PROBLEMS AND POSSIBILITIES: UNDERSTANDING THE EB-5 INVESTOR VISA

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CHAPTER 15.1

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I. INTRODUCTION

The Employment-Based 5th preference ("EB-5") investor visa program was underused for most of its 20 year history, and for good reason. The program has begun to see rapid growth within the last several years. Several positive developments lead to this growth, and many immigration lawyers now consider the EB-5 program a viable alternative for achieving permanent residence in the US, in appropriate cases. This paper presents the development of the law, regulations and key precedent decisions governing the EB-5 investor visa classification, so that lawyers considering this type of representation have some idea of what they are up against.

In addition to the legal background, the paper discusses key ethical, evidentiary and procedural issues that practitioners must anticipate before accepting a representation in this complex area of immigration law.

A. Legal Background of the EB-5 Visa

Congress originally created the EB-5 visa classification in the Immigration Act of 1990, also known as IMMACT90. (Pub. L. No. 101-649, 104 Stat. 4978. Immigration & Nationality Act §203(b)(5), 8 U.S.C. §1153(b)(5)). To achieve the stated goal of increasing "employment creation" and infusing new capital into the US economy, IMMACT90 reserved 10,000 permanent visas per fiscal year for the EB-5 classification. Of those 10,000 visas, IMMACT90 allocated 3,000 visas for investment in "targeted employment areas." Despite substantial underutilization, these same annual visa allocations continue to be available to EB-5 investors today. The entire annual quota has never been used in any year since the program began, for reasons which will become clear below.

1. Minimum Initial Requirements

To qualify for an EB-5 visa, an investor must contribute, or be in the process of contributing at the time of filing an EB-5 petition (Form I-526), a minimum of $1,000,000 "capital" to a "new commercial enterprise" or to an existing "troubled business."

The I-526 petition must prove that the enterprise will create at least 10 "full time jobs" for "US workers," as a result of the capital investment. The investor must prove the capital is derived from a "lawful source," and is at actual risk of loss, however small that risk may be. The investor must also engage in a "management" role in the business—"passive investors" do not qualify.

The minimum capital investment amount is reduced to $500,000 if the investment is made in a business located in a "targeted employment area," i.e., in a rural area, or in an area that has experienced high unemployment of 150% of the national average. At 8 CFR § 204.6(e), the Service has defined all of the aforementioned terms in quotation marks. Lawyers considering accepting a representation of an EB-5 investor are cautioned to become be intimately familiar with these definitions, as well as the Service's interpretations expressed in by the four precedent cases (cited *infra*) and discussed in various USCIS policy memoranda.

2. Remove Your Conditions Or You Are Removed

To avoid fraudulent claims of investment and of employment creation, the statute provides investors a two year initial period of "conditional" residence upon approval of the required petition, Form I-526. To achieve removal of the conditions, and thus long term "permanent residence," the investor is required to prove that, 24 months after admission as a conditional resident, the investment in the enterprise continues to be sustained, and that the 10 new jobs have actually been created or are likely to be created within a reasonable period of time. This removal of conditions petition is filed on Form I-829.

Investors who fail to satisfactorily prove either of these two elements at the I-829 stage *are subject to removal from the United States.* That is, after making a substantial, good faith investment of capital, moving his or her family, and setting down roots in the United States for two or more years, the investor can be *deported* following an immigration court proceeding, if he fails to prove either that his capital remains invested, or the required 10 jobs have been created. The risk of deportation tended to scare off most foreign investors.

B. The Immigrant Investor Pilot Program

Not surprisingly, few investors took up the challenge of an EB-5 visa in its original IMMACT90 form. Most immigration lawyers advised clients against participation in the program, in view of the risk of removal at the end of the process, as well as the fact that investors wealthy enough to qualify for an EB-5 visa nearly always had a less risky alternative under other provisions of the Immigration Act. (Even today, many foreign investors have other, less capital-intensive and less risky options to immigrate, and practitioners are best advised to consider carefully such alternatives, especially the EB-1C multinational manager or executive classification.)

By 1992, Congressional supporters of immigrant investment noticed that the original program had very few takers. In response, Congress came up with the "Immigrant Investor Pilot Program," known today as the "Regional Center Pilot Program." Created by the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, §610, 106 Stat. 1828; S. Rep. No. 102-918 (1992), this amendment set aside 3,000 visas beginning in 1993 for foreign nationals who invest through designated "regional centers" as defined in the amended statute.

