

NEWSLETTER | APRIL 2011

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A Victory for Transparency? EB-5 Visa Attorneys Comment on the Release of Adjudicator Training Materials

At a grand total of 486 pages, the EB-5 adjudicator training materials released by USCIS last month could have a significant impact on EB-5 practice.

If nothing else, the documentation should "aid U.S. immigration attorneys in preparing and submitting more complete petition packets," said attorney [Steven Culbreath](#). The ability to do that would likely be well worth any time spent analyzing the materials, which are voluminous and full of detail.

EB-5 visa attorneys have long maintained that USCIS requests items from their clients that were never before listed as necessary for the processing of petitions. The hope of many in the EB-5 community, it seems, is that these materials will lend more transparency to adjudication protocol, making the entire process easier for EB-5 applicants and their attorneys to navigate.



Clockwise from top: Steven Culbreath, Kristina Rost, Vaughan de Kirby, Charles Kuck

The Devil in the Details

The release of these documents was a bombshell. In response to a Freedom of Information Act request, USCIS disseminated notes on how it reviews form I-526, information on federal EB-5 precedent decisions like the Matters of Soffici, Izumii, Hsiung, and Ho, copies of I-526 and I-829 denial notices, and interoffice memoranda dating back to 1998.

Copies of Requests for Evidence (RFE's) sent to individual regional centers were also included in the release, albeit with sensitive information about investors redacted. According to one of the adjudicator training presentations, "RFE's are commonly necessary," a reality that certainly has not escaped the notice of EB-5 attorneys and regional center operators over the years.

Also included in the materials is a checklist detailing information to look for in an EB-5 business plan as well as several "In-depth capital investment issues" meant to address common "deficiencies" in EB-5 investment procedure – lack of documentation proving the legal acquisition of funds or insufficient documenting of the source and path of funds, for example.

"We are not performing IRS audits of capital," the presentation states, "but we do need to track the path of the capital to make sure that it belongs to the petitioner."

Attorneys Comment on the Materials

Reaction among EB-5 attorneys has been mostly positive if not jubilant. The opportunity to understand exactly how EB-5 adjudicators approach new petitions could mean less uncertainty on the part of immigrant investors and those who represent them.

In statements provided to EB5info.com, several attorneys commented on the release of these documents and what their availability means to EB-5 practitioners and their clients. [Kristina Rost](#) of Maged and Rost thinks obtaining the materials was "a brilliant idea" that will benefit the EB-5 community:

They provide an excellent framework and insight into the interdoings of USCIS and allow us to see what emphasis is relevant for each criteria from adjudicators' point of view. Many questions still remain, of course, yet the road is becoming less stony with materials of this amplitude being available to EB-5 attorneys.

[Vaughan de Kirby](#), who practices immigration law in California, concurs:

To have this material helps assure us that we are communicating with the adjudicating officers in the language they are looking for. [...] The adjudicating officer, our client, and our firm have the same goal: a lawful EB-5 investment that stimulates job creation and provides a participating foreign investor with permanent residency. Transparency and communication in this process can go a long way toward moving us to this goal.

In spite of such encouraging commentary, only time will demonstrate whether having this breadth of new information will make the petitioning process smoother. According to [attorney Charles Kuck](#), simply knowing what adjudicators are taught does not necessarily mean those adjudicators are applying their training appropriately:

These training materials are designed to teach a new generation of unprepared examiners how to adjudicate extraordinarily complicated financial-based cases. The bigger question is this: Are the examiners receiving this training prepared to understand it and implement it correctly, or will we be faced with yet another hurdle for foreign nationals to navigate, just for the privilege of investing in America?

Even Steven Culbreath, who insists that "getting cases in and out the door 'should' be smoother" assuming USCIS and practitioners are on the same page, is skeptical. "If USCIS continues to send lengthy laundry lists of requested items not previously listed or provided to practitioners, we could still see lengthy processing problems and issues," he explained.

Overall, knowing exactly what adjudicators are looking for – or, at least, what they should be looking for – is a victory for EB-5 attorneys. Whether it smooths over several aspects of the process (or not), adjudicators' awareness that their "textbooks" are in the public domain should bring some relief to practitioners like Culbreath.

