work with qualified strategic partners – such as business planners, economists, marketing experts, licensed EB-5 broker-dealers, migration agents, and immigration and securities attorneys as well as other stakeholders. These professionals must be well-vetted and immediately available to work on new projects. The quarterback must hold these service providers accountable and to strict deadlines and high quality standards throughout the process – making sure that everything is delivered on time, on budget, and on target (consistency must be ensured among all documents to ensure a smooth path to approval).

With these strategic partnerships in place, the quarterback provides the full spectrum of services needed for EB-5 approval, from conception of the project or business through its inception and fruition (so from beginning to end). Working with an experienced quarterback eliminates the need to procure outside services from unrelated sources, which significantly streamlines the otherwise overwhelming process.

Specifically, the scope of a quarterback's offerings for project developers and business owners should include but not be limited to the following (as applicable):

1. *Project readiness/due diligence assessment: Due diligence services evaluate the viability and Market feasibility study: This is an essential component of a thorough due diligence assessment.*
2. *Initial jobs analysis: The number of jobs a project can create dictates the amount of EB-5 capital.*
3. *Capital stack analysis: This involves helping clients determine what proportion of the capital.*
4. *Matter of Ho-compliant business plans: It is best to find someone who will create comprehensive and credible EB-5 business plans that comply with the relevant case in the area which was decided in 1998 and is commonly known as Matter of Ho. There are 9 key components in Matter of Ho business plan, including (i) description of the business, (ii) discussion of the business structure, (iii) marketing plan with target market analysis, (iv) competitive analysis, (v) personnel experience, (vi) required licenses and permits, (vii) staff timetable for hiring, (viii) job descriptions, and (ix) budget and financial projections.*
5. *Legal documentation filing: Immigration attorneys prepare and file application with the USCIS.*

For project submission, the quarterback will enlist qualified professionals to perform the following services:

1. *Securities Counsel: to create a private placement memorandum and supporting documents.*
2. *Immigration Counsel: to file an applicable USCIS petition documentation.*
3. *Market study: see above.*
4. *Economic Impact Report: comprehensive report prepared by an economist based on the initial job analysis.*
5. *5-Year financial projections: as calculated by a CPA.*
6. *Matter of Ho-compliant business plans: see above.*

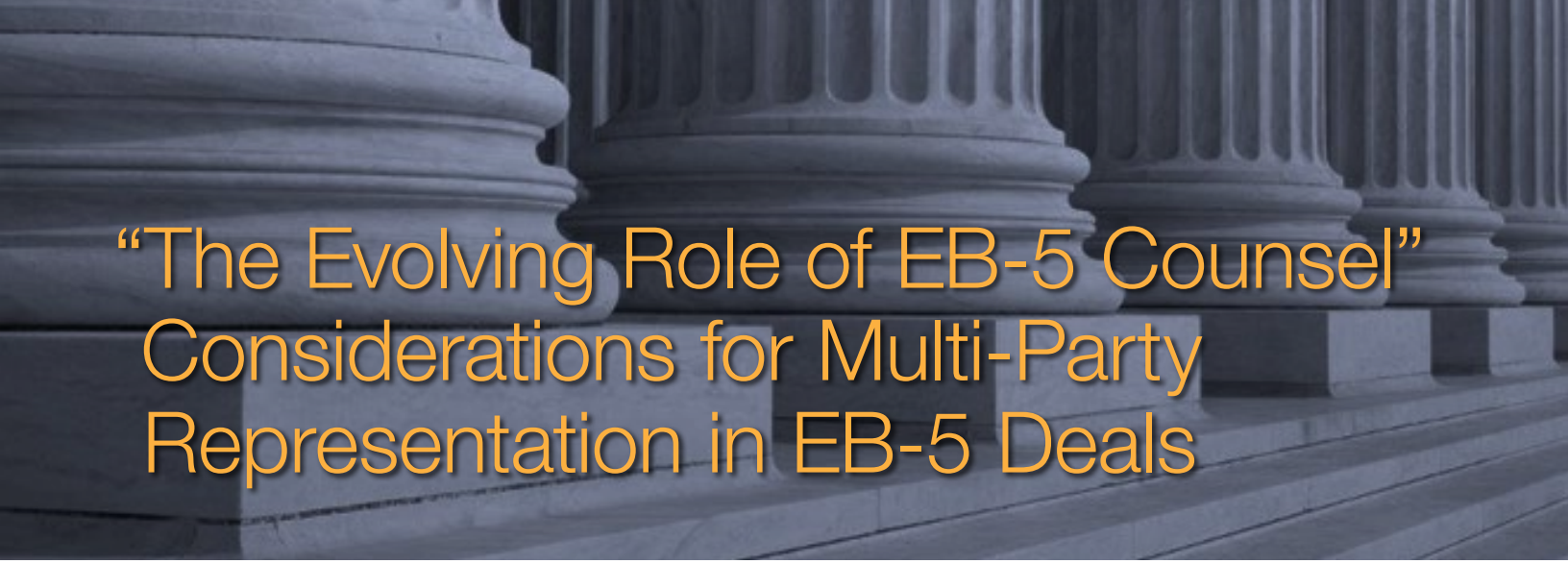
In today's competitive EB-5 environment, having an experienced quarterback can help issuers better streamline the otherwise complex EB-5 process.

About the Author

Lauren Cohen, an attorney licensed in the U.S. and Canada, is the Founder of e-Council Inc., which offers professional concierge-level strategic solutions across a broad spectrum of business categories for U.S. businesses seeking to raise capital and international clients seeking business visas and entrée to the U.S. market. As a nationally-recognized expert in the field, Lauren is a frequent local, regional, and national speaker and guest lecturer. She has been featured in the Wall Street Journal and on NPR, the Palm Beach Post, The Real Deal, and countless other media. After practicing law for nearly 20 years as corporate counsel working with various healthcare and financial services, through which she honed her business acumen and expertise, Lauren founded e-Council Inc.

About e-Council Inc.com

e-Council was founded to support the growth of U.S. companies while helping immigrants pursue the American Dream. The overriding company mission is to streamline the EB-5 process for its clients. e-Council provides a similar suite of services for EB-5 investors, whether they pursue Regional Center or direct investment projects. e-Council's skilled professionals can assess an investor's goals and profile to help them seek out appropriate investment opportunities (although no investment advice is provided). e-Council can also advise and guide aspiring Regional Centers through the complete application process.



"The Evolving Role of EB-5 Counsel" Considerations for Multi-Party Representation in EB-5 Deals

By: **Nima Korpivaara, Esq.** and **Phuong Le, Esq.**

As the EB-5 market continues to mature, so will the quality and sophistication of the players and projects in this industry. As clients evolve, so must attorneys. Gone are the days when an EB-5 firm could focus on only one area (such as filing I-526 petitions). Clients will often expect their EB-5 counsel to guide them through the entire life cycle of an EB-5 deal. Counsel's role and guidance may be drastically different depending on the client being represented in an EB-5 transaction.

For example, take your typical EB-5 hotel project. Say the client is the developer and their goal is to determine the amount of EB-5 financing that their project can reasonably rely on. In addition to the immigration aspects of EB-5, one will need to understand both the project development process and financing needs of the developer to effectively advise them. Counsel may be asked to work closely with the hotel's development team to analyze the projected budget, current capital stack, and whether EB-5 can feasibly fill the rest of the gap. Once a baseline understanding of the proposed plan is established, counsel will typically work alongside an economist to advise the developer on the economic methodology and the underlying assumptions that are necessary for job creation.

If the hotel's job creation is based on hard and soft construction costs, steps may include analyzing the current budget and comparing the costs to construction bids that have been received and how they line up with similar projects in the area. This analysis will help stress test the underlying assumptions to determine the range of job creation, which will ultimately determine the range of EB-5 financing available. Finally, since EB-5 financing doesn't happen overnight (somebody has to originate the loan after all), it may be necessary to advise the client to secure sufficient non-EB-5 capital or arranging for bridge financing to ensure that construction (and job creation) can continue without delay.

On the other hand, if the client is an EB-5 investor who is considering the same hotel project for his or her EB-5 investment, the analysis will need to be tailored to this specific situation — namely, how likely will the project satisfy the job creation requirements for this investor's I-526 and I-829 petition? Thus, counsel may begin with the same general analysis by stress testing the reasonableness of the project's estimated job creation but should then specifically analyze how the jobs wills be assigned to the investor. Additional factors should be accounted for,

such as the number of investors who have filed in the project, country of nationality, and job sharing provisions in the offering documents. For example, although jobs may be allocated by "first in, first out" basis in order of I-829 filing, the project may be more attractive to an investor of Vietnamese nationality since he or she will be allocated jobs earlier than investors from China due to retrogression/backlog.

Finally, if the client is a migration agent, due diligence on the project's investment structure might also be necessary. This will require an understanding of EB-5 project structuring, such as what guarantees and assurances are typically available (and negotiable). To illustrate, it's well understood that many escrow structures do not afford the same level of investor protection as they did in the past, since funds are typically released upon I-526 filing. However, if investors are asked to bypass the protections of escrow, then they may understandably want the project to help mitigate that risk by providing for a refund if an I-526 petition is denied. The agent may seek counsel's advice to assess the quality of these particular provisions, including the trigger and timing of any repayment, to evaluate whether they effectively protect an EB-5 investor.

Because of our firm's comprehensive experience representing all sides of an EB-5 transaction, we can help our clients step into the shoes of each party in an EB-5 deal — be it developer, investor, or agent — understand their viewpoint and effectively advise them. These are issues we navigate on a routine basis as we work closely with clients throughout the EB-5 process: from creation of Regional Centers, advising developers on structuring and deploying EB-5 financing, and guiding investors through the I-526 and I-829 process.

Ultimately, a more sophisticated market benefits everyone in the EB-5 industry. The more experienced players in the market understand that just because a project is "EB-5 compliant" does not mean it is a good EB-5 investment — it simply means the project will not be denied for obvious violations of EB-5 regulations. It's a bare minimum requirement. However, an "at-risk" investment does not require an investor to make a reckless investment. These higher standards will help guide our industry toward creating smarter, better investment opportunities for everyone involved.

About the Authors

Nima Korpivaara joined David Hirson & Partners, LLP in 2014. He handles all types of U.S. immigration, including complex matters associated with corporate business structure and EB-5 investor applications. Nima practices in the fields of corporate, investor (E-2 and EB-5) and family immigration law, representing large and small clients within a variety of industries. This includes temporary and short-term work visas, business visas, permanent residence (employment-based and family-based) and naturalization. Nima has successfully represented thousands of investors in receiving EB-5 green card approval, as well as dozens of Regional Centers in successfully receiving designation from the USCIS.