1. Regional Centers and Indirect Job Creation

The great advantage of the "pilot program" is the concept it created, known as the "regional center." A regional center is defined as "any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." 8 CFR §204.6(e). Throughout the 1990s, about 20 such "regional centers" were formed and gained approval from the Service, many in California.

An EB-5 investment through a USCIS-designated regional center was intended to reduce an investor's risk of failing to prove the creation of 10 direct jobs by the end of the 24 month period of conditional residence, and thus finding himself in removal proceedings. The pilot program does this by permitting the investor to meet the minimum job creation target of 10 jobs by counting both **direct** jobs created (i.e., new full time workers employed by the business receiving the EB-5 capital) as well as the "**indirect**" jobs created by the increased revenues and other economic impacts of the investment.

2. Proving Indirect Job Creation

Under the regulations, creation of these "indirect jobs" can be proven through the use of "reasonable methodologies" that estimate job creation potential for a given project or business. Today, USCIS adjudicators accept the RIMS II "final demand multiplier" model, the Regional Dynamics Economic Analysis Model (REDYN) model and the Impact Analysis for Planning (IMPLAN) model as such "reasonable methodologies" for estimating indirect job creation. However, the agency took about 15 years to achieve clarity in this area, and the road to clarity was a bumpy one.

C. The Dark Days 1997-2003

Following the 1993 legislative attempt to reduce investor uncertainty through the regional center/indirect job creation concept, a number of regional centers sought and obtained Immigration Service designation by the mid-1990s. Primarily, they offered real estate development or re-development projects, and foreign investors responded in somewhat greater, but never large numbers.

However, the Service's regulations at 8 CFR § 204.6, amended to incorporate the pilot program in 1993 (58 FR 44608, 8/24/93), offered little guidance either to regional center operators or to individual investors. Essentially, the regulations merely tracked the statutory language creating the regional centers. Finding out how the Service would apply those regulations became a matter of trial and error, i.e., denial of I-526 petitions, or worse, denial of I-829 petitions.

1. Strict Interpretation of the Regulations

Adjudication decisions interpreted the regulations strictly, and focused heavily on whether or not the investor would engage in management of the enterprise, under 8 CFR § 204.6(j)(5).

Many I-829 petition denials related to investments in "troubled businesses," which under the regulations, required a 40% increase in either the net worth or the number of full time jobs, to secure removal of conditions. 8 CFR § 204.6(h)(3).

The Service determined, for example, that a $1 million investment in an existing "troubled business" employing 100 people was required to prove creation of 40 jobs, rather than just the 10 jobs required for investment in new commercial enterprises. The Service offered no explanation to harmonize these two contradictory standards with the program's job creation policy objective..

Naturally, both regional center operators and foreign investors felt they were essentially "flying blind," through uncharted regulatory territory, and the pilot program languished. Gradually, however, some regional centers began to find somewhat more confidence in the types of projects and practices the Service would approve, at both the I-526 and the I-829 stage. By the mid- to late 1990s, approvals began to rise. All that changed in 1997.

2. The General Counsel's 1997 Opinion

In 1997, the Service's Office of General Counsel issued an opinion that stopped the regional center program in its tracks. Reversing several years of approvals, the opinion prohibited such previously approved practices as:

a. Down payments of cash with the balance of the investor's capital paid in the form of a promissory note secured by assets of the enterprise invested in;
b. Multi-year installment plan payments on an investor's promissory note, with a large "balloon" payment upon removal of conditions;
c. Options to give the investor the right to sell the investment for a fixed price less than, equal to, or more than the investor's cash contribution;
d. Options to give the enterprise the right to buy the investment at a fixed price;
e. Provisions that permit or require the enterprise to place enough cash in a bank account to guarantee that funds will be available to repay the investor if he or she exercises the option to sell;
f. Provisions to withhold some portion of the investor's capital contribution to cover attorney's fees and marketing costs;
g. Arrangements to guarantee a specific return on the cash invested.

3. Reversing Course, Retroactively

Most of these practices grew out of regional center projects designed to attract investors' funds into pooled arrangements, such as limited partnerships. In many cases, the full amount of investment capital ($1 million or $500,000, depending on whether the project is located in a "targeted employment area"), never reached the business enterprise. The risk reduction features of many of these buy-back and guaranteed return provisions meant that the funds that did flow to the enterprise were not truly "at risk of loss" in the commercial sense. The General Counsel's opinion required the Immigration Service to apply these new standards going forward *and* retroactively.

