

# *Is Your Money Of Suspect Origin?*

*By Joseph P. Whalen (Thursday, November 24, 2016)*

I have written previously (*ad nauseum?* No, of course not.); on the topic of EB-5 money, especially “Dirty Money” but also “OPM” (Other People’s Money), and *unsecured* loan proceeds. I see great value in being strict by demanding that the petitioner’s money be squeaky clean. In short, he or she needs to be *transparent* and forthcoming about the source and path of all capital invested.

“An examination of a restriction placed on the use of loan proceeds is relevant in determining whether a petitioner has established; by a preponderance of evidence, the lawful source of investment funds. For example, if the petitioner obtains a loan from a lawful source, such as a bank, the loan proceeds may nevertheless be unlawful if the petitioner obtained the loan by improper means, *e.g.*, fraud and intentional misrepresentation on the loan application.”

[Matter of Y-H-, ID# 73293 \(AAO Nov. 1, 2016\)](#), at p. 2

“The AAO further found that Chang failed to designate the nature of her employment for three of her four jobs and did not submit tax information for five years as the regulations require. See A.R. 20. These are **hypertechnical requirements to serve a valid government interest; i.e., to confirm that the funds** utilized in the program **are not of suspect origin.**”

See [Spencer Enterprises, Inc. v. United States, 229 F. Supp. 2d 1025, 1040 \(E.D. Cal. 2001\)](#), *aff’d*, [345 F.3d 683 \(9th Cir. 2003\)](#).

There is such *huge demand* for EB-5 visas that the developers utilizing this source of funding can afford to be as *strict* as USCIS prefers. Any of the many potential EB-5 investors that exhibits *any problem* can easily be excluded by the developers and/or Regional Centers. For each one turned away, there might be one or two {DOZEN} waiting to take that slot. It is perhaps worth mentioning at this point, that the vast majority of EB-5 investment is through USCIS-Designated Regional Centers, so this discussion is geared towards that reality. However, to those few non-Regional Center, Direct EB-5 investors, you self-petitioners and your counsel, can be easily adapt these principles, and “best practices” mentioned below, to your own case preparation activities.

IIUSA has just announced the adoption of a new “Best Practice” somewhat related to this topic. Under the heading of **Regional Center Oversight/Project Selection**, best practice number 12 reads as follows.

“If a developer, acting as the issuer, puts together the professional team that will be preparing the EB-5 project and/or offering documents, the regional center should insist on a right to have its own or an independent third-party professional team review and provide comment on all documents. The regional center as an issuer will usually have its own team of professionals to prepare the EB-5 project and offering documents. If the EB-5 project wants to have its own team of professionals to review and comment, this may not be enough.

- A Regional Center should utilize a fund administrator that is independent of the job creating enterprise to implement due diligence fund control measures in order to track the lawful source, transfer, use and disbursement of funds.
- A Regional Center should obtain, at least reviewed, and ideally audited, financial statements for all NCE’s and JCE’s.
- The regional center should actively monitor, or by written agreement, cause others to actively monitor, the ongoing activities of the project during the conditional residency period. This monitoring can include, but not be limited to the following:
  - Tracking of construction expenditures through recording of invoices and canceled checks on a quarterly basis,
  - If the project includes an operational phase of a business which is expected to create jobs, then the tracking of business-generated revenues, if the expenditure approach was used to estimate job creation at the I-526 stage, or the tracking of direct employee hiring through I-9s, E-Verify records and/or quarterly payroll records.”

Found at: <https://iiusa.org/regional-center-operations/>

I believe that independent third-party oversight, due diligence, project review, and verification, etc.... are not just a *best* practice, but an *excellent* practice. There are a growing number of EB-5 service providers to choose from.

Next, I want to touch upon an often overlooked element of an EB-5 investment. While it seems that everyone is familiar with the requirement that the invested capital must be placed “at risk”, many forget that it must be placed at risk *for the purpose of generating a return*. [8 C.F.R. § 204.6\(e\)](#), defines a commercial enterprise, in part, as “any for-profit activity formed for the ongoing conduct of lawful business...” If there is no intention to at least try to make any profit then the investment will be viewed as *bogus*, and rightly so because it would be. A *bogus* EB-5 investment equates to visa fraud. Visa fraud is a crime. See [18 U.S.C. § 1546](#), entitled: “Fraud and misuse of visas, permits, and other documents” which states, in part:

“Whoever knowingly makes under oath, or as permitted under penalty of perjury under section [1746 of title 28, United States Code](#), knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact-

Shall be fined under this title or imprisoned not more than 25 years ...”

Please recall the simple fact that, *in reality*, there are only ~3,250 actual EB-5 investment opportunities available annually with each one accounting for one I-526 petition. Only the actual investors file these forms. The investor gets one EB-5 visa, and the remainder of the 10,000 visas<sup>1</sup> will be allocated to the spouses and children of the actual investor-petitioners. Even if you don’t do the math, you can see that each I-526 represents one family’s allotment of visas. In that there are now somewhere [around 20,000± I-526 petitions pending](#), representing as many individual investments, it will take several years to work through the backlog of pending petitions. Given this situation, the entire EB-5 industry, both the government and stakeholders, can afford to be picky. It’s a buyer’s (or borrower’s) market. Any investor with even only remotely troublesome money issues can be kicked to the curb with no harm done to the developers, Regional Centers, and their various EB-5 projects. It should be just the opposite.