Phuong Le's EB-5 practice focuses on advising businesses, developers, and Regional Centers with structuring, deploying, and managing EB-5 financing. He draws upon an extensive background advising parties on all sides of EB-5 transactions, including individual investors, business owners, developers, and agents. Prior to joining David Hirson & Partners, LLP, Phuong was in-house counsel for a large Southern California EB-5 Regional Center and real estate developer. He has successfully advised a wide range of businesses with their EB-5 financing needs,

including commercial real estate developments, multifamily apartment buildings, boutique and full service hotels, medical office buildings, nightclubs, and restaurant franchises. He works closely with businesses throughout the EB-5 financing process, including structuring debt/equity EB-5 offerings as part of a diversified capital stack and coordinating complex review and structuring with securities attorneys, economists, business plan writers, and escrow banks. Phuong regularly consults businesses on forming and managing their own Regional Centers, including filing annual I-924A compliance reports and creating I-526 and I-829 templates to ensure Regional Centers and investors have consistent work product, including peer review of other attorneys' EB-5 filings.

About David Hirson & Partners, LLP

David Hirson & Partners, LLP has over three decades of experience working on EB-5 cases. Managing Partner, David Hirson, has been handling cases in the EB-5 program since it was first put into effect in 1991. The attorneys at David Hirson & Partners are frequently called upon by trade groups, investors, projects, and universities to serve as subject-matter experts on the topic of EB-5 investment visas. In addition to the attorneys at David Hirson & Partners, the firm's highly trained and knowledgeable staff are able to quickly and accurately produce source of funds and project documents, which are key to providing eligibility for the EB-5 visa.

Is the EB-5 Regional Center "Pure" Rental Model Sustainable?

By: **Rohit Kapuria**

Over the last few years, there has been a remarkable growth in the number of EB-5 regional center designations. This rise was partially driven by the perceived demand for regional center geographic coverage. Real estate developers seeking access to EB-5 capital largely shied away from the administrative burdens and ongoing responsibilities associated with the regional center business. Setting aside the legal and rather insignificant government application fees, the barriers to entry in the regional center market have been low. USCIS actually simplified the process when, in the May 30, 2013 EB-5 Adjudications Policy Memorandum ("May 30 Memo"), it obviated the need for offering documents if the Form I-924 application was based on a "hypothetical" project. To put this in perspective, there were less than 25 I-924 applications approved in all of 2012 as compared with the few hundred that have been approved since the May 30 Memo was issued. Some of the dramatic increase in application adjudications could also be attributed to the efficiency with which the new Washington, D.C. adjudicators are handling the I-924s in stark contrast with the confounding backlog applicants previously faced with the California Service Center. Whatever the reason though, the increase in I-924 designation numbers has not been welcomed by veteran regional centers that previously had a much stronger grip on the EB-5 market. Even more vexing for such veterans, however, has been a spike in the general acceptance and usage of the regional center rental model. To be clear, while there are different rental models with varying degrees of regional center involvement, the focus of this article is on the pure rental model (hereinafter simply referred to as the "rental model").

The prevailing wisdom, of late, has been that unless a developer is looking to develop more than a single project within a certain geographic area, especially in rather crowded regional center markets like New York City, one need only rent an existing regional center outfit as opposed to spending the time, energy, and capital to secure and maintain a new regional center designation. Developers who like the rental model often appreciate the regional center's non-interference in the development process. After all, not all regional center principals have real estate development experience, and as such, are usually not in a position to dictate the development terms. Therefore, separate from (perhaps) an initial review and subsequent sign off on the project documents, execution of a regional center sponsorship agreement, and later communications to gather data for the annual Form I-924A and (hopefully) the Form I-829, leased regional centers are largely removed from the overall project process. From the perspective of the leased regional center, as long as it has conducted sufficient due diligence to vet the developer for possible

fraud and other relevant infractions, the rental model could translate into a relatively painless transaction. Since the developer usually has its pick of regional centers, in this saturated market, a regional center's demand for more involvement could mean losing out on the transaction.

As of January 4, 2016, there were 790 approved regional centers around the country. While there is an expectation that this number will be, at least slightly, whittled down in the next few months, due to non-compliance with the annual Form I-924A requirements, there are likely still a number of new regional center applications currently pending to make up for such loss. Therefore, the 790 number is unlikely to be dramatically affected unless a legislative push comes into play.

What seems to be clear from the 2015 legislative gymnastics is that regional center integrity is of great import to Congress. One need only scan through the first EB-5 bill introduced in 2015, entitled S. 1501 and sponsored by Senators Grassley and Leahy, and the last EB-5 bill, entitled S. 2415 and sponsored by Senators Flake, Cornyn, and Schumer, to get a hint of what changes are expected to be coming down from Congress. Irrespective of whether the above two bills end up dead in the water, the war drums in Congress are focused on Integrity. The path to such integrity will require greater regional center involvement in EB-5 deals. As such, I expect that these impending changes are going to have a consequential impact on the regional center rental model. **For example, consider a few (non-exhaustive) requirements delineated in S. 2415 such as:**

1. *The requirement that the regional center file exemplar applications that contain disclosures: of fees, pending or past litigation/bankruptcies/adverse judgments affecting any of the project associated entities, and conflicts of interest between any and all of the project associated principals. In order to ensure compliance with such requirements, regional centers will have to conduct extensive due diligence of the Developer entity and its respective affiliates. As such, the vetting process will necessarily have to be a lot more involved and likely have some expense associated with it. With regard to the aforementioned conflict of interest issue, barring use of a neutral third party General Partner or Manager of the new commercial enterprise, it is not uncommon, in the rental model structure, to find affiliates of the job creating enterprise managing/directing the affairs of the new commercial enterprise. As such, separation between the EB-5 Lender and EB-5 Borrower are not exactly clear cut. While securities attorneys have traditionally been the professionals pushing for appropriate disclosure in the offering documents, the relevant textual applications have not always been pronounced (and in some cases even missing). Regional Centers may soon be forced to take more focused positions on these requirements.*
2. *The requirement that the regional center annually certify that both it as well as all project associated entities are complying with securities laws. Pause and reflect on this. It could be a scary prospect for leased regional centers because it is not a small burden. Leased regional centers are typically not involved in the securities offering, do not play any managerial role in the new commercial enterprise, and do not participate in the marketing seminars conducted abroad (or onshore if appropriate). Without such involvement, how exactly can a regional center make such annual attestations? If one examines some of the other proposed annual certification requirements contained in S. 2415, it reads like the Form I-924A on steroids. Contrast these proposed attestations with the current rules; you will notice that annual regional center compliance has, to date, been rather innocuous.*

3. *USCIS site visits to the regional center and new commercial enterprise. For those regional centers that have assumed a mom and pop type office atmosphere and/or which do not have an official separation between the regional center entity and the principals' other commercial enterprise(s), this possibility is going to be of some concern. One would assume that the USCIS officer, conducting the site visit, will closely review the regional center's infrastructure. Typical rental regional centers that have failed to formulate and maintain appropriate infrastructure and more importantly, that have failed to ensure collection of applicable project and investor documentation, may be in a predicament. On this latter note, Nicholas Colucci appeared in front of the full Judiciary Committee on February 2, 2016. He was asked, by Senator Grassley, whether USCIS would be willing to conduct site visits to regional centers. Mr. Colucci noted that even if legislation is delayed, USCIS has already begun plans for random site visits and an audit program that he expects will go into effect sometime this fiscal year.*

The point of this article is not that the above outlined requirements are the most important considerations nor does this mean that S. 2415 will pass in its current form (in fact, there is small chance of this latter point); rather, the big picture issue is that compliance has never been more important. As such, the key takeaway is a necessary focus on how compliance measures will help address the Integrity issues weighing on the minds of the members of the Senate Judiciary Committee.

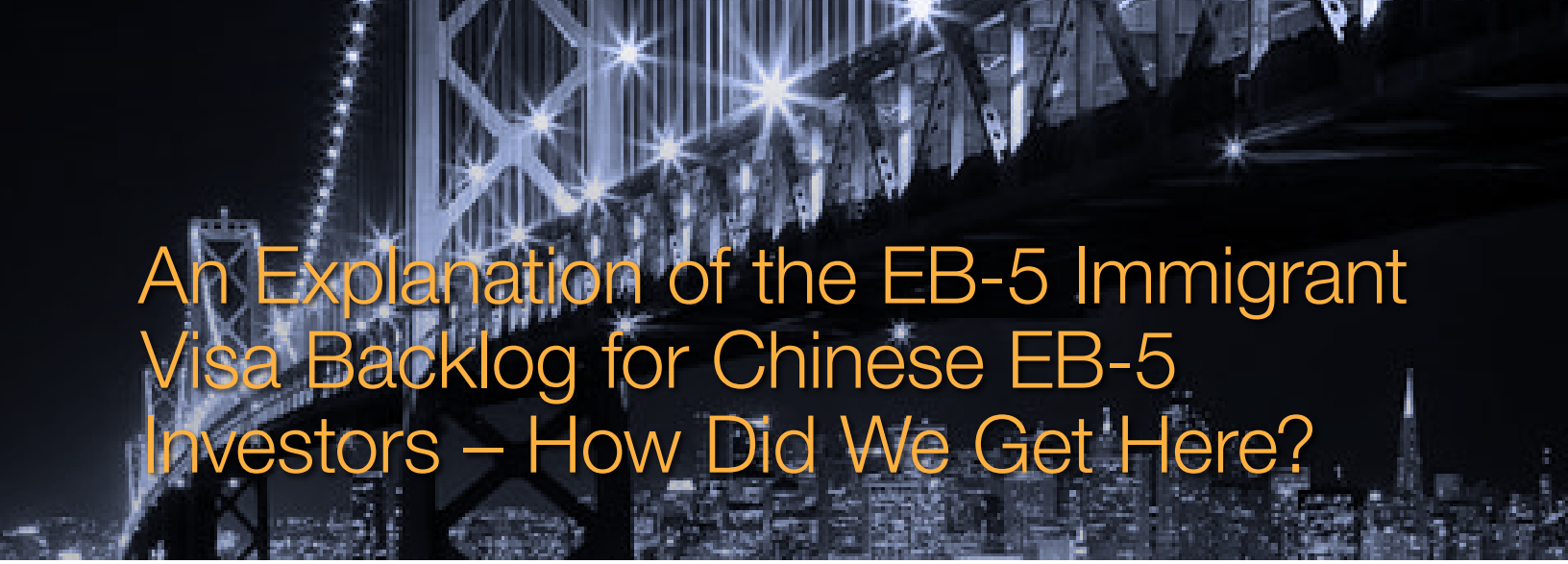
In the context of this article, compliance appears to be charging in the direction of greater regional center involvement in the offering process. After all, how else can a regional center meet its (proposed) annual certification requirements without getting more actively involved in the project's lifecycle? How else will a regional center pass a random site visit without having its own, and the relevant sponsored Project's, affairs in order for the USCIS adjudicator's audit? Limited communications with the issuer of the EB-5 securities, in efforts to collect Form I-924A relevant data, might no longer cut it.

