

*BASIC CONCEPTS OF THE
EB-5 INVESTOR VISA*
(SECOND EDITION, JANUARY 2016)



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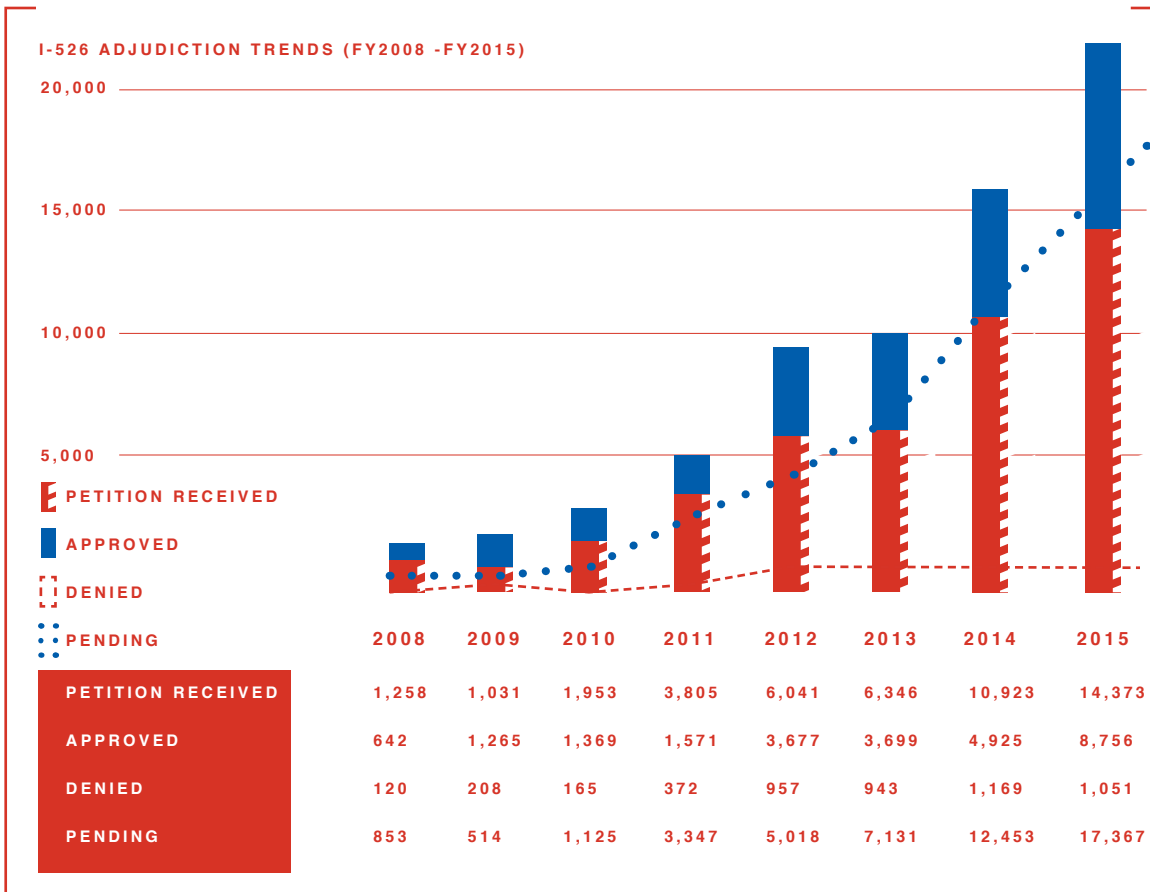
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INTRODUCTION

Although the EB-5 Program was first enacted by Congress in 1990, the explosive popularity that it enjoys today is a relatively recent phenomenon. In FY2001, only 188 EB-5 visas were issued. In FY2006, when the program started gaining in popularity, 802 EB-5 visas were issued. In FY2014 the number of EB-5 visas issued exceeded the 10,000 quota for first time in EB-5 history. (10,692 to be exact.) That quota, however, was reached in September of 2014 at the very end of the U.S. government’s fiscal year so had minimal impact on visas being processed. It was in April 2015 (7 months into FY2015) that the Department of State announced that the 10,000 visa limit was reached and implemented a cut-off date in the Visa Bulletin for investors born in mainland China. This created a long line of investors and their families from China waiting to get EB-5 visas and also created complications for Chinese families with children over 18.

In addition, in 2015, a total of six bills were introduced in the House and the Senate each proposing slightly different measures for reform and improvement of the EB-5 program. But all of the bills proposed an increase of the minimum investment amount for TEA projects from \$500,000 to \$800,000 which prompted a fire sale of sorts as investors tried to squeeze in under the \$500,000 investment amount. According to USCIS’s published data for FY2015, over 14,000 I-526 petitions were filed with 46% of these numbers filed in Q4.



The I-526 petition is the underlying petition for an EB-5 visa. One investor will file a petition and once approved, the investor’s qualified dependents (i.e. spouse and unmarried children under the age of 21) will apply for an EB-5 visa alongside the investor. Currently it is estimated that approximately 2.2 EB-5 visas are issued for each I-526 petition. This means that the 14,000 I-526 petitions filed in FY2015 alone, once approved, will account for over 30,000 EB-5 visas.