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<sup>1</sup> [8 U.S.C. § 1151](#); [§1152](#); [§1153](#); and [§1154](#)

Considering all of the above, if or when, third-party professionals are engaged, *as suggested*, what qualities will you seek in them? In other words, precisely which *Knowledge, Skills, and Abilities* (KSAs) do you need for the EB-5 project(s) you have at-hand? What are the qualities necessary for *the particular business venture* being financed or undertaken? What evidence will prove the requisite job creation? More precisely, according to the Economic Model which was used to create the Economic Impact Analysis (EIA), what are the ***conditions precedent***<sup>2</sup> that need to be proven in order to support the job creation predictions? In EB-5, aside from “direct employees” who are actually named through the production of “specific evidence” from among that which is listed in the regulations, most jobs are “indirect” as predicted in an EIA. Indirect jobs are substantiated through production of documentary evidence that satisfies USCIS by a “preponderance of the evidence” *standard-of-proof*,<sup>3</sup> where *preponderance* means “a superiority in weight, power, importance, or strength”. See [Merriam-Webster Dictionary online](#)<sup>4</sup>. What specific documentary evidence and data need to be collected and tracked over the course of the development of the project? As a place to start, if you can’t answer these questions, hire someone who can!

However, it might be necessary to rollback this discussion a bit further. If the jobs have not yet been created at time of filing the I-526 petition, the petitioner will need a *Matter of Ho*<sup>5</sup> compliant Business Plan (BP). A few developers might present a BP to a Regional Center but only a small percentage of those will meet EB-5 requirements. There is some debate as to which is the *first professional* that should be brought on board first. Some will want a very preliminary and quick “guesstimate” on job creation potential and will seek an

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<sup>2</sup> See pages 9-10 of <http://www.slideshare.net/BigJoe5/a-trade-off-between-quality-and-quantity-in-eb5>  
“Many **indirect** job creation projections are based on stated assumptions. **Assumptions** in this context may later morph into **conditions precedent** that are deemed necessary for the fulfillment of obligations and supportive of a finding that due to the completion of one stated objective or the meeting of a benchmark or deadline for completion of **some identified condition** that **another stated result is reasonably also deemed true and/or accomplished**. If X is proven true, then Y is accepted as true.” *Id.* p. 9

<sup>3</sup> *Matter of Chawathe*, 25 I&N Dec. [369](#) (AAO 2010)

<sup>4</sup> Visited on November 24, 2016.

<sup>5</sup> 22 I&N Dec. [206](#) (AAO 1998)

Economist as their first hire, or more likely as a contractor. Others will be fully confident of a high job count and will therefore, concentrate on the BP first. Only a few developers or Regional Centers will have the necessary talent in-house to produce a *Ho* compliant BP and will instead seek a professional Technical Writer to produce their BP before doing anything else.

Getting back to the question expressed in the title of this essay, ***is your money of suspect origin?*** How do you vett<sup>6</sup> your EB-5 investors? How about the *non*-EB-5 investors? How do you trace the money's path back to the source? For that matter, what was the source? How do you prove all of this stuff? It might be necessary to hire or contract an auditor or accountant; possibly even a *forensic* accountant. What anti-money laundering rules, regulation, processes, and/or procedures must be followed? How do you do that? I am sure that I must be missing something here, because I am not a financier, securities attorney, economist, technical writer<sup>7</sup> (for BPs), auditor, or forensic accountant.

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To this point, I have been addressing the developers and Regional Centers, but the EB-5 investors need to take heed as well. It will be “your money” that needs to be proven clean! Firstly, is it actually yours? Was it a gift? When using gifted money, the burden of demonstrating the source and path of funds falls on the gift-giver, sort-of. Technically, it will be the investor's burden to prove the source and path of the gift-giver's money. If the gift-giver happens to be the head of a drug cartel, then the investor is screwed.

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<sup>6</sup> Per [www.Dictionary.com](http://www.Dictionary.com), **vetting**: to appraise, verify, or check for accuracy, authenticity, validity, etc.: *An expert vetted the manuscript before publication.*

<sup>7</sup> I do perform document review and evaluation for EB-5 compliance purposes as a third-party professional in concert with a **registered** (bio) [Investment Advisor](#) (contact form) and alongside other firms of professionals for *Risk Analysis & Due Diligence*. I edit or offer suggestions about potential changes to project-specific transactional and organizational documentation. I also prepare training materials across all topics in immigration, nationality, naturalization, citizenship, or other related laws and “benefit requests”. **Contact me at:** [joseph.whalen774@gmail.com](mailto:joseph.whalen774@gmail.com)

If not a gift, is it “loan proceeds”? As AAO pointed out in *Matter of Y-H*, *supra*, if you are trying to invest loan proceeds, did you obtain it under false pretenses? Did you actually state on your loan application that you were going to invest it in an effort to obtain an EB-5 immigrant visa so you could move to another country? Really? And the bank was OK with that? Or did you state that you were going to purchase a vacation home in the mountains, or at the beach? I suppose that taking a mortgage on real property might be OK. However, is it your property, free-and-clear, no strings attached? Perhaps, you are a “co-owner”. Are you legally entitled to mortgage the property?

Now, let’s suppose that you sold a piece of property? Was it all yours, or were you a co-owner? Were you free to sell it? You were, great, but was it 100% yours? No, you owned half, was that amount enough to cover your investment? No, you needed 100% of the sale proceeds? Who was the other co-owner? Where did you and that other person get the money to buy the property in the first place? You inherited it? Can you show how the property was originally purchased? Grandpa bought it. Where did Grandpa get the money to buy it? He used his savings from his wages. Great! Where did he work? At the widget factory on the edge of town. OK, prove it.

I could go on and on, down various different paths, but I won’t subject you to that. I think you get the idea. ***It’s just not that simple!***

***That’s My-Two-Cents, For Now!***