About the Author

Rohit Kapuria is the resident attorney in the Klasko Immigration Law Partners' Chicago office, where he serves as a member of the Firm's comprehensive EB-5 practice. Rohit has worked on over 200 EB-5 transactions around the country. He regularly represents EB-5 lenders, EB-5 borrowers, banks, regional centers, real estate developers, investors working on direct EB-5 projects, and migration brokers. Rohit is a member of the Illinois State Bar, IIUSA's Investor Market's Committee, and AILA.

About Klasko Immigration Law Partners

Klasko Immigration Law Partners, LLP has offices in Philadelphia, New York, and Chicago and provides top-tier legal services to EB-5 investors, regional centers, and developers. Its EB-5 team is one of the largest and most respected in the country, and its Compliance team is the first of its kind. The EB-5 Practice Chair, H. Ronald Klasko, has served four terms as Chair of the EB-5 Committee of AILA and chaired the IIUSA Best Practices Committee. The firm has been selected as one of the top five business immigration law firms in the United States by the prestigious Chambers Global: The World's Leading Lawyers for Business (Chambers and Partners) for the past eight years. For more information on the firm's EB-5 practice, *please visit eb5immigration.com*.



An Explanation of the EB-5 Immigrant Visa Backlog for Chinese EB-5 Investors – How Did We Get Here?

By: **Bernard P. Wolfsdorf, Esq., Joseph M. Barnett, Esq.,** and **Robert J. Blanco, Esq.**

The immigrant visa backlog for EB-5 investors subject to the China quota threatens to undermine the EB-5 immigrant investor program (EB-5 program). Chief amongst the many factors that have caused the formation of this backlog is the demand from mainland China that constitutes over 80% of investors. Unless and until remedies are created at the legislative and/or executive level causing the long waiting times, the ability to use the EB-5 program as an avenue for immigration will decrease. This article looks to current data released by the U.S. Citizenship and Immigration Services (USCIS)[1] and the U.S. Department of State (DOS)[2] to demonstrate how the immigrant visa backlog for Chinese EB-5 investors has been created.

EB-5 Visa Allocation

The Immigration and Nationality Act (INA) allocates an annual amount of 10,000 immigrant visas to EB-5 investors and their derivative beneficiaries.[3] This EB-5 immigrant visa quota was established in 1990, has never been changed, and until recently, has been sufficient to meet the demand for EB-5 immigrant visas. Immigrant visas issued to each derivative beneficiary are charged to the principal beneficiary's preference category.[4] In FY15, the DOS issued a total of 8,773 immigrant visas to EB-5 principal and derivative beneficiaries. Of those issued, 2,919 (33%) were issued to principal beneficiaries, while 5,854 (66.7%) were issued to derivative beneficiaries. An additional 991 visa numbers were used by the USCIS to complete adjustment of status cases in the U.S. Accordingly, with an average of three green cards issued per approved I-526 petition, approximately 3,100 – 3,300 EB-5 investor family units are able to immigrate annually.

Increased Filings and Processing Times of Form I-526 Petitions

Despite the many contentious issues in the EB-5 arena resulting in calls for reform, the EB-5 program has never been more popular amongst foreign nationals, especially those from China. Over 20,000 petitions remain unad-

[1] Number of I-526 Immigrant Petitions by Alien Entrepreneurs by Fiscal Years, Quarter, and Case Status 2008-2016, U.S. Citizenship and Immigration Services, March 21, 2016, available at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_performancedata_fy2016_qtr1.pdf (last accessed March 31, 2016).
[2] U.S. State Department Report of the Visa Office 2015, Table V (Part 3), available at http://travel.state.gov/content/visas/en/law-and-policy/statistics.html (last accessed March 31, 2016).
[3] 8 U.S.C. § 1153(b)(5).
[4] 8 U.S.C. §§ 1153(d), (h).

judicated in the pipeline at the Immigrant Investor Program Office (IPO) in Washington, D.C., and another 20,000 approved visa applicants are waiting for final green card interviews to be scheduled. A record-breaking 12,852 new I-526 petitions were filed during the six-month period from July 1, 2015 through December 30, 2015.[5] This unprecedented surge was due to the foreseen sunset of the program and the announced increase in the minimum investment amount, as well as the possibility of other reforms to the EB-5 program. At the same time, the average processing time to adjudicate an I-526 petition has increased to 16.2 months as of May 12, 2016.[6]

Fewer Adjudications and Increased Denials of I-526 Petitions

The USCIS adjudicated 1,629 I-526 petitions in FY16 Q1, despite its receipt of 6,277 I-526 petitions during that same period. Of the 1,629 I-526 petitions adjudicated, the USCIS approved 1,257 (77.2%) and denied 372 (22.8%). Although there is insufficient data to confirm a broad trend, the increased I-526 petition denial rate is double that for FY15.[7]

Large Number of Pending Form I-526 Petitions at USCIS

As adjudication processing times continue to remain the norm at the IPO, the number of pending I-526 petitions has increased from 13,569 at the end of FY15 Q1 to 21,988 at the end of FY16 Q1, representing a 62.5% increase. This number has anecdotally been reduced to 20,150 as of the end of March 2016. The IPO is clearly inundated with I-526 petitions.

Majority of I-526 Petitions Filed by Individuals Born in Mainland China

For the past few years, the overwhelming majority of I-526 petitions submitted was filed by foreign nationals born chargeable to China. In FY15, 8,156 EB-5 immigrants were from China, equaling 83.5% of total immigrants. Along with the annual allocation of 10,000 immigrant visas, the INA establishes per-country levels, or country caps, at 7% of the worldwide level.[8] Country caps are not set to ensure that certain nationalities make up 7% of immigrants but rather to ensure that a limit is set to prevent any immigrant group from dominating immigration patterns to the United States. As a result, China and Liechtenstein both have the same quota. Once the annual allocation of 10,000 EB-5 immigrant visas is reached, EB-5 immigrant visa applicants from over-subscribing countries (those that use more than 7% of the worldwide total) are required to wait for a future fiscal year's allocation to be available before proceeding with consular processing or adjustment of status. Since no other country comes close to the 7% per country limit, China is able to use all available EB-5 visas allocated annually. Despite this, the remaining available visas are still insufficient to meet current demand from China, resulting in an ever-increasing waiting line. When this happens, the DOS establishes a queue by assigning each EB-5 investor a "priority date," which is the date the USCIS receives the EB-5 investor's I-526 petition.[9]

[5] Number of I-526 Immigrant Petitions by Alien Entrepreneurs by Fiscal Years, Quarter, and Case Status 2008-2016 U.S. Citizenship and Immigration Services, March 21, 2016, available at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20 Data/Employment-based/I526_performancedata_fy2016_qtr1.pdf (last accessed May 27, 2016).

[6] USCIS Processing Time Information for the Immigrant Investor Program Office, USCIS, February 11, 2016, https://egov.uscis.gov/cris/processingTimesDisplay.do (last accessed March 3, 2016).

[7] The average Form I-526 petition denial rate from FY 2014 Q2 to FY 2016 Q1 is 12%.

[8] 8 U.S.C. § 1151(a)(2).

[9] The derivative beneficiaries receive the same priority date as the principal beneficiary. See 22 CFR 42.53(c).

When the DOS establishes a cut-off date each month in its Visa Bulletin, only EB-5 investors with approved I-526 petitions and priority dates before the Chart A cut-off date are eligible to proceed with consular processing or adjustment of status, unless the USCIS announces that Chart B – Date for Filing (DFF) can be used. The waiting line under Chart B is considerably less than under Chart A – Final Action Date (FAD). According to the July 2016 Visa Bulletin, the Chart A cut-off date for investors chargeable to China is February 15, 2014. The Chart B cut-off date is May 1, 2015.[10] This means that Chinese EB-5 investors with an approved I-526 petition filed before February 15, 2014 are now authorized to schedule an immigrant visa interview at a consular office abroad. As a result, there is over a 28-month visa backlog for EB-5 investors chargeable to China. The USCIS is authorized to allow applicants in the U.S. to file Form I-485 (Application to Register Permanent Residence or Adjust Status). Last year the USCIS allowed applicants to file Form I-485 based on Chart B for two months in October and November 2015, the beginning of FY16. Hopefully, the USCIS will do so again in October and November 2016 to provide some relief for those waiting for EB-5 immigration benefits.

Solutions to the Chinese Waiting Line

Critical issues stem from the Chinese EB-5 waiting line. One is the inevitable ageing out of minor children, who risk turning 21 years old before they receive their green card. EB-5 projects must also plan ahead regarding significant repercussions, such as the use of escrow accounts, job creation, the "sustainment" of the capital investment, and the repayment of funds to investors through a Regional Center. Hopefully, Congress will recognize the value of the $10+ billion already invested through the currently pending I-526 petitions alone, as well as the billions invested in the last few years and the thousands of direct and indirect jobs at stake.

Some of the many solutions include allocating immigrant visa numbers based on families not individuals, allocating the many wasted EB-5 numbers from previous years to pending cases, and protecting age-out children by freezing the child's age at the time of filing the petition and/or holding the petitions of investors requesting delayed adjudication to allow children to deduct this "pending petition time" under the existing Child Status Protection Act (CSPA). Other solutions include allowing investors to file adjustments based on Chart B – Date For Filing and permitting applicants with approved I-526 petitions into the U.S. for the purpose of filing for adjustment of status.

Minors as the Primary EB-5 Investors

With the waiting line for Chinese EB-5 investors getting longer every month, many Chinese investor parents are concerned their derivative beneficiary children will turn 21 before an EB-5 visa number will be available, and the child may therefore "age out." Unfortunately, the Child Status Protection Act only allows for subtraction of the number of days the I-526 petition was pending (usually about 1-1 ½ years) from the child's biological age. Consequently, many investors are questioning whether it may be better (for both derivative beneficiary eligibility reasons and even for tax reasons) to have the minor child be the primary EB-5 applicant.

The acceptance of minors as principal EB-5 investors may pose risks to Regional Centers, EB-5 projects, and even escrow agents and banks under U.S. laws. This is a relatively new issue and is in an untested area. With adjudica-

[10] Visa Bulletin for July 2016, U.S. Department of State, Bureau of Consular Affairs, February 8, 2016, https://travel.state.gov/content/visas/en/law-and- policy/bulletin/2016/visa-bulletin- for-july-2016.html (last accessed June 22, 2016).

tions taking more than a year, the EB-5 community may not know the USCIS' position on minors as principals for some time. Accordingly, investors should be advised there is risk from the USCIS' perspective, and for Regional Centers, EB-5 projects, and even escrow agents and banks, there is risk from both the USCIS adjudications perspective and from the minor investor being able to elect to set aside the investment contract upon reaching the age of majority. Legal counsel, including corporate, securities, and immigration attorneys should be cautious to explain these risks when offering advice to parents about having their children as the primary investor.

