

REGIONAL CENTER'S ACHILLES' HEEL IS OFTEN THE INVESTOR'S MONEY

By Joseph Patrick Whalen (Friday, January 22, 2016)

I have been very vocal for years about the need for improved knowledge, skills, and ability (KSAs) of EB-5 Regional Center principals/sponsors and staff. Due diligence and compliance efforts as well as healthy plans for oversight of projects are also of critical importance. Some folks have wondered why I have been so adamant and persistent (*perhaps "unrelenting"?*) about these topics. I will share some of my thinking and observations in the hope of enlightening the confused and any nay-sayers out there.

For a start, just when you think that you thought of everything, there might just be one little (or huge) thing missing. When you ask "What could possibly go wrong?" something does. Maybe it might be easier to grasp if you think of "Murphy's Law". That is the old adage that imbues the sentiment that *if anything can go wrong, it will, and at the worst possible time.*¹ After that lengthy introduction, I will get to the point of the title.

Regional Centers (RCs) work hard and put so much effort into their project's documents that they tend to overlook everything about their EB-5 investors' money *except* getting their hands on it. I have urged RCs to **vet the investors' money** to the same high standards employed by USCIS. RCs need to be mindful of not only USCIS but also need to beware of various other government agencies. For instance, the Security and Exchange Commission (SEC) Office of Compliance Inspections and Examinations (OCIE) [announced](#)² that it will allocate examination resources to specific priorities, including:

"Private Placements. We will review private placements, including offerings involving Regulation D of the Securities Act of 1933 or the Immigrant Investor Program ("EB-5 Program") to evaluate whether legal requirements are being met in the areas of due diligence, disclosure, and suitability." At p. 4

¹ There are other variants of the phrase such as: *Anything that can go wrong, will go wrong.*

² <https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2016.pdf>

Other agencies look at EB-5 money from other angles. OFAC maintains a list of people and institutions with whom Americans are forbidden to do business. Their SDN List and various other lists are regularly updated and available [online](#).³ RCs need to ensure that their investors' money does not pass through OFAC prohibited financial institutions as well. OFAC is not alone, FINCen ([Financial Crimes Enforcement Network](#))⁴ deals with such topics as anti-money laundering efforts as well as anti-terrorism efforts. I will remind the reader of the case of Ofer Biton, an Israeli national who sought an EB-5 visa but ran into trouble over his funds. In that case, USCIS worked with the FBI when serious irregularities showed up in his submitted documentary evidence. Read the complaint [here](#),⁵ and one of my earlier [articles](#)⁶ on this topic. RCs must not lose sight of these concerns. If RCs take to heart all the lessons that can be learned by simply studying a few [AAO non-precedent decisions of denied I-526 petitions](#)⁷ as to the agency's concerns about fully documenting and tracking the source and path of funds, they would be doing themselves a favor.

In particular, folks might start by reading [Matter of J-Z-, ID# 14962 \(AAO Dec. 30, 2015\)](#)⁸ which involved an investor in a Regional Center who contributed a full one-million dollars plus a subscription fee of \$45,000.00. Unfortunately for that RC, IPO was not satisfied to the *preponderance-level standard of proof* that the funds contributed were proven to be 1.) lawful, or 2.) the petitioner's own. I have not heard about what happens next under these circumstances in real life. With that said, I know what EB-5 jurisprudence *requires* next. Again, I am unsure what actually happens next in reality. First, in case the readers need to refresh their memories EB-5 law on topic, here goes.

³ <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>

⁴ <https://www.fincen.gov/>

⁵ <http://www.slideshare.net/BigJoe5/usa-v-ofer-biton-eb5-visa-fraud-complaint-8132012>

⁶ <http://www.slideshare.net/BigJoe5/dirty-money-and-tainted-investors-ruin-eb5-projects>

⁷ http://www.uscis.gov/laws/admin-decisions?topic_id=1&newdir=B7+-+Immigrant+Petition+by+Alien+Entrepreneur%2C+Sec.+203%28b%29%285%29+of+the+INA/

⁸ [http://www.uscis.gov/sites/default/files/err/B7%20-%20Immigrant%20Petition%20by%20Alien%20Entrepreneur.%20Sec.%20203\(b\)\(5\)%20of%20the%20INA/Decisions%20Issued%20in%202015/DEC302015_01B7203.pdf](http://www.uscis.gov/sites/default/files/err/B7%20-%20Immigrant%20Petition%20by%20Alien%20Entrepreneur.%20Sec.%20203(b)(5)%20of%20the%20INA/Decisions%20Issued%20in%202015/DEC302015_01B7203.pdf)

INA §203 [8 U.S.C. §1153] Allocation of immigrant visas⁹

(b) Preference allocation for employment-based immigrants

Aliens subject to the worldwide level specified in section 1151(d)¹⁰ of this title for employment-based immigrants in a fiscal year shall be allotted visas as follows:

(5) Employment creation

(A) In general

Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise (including a limited partnership)-

(i) in which such alien has **invested** (after November 29, 1990) or, is actively in the process of investing, **capital** in an amount not less than the **amount specified in subparagraph (C)**, and

(ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

(B) Set-aside for targeted employment areas

(i) In general

Not less than 3,000 of the visas made available under this paragraph in each fiscal year shall be reserved for qualified immigrants who invest in a new commercial enterprise described in subparagraph (A) which will create employment in a targeted employment area.