"The intent of USCIS to provide better all-round education in the EB-5 arena should be applauded," he said.

All released EB-5 adjudicator training materials are available on [EB5info.com](#). Click here to download [the first](#) and [second](#) set of documents.



Expert EB-5 Attorneys Comment on a Wide Range of EB-5 Issues in ABIL's April Webinar

In 2011, expect USCIS to issue around 6,000 of the 10,000 EB-5 visas available each year.

That's according to Stephen Yale-Loehr of [Miller Mayer](#), who participated in a recent webinar sponsored by the [Alliance of Business Immigration Lawyers](#) (ABIL). The webinar, which featured four immigration attorneys who have made names for themselves in the EB-5 community, covered a wide array of issues in EB-5 law – from the basics of the program to advising individual clients.

A [complete audio recording](#) of the webinar is available on the ABIL website. A Powerpoint presentation corresponding to the panelists' comments is also available.

In addition to Yale-Loehr, Mark Ivener of [Ivener and Fullmer](#) and Kehrela Hodkinson of the [Hodkinson Law Group](#) joined moderator Bernard Wolfsdorf of the [Wolfsdorf Immigration Law Group](#) in what [has been described](#) as an all-star panel of EB-5 attorneys.

The webinar began with Kehrela Hodkinson, who compared visa options for high net-worth clients. Focusing on the two employment-based visas most often used instead of EB-5 – the E-2 and the L-1 – Hodkinson's overview reminded listeners that EB-5, despite the current buzz surrounding it, is the best option for many clients, but not every client.

The L-1 visa, for example, is better for individuals who don't have \$500,000 to \$1 million to invest and are employed by a foreign company at the time of immigration.

17 kinds of EB-5 green card clients

While many clients' situations may be best suited for the L-1 or E-2, Mark Ivener believes attorneys should still bring up the EB-5 option.

According to Ivener, you never know when clients might be good candidates for EB-5. They could have inherited a substantial amount of money or their spouse might be in a



Clockwise from top: Kehrela Hodkinson, Stephen Yale-Loehr, Bernard Wolfsdorf, Mark Ivener

position to give them enough money to qualify. "The money doesn't have to be yours," Ivener emphasized. You can qualify for EB-5 even if a relative gives you a million dollars.

He then outlined 17 kinds of clients for whom an EB-5 investor visa might be desirable. The following list of potential EB-5 candidates comes directly from the Powerpoint presentation that accompanied this webinar:

1. Retirees
2. Potential H-1B visa holders shut out by the quota
3. H-1B visa holders nearing the six-year limit
4. Investors from non-treaty countries or E-2 investors who don't qualify for the regular EB-5 or have an "aged-out" child
5. Individual owners of a business outside the U.S. who don't qualify for an L-1
6. Entrepreneurs who want to set up a new business in the U.S. that will not create 10 jobs
7. Potential L-1 applicants who are nationals of China or Russia
8. F-1 students who want to start a business
9. Spouses of permanent residents
10. Doctors who have not passed USMLE 1, 2 and 3
11. Foreign nationals in a multiple-year immigrant quota waiting list
12. CEO's or managers of companies who also are not L-1A transferees
13. Parents who want their children to attend school in the U.S.
14. Foreign nationals whose employer cannot or will not pay legal fees and advertising costs for a labor certification
15. Graduates who cannot find a job but have money or have wealthy parents
16. Nationals who need or want to leave their country
17. Any foreign nationals with an urgent need or desire to become a permanent resident

Some EB-5 candidates less likely than others

Although wealthy retirees are among the more obvious clients for whom EB-5 is appropriate, several foreign nationals described in this list may seem less likely candidates for an EB-5 green card, at least at first glance.

Entrepreneurs who know that the business they wish to start in the U.S. is unlikely to create 10 jobs, for instance, still have the option of investing in a regional center. Recent college graduates with access to family money can take advantage of the regional center program as well.

As noted by Ivener, currently enrolled students could potentially invest their parents' money in a regional center and be permanent residents of the United States by the time they graduate.

The Individual vs. Regional Center Investment

Another topic addressed during the webinar was whether the individual EB-5 visa or investment in an EB-5 regional center is preferable for the immigrant investor. Depending on the investor's situation and motivations, one will almost certainly be more desirable than the other.