Conclusion

Unfortunately, EB-5 applicants chargeable to China who filed I-526 petitions in the beginning of 2014 will need to wait about 2½ years for their conditional green cards, but those who filed in the end of 2014 may have to wait at least 3½ to 4 years, unless Congress or the Administration provide additional visa numbers or other solutions. Until solutions to alleviate this waiting line are implemented, it is important for prospective investors and their counsel to carefully prepare a long term strategy, which incorporates accommodating nonimmigrant visa options, such as F-1 student, F-1 Optional Practical Training, H-1B specialty occupation, L-1 company transfer, O-1 extraordinary ability/achievement, and other nonimmigrant visas to ensure Chinese investors can achieve their educational and personal goals.

About the Authors

Bernard P. Wolfsdorf is a past president of AILA and current Managing Partner of the 20-lawyer Wolfsdorf Rosenthal LLP law firm. For the past six years from 2010 to 2015, he has been selected as "Immigration Lawyer of the Year" by *Who's Who Legal*, a researcher partner of the Int'l Section of the ABA. He serves on AILA's EB-5 Committee and is a frequent speaker and author on EB-5 topics. *EB5Investors Magazine* has twice named him in its ranking of the top 25 EB-5 lawyers. Bernie is a recipient of the AILA Service Excellence Award for his volunteer services.

Joseph (Joey) Barnett is licensed as an attorney in the State of Illinois and the State of Wisconsin and practices exclusively in immigration and nationality law. Mr. Barnett's practice focuses in the area of EB-5 Immigrant Investor Program and other business immigration matters. Mr. Barnett received his *Juris Doctor* from Vermont Law School in 2010 and also has a Masters of Environmental Law and Policy.

Robert Blanco specializes in business and employment immigration cases. He prepares both immigrant and non-immigrant petitions for skilled workers, executive managers, high net worth investors, and people of extraordinary ability in business, the arts, and sciences. As a member of the firm's EB-5 team, Mr. Blanco prepares cases for individual investors and advises U.S. businesses on how to structure investment projects under the regulations of the EB-5 program. He also represents clients before the United States Citizenship and Immigration Services (USCIS). Mr. Blanco graduated *cum laude* with a Bachelor of Science degree in Business Administration from the McDonough School of Business at Georgetown University. He earned his Juris Doctor degree from Loyola Law School with a concentration in Corporate Law. Mr. Blanco is admitted to practice law in the state of California.

About Wolfsdorf Rosenthal LLP

Wolfsdorf Rosenthal LLP is a full-service immigration law firm with 30 years of experience providing exceptional quality immigration and visa services. With 20 lawyers and offices in Los Angeles and New York, the firm specializes in comprehensive immigration solutions for investors, multinational corporations, small businesses, hospitals, academic institutions, artists, and individuals. Wolfsdorf Rosenthal LLP offers specialized immigration services that empower our clients to achieve their diverse goals. Whether working on projects big or small, the firm is passionate about delivering extraordinary service, preeminence in knowledge, and using its extensive capabilities to achieve optimally successful results.

Suggested Procedures and Possible Options for Accepting Minors as Investors in EB-5 Investment Funds

By: **Catherine DeBono Holmes, Esq.** and **Bernard P. Wolfsdorf, Esq.**

The delay in processing EB-5 immigrant visas caused by the increasing waiting line commonly referred to as "retrogression" is causing an increase in demand by parents in China to have their minor children named as the primary applicant on I-526 petitions.

With estimated delays of five to six years for the processing of EB-5 immigrant visas or green cards for applicants subject to the Peoples Republic of China (PRC) quota, many parents are concerned their children will "age out" by reaching the age of 21 before their final green card interviews are scheduled. As a result, the children may be ineligible to immigrate as derivative beneficiaries and may be unable to join their parents and younger siblings when immigrating. Since many PRC parents are primarily motivated to obtain green cards under the EB-5 program for the benefit of their children, these parents are requesting EB-5 investment funds to accept their minor children as investors so that the child can file the I-526 petition as the principal applicant.

Acceptance of minors as investors in EB-5 investment funds poses risks to EB-5 investment funds, escrow banks, and EB-5 investors under U.S. laws.

Under the laws of every state in the United States, minors under the age specified in that state's law, normally persons under 18 or 21 years of age, are not legally competent to sign certain contracts, and many states provide that such contracts are voidable by the minor. Under these state laws, an investor who signed a subscription agreement who was not of legal age to enter into a contract would have the right to void the subscription agreement and to make a claim against the EB-5 investment fund to return the investment funds to the investor. This may be done usually when the child reaches the age of majority. For this reason, EB-5 investment funds typically require that each EB-5 investor represent in their subscription agreement that the investor is of the required age to legally sign a contract. Some escrow banks believe they also could be subject to claims if a minor investor voids their subscription agreement and demands their investment funds be returned to them, and for this reason, these escrow banks will not accept subscription funds from investors who are minors. In addition, EB-5 investors who are minors may face a risk of denial of their I-526 petitions, although to the best of our knowledge no EB-5 investor has been denied approval of their I-526 petition solely on the grounds that the investor is not of legal age to sign a contract.

There are immigration issues, including the ability of a minor to fulfill management responsibilities to the extent required and whether the investment funds of a minor investor are irrevocably committed to the EB-5 investment fund, that have not yet been considered by the USCIS because until now there has been no need to have the derivative child file as the principal applicant. On the positive side, the USCIS allows only "children age 13 or younger" to file a Form I-485 Application to Register for Permanent Residence or Adjust Status paying the reduced fee for children, while persons aged 14 and over must file the full adult fee for the Form I-485 application. In addition, the USCIS has accepted minor children as principal applicants in other Employment Based (EB) categories such as for EB-1A extraordinary ability aliens.

Chinese law may allow minors to legally sign subscription agreements with EB-5 investment funds with the consent and co-signature of their parents. The General Principles of the Civil Law of the Peoples Republic of China provide that: (i) a citizen aged 18 or over has the full capacity for civil conduct; (ii) a citizen aged 16 until the age of 18 whose main source of income is his own labor also has the full capacity for civil conduct; (iii) a minor aged 10 or over has limited capacity for civil conduct and may engage in some civil activities appropriate to his age and intellect, and in other civil activities must be represented by his agent ad litem or participate with the consent of his agent ad litem; and (iv) a minor under the age of 10 has no capacity for civil conduct and must be represented in civil activities by his agent ad litem. The General Principles also provide that the parents (or other designated persons if the parents are not living or competent) of a minor shall be his guardians and that the guardian of a person without or with limited capacity for civil conduct shall be his agent ad litem. According to these General Principles, it appears that a parent (or other legal guardian) may represent the child in civil activities, including the execution of contracts.

EB-5 investment funds may select PRC law as the governing law for purposes of execution of a subscription agreement and other legal documents required for an EB-5 investment, to permit the parent or legal guardian to co-sign the documents on behalf of a minor investor.

EB-5 investment funds which desire to accept minor investors who are citizens of the PRC may wish to specify PRC law as the governing law for purposes of determining the capacity of the minor to legally enter into a subscription agreement and other agreements required for an EB-5 investment. In that case, the EB-5 investment funds would provide for the subscription agreement and other agreements to be signed by both the minor investor and the parent of the minor investor. The parent of the minor investor should also sign an attestation representing that the signer is the parent of the minor investor, the parent and the minor investor are citizens of the PRC, the parent has reviewed and approved the EB-5 investment on behalf of the minor investor, and the parent has provided the funds used to make the EB-5 investment. Courts in the United States will generally accept the choice of law specified by the parties to a contract, unless the law specified has no connection with the parties to the contract or there is a strong public policy of the state that would be violated by the choice of law. It is possible that, upon a legal challenge, a state court could hold that a choice of PRC law in a contract will not be accepted by the court, but if the parent and the minor are citizens and residents of the PRC, the primary purpose of the contract is to allow the minor to qualify for a United States immigrant visa, and the parent has reviewed and approved the investment and provided the funds for the investment, there would appear to be sufficient reasons for a court to accept the choice of PRC law for the purpose of recognizing the validity of the choice of law in the subscription agreement.

EB-5 investment funds could alternatively consider allowing parents to make a gift to a minor investor under the Uniform Gifts or Transfers to Minors Act that applies under state laws of the United States.

If EB-5 investment funds do not wish to rely on PRC law to accept minor investors, another possible option might be to use the Uniform Gifts or Transfers to Minors Act that is in effect in the state where the EB-5 investment fund is located, and select that state's choice of law for purposes of execution of the subscription agreement. A similar version of this Act has been adopted in every state within the United States. This Act allows any person to make a legal gift of any form of property or cash to a minor, without the adoption of a formal trust agreement. The Act provides that the person making the gift, who is normally the custodian of the property that is gifted to the minor, will control the property until the minor reaches the age of majority, which is normally either the age of 18 or 21, at which age the minor automatically becomes the control person of the property. The only requirement for the gift is that the instrument that confers the gift contain the appropriate language specified by the applicable state Act, which is normally stated as *"[Name of Custodian] as custodian for [Name of the Minor] under the [Name of State] Uniform Gifts [or Transfers] to Minors Act."* There may be some reluctance to use this alternative because the name on the Subscription Agreement will be both that of the Custodian and the Minor, and this may create a greater risk of denial of the I-526 petition. To our knowledge, no reported I-526 immigrant petition has been filed using the Uniform Gifts or Transfers to Minors Act, but this may be due to the fact that the age out issue did not become a serious concern until the retrogression policy was announced commencing in May 2015. It would be difficult to use both this method and the PRC law method of subscribing for an EB-5 investment because each method would require a different choice of law and a different method of signing the subscription agreement.

EB-5 investment funds may need to accept minor investor subscription funds outside of escrow unless the escrow bank approves the acceptance of minor investors.

EB-5 investment funds should discuss the procedures for acceptance of minor investors with their escrow banks and administrators to determine if the escrow bank will accept those subscriptions. If the escrow bank will not accept those subscriptions, the escrow bank may be willing to allow the EB-5 investment fund to accept subscription funds from minor investors outside of escrow, subject to some conditions, such that those investors will not receive any repayment from the escrow holdback account if the investor's I-526 petition is denied. In that case, the EB-5 investment fund will need to prepare a separate agreement with the minor investor and his or her parent, under which they agree to waive the deposit of their funds in the escrow account and waive any other benefits that would apply if their funds were held in the escrow account.

These suggested procedures are new and untested, and as such, there are risks that they may not work as intended.

Since the Chinese quota or waiting line only emerged in May 2015 as a result of a surge in demand from Chinese applicants, who still represent over 80% of EB-5 investors, this area is evolving. As is the case with respect to many other issues in EB-5 investing, there are uncertainties as to whether these procedures will be accepted by the USCIS or by courts in the event of a dispute. The USCIS has indicated they are preparing regulations which

hopefully will address this issue. Until such regulations are adopted, there are risks to EB-5 investment funds and to parents and minors who seek to use these procedures as a means of making an EB-5 investment and applying for a visa under the EB-5 program. The alternative is for EB-5 investment funds to accept only those investors who can legally enter into contracts under the governing law of the applicable state, but in that case the parent and the minor will retain the risk that the minor will age out before the parent is able to obtain the visa. This problem could be better solved if Congress amends the Child Status Protection Act [8 U.S.C. 1153(h)] to freeze the child's age as of the date of filing, rather than merely allowing the child to deduct the time the petition was pending from their actual age. With the September 2016 sunset of the EB-5 regional center program, Congress has a perfect opportunity to amend the law to protect children from aging out.