(ii) "Targeted employment area" defined

In this paragraph, the term "targeted employment area" means, at the time of the investment, a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate).

(iii) "Rural area" defined

In this paragraph, the term "rural area" means any area other than an area within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States).

(C) Amount of capital required

(i) In general

Except as otherwise provided in this subparagraph, the amount of capital required under subparagraph (A) shall be \$1,000,000. The ~~Attorney~~

⁹ [http://uscode.house.gov/view.xhtml?req=\(title:8%20section:1153%20edition:prelim\)%20OR%20\(granuleid:USC-prelim-title8-section1153\)&f=treesort&edition=prelim&num=0&jumpTo=true](http://uscode.house.gov/view.xhtml?req=(title:8%20section:1153%20edition:prelim)%20OR%20(granuleid:USC-prelim-title8-section1153)&f=treesort&edition=prelim&num=0&jumpTo=true)

¹⁰ References are to 8 U.S.C. section equivalents of INA sections.

~~General~~, in consultation with the Secretary of Labor and the Secretary of State, may from time to time **prescribe regulations** increasing the dollar amount specified under the previous sentence.

(ii) Adjustment for targeted employment areas

The ~~Attorney General~~ may, in the case of investment made in a targeted employment area, specify an amount of capital required under subparagraph (A) that is less than (but not less than 1/2 of) the amount specified in clause (i).

(iii) Adjustment for high employment areas

In the case of an investment made in a part of a metropolitan statistical area that at the time of the investment-

(I) is not a targeted employment area, and

(II) is an area with an unemployment rate significantly below the national average unemployment rate,

the ~~Attorney General~~ may specify an amount of capital required under subparagraph (A) that is greater than (but not greater than 3 times) the amount specified in clause (i).

(D) Full-time employment defined

In this paragraph, the term "full-time employment" means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

8 C.F.R. §204.6 Petitions for employment creation aliens.

(e) Definitions. As used in this section:

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair market value in United States dollars. **Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act.**

Invest means to contribute **capital**. A contribution of **capital** in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of **capital** for the purposes of this part.

(g) Multiple investors—

(1) General. The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur by **more than one investor**, provided each petitioning investor has invested or is actively in the process of investing the required amount for the area in which the new commercial enterprise is principally doing business, and provided each individual investment results in the creation of at least ten full-time positions for qualifying employees. The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an **alien entrepreneur** even though there are several owners of the enterprise, **including persons who are not seeking classification** under section 203(b)(5) of the Act and non-natural persons, both foreign and domestic, **provided that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means.**

(2) Employment creation allocation. The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any **reasonable agreement made among the alien entrepreneurs** in regard to the identification and **allocation of such qualifying positions.**

Assuming *arguendo* that there are no major disasters; and that USCIS is satisfied with: the business plan, economic analysis and its job projections (i.e. *reasonable methodologies*), and the deal structure; there is still another hurdle. The RC must rely on its investors to prove that their funds are *their own* and that they are *lawful* funds. This may be as big of a due diligence problem for RCs, as investment due diligence is for the investors. Those investors who fail to seriously check out the investment vehicles are fools. On the flipside, RCs that accept funds that have not been sufficiently sourced and tracked are also fools.

The critical part of the above regulation states two critical requirements. Firstly, in order for all EB-5 investors to pass muster with USCIS you have to demonstrate that “*all capital invested is **identified***”. Secondly, you must demonstrate that “*all invested capital has been **derived by lawful means***”. If these two requirements are not met then the whole of the project funding becomes tainted for EB-5 purpose. In order to preserve eligibility for the EB-5 investors whose funds were sufficiently sourced as their investor’s own, the investors with

insufficiently sourced funds needs to be cut loose and replaced. It is easier to require investors to show the source of their funds upfront and decline to accept investors who cannot demonstrate lawful source of their funds. Can you understand why the alien investors' money can be an "Achilles' Heel"? In EB-5 **pooled** investments, one bad apple does spoil the whole barrel!¹¹

Try not to shoot yourself in the foot with dirty money or inadequate sourcing efforts that would spoil the immigration opportunity for the rest of the EB-5 investors.

That's my two-cents, for now!



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¹¹ Other variants exist *such as*: one bad apple spoils the (whole) bunch.