	COUNTRY	NUMBER OF VISAS
1	CHINA – MAINLAND BORN	7616
2	VIETNAM	253
3	CHINA – TAIWAN BORN	124
4	SOUTH KOREA	89
5	INDIA	71
6	GREAT BRITAIN & NORTHERN IRELAND	62
7	RUSSIA	60
8	IRAN	54
9	NIGERIA	37
10	EGYPT	31
11	CHINA-HONG KONG BORN	30

TOP 11 EB-5 ORIGINATING COUNTRIES FOR FY2015 (SOURCE: DEPARTMENT OF STATE)

The growing popularity of the EB-5 Immigrant Visa has introduced many changes to the type and size of projects being offered on the market during the past 7 years. Such changes have forced the USCIS to expand its interpretation of the EB-5 rules and regulations. Often changes in adjudication policy will come slow and create a disconnect between business reality and immigration adjudications. A great example is the use of bridge loans. At first, the USCIS did not allow EB-5 funds to replace existing financing such as bridge loans brought in to cover the gap while EB-5 funds were pending in escrow.

When I-526s adjudications took too long, however, and deals could not continue without bridge loans, the USCIS started to allow bridge loans but only if you had jumped through certain hoops. Then in the EB-5 Adjudications Policy Memorandum issued by the USCIS on May 30, 2013 (the “May 30 Memo”), the USCIS finally relented and basically said EB-5 loans could replace existing short term financing. But this was not before many projects had to go through a lot of pain.

In other words, EB-5 rules keep changing and evolving. It is important to note, however, that this is not because the “law” keeps changing. In fact, the laws related to EB-5 have not changed since Congress added the Regional Center program to existing EB-5 rules in 1993. It is how these laws are interpreted that keeps changing. Similar to other U.S. administrative laws, the immigration laws are broadly written while USCIS devises its own guidance documents. The proper use of agency guidance documents is subject to much debate across administrative law scholars in the United States. However, practically speaking, rules provided in these “guidance memos” operates the same as legally binding rules.

As of January 2016, there are five official USCIS Policy Memoranda related to EB-5 that can be found here: <http://tinyurl.com/EB5memos>.

And, as of January 2016, the May 30 Memo is still the most comprehensive document for EB-5 rules.

After many rounds of collecting public comments, the USCIS announced its comprehensive memo which attempts to address almost every aspect of the EB-5 program – basically superseding all of the existing guidance memos discussing EB-5. Considering that it took the USCIS close to two years to finalize the May 30 Memo coupled with the fact that the EB-5 program in its current form is scheduled to expire in less than nine months on September 30, 2016, it is unlikely that the USCIS will be releasing another set of comprehensive rules in the near future.

1. THE BASICS

There are two broad categories of visas through which a foreigner can hope to obtain permanent residency (colloquially dubbed “green card” or “greencard”). One is through family based immigration (i.e. spouses, parents, children and sibling) and another is through employment in the United States. Within in the employment based category are five different categories ranging from EB-1 to EB-5.¹

Under the EB-5 program, a foreigner can obtain a conditional greencard by investing a minimum of \$1,000,000 (\$500,000 under certain circumstances, as detailed below) to create a new business or invest in an existing business with the promise to create 10 new U.S. jobs by the end of the 2.5 year mark of the approval of the conditional greencard petition, called the I-526.

If the investor is investing in an existing business, the infusion of capital must create 10 additional jobs to the jobs that already exist. (There is also a provision for investing into “troubled” businesses which I will not discuss as it is rarely utilized.)

Once an investor’s immigration petition filed on Form I-526 is approved by the USCIS, she can apply for a greencard along with her spouse and unmarried children under the age of 21. If the child of the EB-5 investor is under the age of 21 when the I-526 is filed, the child will still qualify for a greencard even if he is over the age of 21 when the I-526 is approved 14 to 18 months after the I-526 filing according to the protections provided by the Child Status Protection Act (CSPA). However these protections are limited when visa numbers are backlogged, which is currently what is happening for immigrant investors born in mainland China. As such, Chinese investors whose main purpose of obtaining the U.S. greencard is for the benefit of their child and the child is near or over 18 are strongly cautioned to consider gifting funds to the child and have the child apply as the main petitioner.

Please see www.aueb5.com/chinesebacklog for a detailed discussion about the The Visa Backlog for Chinese investors and the impact it has on children.

¹The EB-1 greencard is for people who fall into the following categories: Extraordinary Ability, Outstanding Professors and Researchers, or Multinational Manager or Executive. The EB-2 is for employer sponsored petitions for those with Advanced Degrees or Exceptional Abilities; and self-sponsorship in the case of National Interest Waiver visas. The EB-3 is generally for people with college degrees and some non-degree workers. The EB-4 is a category for special cases, mostly religious workers, but also very specific groups of people like Iraqi translators. Other well-known category of visas like the F-1 student visa or H-1B work visa are non-immigrant visas (NIVs), meaning they are not greencards.

2. TEAS AND MINIMUM INVESTMENT AMOUNTS

While the basic EB-5 program is for a minimum \$1 million investment, if the investment is made in a Targeted Investment Area (“TEA”) the minimum investment is reduced to \$500,000. Many people mistakenly believe that only Regional Center projects qualify for \$500,000 investment and all Direct EB-5 investments require \$1 million. That is not the case. Whether the minimum investment is \$500,000 or \$1 million depends on the location of the project. (We will discuss the difference between a Regional Center Investment and Direct Investment below.)

However, almost all Regional Center projects are located in TEAs. In FY2015, a total of 8,773 EB-5 visas were issued. Of these, only 33 visas were from projects located in non-TEAs requiring \$1 million investments. In the same period, a total of 72 EB-5 visas were obtained through investment into Direct Investment projects and of these 24 visas were from projects in non-TEAs.