Conclusion

While it is possible that the USCIS may establish a brightline cut off age for principal EB-5 immigrant visa applicants, it is likely that each case will be evaluated on a case-by-case basis, providing an opportunity for EB-5 investment funds and their counsel to structure a framework that complies with state and federal law. Presently it appears unlikely that it would be necessary to file with a primary applicant "age 13 or younger" as these children are likely to be derivatively eligible for immigration benefits. Since the USCIS has articulated age 14 as a cut-off age for payment of the children's filing fee when applying to Register for Permanent Residence or Adjust Status, it would make sense to establish a transparent brightline test that investors can use when making the commitment of funds in order to obtain a green card.

About the Authors

Catherine D. Holmes is Chair of the JMBM Investment Capital Law Group, and she has practiced law at JMBM for over 30 years. She has also worked as a senior member of the JMBM Global Hospitality Group and JMBM Chinese Investment Group. Within the Investment Capital Law Group, Cathy helps real estate developers and business owners, brokers, investment advisers, and investment managers raise and manage investment capital from U.S. and non-U.S. investors. In the last five years, she has represented over 100 real estate developers and helped them obtain financing through the EB-5 immigrant investor visa program for the development of hotels, multi-family, and mixed use developments throughout the U.S. She has also acted as lead counsel on numerous hotel and mixed-use developments and transactions in the U.S., Europe, China, South America, and Asia Pacific regions, as well as hotel management and franchise agreements and public-private hotel developments. Cathy has also represented private investment fund managers, registered securities broker-dealers, and investment advisers on securities offerings, business transactions, and regulatory compliance issues.

Bernard P. Wolfsdorf is a past president of AILA and current Managing Partner of the 20-lawyer Wolfsdorf Rosenthal LLP law firm. For the past six years from 2010 to 2015, he has been selected as "Immigration Lawyer of the Year" by Who's Who Legal, a researcher partner of the Int'l Section of the ABA. He serves on AILA's EB-5 Committee and is a frequent speaker and author on EB-5 topics. EB5Investors Magazine has twice named him in its ranking of the top 25 EB-5 lawyers. Bernie is a recipient of the AILA Service Excellence Award for his volunteer services.

About Jeffer Mangels Butler & Mitchell LLP

Jeffer Mangels Butler & Mitchell LLP (JMBM) has provided clients with results for more than 30 years — successfully resolving cases, closing deals, protecting assets, and adding value. Many of the Firm's founding members continue to practice law at JMBM, which is now ranked in the American Lawyer's AmLaw 200 list and recognized by numerous industry, peer, and media groups. From its offices in Los Angeles, San Francisco, and Orange County, JMBM serves its clients' needs worldwide.

About Wolfsdorf Rosenthal LLP

Wolfsdorf Rosenthal LLP is a full-service immigration law firm with 30 years of experience providing exceptional quality immigration and visa services. With 20 lawyers and offices in Los Angeles and New York, the firm specializes in comprehensive immigration solutions for investors, multinational corporations, small businesses, hospitals, academic institutions, artists, and individuals. Wolfsdorf Rosenthal LLP offers specialized immigration services that empower our clients to achieve their diverse goals. Whether working on projects big or small, the firm is passionate about delivering extraordinary service, preeminence in knowledge, and using its extensive capabilities to achieve optimally successful results.

EB-5 Risk Management and Insurance Facts: A Discussion about EB-5 Risk Exposures and Related Risk Management Tools

By: **Bonnie Novella, CAIA**

An important fact must be addressed head on: the EB-5 immigration process is actually a complex financial transaction which imposes numerous risks on participants. The transaction involves a securities instrument, multiple parties, multiple legal entities, many bank accounts, and an illiquid, long-term financial vehicle, all of which contribute to the complexity and confusion around the process.

Regardless of that confusion, it is up to project sponsors and EB-5 investors to install a risk management framework to mitigate the risks in the transaction. Some of the risk mitigation approaches protect the issuer officers and directors, while others directly protect investors. Risk management tools (such as insurance and third-party oversight) are not free but well worth the cost to achieve greater success and peace of mind.

The EB-5 marketplace has a large variety of projects vying for investor capital, and investors have the power of choice. Investors should first understand all of the risks in the EB-5 transaction, then strategically select projects where the issuer provides strong risk management framework. For an investor seeking an EB-5 project, insurance and risk management are prudent components of the investment (project) selection and the path to success obtaining the permanent visa.

The Principles of Risk Management

"Risk management" is a common description for controlling risks and starts with a solid understanding of what specific risks exist on both sides of a transaction. Each party is responsible for understanding their own risks and taking action to find protection.

Risk management experts study the risks of a financial transaction and categorize them, then employ specific tools to mitigate the components of the risk stack. Before looking at the granular risks, it may be helpful to underscore the principle that there are two sides of the EB-5 financial transaction: the issuer of the EB-5 private placement (the financial security) which raises capital, and the EB-5 investor who selects the exact project to commit their capital to. The project sponsor accepts the capital while also accepting the burden of administration of the immigration and

job creation. While risk management approaches are not compulsory for the issuer, the elective decision by some project sponsors to mitigate risk is a sign of best practices around the management of investor capital.

Investors may benefit by reading the project's offering carefully and search for those with a risk management framework in place. For example, in EB-5 these risk types are fairly standard:

Issuer and project-specific risks:

1. *Construction*
2. *Property and casualty*
3. *Liquidity*
4. *Operational*
5. *Regulatory*
6. *Reputation*
7. *Compliance*
8. *Liability*
9. *Interest rate*

Investor-specific risks:

1. *Currency*
2. *Investment loss (loss of capital)*
3. *Life disruption (a form of operational risk)*

There are risk management experts available to EB-5 project sponsors who specialize studying the risks of a project, company, or person – such as insurance brokerage firms. Insurance is a common tool in the management of risk, so insurance brokers must be licensed and knowledgeable on the specific risks of any business.

A prudent investment approach would be for the EB-5 investor to understand the risks, then seek projects that adhere to the highest risk management standards by providing the necessary insurance coverages to protect the investor.

EB-5 projects can and should have a detailed study of the specific risks of their project, many of which are disclosed in the offering documents. However, it is rare for the risks disclosures to be followed with a sufficient description of the insurance and risk mitigation framework, so incumbent on the investors to ask for this information and proof.

Insurance as a Risk Management Tool

Insurance tools are available to EB-5 project sponsors to address a variety of the risks of a project. However, these insurance products require preparatory "underwriting" of the project, where the project team provides detailed documents for the insurance broker to analyze the risk hierarchy.

Insurance underwriters read the offering documents carefully and look for certain project traits:

1. *Projects with a strong capital stack.*
2. *Involved team with a strong track record.*
3. *Independence between the New Commercial Enterprise (NCE) and the Job Creating Entity (JCE).*
4. *Econometrics prepared by known EB-5 economist.*
5. *Known securities law firm.*

6. *Known immigration counsel.*
7. *Use of independent, third-party auditor, fund administrator, and investor portal (for transparency).*
8. *Marketable project.*

Projects which are approved for the insurance offering can then place the I-526 and I-829 policies for the investors in a project. This is especially helpful for projects using "early-release escrow" structures, which expose investors to higher risk of loss of capital.

EB-5 Insurance Solutions

A project's risk management framework should have insurance policies in place to protect investors and other participants in the EB-5 project from risk at the project and investor level with respects to fraud, mismanagement, and the investor's failure to pass both the I-526 and I-829 visa application processes. The following table identifies and defines such risks and the available solutions.

Table 1: Investor Risk Exposures and Mitigation Tools

Risk	Risk Mitigation Action
Risk of loss of capital due to fraud, theft, or misappropriation of investor funds	Projects should be required to carry a fidelity bond. A fidelity bond will protect the investor against the risk of fraud, theft, and misappropriation of assets. This bond can be purchased by the project for a minimal cost.
Risk	**Risk Mitigation Action**
Risk of misrepresentations, breach of fiduciary duty (to investors), and mismanagement by the general partner	Projects should be required to carry a Management and Professional Liability Insurance policy. This policy needs to be specifically manuscripted to ensure that it provides the required protections needed depending on the organizational structure of the project. In particular, should the structure be a Limited Partnership, the policy would provide coverage for the indemnification obligation of the limited partners (the investors) to the General Partner for any error, omission, misstatement, breach of fiduciary duty, etc.
Risks related to denial of I-526 petition - *Risk of loss of capital* - *Risk of disruption in life caused by denial*	Projects seek approval to offer an I-526 Insurance Policy backed by a major global insurance company. The coverage provides a higher level of protection against the risk of denial of an investor's I-526 petition than a standard developer guarantee, or more commonly, no guarantee at all. Projects are required to pass a significant due diligence (underwriting) process by the insurance company, thereby ensuring a more structurally sound project. *Note:* if the project is using "early-release" of funds from escrow (before the I-526 petition is approved), insurance is vitally important to ensure the full investor refund.
Risks related to denial of I-829 petition - *Risk of loss of capital* - *Risk of disruption in life caused by denial*	Investors can elect to purchase an I-829 insurance policy from projects which have adopted the I-526 policy, to ensure that they receive a full refund of capital, for protection in the event of an I-829 petition failure. If projects cannot prove the job creation, that funds were sustained in the investment, or a variety of other facts, investors may have a petition denial. *Note:* The I-829 insurance policy is a direct contract between the investor and insurance company and will respond in the event of an I-829 petition denial.

Conclusion

The EB-5 program is an excellent way to enter the United States and gain a permanent U.S. visa. However, it is a complex financial transaction that exposes participants to risks. These risks can be understood, then mitigated through the use of insurance and other best practices.

However, EB-5 projects are not required to institute a risk management framework or gain approval for EB-5 insurance to protect investors from unexpected risk. Those projects which employ insurance solutions and risk management tools have a higher chance of delivering a successful result for the investor. EB-5 investors may wish to understand the risks in the financial transaction, then choose the projects which provide sufficient protection.

About the Author

Bonnie Novella is the Senior Vice President for Mark Edward Partners, an insurance brokerage firm with solutions for EB-5, family offices, endowments, not-for-profit entities, and private equity firms. Bonnie is a chartered alternative investment analyst and is committed to facilitating the adoption of institutional caliber practices by any funds co-mingling investor capital in illiquid investments. Bonnie was educated at Northeastern University in Boston, MA and part of the private equity program at the Said Business School at Oxford University in the UK. She has previously been employed by NES Financial, SunGard, JPMorgan, Yardi Systems, and Saunders Real Estate Corporation.