4. The Four Precedent Decisions of 1998

In the summer of 1998, the Administrative Appeals Office of the Service issued four precedent decisions that essentially mirrored the General Counsel's opinion of 1997, and forbid the practices discussed therein. These were *Matter of Soffic*i, 22 I&N Dec. 158, 19 *Immigr. Rep*. B2-25 (AAO June 25, 1998): *Matter of Izummi*, 22 I&N Dec. 169, 19 *Immigr. Rep*. B2-32 (AAO June 13, 1998); *Matter of Hsiung*, 22 I&N Dec. 201, 19 *Immgr. Rep*. B2-106 (AAO July 31, 1998) and *Matter of Ho*, 22 I&N Dec. 206, 19 *Immgr. Rep*. B2-99 (AAO July 31, 1998. All were applied *retroactively* to previously approved and pending cases.

With the issuance of these precedent cases, which are binding on USCIS adjudicators, hundreds of investors with ostensibly approved I-526 petitions found themselves facing the impossibility of obtaining removal of conditions at the I-829 stage. Many investors with pending applications for permanent residence, found themselves facing denial and deportation.

Litigation questioning the power of the Service to impose the four precedents retroactively quickly followed and was not fully resolved until 2003. In *Chang v. United States*, 327 F.3d 911 (9th Cir. 2003), the court held that the Immigration Service could not "change the rules of the game" by applying the four precedent decisions to investors who had already received conditional permanent residence. To that extent, retroactive application of the "four precedents" was impermissible.

D. Congress Tries To Reform EB-5, Somewhat

In 2002, Congress tried to resuscitate the moribund EB-5 program with the passage of the 21st Century Department of Justice Appropriations Act, Pub. L. No. 107-273, 116 Stat. 1758, signed into law on November 2, 2002. This law amended the Immigration & Nationality Act and provided some relief to investors caught up in the retroactive application of the 1998 precedents.

Investors whose I-829 petitions were denied could file a motion to reopen while those with approved I-526 petitions were given another chance to comply with the precedents.

1. Fixing the "Establishment" Requirement

The 2002 amendments also eliminated the requirement that the EB-5 investor must "establish" a commercial enterprise. Under the 2002 amendments, the investor need only show he has "invested" in a commercial enterprise, not that he has "established" one. This attempted to legislate away one of the holdings in *Matter of Izummi*, *supra*, which had found that limited partners who invested in a partnership over a period of time had "circumvented" the "establishment" of a new enterprise requirement, leading to numerous I-526 petition denials.

2. A Brief Victory

The celebration of this minor victory was short, since the Service determined in a 2003 policy memo, that even if an alien entrepreneur did not have to "establish" a commercial enterprise, the requirement that the enterprise be "new"—established after November 29, 1990—remained in effect. In addition to throwing this additional obstacle in the way of the EB-5 program, the Service declined, and continues to

decline, to publish regulations to implement the 2002 amendments or any subsequent ones.

E. The GAO Suggests Some Improvements

Alert readers will note that by 2003, the EB-5 program was still a shambles. In its wisdom, Congress that year extended the EB-5 pilot program for five years in the Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944. (The program currently is due to expire on September 30, 2012—yet another form of uncertainty that ill serves immigrant investors, regional centers and the policy objectives of the program).

1. Thirteen Years of Regulatory Fog

Among the 2003 law's provisions was one requiring the Government Accountability Office (GAO) to conduct a thorough study of the EB-5 program's "efficacy." (U.S. Government Accountability Office Report to Congressional Committees, "Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors," GAO-05-256 (Apr. 2005)).

The GAO study found that the EB-5 program is beneficial if underutilized. It estimated that a mere 653 immigrant investors had actually survived the legislative, judicial and regulatory minefield and managed to secure permanent residence during the EB-5 program's first 13 years of existence. By GAO's estimate, these brave, or desperate, investors enriched the U.S. economy by $1 billion in capital investment, directly and indirectly. However, the study authors recommended that the newly established Department of Homeland Security (DHS) issue long-awaited regulations for the pilot program.

2. The Fog Begins To Lift

While DHS, of which USCIS is a part, has still not published new regulations, it has taken some positive steps. In January 2005, the USCIS established the Investor and Regional Center Unit, now known as the USCIS Foreign Trader, Investor and Regional Center Program (FTIRCP). This unit oversees policy and regulatory development for the EB-5 program, and conducts case auditing and field training of EB-5 adjudicators.

