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Immigration & Naturalization Committee Newsletter

*A quarterly newsletter of the ABA's Section of
International Law's Immigration and Naturalization
Committee*

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If you wish to contribute to the next edition of the I&N Newsletter, please contact Poorvi Chothani at poorvi@lawquestinternational.com or Melanie Glover at melanie.m.glover@gmail.com



Editor's Note

Dear Members,

We are excited to present the Immigration & Naturalization Law Committee's newsletter (the I&N Newsletter), the second one for 2014-2015. The I&N Newsletter is your portal to share updates from your jurisdiction with Committee members from around the world.

We invite you to publish updates, articles and practice pointers for your jurisdiction in this publication. Your contributions are very valuable to our readers, and we hope that you find the information shared here to be useful in your practice.

This issue contains an article entitled "*Evaluating an EB-5 Investor from a Regional Center's Perspective*" by Christian Triantaphyllis and Catharine Yen, and two articles entitled "*Express Entry: Opportunities for Permanent Residence To Canada*" and "*New Employer Compliance Work Permit Regulations for Canada*" by Jacqueline Bart. In addition, Poorvi Chothani has written an article on "*India Becomes More Welcoming! - Electronic Visas or Electronic Travel Authorization.*"

We extend our thanks to all of the contributors to this issue.

We would be delighted to enhance this publication and welcome your comments and suggestions on ways to do so.

Editors

Poorvi Chothani (LawQuest, Mumbai)

Melanie Glover (Amway Corp., Grand Rapids)

Chapter-Chair's Column

Dear Members,

We are delighted to present to you the second edition of our Committee Newsletter for this year. These three articles are insightful and present timely topics on the subject of global immigration.

We warmly welcome all members to fully participate in the Committee by

- Posting any questions or comments relating to U.S. or global migration to our listserv – intimmigration@mail.americanbar.org – we have a wealth of collective knowledge – utilize it!
- Contributing articles to our next newsletter
- Participating in our monthly committee calls
- Joining our committee during the upcoming Spring Meeting in Washington, D.C.

If you would be interested in participating in any of these areas, please let us know at nklug@balglobal.com or mjacobson@fragomen.com.

Enjoy the newsletter!

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Evaluating an EB-5 Investor from a Regional Center's Perspective

By: *Christian Triantaphyllis and Catharine Yen*

Under the Fifth Preference Category of Employment-Based Immigration, USCIS allows foreign investors to invest \$500,000 or \$1 million USD, depending on the location of the project, into a business to create jobs for at least ten U.S. workers per EB-5 investor in exchange for the opportunity to apply for a green card. The EB-5 investor must make an at-risk investment in a new commercial enterprise that undertakes for-profit activities. USCIS will designate regional centers to manage or sponsor the new commercial enterprise that is undertaking its EB-5 project. The primary advantage for regional center designation is that the regional center can count the indirect and induced jobs, in addition to the direct jobs, created by its EB-5 projects towards the job requirement.

In the realm of EB-5 immigrant investment, the relationship between the EB-5 investor and the USCIS designated regional center is a complex one. Often times, the development of the relationship between the two sides focuses on how the EB-5 investor selects a regional center project in which to make his or her \$1 million or \$500,000 investment. Factors considered by the EB-5 investor when selecting a regional center project involves both evaluating the investment opportunity and EB-5 immigration compliance issues within the project documents. Conversely, the flipside of this relationship involves determining how the regional center should decide which potential EB-5 investors to accept as an investor in the project.

For this selection process, the authors have identified three categories that regional centers should examine when accepting potential EB-5 investors into a project: securities laws, national security issues, and immigration history and

circumstances. The authors write this article to provide an overview of the types of questions and concerns that regional centers should evaluate when accepting investors for its projects.