About Mark Edward Partners

Mark Edward Partners is a national, full service insurance brokerage firm, with headquarters in New York and offices in Palm Beach, that differentiates itself by delivering unrivaled service through a unified service team model and by upholding its core values of service, trust, and innovation. Mark Edward Partners' approach to risk management involves a complete and thorough risk assessment to help clients mitigate their exposure through quality, cutting-edge products and services at attractive costs.

Searching for a Silver Lining in Vermont

By: **H. Ronald Klasko** and **Tammy Fox-Isicoff**

No matter what your perspective, the report that the SEC has filed a complaint alleging fraud on the part of developers of Jay Peak and other related projects under the auspices of the State of Vermont Regional Center is terrible news. It's terrible for the investors in those projects, it's terrible for the State of Vermont, and it's terrible for the EB-5 program. However, as with many examples of bad news, there are lessons to be gleaned that could, with the passage of time, enable us to look back on this event as the prod that stoked long term changes that benefit the EB-5 program and its investors.

There are several points on the matter that need to be brought up:

1. *The charges brought by the SEC are just that – charges. We have not heard the other side of the story. One can only hope that some or all of the charges prove to be unfounded.*
2. *Every business, and certainly every government program, has bad actors. There is no example that can be cited of a government program, a profession, or an industry that does not have outliers (individuals and institutions that take advantage of weaknesses in a program and in government oversight). The fact that Bernie Madoff and other supposed luminaries in the investment industry bilked untold millions is not a reason to stop investing – it is only a reason to be more careful when doing so. The fact the banks have engaged in fraud and shoddy practices in connection with mortgages and investments is not a reason to shun banks. The fact that doctors and hospitals have engaged in Medicare fraud is not a reason to end Medicare or to condemn all doctors. The fact that a tiny percentage of EB-5 projects may be susceptible to the fraudulent activities of bad actors is equally no reason to condemn the EB-5 program or its many worthy projects, regional centers, principals, and representatives.*
3. *It is good to know that the SEC and other government agencies are actively involved in monitoring the EB-5 program. The EB-5 community encourages this oversight. The EB-5 community also encourage the federal government to take action to ensure that innocent investors are not harmed by the actions of a few bad actors.*
4. *As pointed out by the Governor of Vermont in his press conference, even if these allegations are true, the EB-5 program still produced economic revitalization for the Northeast Kingdom of Vermont and a large*

number of jobs that will be ongoing and that never would have been created without the influx of EB-5 money. This does not lessen the significance of the alleged malfeasance; it does provide another example of the importance of the EB-5 program in producing jobs in areas of need. The potential for use of EB-5 funds in ways that will benefit the U.S. are limitless. EB-5 funds could be used to re-build this country's crumbling infrastructure.

With all of that said, there are certainly prophylactic measures that should be taken to ensure a brighter future for the EB-5 program and to minimize the risk of bad actors bringing down a highly successful government program. When a neighbor's house is burglarized, one looks to tighten security at one's own home. What can be done to tighten security in the EB-5 program?

Here are some thoughts:

1. *The U.S. Congress, as part of an extension of the EB-5 program, should pass integrity measures that would go a long way toward preventing fraud in EB-5 projects. Senate Bill 1501 included extensive integrity measures that had bipartisan support. The problem was that they were surrounded by many non-consensus, controversial provisions. In order to alleviate that problem, bipartisan bills limited to integrity measures have been introduced in both the House and Senate. While some of the specific provisions of the integrity measures being proposed in the House and Senate are in need of some refinement in order to conform to the realities of these complex global transactions, virtually everyone agrees that, given the bipartisan support, these changes can be enacted and legislation passed that would enhance the integrity and transparency of the EB-5 program. These integrity measures have widespread support within all corners of the EB-5 industry.*
2. *The government – the USCIS, the SEC, and other regulatory agencies – does not have to wait for legislation to enact oversight measures that will enhance the integrity of the program. While some may require regulation, other steps could be implemented tomorrow. In fact, the USCIS has already announced plans to implement programs that will enhance oversight of the EB-5 industry, including audits of regional centers, site visits of regional centers and projects, interviews of investors seeking condition removal, issuance of Notices of Intent to Terminate Regional Centers that may be non-complying and enhancing the annual reporting requirements of regional centers. This is just a small sample of what can and should be done. When one reads the legislative integrity measures in the various bills, one is left with a distinct impression that many or most could be implemented without legislation.*
3. *It is unfortunate that an alleged scheme that diverted many millions of investor dollars from their intended use to uses not authorized under the business plan or offering documents would become Exhibit A in support of the importance of regional centers and projects having thorough compliance plans in place. This is critical for regional centers and project developers to protect themselves against bad actors. It is critical for migration agents to make certain that they are promoting projects that provide the greatest possible protections for their investors. It is critical for investors in their choice of projects in which to invest.*
   We have stated previously that up front immigration and financial due diligence regarding project documents is not sufficient. Even a project with the most perfect business plan, economic report, marketing study, and offering documents can be the subject of fraudulent activities. While no program is a panacea, a regional center and/or project developer that has implemented from the onset a thorough compliance program to

monitor on an ongoing basis the flow of money from the investor to the escrow to the NCE to the JCE and to its ultimate use in the project and to monitor the timing and amount of construction expenditures of various types, provides the greatest protection available for agents and investors.

4. *It has always been critical for the EB-5 industry and all of its groups to work together toward the common goal of an EB-5 program that works in the manner intended and merits a long term and hopefully permanent extension by the U.S. Congress. Whether, for example, a specific location is or is not a targeted employment area will be of scant importance if the EB-5 program does not achieve a long term extension and if there is no legislation that addresses the untenable quota backlog. The chances of achieving those legislative goals are far greater if this small industry works together than if it works at counter purposes.*
5. *This would be a great time to take a refresher look at the list of best practices that can be found through various industry associations, such as IIUSA. They are, if anything, even more important today than when crafted a few years ago.*
6. *Two of the best practices bear emphasis in this article, especially given the events in Vermont. One relates to the importance of an individual or entity serving in a role as investor protector with full access to all necessary information to perform those duties. In the typical example of an EB-5 loan model, this means that the general partner or managing member of the new commercial enterprise should be an individual or institution that is independent of the job creating entity.*

   Another suggested best practice of note is the importance of investors insisting on regular – no less than quarterly – reports of the activities, progress, and status of the project and the use of their funds. This is a best practice for regional centers and developers; it is critical for investors.
7. *Speaking of investors, any negative story involving EB-5 projects provides further evidence of the importance of investors being engaged in this process. Whether the investment is $500,000 or $1 million, it is a good deal of money. Investors should be involved in reviewing financial documents of projects in which they invest. They should demand accountability and review the progression of the investment to ascertain that it meets the representations made in the business plan and offering documents. They can certainly retain agents or other professionals to perform this function. What they shouldn't do is just assume that, for example, because a project has some aura of government involvement or support, no further diligence is required.*
8. *Redeployment of funds after their intended use enhances the possibility that funds will be used in a manner not approved by, or reviewed by, the investor or his agent or representative. The best way to avoid this result is for the USCIS to finally take a position that, once the EB-5 funds have been used in the manner intended to create the requisite number of jobs, even though the NCE cannot pay back the investor, the NCE does not have to redeploy the funds to keep them at risk. Unless or until the USCIS agrees to this position, which will both protect investors and comply with the law, regional centers and developers will want to develop mecha nisms to ensure that the investors' investment dollars remain at risk but at the least risk possible. This needs to be done in a manner that enables the investors to know in advance and to approve of the ultimate deployment of their investment dollars.*

The SEC charges against Jay Peak and its principals have caused tremors in the EB-5 world. These charges have again shaken confidence in the EB-5 program. Though the recent allegations are chilling, there is no reason to believe that the EB-5 program is or will be an exception to the rule that, in every program, abuses will occur. That is

no basis to draw conclusions about the program as a whole. It is a reason, however, for all parties – U.S. Congress, executive agencies, regional centers, developers, representatives, agents, and investors – to take action now to minimize the risk of more bad news and to maximize the integrity of the EB-5 program and its long term ability to bring foreign direct investment dollars to the U.S. to create employment in the U.S. at no cost to the U.S. taxpayer.

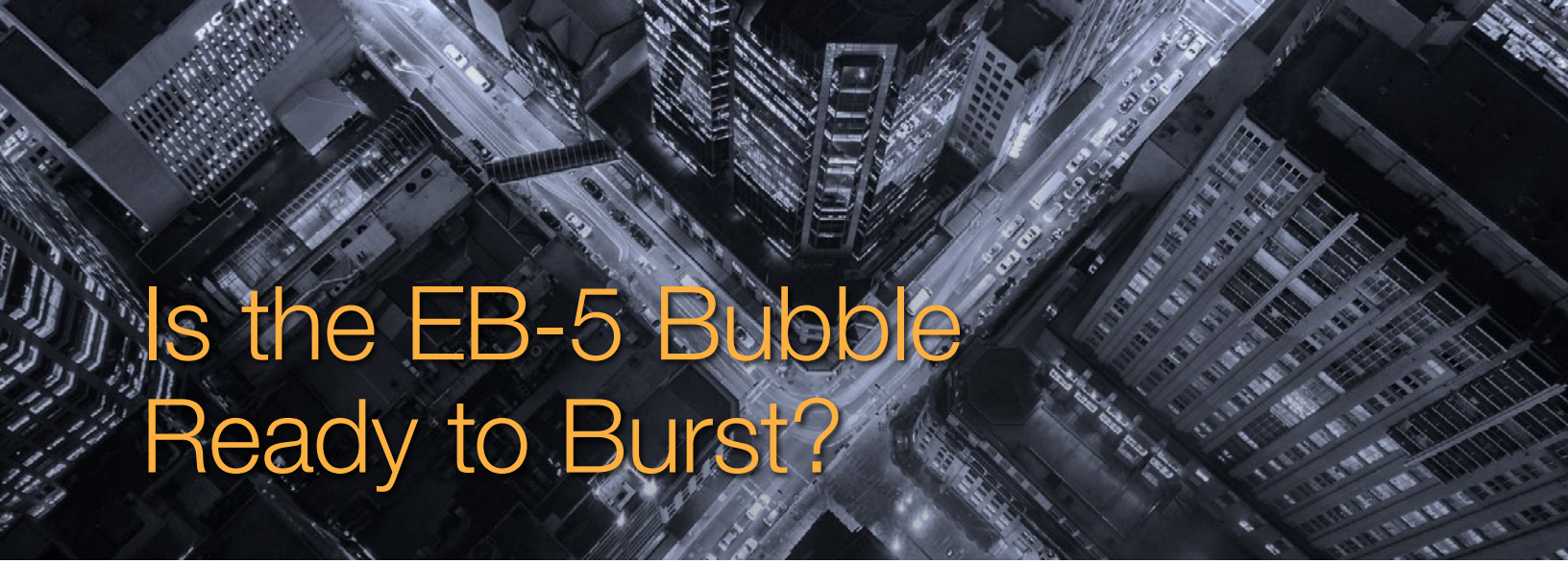
About the Authors

H. Ronald Klasko is one of the U.S.'s leading lawyers representing treaty investors (E-2) and green card investors (EB-5). Ron was the lead attorney on the Matters of Walsh and Pollard case, the key precedent for E-2 visas. Ron is serving his fifth term as Chair of the EB-5 Committee of the American Immigration Lawyers Association (AILA), where he was also President and General Counsel. He led the effort to develop the first comprehensive list of best practices in the EB-5 industry and is a sought after speaker, regularly speaking on investment migration at events around the world. Under Ron's leadership, Klasko Immigration Law Partners, LLP is regularly chosen by Chambers Global and U.S. News and World Report as a top tier business immigration firm. He has been included in *Best Lawyers In America* for two decades. *Who's Who Legal in Corporate Immigration* named him as the world's most highly regarded immigration lawyer.