The basic (and probably the most obvious) difference between the two options has to do with who is operating the U.S. business. The individual option is appropriate for those few EB-5 investors who elect to manage a business themselves. The vast majority, upwards of 90 percent, prefers to let a regional center handle the investment.

Perhaps a less obvious difference between the two EB-5 options is the issue of direct jobs. As Mark Ivener explained, the individual EB-5 investor must show that 10 jobs have been directly created through the investment. The regional center investor, on the other hand, can count indirect jobs toward its total of 10 jobs per investor. Those jobs, in other words, do not have to be on the regional center investor's payroll.

According to Steven Yale-Loehr, the individual EB-5 investor must also be aware of very stringent USCIS requirements, including the submission of an extremely detailed business plan. USCIS will also need proof that all the funds are available at one time. It is not possible to invest a portion of the \$500,000 one year and the rest of it the following year, for example.

Individual EB-5 investors should also be aware that the immigration agency takes a "snapshot," as Yale-Loehr puts it, of the number of jobs created after two years. In other words, it's not possible to create 10 jobs the first year and still qualify for an EB-5 visa if workers are laid off the following year.

For these reasons, most EB-5 investors prefer the regional center option. It also allows them to live wherever they please, meaning they are not obligated to reside anywhere near the business in which their funds are invested.

The Powerpoint presentation that accompanied this webinar contained a useful overview of the kinds of EB-5 clients who might prefer either the individual option or a regional center investment.

Performing EB-5 due diligence

As all four ABIL presenters agreed, to arrive at the "removal of conditions" stage – the point at which an investor's I-829 petition is approved and he or she is a permanent U.S. resident – investors can expect to wait up to four years.

This reality is significant because it can have a great effect on which EB-5 regional center an investor chooses. As Mark Ivener pointed out, only 6 out of 125 [regional centers](#) have ever reached this stage with a single investor.

That's because most regional centers are quite new. A substantial number of them only received USCIS approval within the past two years.

That being the case, there are several questions that all four attorneys agreed should be asked before handing over between \$500,000 and \$1 million to an EB-5 regional center. The following list of due diligence questions comes directly from the Powerpoint presentation shown during the webinar:

1. What is the projected return on investment? (in prospectus)
2. Is there any documentation of returns on past EB-5 investment projects?
3. How many projects has the EB-5 company completed?
4. May the EB-5 applicant need to invest additional money over and above \$500,000 at a later date?
5. Does the EB-5 project have U.S. investors as well as immigrant investors?
6. Does the applicant get interest on money until it is spent on the EB-5 project?
7. When is the return paid? Monthly, yearly, or at the end of the project?
8. How is the return determined?
9. In the subscription agreement or purchase contract, is there a provision for return of money if the I-526 is denied? How much is refunded?
10. Does the investor have to make any deposit or pay any fee for the offering materials?
11. What is the amount required to be paid by the investor?
12. Does the regional center provide regular reporting of the status of the investment to the investors? At what intervals?
13. Does a referring attorney get finder's fee from the regional center? How much?
14. Has any regional center project lost money or been in default? Have investors lost money? Have there been any lawsuits?

In addition to these questions, it was also suggested that prospective immigrant investors understand whether a particular regional center has ever filed a single I-526 petition. If it has, how many have been approved or denied? Many new regional centers will have little or no information to share about their history with I-526 petitions – especially if they are opening their doors for the first time.

Even fewer can say whether their investors have cleared the removal of conditions stage.

Although the first EB-5 investor due diligence checklist provided by ABIL's attorney presenters included several questions investors should ask before committing to a specific EB-5 regional center, it is often necessary to perform due diligence on the regional center operators themselves.

Many regional centers are new. None of their investors will have reached the I-829 stage – especially if the regional center is less than two years old.