	REGIONAL CENTER EB-5	DIRECT EB-5	TOTAL
TEA (\$500,000)	8692	48	8740
NON-TEA (\$1,000,000)	9	24	33
TOTAL	8701	72	8773

VISA ISSUANCE NUMBER FOR FY2015 (SOURCE: USCIS)

In 2015, the minimum investment amount for TEA based projects was almost increased from the current \$500,000 to \$800,000. (The \$1,000,000 minimum investment amount for non-TEA based projects would have stayed the same under the proposed bill that almost made it through Congress but was pulled at the very last minute.)

Because the \$500,000/\$1 million minimum investment amounts were last visited in 1993, there is pretty wide consensus that it will be increased in the near future and it will be next up for possible increase before the end of FY2016.

Currently, there are two types of TEAs:

First is an area that, at the time of investment, is a rural area. A rural area, in turn, is any area outside a metropolitan statistical area (as designated by the Office of Management and Budget) or outside the boundary of any city or town having a population of 20,000 or more according to the decennial census.

The second type of TEA is a particular geographic or political subdivision located within a metropolitan statistical area or within a city or town having a population of 20,000 or more” as a high unemployment TEA. This type of TEA requires that a designated agency of the state make this determination, and this determination is usually in the form of what is called a TEA letter. Most urban EB-5 projects, including projects in New York City, on the market today utilize this second type of TEA.

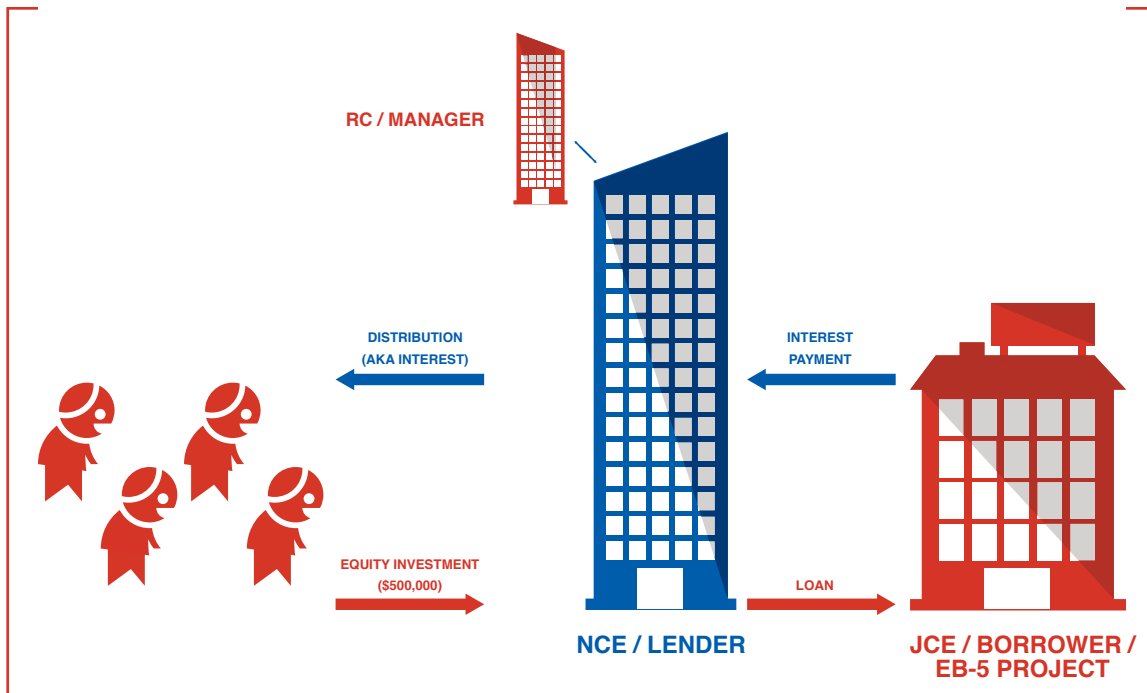
As can be seen in the table above, in FY2015, out of the total 8,773 EB-5 visas issued, only 33 were issued based on non-TEA deals with minimum investments of \$1 million. In other words, without TEA status, a project is not marketable. In 2015, changing the definition of TEA was the biggest controversy among politicians representing the interests of rural area Regional Centers and those representing urban area Regional Centers. And it was the gridlock between the two different interests that apparently resulted in legislative reforms not going forward.

3. THE EB-5 INVESTMENT STRUCTURE

The basic framework of the EB-5 regulations requires that an investor make an “equity” investment into a qualifying EB-5 program. Lending funds to a project with a guarantee of repayment does not suffice. This has not always been the case, however. In the 1990s when the program was first introduced, it was common for investors to invest a portion of their investment in cash and a portion in the form of “promissory notes”. The USCIS has since disallowed this and has made it clear that a loan is not an investment. (This, is another good example of how the EB-5 program is really shaped by USCIS policy and not the actual statute and regulations which are broadly drafted.)

There was a brief period following the Great Recession when EB-5 financing took first mortgage positions in real estate projects. But improvement in the lending environment coupled with tighter regulation of the USCIS on eligible inputs for jobs creation has resulted in EB-5 financing being pushed down the capital stack in recent years. Today, most EB-5 financing can be characterized as mezzanine financing, either in the form of mezz debt or preferred equity, but mostly mezz debt which is commonly referred to as the “EB-5 loan”. That most Regional Center investment projects are structured as a “loan” confuses a lot of investors because it seemingly contradicts the “equity” requirement mentioned above. (A common question is “If an EB-5 investment cannot be in the form of a loan, then how are the Regional Centers saying that their project will give investors a fixed interest rate with the “loan” repaid in 5 years?”)