In addition, all EB-5 adjudications have been "localized" at the California Service Center of USCIS, which has formed a specially-trained unit to perform these complex adjudications. Having this dedicated EB-5 adjudication unit has greatly improved the consistency of EB-5 decisions.

The greater focus on training of adjudicators since 2005 has been paired with expanded outreach and substantially improved guidance to regional center operators and to investors. Even without issuing regulations, the Service has begun to make clear what makes an EB-5 project compliant, and what is non-compliant, at least on some issues.

F. The EB-5 Pilot Program Takes Off, Sort Of

From 2005 to the present, the Service has shown a marked preference for EB-5 petitions filed through the Immigrant Investor Pilot program, i.e., through regional centers. In response to greater clarity as to the requirements for center designation, and the recent institution of a form-based application process, more and more public and private entities have sought and obtained approval as regional centers.

Today, the Service has approved 211 such regional centers in all 50 states, and the number continues to grow. (A list of current regional centers, with their contact information and areas of investment focus, can be accessed at the USCIS webpage: http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=d765ee0f4c014210VgnVCM100000082ca60aRCRD&vgnextchannel=facb83453d4a3210VgnVCM100000b92ca60aRCRD.

1. Increasing Volume of EB-5 Investor Petitions

Investors too, have noticed the change. Approval rates for I-526 and I-829 petitions have risen substantially, as the Service has improved adjudicator quality, even adding, in 2011, a professional economics staff to analyze investment project business plans and their supporting job-creation models. The Service's outreach to investors, lawyers, regional center operators now includes quarterly stakeholder telephone conference calls, some of which include webcasts of in person meetings. The USCIS Office of the Ombudsman has also taken an active interest in the fair and timely adjudication of EB-5 petitions. The Service has issued several policy memoranda to clarify specific issues, and simultaneously updated the USCIS *Adjudicators Field Manual* so that lawyers can at least see what the rules the adjudicators think they are following when deciding cases.

In response to these initiatives, the volume of EB-5 investor petitions has increased in recent years to the 3,500- 4,000 range annually. Over 90% of EB-5 petitions are today filed through the regional center program, as opposed to the original 1990 "traditional" program.

Doubtless, political and economic events play a substantial role in the EB-5 investor's decision to transfer substantial wealth from the home country in Asia, Africa and Latin America to the United States. Investors in many countries fear for their children's future, or their own, as violence and civil unrest, as

well as poor or unsustainable governance, haunt many countries. For many such investors, the US EB-5 program, as it has grown more certain, has also become more attractive for what it does not require.

2. The Comparative Advantages of EB-5

For example, most regional center investment projects today are organized as limited partnerships, in which the investor's position as a limited partner is considered enough of a "management" or "policy-making role" to comply with the regulations on "engagement" in the management of the enterprise that so concerned the Service early on. 8 CFR §204.6(j)(5). Many investors are attracted to the freedom the limited partner role gives them to pursue other interests in the United States, including other investments or entrepreneurial opportunities, or enrolling in US educational programs, once they become permanent residents.

In addition, most regional center investment partnerships are now located within "targeted employment areas" (TEA), although the Service has noted it is troubled by what it calls "gerrymandered" TEAs. (This refers to the practice of cobbling together census tracts, one or two of which may meet the "high unemployment" rate criterion, with several others that do not.) As noted above, investment in a project or company located within a TEA reduces the minimum capital requirement to $500,000, an amount far more investors can afford. In comparison, the Canadian investor visa program *raised* its minimum capital requirement in 2011, to $800,000.

Another advantage of the EB-5 program is that it does not require the investor to prove any particular business experience, skills, or credentials. Although there are evidentiary issues to be aware of—the "lawful source of funds" being the major one—the EB-5 program is generally open to anyone who can meet the capital requirements, and who properly invests in a qualifying "traditional" EB-5 enterprise, or in an approved regional center investment partnership or project.

3. Exemplar Petitions: A True Advance

In a departure from past practice, the Service has decided, over the past two years, that regional centers may submit, before they subscribe investors, an "exemplar" petition for a project or partnership. The exemplar provides the detailed business plan, job-creation forecast and modeling study, and draft investment documents. If such an "exemplar" petition, business plan and investment documents are approved and individual investors then submit substantially identical documents with their individual petitions, the Service has stated that it will not "re-adjudicate" whether the investment project is compliant with EB-5 regulations. It will only review the individual investor's evidence of "lawful source of funds" and "path of funds."