Securities Law and National Security Concerns and their Overlap with EB-5 Immigration Law

Qualifying as an Accredited Investor

An aspect of raising EB-5 funds that a regional center must be acutely aware of is the securities law involved, particularly whether the EB-5 investor qualifies under the cover of Rule 506 of Regulation D of the Securities Act. Under Regulation D, an EB-5 investor is considered to be an "accredited investor" if:

- The EB-5 investor's earned income exceeded \$200,000 (or \$300,000 together with a spouse) in each of the prior two years, and reasonably expects the same for the current year, OR
- The EB-5 investor has a net worth over \$1 million, either alone or together with a spouse (excluding the value of the person's primary residence).¹

The concept of being an accredited investor is mentioned not to give guidance on securities law, as the authors are certainly not securities attorneys, but rather to point out that the \$1 million minimum investment requirement pertaining to EB-5 immigration law fits nicely with the "net worth over \$1 million" aspect of the being an accredited investor. Therefore, depending on whether the regional center undertakes an EB-5 project that requires \$1 million or \$500,000 investments from the EB-5 investors, the regional center should understand the amount resources it will need to dedicate to this issue. In a perfect world, an EB-5 investor who can make a \$1 million investment means that the EB-5 investor likely has a net worth of over \$1 million, thereby qualifying him or her as

¹ <http://www.investor.gov/news-alerts/investor-bulletins/investor-bulletin-accredited-investors>

an accredited investor. Of course, facts vary on a case by case basis.

National Security Concerns

Regional centers should also be focused on making sure that it is accepting investment funds from EB-5 investors who will actually be able to become lawful permanent residents if the I-526 immigrant petition is approved. This is particularly important for regional centers because of competitive market that exists in the EB-5 world. With over 600 regional centers in existence, many of them claim to have a high rate of success and approvals of getting investors their green cards. In an effort to keep up with the competition, regional centers must strive to do business with investors who are not only eligible for the EB-5 program, but who also have a high chance of obtaining the immigration benefit of becoming a green card holder that's involved with the EB-5 program. Therefore, regional centers should be diligent in not getting involved with potential investors who are bound for years of administrative processing, or worse, are designated by the United States as being a threat to national security.

Regional Centers can be diligent with regards to vetting clientele by entering each potential investor's name into the Specially Designated Nationals List managed by the Office of Foreign Assets Control. It lists individuals, groups, and entities, such as terrorists and narcotics traffickers. Their assets are blocked and U.S. persons are generally prohibited from dealing with them, and thus, are not the type of investor candidate to consider. Another example that stresses the importance of the regional center to review the background of potential investors deals with administrative processing. By setting up proper vetting systems, a regional center operator should be able to determine whether investors have a problematic travel history and thus perhaps should first address their issues through traveler redress channels before beginning the EB-5 immigrant process.

By proactively performing background checks on potential investors, the regional center facilitates its goals of doing business with EB-5 investors who will have an opportunity to make an investment and obtain a green card as fast as the EB-5 program permits.

Vetting Prominent Immigration Concerns

Notably, it is important to ensure the regional center is transacting with the right type of potential immigrants. There are several immigration factors and issues for the regional center to consider:

- **Evaluate the family for any age-out children.** Pursuant to the Child Status Protection Act, certain children who are derivative beneficiaries of an immigrant visa petition are to be classified as a "child" even if the child has already reached age 21. With an impending EB-5 cut-off date for Chinese investors (Mr. Oppenheim predicts it will happen Summer 2015), it is imperative that the immigration attorney evaluate the family to determine whether a child is likely to age out even if the I-526 petition will be filed shortly. In the event that the child is likely to age out, another strategy would be to file two I-526 petitions: one with the parent as the petitioner and another with the child as the petitioner. An age-out issue could be avoided in this way.
- **Understand the investor's previous criminal history (i.e. fraud, crimes, etc.).** This is important because even though the EB-5 investor may be able to demonstrate a lawful source of funds, the EB-5 investor may be inadmissible to the U.S. anyway due to his past crimes.
- **Ascertain the types of visas (approved and denied) that the investor has applied for in the past.** The regional center will want to ensure that the investor has not violated

status, overstayed his previous visas or accumulated any inordinate amount of unlawful presence that would significantly delay or prevent the individual from being admitted to the U.S. Particularly, if the investor has previously been denied U.S. visas, the regional center should inquire as to the reasons for the denial and whether that will affect the investor's EB-5 application. These inquiries also apply if the investor has ever had a U.S. visa cancelled or revoked. **The same due diligence should apply to the investor's spouse.** Even though the investor's spouse may not be the petitioner of the I-526 petition, the regional center should also evaluate the investor's spouse to confirm that the spouse's potential immigration or criminal concerns will not raise issues for immigrating in the future.