This is possible because the loan is not made by the investor, but by the company that the investor takes an equity interest in. At this point, it is necessary to employ a bit of EB-5 jargon and diagrams. A typical EB-5 loan takes the form below:



A simple explanation is that the EB-5 investor is taking an equity position in a debt fund. The individual EB-5 investors will purchase an equity interest in the New Commercial Enterprise (“NCE”) which is a special purpose entity created to pool the investors’ funds. The NCE is usually a limited liability company or limited partnership. An affiliate of the Regional Center will be the Manager/GP of this NCE while the investors are the Members/LPs. The NCE is a Lender and the project (usually a real estate construction project) will become the Job Creating Enterprise (“JCE”) which is the Borrower of the loan proceeds. In other words, investor funds into the NCE must be equity but the investment of funds from NCE to JCE can take the form of debt or equity.

While not an EB-5 requirement, most EB-5 loans are collateralized. In a Loan Model where the EB-5 loan takes a mezz debt position, the collateral is the equity interest of the JCE similar to conventional real estate mezzanine loans.

An “Equity Model” investment usually refers to the structure where EB-5 funds come in as preferred equity.² The Equity Model is often utilized when the senior lender in a project prohibits any subordinated debt, including mezz debt. It is also preferred by the developer because of its relative flexibility compared to mezz debt.

For the EB-5 investor, the two structures are not too different in that both provide a fixed return and are positioned similarly in the capital stack. However, the Loan Model will have benefits such as a clearly established exit date and a guaranty of some sort by the JCE or an affiliate (e.g. pledge of equity interests, Completion Guarantee). The Loan Model also has the benefit of a foreclosure remedy – while realistically not all NCEs will have the capacity to take over a borrower entity and complete a project, the legal right to do so would have the effect of pressuring the JCE to complete the project.

²Previously this referred to EB-5 funds being deployed as “true” equity where the individual investor takes an equity position in the project itself. Today, “true” equity is still common in Direct EB-5s where the investor is the owner of the project, so the NCE and JCE are one and the same. And while a handful of older Regional Center deals (pre-2005) utilized the “true” equity model, today, in the Regional Center or Pooled Direct EB-5 context is almost non-existent. As such Equity Model in this booklet refers to preferred equity deals.

4. FIVE BASIC STEPS TO ACQUIRING AN EB-5 GREENCARD

The following are the five steps of getting an EB-5 greencard.

STEP 1 | INVEST

Immigrant investor identifies a project for EB-5 investment. She then works with an immigration attorney to clear the Source of Funds (“SOF”) for the funds to be used for the EB-5 investment. Once immigration attorney signs off on the SOF, the investor invests the minimum required capital into the New Commercial Enterprise (the “NCE”).

STEP 2 | FILE I-526 IMMIGRATION PETITION

Investor files a petition for a conditional greencard on Form I-526. The I-526 petition consists of two parts:

- 1) Investor’s SOF documentation
- 2) EB-5 Business related documents
 - a. EB-5 Business Plan showing how the investor intends to create 10 new U.S. jobs in the next two years. (I-526 must be accompanied by documents that show how the investor proposes to create jobs within 30 months of I-526 petition approval.)
 - b. EB-5 Economic Report showing how indirect jobs will be created (for Regional Center projects only).
 - c. EB-5 Offering Documents such as Private Placement Memorandum, Subscription Agreement, Partnership/LLC Operating Agreement.

STEP 3 | APPLY FOR GREENCARD

After the I-526 is approved, the investor and her family will apply for conditional residency (aka “temporary greencard”) either through Adjustment of Status on Form I-485 or Consular Processing depending on where the investor lives.

STEP 4 | CREATE JOBS

Either the investor (in most Direct EB-5 projects) or the project (in a Regional Center EB-5) must create the requisite number of jobs.

STEP 5 | PROVE JOBS

Finally, between month 21 and month 24 of the approval of the conditional greencard, the investor must file a petition on Form I-829 to prove to the USCIS that the jobs have been created or will be created within a reasonable period of time.

5. THE DIRECT EB-5 PROGRAM

When the EB-5 program was originally established in 1990, Congress had in mind a single immigrant investor (and his/her family) coming to the United States with investment funds to set up a business that hired 10 full-time U.S. workers. This structure is referred to as the Basic EB-5, Non-Regional Center EB-5, the Original EB-5 program or Direct EB-5. (I prefer the term Direct EB-5.) A common misconception about the Direct EB-5 Program as mentioned above, is that the minimum investment must be \$1 million. In fact, the minimum investment depends on whether or not the business created is located within a TEA.

In FY2015, out of the total 8,773 EB-5 visas issued, only 72 were issued based on investments into Direct EB-5 Projects compared with the 8,701 Regional Center EB-5s.

In a Direct EB-5, the proposition is pretty simple:

When the investor applies for a Direct EB-5, at the I-526 stage (the FILE stage, above) the investor is required to show how he actually plans on creating 10 or more jobs. For example, if you were opening a restaurant, you would include in the business plan the size of the restaurant, how many customers you anticipate, the hiring plans, and how you plan to increase the number of employees over a two-year period so that at the I-829 stage, you will have 10 or more employees. These projections need to be based in reality (what the USCIS calls “verifiable data”) – so you would put in third-party market studies if they were available, or if not, at least include basic information about your competitors to prove to the USCIS you are not just making things up out of thin air.