While in some cases, the Service has in fact re-adjudicated at the individual investor petition stage, investments ostensibly "approved" in a prior "exemplar" petition filing, the "exemplar" petition process is a good example of the Service's recent attempts to streamline the I-526 adjudication process. This initiative may actually increase capital investment and job creation as the EB-5 program's authors intended.

Importantly, individual I-526 petitions filed based on an approved exemplar were adjudicated much more rapidly than others, and so attracted even more investor interest. Unfortunately, at this writing, the Service's currently published processing time for an I-526 petition has degraded to 8 months, without explanation—a substantial decline from the 6 months required during most of 2011.

II. REPRESENTING AN EB-5 INVESTOR

As is always the case, a lawyer taking on a potential EB-5 representation must be cognizant of the duty of competence. In the EB-5 context, this duty counsels that the lawyer must gather all of the investor's relevant facts carefully; consider all of the investor's options for immigrating under the Immigration & Nationality Act, (INA), and present all of those options with their risks and costs. Clearly, the lawyer must be competent to know which facts are relevant, and which immigration strategies may be implied by those facts. Give consideration to making a co-counsel arrangement with an experienced business immigration practitioner if there are doubts on this score.

A. Get the Facts

The standard immigration intake consultation must start with a careful exploration of the investor's immediate family relationships, prior immigration history, if any, and all potential grounds of inadmissibility under INA § 212(a), 8 U.S.C. § 1182(a). This analysis can be complex in many cases, but is essential to comply with the duty of competent representation, and to avoid the malpractice pitfall of filing an EB-5 petition (or any other visa petition) that can never result in permanent residence, because the investor is ineligible for any type of visa.

1. Assess the Alternatives

Assuming the investor is admissible, the lawyer must also elicit information to permit an assessment of immigration strategy alternatives. A client interested in an EB-5 investor visa may have simply heard about the program from a friend or from the numerous Internet sites devoted to it. He or she may qualify for an immigration strategy that does not involve the two year conditional residence period, and the potential risk of failing to meet the criteria for removal of conditions. Many investors' needs may be met through a temporary, but renewable, Treaty Trader (E-1) or Treaty Investor (E-2) visa, so that those temporary visa strategies should also be considered.

Hence, it is important to develop a full understanding of the investor's net worth, potential amount available for investment, business ownership interests, and their location(s), and perhaps most important, his or her goals in securing residence status in the United States.

Many clients who express an interest in the EB-5 program do so not because they are particularly interested in permanent residence in the US for themselves, but because they have children approaching college age. Attending college or university in the US as a permanent resident is substantially less expensive, and the student will qualify for most forms of financial aid. With a green card, the graduate is free to seek U.S. employment after completing his or her degree. For these reasons, many potential EB-5 clients simply give the EB-5 capital to a college-age son or daughter, and the child files the I-526 petition.

2. EB-1C: A Common Alternative To EB-5

Many potential EB-5 investors own a company abroad, and play a managerial or executive role in that business. This common set of facts should be carefully explored, since the investor may be able to immigrate in less time, with less risk, and a lower capital investment, as a "Multinational Manager or Executive" under the Employment-Based 1st Preference (EB-1C) visa classification. INA § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C).

Typically, if the investor has been a manager or executive of a foreign company for at least 12 months in the preceding three years, and comes to the U.S. to develop and manage a subsidiary or affiliate of the foreign company, he or she can qualify for an L-1 "new office" visa, or possibly an E-2 Treaty Investor visa. Once the new US business has been doing business for at least one year, the company can file an EB-1C visa petition for the investor and his spouse and minor children.

To further reduce risk, the investor may simply acquire a business that already has been doing business for at least one year, so that the acquired company can file the EB-1C petition without the intermediate L-1 or E-2 visa. There is no requirement that the US subsidiary or affiliate be in the same line of business as the foreign parent owned by the investor.

The EB-1C strategy has its own set of requirements and evidentiary pitfalls, and a fairly well-developed regulatory framework at 8 CFR § 204.5(j). Before proceeding with this strategy, the lawyer must carefully consider the requirements imposed by the duty of competence, and work with a co-counsel if necessary.

B. If the Client's Best Alternative is EB-5

On the assumption that the best alternative for the client to immigrate is the EB-5 visa, the lawyer must be aware of the two alternatives within that classification and assist the client in deciding between them. While an investment in a non-regional center project or enterprise may be the client's initial choice, the wise lawyer will make sure the client understands the differing, and possibly greater, risks which the non-regional center investment entails.