Tammy Fox-Isicoff is a former Trial Attorney for the United States Immigration and Naturalization Service and Special Assistant United States Attorney. She has been selected by Best Lawyers as the Best Lawyer in Immigration Law in S. Florida in 2012 and 2016 and by SuperLawyers as one of the top 50 women lawyers in Florida. Tammy holds an AV® Preeminent™ Peer Review Rated℠ by Martindale-Hubbell® and has been continually listed in *The Best Lawyers in America, Chambers Global, South Florida's Top Lawyers, SuperLawyers, and International Who's Who of Corporate Lawyers. The National Association of Distinguished Counsel* has recognized Tammy as being in the top 1% of attorneys in the entire U.S. She has been a frequent immigration law consultant on the Today Show and Morning Show as well as serving as immigration legal consultant to NBC, ABC, CBS, CNBC, FOX and MSNBC. An author and frequent lecturer on all areas of immigration law nationally and internationally, Tammy has served as a legal expert on a number of occasions in federal court, state court, and in Florida Bar disciplinary proceedings.

About Klasko Immigration Law Partners

Klasko Immigration Law Partners, LLP has offices in Philadelphia, New York, and Chicago and provides top-tier legal services to EB-5 investors, regional centers, and developers. Its EB-5 team is one of the largest and most respected in the country, and its Compliance team is the first of its kind. The EB-5 Practice Chair, H. Ronald Klasko, has served four terms as Chair of the EB-5 Committee of AILA and chaired the IIUSA Best Practices Committee. The firm has been selected as one of the top five business immigration law firms in the United States by the prestigious Chambers Global: The World's Leading Lawyers for Business (Chambers and Partners) for the past eight years. For more information on the firm's EB-5 practice, please visit *eb5immigration.com*.



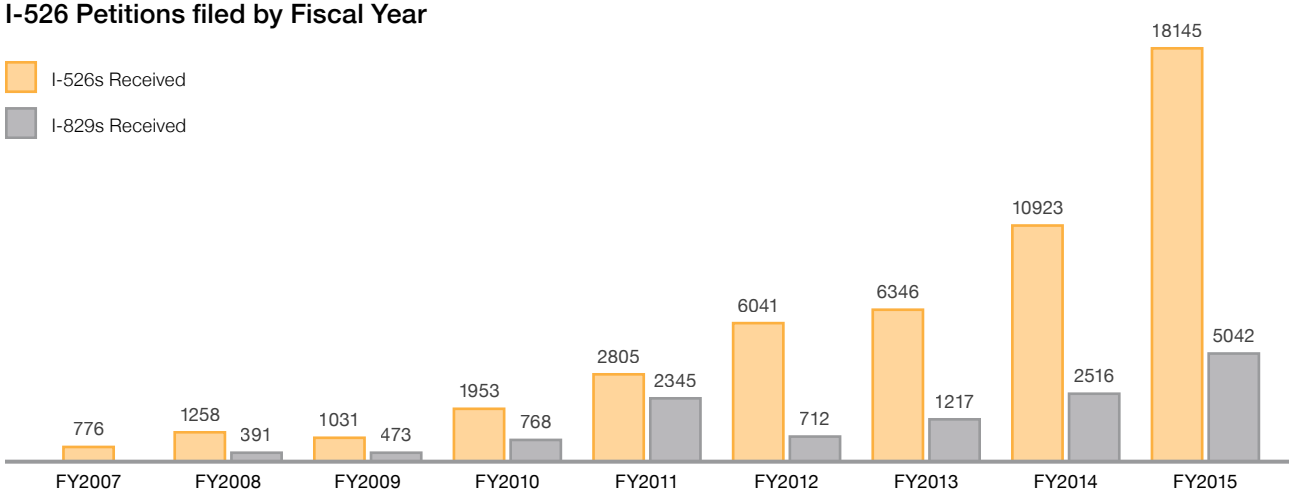
Is the EB-5 Bubble Ready to Burst?

By: **Kaitlin Halloran**

After the 2008 financial crisis, EB-5 became an increasingly popular source of capital as traditional funding sources dried up. Since 2008, use of the EB-5 program has grown steadily and dramatically.

EB-5 investors file the I-526 petition at the beginning of their EB-5 immigration process. Once their I-526 is approved – a process that can take upwards of a year and a half due to USCIS processing backlogs – investors must wait two years before filing an I-829 petition to remove conditions on their permanent residence. If their investment has met EB-5 program requirements, they then become legal permanent residents and achieve immigration success.

I-526 Petitions filed by Fiscal Year



This two-year delay between I-526 and I-829 petition filings provides a forecast of I-829 filings in the years to come. As the chart above demonstrates, the increase in I-526 filings in FY08 correlated with a spike in I-829 petition receipts in FY11, and increases in FY12 and FY13 correlate with a FY15 jump in I-829 filings[1].

As the EB-5 program grew more popular and I-526 filings surged, many predicted an unprecedented number of

[1] USCIS I-829 petition data set.

I-829 petitions would eventually be filed, revealing, several years after the fact, the true viability of the many new projects and players making use of EB-5 funding.

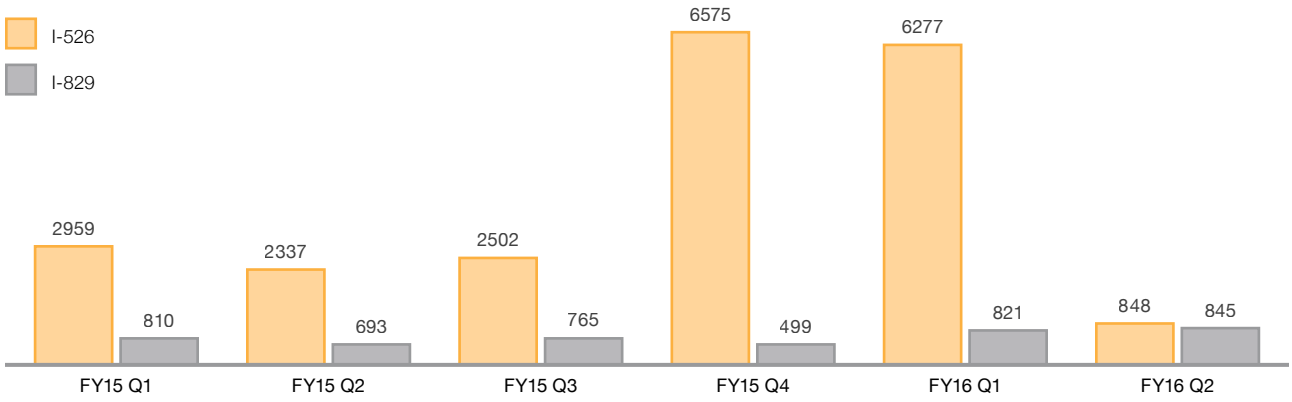
And as I-526 petition filings skyrocketed in anticipation of potential legislation at the end of FY15 and beginning of FY16, a similar bubble in I-526 petitions formed. Because so many petitions had been filed so rapidly, many raised concerns regarding the quality of those filings.

Potential increases in I-526 and I-829 denials as a result of these bubbles will likely drive an increased focus on best practices in EB-5.

I-526 Filings Are Down, but Denials Have Increased

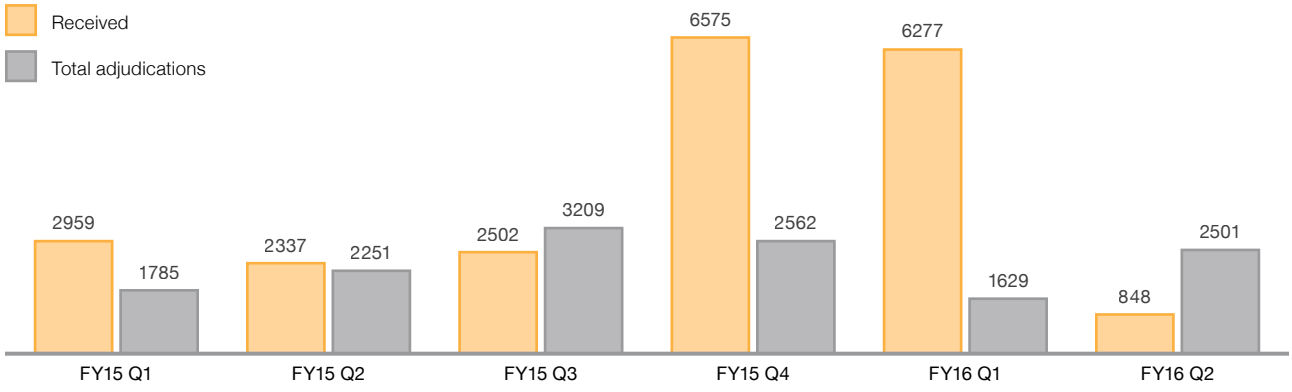
After several quarters of sustained, record levels of I-526 petition filings, I-526 filings have dropped off dramatically. FY15 Q4 and FY16 Q1 both saw upwards of 6,000 petitions filed each quarter; in comparison, only 848 I-526 petitions were received in Q2 of FY16.[2]

Quarterly I-526 and I-829 Filings



Decreased petition filings have given the USCIS a chance to improve the I-526 backlog. The number of backlogged petitions remains high but has decreased to 20,235 at the end of Q2 compared to 21,988 pending I-526 petitions at the end of Q1.