At the I-829 stage (the PROVE JOBS stage), the investor will need to provide the USCIS with a list of a minimum of 10 employees who are:

- Salaried W-2 employees
- Full time, which is defined as a minimum 35 hours/week,
- U.S. Citizens or greencard holders or people otherwise authorized to work in the United States, and who are not immediate family members of the investor. (Immediate family members can work in the business but they can’t be counted to make up the 10 employees.)

Then what is the difference between the Regional Center EB-5 and the Direct EB-5? The procedural difference is that an investor doesn’t need to affiliate with a Regional Center and can file an I-526 petition based on a qualified investment. The substantive difference is that investors in Direct EB-5 projects need to hire ten W-2 workers while Regional Center investors are allowed to count indirect jobs. Let’s take a closer look at Regional Center EB-5 projects and what it means to count indirect jobs.

Pooled Direct EB-5 Programs

Until recently, Direct EB-5s have usually taken the form of a single investor investing in his own venture as the 100% owner. However, pure Direct EB-5 projects have virtually disappeared due to the extremely long period of time between when the funds have to be invested into the business for the I-526 filing and when the investor

can enter the United States on the EB-5 visa (currently approximately 2.5 to 3 years for non-Chinese investors and almost 40 months for investors born in China). As a result, most Direct EB-5 projects on the market today are third- party projects similar to Regional Center projects (i.e. the investment project is set up and managed by a business that is not owned by the investor) where the investment is pooled and the

investors get an allocated share of the hired workers. Because Direct EB-5 projects are required to show direct job creation, by definition most businesses seeking Direct EB-5 Investments are in labor-intensive businesses. Examples of Pooled Direct EB-5 projects today include fast food restaurants, livery car services companies or call centers.

6. THE REGIONAL CENTER EB-5 PROGRAM

A Regional Center is a company that has received a federal designation from the USCIS to pool the investment of multiple foreign investors into a qualifying U.S. business to create employment.

While there are a handful of Regional Centers that are affiliated with government entities, the vast majority of Regional Centers are privately owned. Loosely Regional Centers can be categorized into “developer owned” Regional Centers or “third-party” Regional Centers that are formed by attorneys or real estate professionals.

As of January 2016 there are approximately 790 approved Regional Centers in the United States and many more applications pending with the USCIS. But note that most Regional Centers currently do not have projects on the market. Many are new centers preparing to launch a project and many more are dormant and not actively operated. You can find the current list of Regional Centers here: <http://tinyurl.com/regionalcenterlist>.

Currently the USCIS monitors Regional Centers by requiring each center to submit an annual report outlining the investment activities of each fiscal year, such as the number of I-526s or I-829s filed, the number of jobs created, etc.

While the more comprehensive EB-5 reform bill did not make it to a vote in Congress, as of January 2016, the EB-5 Integrity Act of 2015, or S. 2415, is pending which could bring some changes to the EB-5 rules but not touching the more controversial provisions related to TEAs or job counting. S. 2415 bill was introduced by Senator Flake of Arizona on Dec. 17 and co-sponsored by Sens. John Cornyn, R-Texas, and Charles Schumer, D-N.Y. This bill proposes to introduce Sarbanes-Oxley type certification requirements for Regional Centers and their principals as well as a \$25,000 a year “license” fee of sorts. These fees would be utilized to perform USCIS site visits to Regional Centers and EB-5 projects. These fees, if introduced, will probably also have the effect of weeding out non-operating Regional Centers.

As mentioned above, the only meaningful difference between a Direct EB-5 project and a Regional Center project is that Regional Center projects have the ability to capture indirect job creation. This gives Regional Centers the ability to raise bigger amounts of foreign capital because there will always be more indirect jobs created in a project than direct jobs. But what are indirect jobs?

7. CAPTURING INDIRECT JOBS

The EB-5 Economic Report

When filing an I-526 for a Regional Center EB-5, an EB-5 Economic Report will be included. The Economic Report shows how many jobs (both direct and indirect) will be created from the particular project in which the investor is investing. EB-5 Economic Reports are economic impact analyses using “reasonable methodologies” that have received the blessing of the USCIS. (RIMS II, IMPLAN, REDYN are examples of these methodologies.) Economic impact analyses attempt to measure the effect that a policy or a program or even an event has on the economy of a given region. For example, Rutgers University published an economic report estimating that Hurricane Sandy resulted in 4200 jobs lost in Q4 of 2012 in New Jersey; the New York City Economic Development Corporation can quantify the economic impact that Fashion Week or the NYC Marathon has on the local economy, and even how marriage equality impacts the wedding industry in New York City.

In a similar manner, an EB-5 economic report will measure how a certain EB-5 project can have an economic impact of creating jobs in a given region. These economic impact jobs are what are called “indirect jobs”.

Here is an extremely simplified explanation of how indirect, economic impact jobs are measured using RIMS II: An economist inputs three factors – the industry, the region, and the dollar amount – into the economic model. Let’s say, for example, the EB-5 project at hand is a hotel construction in New York. The construction costs are estimated at \$20 million dollars (not including the cost of land). By using the three known variables – the industry (non-residential construction), the region (New York) and the investment amount (\$20 million) the economic report will tell us that based on the RIMS II employment multiplier for this region, the EB-5 project, once completed, will create 187 jobs.