1. Investment Risk and Immigration Risk

A minority of EB-5 investors are experienced entrepreneurs, for whom the challenge of actively running their own enterprise is essential. They may be put off by the role of limited partner in a regional center-sponsored investment project or partnership. They may with reason feel that their knowledge of a particular industry strongly qualifies them to invest in an enterprise in that industry, and manage the investment successfully to achieve both financial goals and immigration objectives.

In such a case, investment risk may in fact be lower than in many regional center projects, some of which have made grandiose financial claims, and failed quite spectacularly. *See*, for example, the Thomson Reuters report at http://graphics.thomsonreuters.com/F/12/EB-5.pdf.

As discussed previously, however, it is important for the investor to understand that even though his or her business espertise and possible partnership with successful U.S. investors may reduce exposure to investment risk, a traditional, non-regional center investment may entail more *immigration risk* than a regional center investment presents.

2. A Cautionary Tale About Employment-Creation in a Non-Regional Center Project

For example, a United Kingdom investor put $500,000 into the development of a limited service brand name hotel located in a rural area of Texas. His local partner was his U.S. citizen brother, who had already achieved substantial success in developing and operating hotels for several well known hotel brands. Capital and business knowledge seemed well-matched.

As set forth in the business plan for the I-526 petition, the partners acquired the land, obtained the permits, and the 57-room hotel was built and began operations. It employed a total of 12 persons full time under the management of the investor. Evidence of the lawful source of his investment funds was straightforward, as he had sold two commercial properties in London. The I-526 petition was approved and the investor, his wife and his son applied for, and were granted, conditional permanent residence. All seemed fine.

Two years later, the investor filed his I-829 petition to remove conditions. The petition supplied complete documentation of his continuing investment in the hotel, as well as of the employment of 12 full time workers, each working at least 35 hours per week.

Evidence in support of the latter included Texas Employer Quarterly wage reports; Federal Employer Quarterly reports; Forms W-2 for each employee; and Forms I-9 for each employee. The latter established that each worker presented, at the time of hire, valid documentation of identity and work authorization as required by the Immigration Reform and Control Act of 1986, INA §274A(b)(1), 8 U.S.C. §1324a(b)(1).

Trouble ensued. The Service denied the I-829, on the ground that it had determined that four of the 12 employees had presented false Permanent Resident Cards, and were thus not "qualifying employees" as required by the EB-5 regulations at 8 CFR § 204.6(e). That regulation defines a "qualifying employee" as "a U.S. citizen, a lawfully admitted permanent resident or other immigrant lawfully authorized to be employed in the United States…."

Because the Service determined, *through means unavailable to the investor*, that only 8 of the employees were "qualifying employees," it found that the investor had failed to prove that his investment had created the minimum of 10 full time jobs. His removal of conditions petition was denied, as was a motion to reopen, and he, his wife and his son were placed in removal proceedings.

Fortunately, the Service took so long (6 years) to process the case that the investor's daughter had not only married a U.S. citizen and become a citizen herself, she was able to file an immigrant petition for the investor and his wife. Likewise, the son had long since married a U.S. citizen and his wife had filed an immigrant petition for him. All three were granted adjustment of status and are today permanent residents without conditions, but only because of good luck and lengthy processing time delays.

The lesson for entrepreneurs is, unless the enterprise is large enough to create employment far in excess of the minimum, there is some risk—more so in industries that attract unauthorized workers than in those that do not, obviously—that the Service will find that some of the new jobs created don't count, because they are held by unauthorized workers. If too many of the jobs created don't count, the investor will face removal after denial of his I-829 petition to remove conditions. Most will not have a U.S. citizen daughter who can petition for them.

3. Regional Center Investments and Immigration Risk

As is discussed in section I.B.1., above, regional center investments can count "indirect jobs" created by EB-5 capital, as well as direct jobs, as long s the indirect job creation forecast are properly documented by a "reasonable methodology." This is a tremendous advantage in reducing the risk that removal of conditions will be denied.

Many regional center projects today go one step further. They structure their projects to rely *solely* on indirect job creation, rather than expose their investors to *any risk* that claimed direct jobs are held by unauthorized workers, and thus do not count. USCIS has approved projects that rely on indirect job creation alone.