That does not mean EB-5 projects being handled by new regional centers should be avoided, however. Many of them may be a good fit for the regional center investor, and ABIL's presenters provided an additional due diligence checklist to help investors understand the business histories of regional center operators:

1. Obtain bank reference of EB-5 general partner and/or principals.
2. Obtain Dunn and Bradstreet on general partners and/or principals.
3. Any past lawsuits? (Regional Center, general partners or principals)
4. Any past criminal convictions? (general partners or principals)
5. When was the regional center established?
6. How long has the EB-5 company been doing business? Any previous business?
7. When can the investment be sold? When can the client get his or her money (\$500,000) back? How many investors have received a return of investment money?
8. How is the amount determined?
9. How many years of experience does the general partner or EB-5 principal in the investment project have in working with immigrant investor programs?
10. What precautions are taken to monitor job creation? What steps are taken if the requisite job creation has not occurred?

The source and path of EB-5 funds

Toward the end of the webinar, all four attorneys stressed the significance of showing the immigration agency where all EB-5 funds actually came from.

Every EB-5 investor must reveal to USCIS exactly how he or she has \$500,000 to \$1 million to invest in an EB-5 project. Earned income, according to Kehrela Hodkinson, is the most straightforward when it comes to showing the source of funds. The investor simply submits tax returns or wage slips.

Investment income is different. If the investor sold a home and put the profits in an investment account before finally moving the money to a checking account, for example, he or she would also have to show the immigration agency the history of those funds passing from one account to the next. This is true of all investment income used toward an EB-5 visa.

For EB-5 investors qualifying with gifted money, it is also necessary to show USCIS how the giftor of funds came into the money. Similarly, those investors with "old money" will need to show documentation detailing the history of how those funds were acquired, held, and/or invested.

As Stephen Yale-Loehr noted, investors unable to follow procedures and fulfill the requirements exactly as USCIS specifies will not be able to clear the I-829 stage and will have to leave the United States.

Whether it's the source of funds, the number of jobs created, or some other specific factor related to the process of qualifying for and obtaining an EB-5 visa, the bottom line to investors is that it is absolutely imperative that all requirements are understood – and, ultimately, met in full.



Michael Bloomberg Stresses Need for an Entrepreneur Visa

In an op-ed in Monday's Wall Street Journal, New York City Mayor Michael Bloomberg [called for creation of an entrepreneur visa](#) in hopes that it will promote job growth in the midst of high unemployment.

It has been some time since a prominent figure endorsed a U.S. visa for foreign-born entrepreneurs. Most of the buzz surrounding the entrepreneur visa – also called the "startup visa" – cooled off after Congress failed to pass comprehensive immigration reform last year.

While each chamber considered different pieces of immigration legislation, both versions contained a provision that would have granted visas to non-citizens seeking to start a business in the United States. This year, Senators Kerry (D-MA) and Lugar (R-IN) [re-introduced legislation](#) that would do the same thing. The Startup Visa Act is a new version of last year's Senate bill, and its proponents hope that the changes it includes will increase its likelihood of passage.



New York City Mayor Michael Bloomberg

If the bill becomes law, entrepreneurs who are able to secure \$100,000 in venture capital investment from an American investor will receive permanent residency if their business creates five new American jobs after two years.

The bill also contains provisions for workers on H-1B visas and graduates of American universities who have an income of \$30,000 and receive commitments from American investors. These entrepreneurs must be able to show that their venture has created three new jobs in two years or is generating more than \$100,000 in annual revenue. Entrepreneurs whose business generates at least \$100,000 in sales from the United States and creates three jobs after two years will also qualify if they meet certain revenue or financing criteria

Like the EB-5 visa, foreign nationals [would have a two-year window](#) during which to create jobs for Americans, but the investment threshold is significantly less.

Even the individual EB-5 visa – the option in which an immigrant investor operates a business in the United States without investing in a regional center – requires at least \$500,000 in capital investment to qualify. What's more, that money has to come from investors themselves, not American venture capitalists.

Passage of the Startup Visa Act would mean more opportunity for more investors to come to the United States and create more jobs for more American citizens. According to Bloomberg, the U.S. is already way behind in encouraging foreign entrepreneurs to invest here:

Our global competitors understand how crucial immigrants are to economic growth. They roll out the red carpet for entrepreneurs; we have no entrepreneur visa. They heavily recruit our advanced-degree students; we educate them and send them home. [...] [We] erect arbitrary, senseless and bureaucratic barriers to recruitment. And we do all this even as our unemployment rate hovers around 9%.