At the I-526 petition stage of a Regional Center EB-5 investment, the investor needs to submit an EB-5 economic report that outlines the number of jobs that this project is expected to create. And, just like in the Direct EB-5 scenario, the USCIS looks to see if the job projections are based on reasonable and verifiable assumptions.

The main difference between the Direct EB-5 and the Regional Center EB-5 comes at the I-829 stage. In a Direct EB-5, the investor provides the USCIS with the payroll and tax records to show job creation. But how do we show that 187 jobs were created in the \$20 million hotel example? When counting indirect jobs, we are not counting the construction workers who built the hotel or the staff employed by the hotel – remember, these are real people, hence direct jobs. In the EB-5 Economic Report we said that based on a reasonable economic model accepted by the USCIS, \$20 million spent on construction in New York will create 187 jobs.

Accordingly, at the I-829 stage when the investor must show job creation, we are not counting the number of people directly employed by this hotel construction project; rather, the investor needs to show that \$20 million was in fact spent on construction in New York as set forth in the original business plan. To prove this you would submit invoices of the construction expenditure, pictures of the construction in progress, and the completed hotel, etc. Once the USCIS is comfortable that the project in fact did what it said it would do at the I-526 stage, the jobs in the economic report will be deemed to have been created. In other words, if the project spent \$20 million on construction in New York, the USCIS will deem the 187 jobs to have been created as a result of the spending. And, if because of delays the project is only half done so only \$10 million has been spent? Then, only one-half of the 187 jobs, so only 93 jobs will be deemed to have been created.

And, because any given project will have more indirect, economic impact jobs than direct jobs, the Regional Center EB-5 program makes it possible for qualified U.S. businesses to attract more investment than through the Direct EB-5 program.

To use the example above, a \$20 million hotel somewhere in New York City would probably get you a 100-room outfit. Think of a Marriot Residence Inn near one of the airports. How many full-time workers would such a hotel hire? I would say, no more than 40 maximum. (Front desk staff for 24 hours, room service, housekeeping, etc.) That means 4 EB-5 investors could invest \$500,000 each and the project job numbers allows you to raise \$2 million total. Compare that to 187 jobs – that means 18 EB-5 investors could claim 10 jobs each, and at \$500,000 each, the hotel project could raise a total of \$9 million. This is the effect of indirect job counting through Regional Centers.

So the answer to the question of “How do you count indirect jobs?” is that you show the economic impact of the project according to what you promised to do at the I-526 stage and the indirect jobs will be deemed to have been created by virtue of the kept promise.³

The Regional Center Immigrant Investor Program

Unlike the Direct EB-5 program, the Regional Center program is a pilot program that is extended every three years. Since 1993, the program has always been extended, and that the Regional Center program will continue to be extended in and of itself is not a matter of controversy. However, the specifics of the Regional Center program and EB-5 rules in general are long overdue for updates. Therefore it was widely anticipated that there would

be an amendment to the statutes and regulations addressing the EB-5 program that would codify many of the USCIS policies in effect today when the program was up for another extension on September 30, 2015. Congress and the EB-5 industry came very close to reaching a compromise on new rules in December of 2015 which included increasing the minimum investment amount into TEAs from the current \$500,000 to \$800,000 and also new definitions of TEAs. The new rules would also

have extended the Regional Center program for another 5 years. But at the last minute, the Regional Center Program was temporarily extended until September 30, 2016 in its current form. This extension brought a collective sigh of relief to many people with vested interest in the current program that would have been adversely affected by new proposed rules. But it has also extended the uncertainty surrounding EB-5 rules for another year, making it harder for Regional Centers and developers to plan for the future.

³This is the “expenditure based” indirect job counting. There is also a “revenue based” job model that allows you to calculate indirect jobs based on projected revenues. In this case, you would need to show that the revenues were actually created at the I-829 stage to prove job creation.

8. SOURCE OF FUNDS

An individual investor's I-526 petition consists of two parts. The first part is the Business Content (business plan, economic report, etc.) which is discussed above. The second part describes in detail the investor's Source of Funds (SOF).

The SOF tells the story of the origins of the \$500,000 that was invested in the United States. A common question asked about SOF is whether the investor can obtain loans to use for EB-5. The answer is yes. The caveat is that the loans must be secured with personal property. For example, a loan from a bank using real estate owned by the investor as collateral is acceptable. Or a loan from a company where the investor holds an equity interest is acceptable. In this case the collateral would generally be the investors' shares in the company.

In loans, however, an additional layer of where the investor obtained funds to purchase the underlying assets must be submitted to the USCIS. For example, in a real estate loan, how the investor purchased the real estate in the first place must be shown. (It used to be that if the real estate was purchased more than 5 years ago, this step was not needed, but starting 2014, the USCIS has been requesting this original source information no matter how long ago the asset was acquired.) In the case of shareholder loans, for example, if the investor is the majority owner of the company, where the funds for the initial capitalization of the company would be required.

The second common question is whether investor can use funds that are gifted to him as EB-5 investment capital. That is also allowed, however, when there is a gift involved, the USCIS looks past the investor and looks at the source of funds that were used for the gift.⁴

One thing the potential investor absolutely must keep in mind is that the SOF needs to be reviewed and documented by the investor's lawyer before any funds are wired to the United States. It is extremely difficult for the person preparing the SOF documents to try to tease out what exactly happened after the funds have left the investor's home country. In addition to the source of funds, the Path of Funds needs to be documented. This is done through wire receipts and other bank documents, and it is also very important for the investor's lawyer to create a roadmap for this before any funds are wired. The entire SOF and wiring process can easily take two or three months for many investors.