Over 90% of all EB-5 investors base their I-526 petition on an investment through a regional center. However, not all regional centers are equal, and not all regional center operators align their interests with those of their investors. For example, many regional centers are formed by real estate developers seeking low cost EB-5 capital. The regional center's interests may be, or may become, adverse to the investor's and if so, the investor may be stuck with a poorly performing investment with no recourse.

Hence, while the regional center approach can and does reduce the immigration risk at the removal of conditions stage, before investing, the client MUST understand the *investment* risks and be prepared for their generally illiquid nature. Most project documents carefully set forth that the investor may lose his capital entirely, although the marketing materials don't emphasize this.

Here too, the lawyer must walk a careful ethical line. Unless the lawyer has substantial expertise in analyzing business plans and partnership documents for capital investment projects, the best practice is to

urge the client to seek independent review by a competent advisor before investing in any regional center project. Avoid recommending specific projects or investments.

C. Key Evidentiary Considerations In Preparing the I-526 Petition

Any immigration lawyer who has represented EB-5 investors has struggled with the "lawful source of funds" issue. It is the primary reason why regional center I-526 petitions are denied and so deserves careful consideration at the initial consultation with the investor. Depending on the client's country of origin and the availability of documentation, this issue alone may counsel against going forward with an EB-5 representation, where the evidence is weak or incomplete.

1. Documenting the Lawful Source of Funds

Under 8 CFR § 204.6(j)(3), the I-526 petition must be accompanied by evidence that the capital invested in the EB-5 project or partnership was obtained through "lawful means." Depending on the client's source of funds, the regulation requires, "as applicable," submission of one or more of the following forms of evidence:

a. Foreign business registration records;
b. Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in our outside the United States by or on behalf of the petitioner;
c. Evidence identifying any other source(s) of capital; or
d. Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States with the past 15 years.

In general, before anything else, lawyers should require all EB-5 investors to provide copies of certain personal documents of identity, for themselves and for any accompanying dependents. This assures the lawyer that the investor can prove identity and any family relationships for derivative beneficiaries of the petition.

This in turn avoids future issues at the time of consular processing, when these relationships must be proved up to the satisfaction of a consular official. For that reason, the best practice is to require copies of the following documents before proceeding with I-526 petition preparation:

a. All pages of investor's passports covering the past 10 years;
b. All pages of each dependent's passports covering the past 10 years;
c. Investor's official birth certificate;
d. Dependents' official birth certificate;
e. Marriage certificate;
f. Divorce decree(s) if applicable;
g. Adoption decree(s) if applicable to dependent children

2. Tax Returns

Unless an investor's home jurisdiction does not impose taxes of any kind, tax returns for the five years prior to the year the investment is made are essential. While the USCIS adjudicators are not experts in foreign law, they do generally insist on tax returns as evidence that any earned income, or distributions or business income claimed as the source of the investment capital, be documented as obtained lawfully, in compliance with local tax laws. Adult sons and daughters who are recipients of gifts of capital will need to provide the donor's tax returns in addition to their own, if they have filed returns.

If the investor has not filed any tax returns, and no entity has filed returns on his behalf (such as an employer or trustee), it is recommended to provide an authoritative source, such as a C.P.A., chartered accountant, or tax lawyer, documenting that the investor was not subject to the requirement to file tax returns.

3. Other I-526 Evidentiary Issues

a. English Translations.

As in all USCIS filings, documents that are not in English must be accompanied by a translation into English. This can become extremely expensive if done within the United States, particularly as to legal or financial documents. It can also take a great deal of time. However, the petitioner is responsible for the quality of the translation, and if a document appears to be mistranslated or to not make sense in English, consider the use of a US translation service. All such English translations should be accompanied by the usual Affidavit of Translation, attesting that the translator is competent in English and the native language, and the translation is accurate to the best of the translator's knowledge and belief.

b. How Far Back Must I Prove Source of Funds?

Investors often ask, "Must I prove the source of the funds I used years ago to acquire an apartment or other asset that I am now selling to generate the funds for my investment?" The answer is "Yes." The attorney must convey that it is in the investor's best interest to avoid a Request for Evidence (RFE) relating to source of funds. This may require combining documents to make the strongest possible case.

c. Parental Gift of Capital

For example, parents who are giving the investment funds to an adult son or daughter should provide an Affidavit of Gift, plus all applicable documents listed in 8 CFR § 204.6(j)(3). That is, the parent must prove the lawful source of the funds given to the adult son or daughter.

d. Parental Loan of Capital

Likewise in the parental loan context, the parents should execute a Promissory Note, evidencing the terms of the loan, plus applicable documents listed in 8 CFR § 204.6(j)(3). It may also be necessary for the parents to provide an employer's or the tax authority's certification of income earned by the parent over a period of years prior to the loan.

