

Due Diligence: NOT Just A Catchphrase

By Joseph P. Whalen

Companies have sprung up for the express purpose of performing “due diligence” for EB-5. Great! What the heck do they mean by that? The term “due diligence” has a variety of meanings in a variety of contexts. Here are a few of them.

From http://www.investorwords.com/1596/due_diligence.html

The process of investigation, performed by investors, into the details of a potential investment, such as an examination of operations and management and the verification of material facts.

From <http://www.merriam-webster.com/dictionary/due%20diligence>

- 1:** the care that a reasonable person exercises to avoid harm to other persons or their **property**
- 2:** research and analysis of a company or organization done in preparation for a business transaction (as a corporate merger or purchase of securities)

First Known Use of DUE DILIGENCE was in 1877

From <http://www.investopedia.com/terms/d/duediligence.asp#axzz1deOrsckS>

- 1.** An investigation or audit of a potential investment. Due diligence serves to confirm all material facts in regards to a sale.
- 2.** Generally, due diligence refers to the care a reasonable person should take before entering into an agreement or a transaction with another party.

Investopedia further explains Due Diligence this way:

- 1.** Offers to purchase an asset are usually dependent on the results of due diligence analysis. This includes reviewing all financial records plus anything else deemed material to the sale. Sellers could also perform a due diligence analysis on the buyer. Items that may be considered are the buyer's ability to purchase, as well as other items that would affect the purchased entity or the seller after the sale has been completed.

2. Due diligence is a way of preventing unnecessary harm to either party involved in a transaction.

Please take note of the phrase in #1 above “plus anything else deemed material”. Now ask yourself exactly what is material in an EB-5 investment? The answer is as varied as the nature of the project and the backgrounds of the people involved.

Black’s Law Dictionary (9th Edition, 2009) tells us:

due diligence. (18c) **1.** The diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. – Also termed *reasonable diligence*. **2. Corporations & securities.** A prospective buyer’s or broker’s investigation and analysis of a target company, a piece of property, or a newly issued security. • A failure to exercise due diligence may sometimes result in liability, as when a broker recommends a security without first investigating it adequately. [Cases: Securities Regulations — 25.21(4), 25.62(2).]

Proper due diligence is accomplished through asking the right questions and providing acceptable answers. That means that due diligence is reliant on honest and accurate disclosure of necessary information. In EB-5, these key concepts continue to evolve just as the program as a whole continues to evolve, primarily through trial-and-error, with plenty of errors.

Who is responsible for performing due diligence in an EB-5 deal? Who needs to ask the questions and who needs to make disclosures? The answers to these questions depends on what is being asked, vetted, or “checked out” but the easy answer is: EVERYONE INVOLVED.

- The stand-alone EB-5 investor has a responsibility to any dependent family members (and *vice versa*); or partners in their entrepreneurial venture.
- The Regional Center (RC) has a responsibility to ALL their partners and investors whatever their role or classification in the grand scheme of things.
- RCs need to vet their investors and any potential partners in their projects.
- Governmental agency partners are relying on the RC to make a full disclosure of plans.
- Those same government agencies are obligated to check on the RC sponsors to protect their constituents from harm (take a look at Mamtek, El Monte, and Victorville). Follow-up or “*keeping tabs on the other players*” is crucial.

- The EB-5 investors are relying on the RC to only partner them with other viable investors whether EB-5, domestic, or “others”.
- Non-EB-5 investors and partners are relying on the EB-5 investors to make full disclosures as to “lawful funds” and any “inadmissibility” or other “immigration” issues.
- Likewise, EB-5 investors are relying on partners with “lawful funds” in order to get their greencards.
- The business experts are expected to produce viable, comprehensive, detailed, and credible business plans.
- The economists are expected to produce accurate and verifiable economic forecasts and job creation projections.
- The new commercial enterprises (NCEs) are expected to only hire work authorized U.S. workers and provide some sort of evidence of it.
- Employers have an obligation not to unlawfully discriminate in their hiring practices and to respect privacy of certain of their employees’ information.
- Job applicants/employees are expected to provide valid evidence of legal work authorization and identity.
- The foreign recruiters are obligated to make accurate representations to prospective foreign investors.
- Financial and securities experts are relied upon to make sure that the offerings are lawful and in compliance with SEC, OFAC, IRS or other regulations.
- Developers and architects are expected to produce plans and blueprints that meet engineering and code requirements.
- Immigration legal experts are expected to help the RC to help the EB-5 investors meet USCIS requirements.
- USCIS needs to help the immigration legal experts help the RC help the EB-5 investors meet EB -5 statutory requirements and make the program function in accordance with Congressional Intent.
- And the lists of expectations, responsibilities, and obligations go on and on

Obviously, EB-5 is not easy but it is not impossible either. Once the major processes are in place it can be easy enough to cycle EB-5 and other investors through RC projects. A strong foundation will make the continued viability of any Regional Center and the entire USCIS managed EB-5 Immigrant Investor Program much more workable than it has been until now. As USCIS enhances its structure so too must the private sector players enhance and/or create their own industry’s infrastructure.