⁴ One exception to this rule is when a collateralized loan is used as the source of funds. If the investor is taking out the loans, the collateral must be personally owned by the investor, while when a third-party takes out a loan to gift to the investor, the underlying collateral need not be personally owned by the giftor. (The fact that someone can get a loan using someone else's property may be a bit confusing in the U.S. context, but it is quite common in China where, for example, a parent would purchase real estate for a child and then the parent would use that real estate as collateral and become the borrower and the child would only execute the underlying mortgage.)

9. PROCESS & TIMING

1 CHOOSE A PROJECT: VARIES

The timing for this step varies widely depending on how (in)decisive the investor is. Many people ask if there is a website where the public can access EB-5 projects. The short answer is no. This is because EB-5 projects are fundamentally private placement offerings that rely on exemptions to the registration requirement such as Regulation D for domestic offerings and Regulation S for overseas offerings. As such, they are subject to securities regulation that prohibits general solicitation (e.g. websites!). Therefore an investor looking for qualified EB-5 projects will often have to contact a Regional Center directly and request information. Investors residing in countries with an emigration infrastructure such as China or Korea will often rely on local migration consulting companies for project information.

2 PREPARING SOF/PATH OF FUNDS/WIRE FUNDS/FILE I-526: APPROXIMATELY 2 MONTHS

The time it takes to prepare SOF documents and wire funds to the United States will also differ depending on the investor's circumstances but generally this step takes 2 to 3 months. In particular, if the investor is from a country with currency regulations such as China, the wiring part alone can take a month (or more). The I-526 is filed after all the documentation is completed AND once all the funds have been wired into the Regional Center's escrow account.

3 WAIT FOR USCIS APPROVAL OF I-526: APPROXIMATELY 14 MONTHS

Investors today can expect to wait at least 14 months, if not more, before hearing back from the USCIS. The USCIS simply has not been able to keep up with the increase in the I-526 petitions in recent years. (As of December 2015, there are approximately 20,000 I-526 petitions pending and only 58 adjudicators on the EB-5 team in Washington, DC.)

This number is an estimate, however, and generally ranges between 12 to 22 months. It used to be that investor petitions in exemplar approved projects enjoyed a shorter wait, but that has changed as discussed below. Also, there was a period during which Direct EB-5 projects also enjoyed a shorter wait time as well, but this is no longer the case.

4 FILE FOR A GREENCARD: APPROXIMATELY 6 MONTHS

(4-1) Adjustment of Status (I-485): If the immigrant investor is already in the United States and in valid status at the time of I-526 approval, he may apply for a greencard without leaving the country. It is at this stage that the investor's qualified dependent's application is submitted. A qualified dependent is defined as a spouse and unmarried child under the age of 21. Generally, investors are not interviewed for adjustments in an EB-5 case. Your greencard is mailed to you and the start date of your permanent residency is the start date of the card.

(4-2) Apply for Consular Processing (DS-230): If the immigrant investor is not already in the United States on a valid visa, upon approval of the I-526, the investor must process his

Previously most EB-5 investments were held in escrow accounts pending the approval of the investor's I-526. These types of arrangements were called "traditional" EB-5 escrows. However, once the I-526 petition approvals started taking over one year, releasing funds upon filing of the I-526 and not the approval became more commonplace. Such "early release" escrows are often backed up by a guarantee of investment refund if I-526 is denied.

greencard through the National Visa Center (NVC) and then go through an interview process at the U.S. Consulate near his home. Because documents are submitted to the NVC then sent to the foreign post and then reviewed again there before an interview is scheduled, this process can be longer than you expect. Once you go through the interview and are approved, you will get a visa stamp on your passport with an approval date. The investor and his family must enter the United States as permanent residents within 180 days of this approval date. The date the investor and his family enters the United States is the beginning of the conditional greencard. (The card is mailed to you after you enter.)

5 RECEIVE CONDITIONAL PERMANENT RESIDENT STATUS VALID FOR 2 YEARS

A conditional greencard holder enjoys all the rights, benefits and duties of a permanent greencard holder.

6 FILE I-829 REMOVAL OF CONDITIONS: APPROXIMATELY 12 MONTHS

This petition is filed between month 21 and month 24 after the start of the conditional greencard period. For investors who have created a Direct EB-5 investment, this is when you show the USCIS that you have in fact created 10+ full-time, U.S. jobs by submitting payroll and tax records. Regional Centers, on the other hand, must provide each individual investor who has filed an I-526 petition and invested in a project, all the records that prove to the USCIS that the projections in terms of expenditure and revenues made in the EB-5 Economic Report filed with the I-526 petition have been met. The I-829 petition stays pending for approximately a year during which the conditional residency period is extended.

10. EXEMPLAR PROJECTS: AKA THE PRE-APPROVED EB-5 PROJECT

Exemplar EB-5 projects are also known as “pre-approved” projects. As discussed above, when an investor makes the decision to invest in a Regional Center EB-5 project, she files an I-526 petition. If the Regional Center project is raising \$20 million dollars in a TEA, 40 investors will each file their own I-526 petition. The I-526 petition consists of two parts: one involving specific project information and the other pertaining to the individual investor’s source of funds (SOF). This means that the 40 petitions filed in our example above all have identical project information. As nobody really knows the inner workings of the USCIS, we can’t be sure, but today it seems like the same adjudicator (or team of adjudicators) review a single project. A few years ago, however, when the EB-5 program started growing at a very rapid rate, it wasn’t unusual for two investors investing in the same project to receive different RFEs (Request of Evidence) asking for different things on the identical project information. To alleviate this confusion, the AILA (American Immigration Lawyers Association) EB-5 Committee started to push for an “exemplar” procedure in 2008.