Startup visa proponents often emphasize the following: Somebody somewhere will start the next Google or Apple. It's only a matter of time before it happens, and there is plenty of global competition to be the country in which a future Steve Jobs decides to run his or her business.

A simple incentive like permanent residency could go a long way in convincing the world's innovators to choose one destination over another.

photo by [Rubenstein](#)

Lunch and Learn Series to Discuss EB-5

On May 18 from 1:00-2:30 PM EST, the Section of Litigation's Immigration Litigation Committee (American Bar Association) will host a Lunch and Learn Series, the focus of which is the EB-5 program.

 AMERICAN BAR ASSOCIATION

Entitled "Avoiding Securities Pitfalls When Advising EB-5 Clients," prominent immigration attorneys Peter S. Erly, [Michael G. Homeier](#), and Joseph W. Bartlett will join [Michael Gibson](#), Managing Director of USAdvisors.org, in a discussion of securities issues related to EB-5.

The teleconference is 100% free and open to anyone who would like to attend. To RSVP, please send an email with the subject line "ABA May Telecon" to klaskoonline@klaskolaw.com.

Feel free to contact [Kate Kalmykov](#), Immigration Litigation Committee Programs chair at kkalmykov@klaskolaw.com for more information.



Philadelphia Regional Center Repays Full Principal to 26 EB-5 Immigrant Investors

Out of Philadelphia comes a success story for a long-established EB-5 regional center.

CanAm Enterprises, which operates four regional centers in [Pennsylvania](#), [California](#), and [Hawaii](#), has just announced that all 26 investors in its Temple University Health System project have been repaid the full principal on their \$500,000 investment. The \$13 million loan, which reached maturity on April 22, 2011, created in excess of 600 jobs in the United States, more than double the 260 required. As a result of the job creation, permanent green cards were issued to investors in the Temple University Health System project.



Temple University Health System

The EB-5 loan for Temple University Health System project financed a new administrative headquarters for the health organization, a nonprofit institution that owns and operates

seven different facilities associated with Temple University. According to their website, physicians at the Temple University Health System include the nationally recognized faculty of the Temple University School of Medicine and are supported by the advanced resources of its major teaching hospitals.

This repayment of the Temple University Health System loan represents the seventh EB-5 project for which all CanAm investors have received principal in full and on time. According to CanAm's website, it is anticipated that five more projects will be repaid by the end of 2011.



USCIS Approves First EB-5 Immigrant Investor in Milwaukee Development

According to a business article from Milwaukee's Journal Sentinel, USCIS [has approved](#) the first of 30 Chinese citizen EB-5 investors, each of whom will provide \$500,000 in equity capital for the tentative development of a new hotel and restaurant in [Milwaukee, Wisconsin](#).



Gary Gorman of the development company Gorman & Co., plans to use EB5 visa funding to convert the former Pabst brew and mill house, at the northwest corner of W. Juneau Ave. and N. 10th St., into a six-story, 90-room extended stay hotel and a German Hofbrauhaus restaurant.

Gorman and Cincinnati Restaurant Group Inc., which operates a Hofbrauhaus restaurant in Newport, Kentucky, are currently negotiating a lease for the 18,000 square foot area.

The Hofbrauhaus restaurant will open on the hotel's first floor, and it will feature traditional Bavarian and American dishes as well as an outdoor beer garden. The original Hofbrauhaus is one of Munich, Germany's most popular and oldest breweries.

While the [EB-5 investment project](#) cannot begin without the rest of the \$15 million in foreign investor capital, developers are optimistic that construction will begin this summer.

"That's one out of 30," says Gorman, referring to the single investor who has "cleared" the I-526 stage. "But it's very significant because it means the USCIS didn't have any problems with the development itself.

Approval for the first Chinese investor comes after six months of waiting to hear from USCIS, so it's no surprise that Gorman is cautioning all involved that the federal approval process is slow and that there are no guarantees that the development will get the go ahead. However, now that the first investor has been approved, the hope is that approval for the remaining foreign investors will follow suit.

\$3.8 million in federal historic preservation tax credits will also help finance the development.

photo: Jeramey Jannene



EB-5 Program to Fund Los Angeles Marriott Development

A recent [press release](#) from Marriott News Center named the EB-5 Investor Green Card Program as the sole equity funder for a new 377-room Marriott hotel tower to be built in downtown Los Angeles.