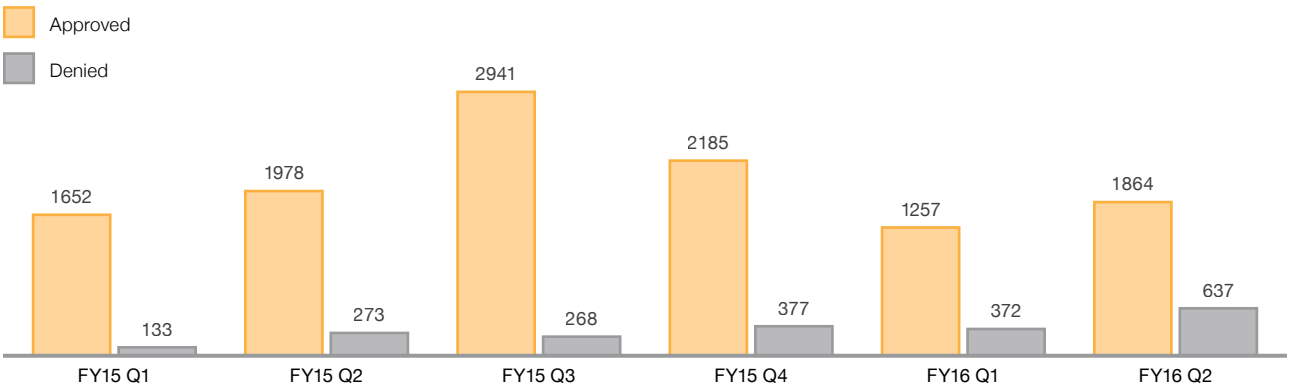
I-526 petitions received vs. adjudications



[2] USCIS I-526 petition data set.

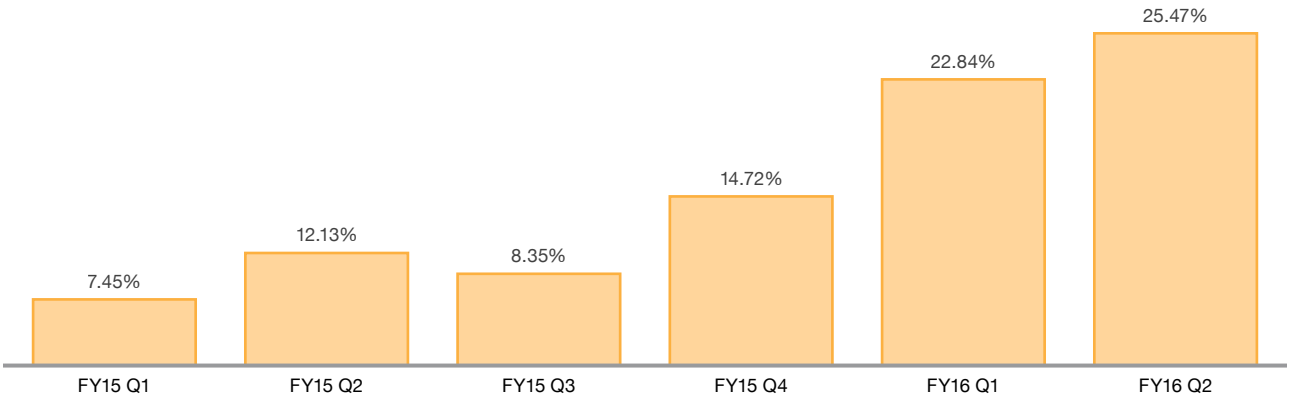
However, I-526 denials have more than doubled since Q2 of last year, validating predictions that the increased petition filings surrounding last year's Regional Center program sunset dates would result in an increase in rejected I-526 petitions.

I-526 approvals and denials



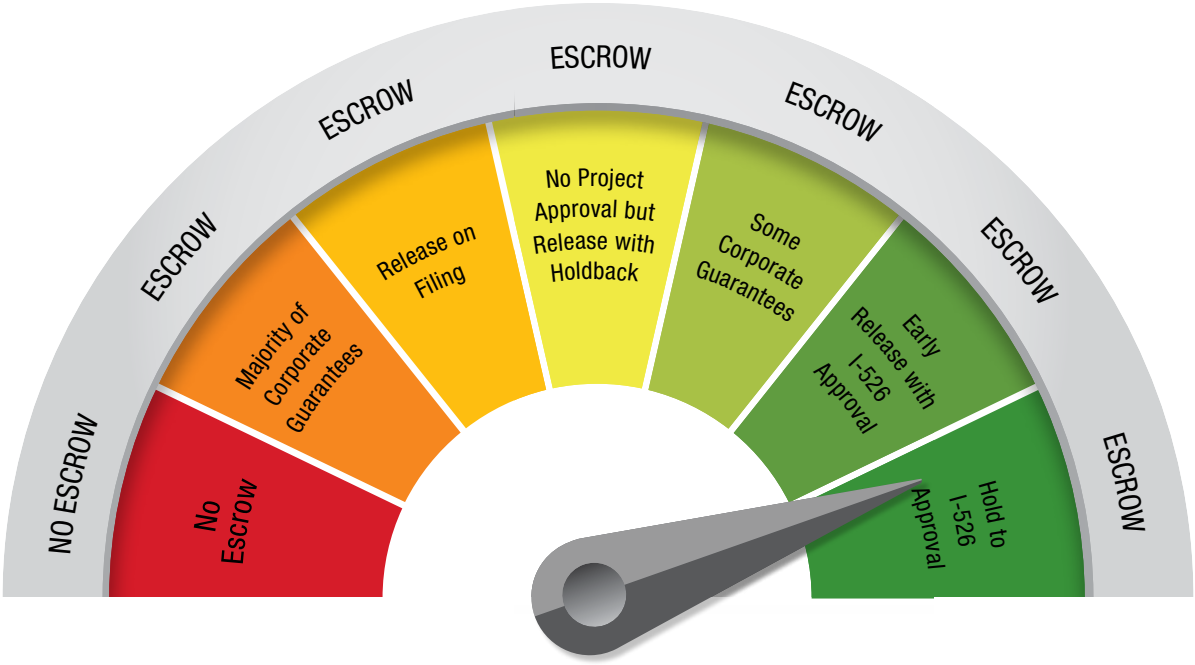
In FY15 Q2, a quarter of all I-526 petitions adjudicated were denied, representing a significant increase in denial rates.

I-526 petition denial rate (%)



Increased I-526 Denials Will Test Escrow Structure

Increased I-526 denial rates make it more important than ever for issuers to ensure they will be able to refund investors in the event of an I-526 denial. The majority of projects now utilize some form of early-release escrow, but not all approaches offer the same security for a project's investors.



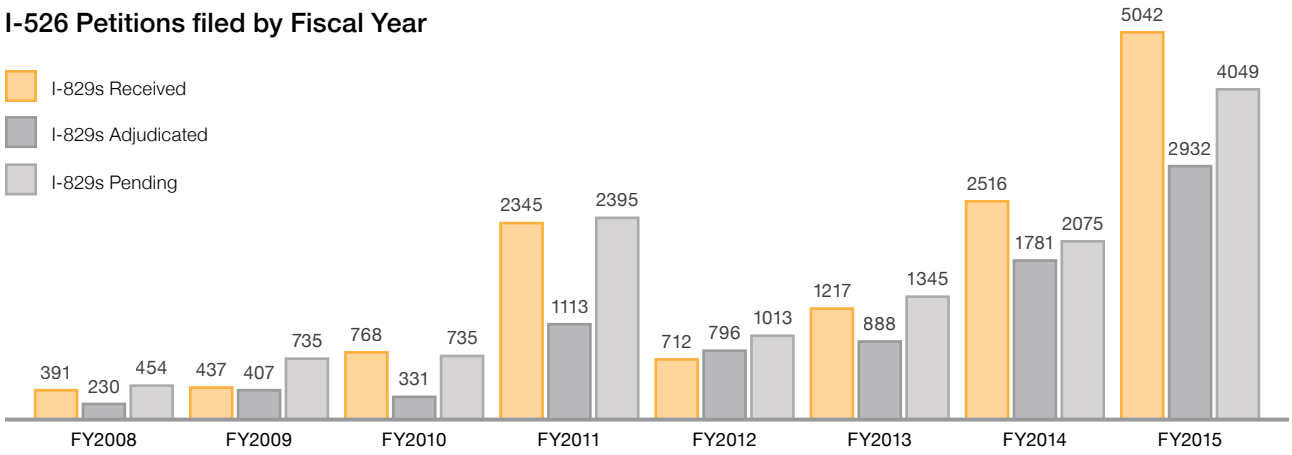
While holding funds in escrow until I-526 approval provides the most security to investors, long USCIS processing times make this approach impractical for many projects. As a result, EB-5 industry leaders have worked to develop solutions that balance investor security with project needs to allow capital to move at the speed of the EB-5 project.

For projects using early-release escrows, it's a best practice to retain a portion of funds in escrow as a "holdback" to refund investors in the case they are denied. Waiting for a project's exemplar or first I-526 approval before releasing funds reduces the risk that the project will be denied wholesale, leaving the issuer scrambling to refund all of the project's investors.

Because EB-5 processing times are so lengthy, in some cases funds need to be released prior to an initial I-526 or exemplar approval. In those situations, it's particularly important to work with a third-party escrow administrator experienced in EB-5 to set up the right safeguards to ensure the project will have the means to refund any denied investors.

The I-829 Bubble Is Here

In the second quarter of FY16, the U.S. Citizenship and Immigration Services (USCIS) reported that for the first time since the EB-5 program's inception, I-829 petition filings have outnumbered receipts of I-526 petitions, indicating that the "I-829 bubble" is here.



To date, the USCIS has adjudicated only 8,585 I-829 petitions; nearly half that number remains backlogged. Though the USCIS has historically struggled to consistently adjudicate I-829 petitions effectively, they have increased staffing and announced plans to begin implementing I-829 investor interview and making process improvements.[3]

As more and more I-829 petitions are adjudicated, approvals and denials will make clear the true viability of the many new projects that have sprung up as the EB-5 industry has grown and the USCIS' ability to successfully administer the growing EB-5 program. For projects that did not take a proactive approach to managing immigration compliance, the I-829 bubble may prove to be a rude awakening reinforcing the importance of best practices in EB-5.

About the Author

Kaitlin Halloran is a frequent author of articles, blog posts, presentations, and other written content at NES Financial, providing information for EB-5 issuers and investors alike in the dynamic EB-5 marketplace. In her role as Policy and Research Marketing Analyst, her responsibilities includes managing NES Financial's investor marketing, including Chinese-facing website, social media, and articles, as well as providing support to the company's thought leadership in the EB-5 industry.

About NES Financial

NES Financial is a Silicon Valley financial technology (FinTech) company providing technology-enabled solutions and services for the efficient back and middle office administration of complex financial transactions. Serving private equity, commercial real estate, and Fortune 1000 clientele, we offer industry-leading fund administration, loan servicing, specialized EB-5 administration, and 1031 tax deferred exchange services. Our unwavering commitment to data security, operational redundancy, and compliance reporting is evidenced by 11 consecutive years of successful independent audits of our technology, processes, and financial controls. Today, NES Financial services over 190 funds, administers over $75B of 1031 assets annually, and has worked with over 450 EB-5 projects.

[3] GAO, *Small Number of Participants Attributed to Pending Regulations and Other Factors*, GAO-05-256 (Washington, D.C.: April 2005)..