In addition, bank statements (not letters from banks) showing deposits and transactions over the relevant time period may be required. If the claim is that the loaned funds were earned from employment, the bank statements (with translations) should cover the entire period during which the funds were earned. In some cases, brokerage investment account statements may serve the same purpose, since in many cases they show not only purchases and sales of securities, but capital gains and losses; amounts reinvested and taxes withheld on trading gains.

e. Sale of an Asset

Where the source of the funds is the sale of an asset, whether real or personal property, the investor (or parental donor or lender) must document clear title to the asset. This may be a registered deed or title, a purchase and sale contract, mortgage payoff documents, an appraisal, insurance documents, etc.

f. Loan Secured by The Investor's Assets

When the source of the investment funds is a loan secured by personal assets, the investor should execute a formal note with the lender and provide documentation of title to the asset.

g. Inheritance

If the investor claims to have inherited some or all of the investment capital, a certified copy of the will, trust or other official instrument, naming the beneficiary, and the amount conveyed to the investor. This is one of the instances where a formal personal financial statement, showing all assets, liabilities and net worth and certified by the client's CPA or accountant, can be useful.

4. Proving Up the Path of Funds

The second area where USCIS adjudicators often raise objections and issue Requests for Evidence (RFE) that slow the adjudication process even more, is the so-called "path of funds." Depending on the home country of the investor, and its currency control regime, it may present more of an evidentiary problem than the "source of funds" issue.

This issue refers to the USCIS requirement that the investor prove that the lawful capital was in his control and that he or she transferred it to the EB-5 investment project, such that it is "at risk" and no longer within his control.

The lawyer must therefore construct a chain of documentation starting with establishing the lawful source of funds, and continuing with the investor's signature on the subscription agreement, obligating him or her to contribute the capital. It is the next link in the chain—i.e., the transfer of the funds from the control of the investor to the control of the regional center or enterprise.—that can present evidentiary problems.

China, for example, currently restricts each citizen to the purchase of a maximum of $50,000 in U.S. dollars per year. Accordingly, unless the Chinese investor has been planning the EB-5 investment for many years, he or she will need to have family members and friends make accommodation purchases of dollars, which the investor then reimburses in the equivalent in Chinese yuan. Each person in this chain must be identified, and the wire transfers and deposits made for the benefit of the investor must be documented, as must the reimbursements in yuan.

The second aspect of the path of funds problem is the limitations some countries place on citizens owning offshore dollar accounts. Investors work around this kind of restriction by using the dollar accounts of friends or relatives abroad, to which the investment capital can be wired. This "accommodation" account holder then wires the investor's funds to the regional center escrow account, or to the enterprise to which the capital is being contributed.

The final step in the path of funds chain of evidence is the confirmation of receipt of the minimum capital required by the regional center or project to which the investor has subscribed. Typically, this consists of one or more wire transfer receipts, stating the amount, date of receipt, and "for the benefit of" the

investor, by name. A letter from the regional center confirming the full amount received is essential when multiple wires are required.

III. CONCLUSION

This paper has limited its scope to the basic legal background and of the EB-5 visa, some recent developments in USCIS adjudication practice, and the evidentiary issues that an immigration lawyer must be prepared for when representing EB-5 investors.

The EB-5 program has never lived up to its promise, or come anywhere near fully using the 10,000 visas set aside for it in 1990. If it did, at least 100,000 new jobs could be created annually. In an era of record high unemployment, this is disheartening, to say the least, particularly since the United States remains the most desired destination of immigrant investors and immigrants in general.

The USCIS under the current administration has begun the hard work of turning this cumbersome program into one that works for immigrant investors and for the policy goals set for it 20 years ago, and for that it deserves the credit. Because of the steps the agency has taken, with prodding from the American Immigration Lawyers Association (AILA) and IIUSA, the trade association for EB-5 regional centers, more investors are interested in the EB-5 program, and more immigration lawyers are taking these often difficult cases.

Experienced practitioners in this area know that there are many other EB-5 issues not discussed here in the interest of space. These include USCIS questioning the designation of Targeted Employment Areas, and country-specific source and path of funds issues. For these and other issues, the publications, telephone seminars and conferences of the American Immigration Lawyers Association (AILA) are highly recommended, as are the IIUSA-sponsored conferences.