- **Due to the impending EB-5 visa retrogression for China, pay special attention to Chinese national cases.** USCIS policy currently requires that at least ten jobs be created within 2.5 years of the approval of the EB-5 investor's I-526 petition.² This approach allowed for approximately two years to pass after obtaining conditional residency to show job creation. This is consistent with the two years requirement to file the I-829 Petition to Remove Conditions. However, if the EB-5 investor incurs significant delays while trying to obtain the EB-5 visa at the U.S. Consulate, then several years could pass before the EB-5 investor could even obtain the EB-5 visa and become a green card holder, to the point that the timing of the 2.5 year rule for receiving credit for job

creation could have expired years ago. Thus, the EB-5 investor may not be able to demonstrate job creation 5-6 years in the future, rather than approximately 2.5 years in the future. This concept will also become a significant factor once EB-5 visa retrogression occurs for mainland born Chinese nationals, because visa retrogression will elongate the time between date the I-526 petition is approved and when the investor obtain his or her conditional green card through consular processing or adjustment of status. That delay in time will likely cause the EB-5 investor to reach the I-829 petition stage much later, perhaps as long as three to five s years later, than the more typical two to three years it takes now to get from I-526 approval to the I-829 stage. Therefore, regional centers should be aware how their mainland born Chinese EB-5 investors may affect the project and investment timeline.

- **Get a comprehensive summary of the EB-5 investor's lawful source of funds.** According to USCIS Regulations at Section 204.6(j)(3)³, "[i]n the case of petitions submitted under the Immigrant Investor Pilot Program, a petition must be accompanied by evidence that the alien has invested, or is actively in the process of investing, capital obtained through lawful means within a regional center... ." Therefore, it is important for the regional center to obtain the proper understanding of the potential EB-5 investor's source of funds background before moving forward with accepting investment funds. The regional center should request the EB-5 investors to describe any funds or assets

² USCIS Memorandum from Donald Neufeld to Field Leadership (HQ70/6.2, AD 09-38) (December 11, 2009).

³ 8 C.F.R. §204.6(j)(3)

that are intended to be dedicated towards the investment. For example, USCIS Regulations list that the EB-5 investor should provide the USCIS with copies of their personal income tax returns for the last five years to prove that the investor's funds were lawfully obtained. This obligation varies according to the income tax rules of the EB-5 investor's country of tax residency, and USCIS tends to understand that the tax rules of each country are different, yet this is a standard request for all EB-5 visa cases. Thus, if the regional center can determine whether that standard is unlikely to be met by an EB-5 investor, then that individual may not be the right candidate for the project.

Best Practices and Conclusion

Regional centers can review these issues through a strict protocol of utilizing due diligence checklists or developing a comprehensive questionnaire in order to vet these types of issues. The EB-5 program can offer one of the fastest ways for a foreign national to become a lawful permanent resident, and eventually a U.S. citizen in five years after becoming a conditional green card holder. However, without the proper vetting process and safeguards in place, both the regional center and EB-5 investor are in for a much longer immigration process full of delays if immigration issues or other factors are not addressed early on in the process.

Express Entry: Opportunities for Permanent Residence to Canada

By: Jacqueline Bart

In January of 2015, the Canadian Government rolled out a new permanent residence application management process called Express Entry (EE). This new immigration procedure involves a two-step process which, according to the government, is designed to match Canadian employers with foreign workers and to streamline the application management process. The changes are also intended to enable Canadian employers to recruit foreign workers permanently to Canada through a job bank matching process. The government has promised that it will process the majority of applications within six months. However, substantial planning and various pre-application processes must be completed in advance of the permanent residence application process.

Applicants who qualify under the immigration programs for Federal Skilled Workers (FSW), Federal Skills Trades (FST) and Canada Experience Class (CEC) are now required to apply under the new two-step system and can no longer apply to the government directly for permanent residence to Canada.⁴ These applicants are subject to a new ranking system. Provincial Nominee applications may be processed either based on the status quo or through the EE process and the provinces will be provided larger immigrant quotas.

The EE system involves two steps:

⁴ Citizenship and Immigration Canada, "Ministerial Instructions for the Express Entry Application Management System", 28 November 2014,

<http://www.cic.gc.ca/english/department/mi/express-entry.asp>, s. 2 [MI, Nov. 28, 2014].