American Life, Inc., which we [profiled in an article last month](#), is partnering with Marriott International, [EB-5 Regional Center Management Los Angeles](#), Williams/Dame and Associates, the firm behind the city's innovative "South Park" residential towers (EVO, Luma, and Elleven), and commercial real estate firm Nomad Ventures LLC in the effort.

According to the release, a new 22-story, 300,000 square-foot high-rise will house two Marriott International hotel brands: Courtyard by Marriott® and Residence Inn by Marriott® and will be located at the Northwest corner of Olympic Boulevard and Francisco Street. "It is clear to us that AEG's leadership in creating L.A. LIVE continues to be a catalyst for economic activity in this neighborhood. We hope, and fully expect, that there will other investors with new projects right behind us," said Homer Williams of Williams/Dame & Associates.

The hotel will serve the near-by sports and entertainment district in hopes that it will become a convenient resting place for event visitors to the Nokia Theatre L.A. LIVE, as well as for business travelers working in the area.

The new development is anticipated to create many well-paying jobs and have a positive impact on both the Convention Center and overall dynamics of the city.

"This project will create countless local construction and permanent jobs and will expand Los Angeles' infrastructure to support large-scale conventions that generate significant revenue for the City," said Los Angeles Mayor Antonio Villaraigosa.

Construction is still almost a year away, with an anticipated start date of March 2012. The hotel is scheduled to open in March 2014.

photo: [CaribDigita](#)



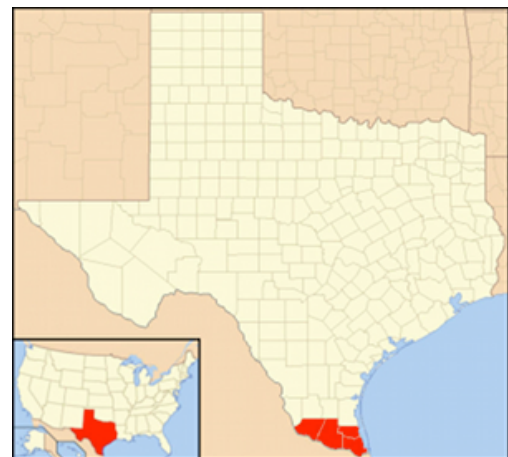
Could a Census Lawsuit Affect a Texas City's EB-5 Visa Program Ambitions?

Everything is bigger in Texas.

Even the city of Harlingen in the Rio Grande Valley grew 12.6% between 2000 and 2010, according to the latest census figures.

But for Mayor Chris Boswell, that isn't sufficient. "I definitely believe Harlingen's population is undercounted," Boswell told the local Valley Morning Star newspaper.

In fact, the city just joined Cameron County, Texas – the county in which it is located – in a lawsuit against the U.S. Census Bureau challenging the new population count. Whether doing so is in the city's best interest is a strictly local issue, but the topic arose in an unusual context.



Harlingen, Texas

It seems the city [decided to enter the lawsuit](#) at the same time it approved formation of an EB-5 regional center. While the two issues wouldn't seem to have anything to do with one another, that may not be the case.

As [attorney Joseph McCarthy](#) recently brought to our attention, it's possible that the census lawsuit could affect the city's ability to qualify as a TEA, depending on how the boundaries are determined.

At this very early stage in the process -- the city has merely approved establishment of the regional center -- it is unlikely that TEA designation is at the forefront of the commissioners minds.

On the other hand, it's also possible that they're well aware of the city's potential TEA designation and expect to qualify for it regardless.

But if the census lawsuit is successful, and through its success Harlingen can no longer claim TEA status, it would be an unusual moment for the EB-5 immigrant investor program and would make it more difficult for the city to woo investors.

With a TEA designation, Harlingen would be a more competitive player in the regional center marketplace.

Without it, investing in Harlingen will be twice expensive for the prospective immigrant investor.

image: [Wikicommons](#)



**Are you an EB-5 practitioner who would like to contribute an article?
Email Adam Green, Editor: adam@usadvisors.org
or contribute directly at EB5info.com**

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