An “exemplar I-526” is filed by the Regional Center on Form I-924 which is the same form that is used to file an initial Regional Center application. In short, you are filing a “sample I-526” petition where the investor’s SOF information is left out, but all the project information would be put in as if the project were going ahead tomorrow. Once the USCIS approves the exemplar petition, the project is deemed “pre-approved” by the USCIS.

Sounds pretty straightforward, doesn’t it? But if you’ve spent a bit of time in the EB-5 world, you should know by now that nothing is simple when it comes to EB-5.

When the exemplar process was first introduced, the USCIS would approve a project within 2 to 3 months. And there was the tacit understanding was that the USCIS would only look at investor SOF and not review the project information for an exemplar approved project. While they first honored this, after a year or so, maddeningly they didn’t keep their promise to not review the project portion of the I-526s. So Regional Centers who got their exemplar designation approved, would go out to market and tout that their project was “pre-approved”. Then individual investors would sometimes still get RFEs for the project information.

Then in 2012-2013 we did see some projects with exemplar approved status get a more expedited review. But after the EB-5 team moved from California to Washington DC in 2014, it seems like the exemplars approved by the California Service Center are being ignored by the Washington DC IPO (Immigrant Investor Program Office) team. Or it might be because the USCIS is now fully implementing a stricter FIFO processing of all petitions so even if an investor invests in an exemplar approved project, there are no time advantages of cutting the line. Nobody is really sure.

However, for all practical intents and purposes, you will not see many exemplar approved projects (also called “I-924 approved” projects) out on the market today. This is because it takes approximately 1 year (often longer) for an I-924 exemplar application to be approved. This means in order for a deal to be structured so that a Regional Center can market an “Exemplar Approved Project”, the Regional Center and Project Developer would have to get a project ready to go (i.e. all the permits, other financing, etc.), file for the I-924 application and then wait around for the I-924 application to be approved – which realistically is not going to happen as time = money in a real estate project.

Therefore, projects that have exemplar I-924 approval on the market today will usually fall into either one of the following categories:

- 1) Very large projects where the Regional Centers file for exemplar approval at the same time as they start marketing and because of its sheer size, there were still slots left for the investors to fill after the exemplar was approved.

2) Projects that didn't sell on the market that well for whatever reason and are still available after 1+ year it took for the exemplar to be approved.

3) A project owned by a developer that has a large pipeline of projects who selects a fully entitled project to submit as part of their original Regional Center application. This is rare but in at least two occasions I have seen a developer just wait and wait until they get the approval before going out to market the project. That said the assumption is that while all this waiting is happening, the project does not change because an exemplar approval might not be honored if the project has changed in a material way during the waiting period because exemplar approvals are only honored when there are no material changes to the original application.

Then, what is the value of an exemplar approved project? Exemplar approved projects used to have two benefits. The first is that it gives the investors comfort that the USCIS has agreed that the structure of the project has been approved by the USCIS to be EB-5 compliant. That means that the investor can expect to receive an I-526 approval as long as his Source of Funds have no issues. The second is that investors that invested into exemplar approved projects would enjoy a quicker approval of the I-526 petition as the USCIS used to have different lines for each project. So if you got in line for an exemplar approved projects, the line would be shorter.

As of January 2016, the first benefit still stands while the second benefit has gone away. Sometime in 2014, the USCIS casually mentioned on one of its Quarterly EB-5 Stakeholder Calls that they were going to implement a First-In-First-Out processing of I-526 petitions. The industry didn't think much of it at the time of the "announcement" but since 2014, anecdotally (because no one really gathers these statistics) investors who invested into an exemplar approved project have no longer enjoyed any benefit of quicker approval periods.

11. COST

WHAT	AMOUNT	NOTES
Investment Principal	\$500,000 (or \$1,000,000)	The \$500,000 minimum investments for projects located in TEAs (or \$1,000,000 minimum investments for non-TEA locations) is unchanged from the early 1990s when the legislation was first introduced. (Remember, the investment amounts differ depending on the location of the project; not whether it is a Direct EB-5 or a Regional Center EB-5.) This amount could be increased in the not too distant future as there are indications of this happening in the Comprehensive Immigration Reform bill(s) pending in Congress.
Subscription Fee or Administrative Fee	\$45,000 - \$55,000	These funds are used by the Regional Centers to cover overhead.
I-526 USCIS Filing Fee	\$1500	Because only the main investor's information is submitted at the time of the I-526 filing, this is paid only once.
I-485 Adjustment of Status Filing Fee (applicable only if, at time of I-526 approval, investor is in the US and in valid visa status)	\$1070 per person	If child is under 14 years of age and applying at the same time as parent, \$635.
National Visa Center fee (applicable only if, investor is not in the US and will obtain visa through consular processing overseas)	\$345 per person	

WHAT**AMOUNT****NOTES**

WHAT	AMOUNT	NOTES
Legal fees	Varies	Legal fees vary widely depending on the scope of service: some law firms will provide a quote for I-526 filing only while some include the whole process up to the I-829 filing. Some will quote for the I-526 with a separate fee to be paid directly to a local accounting firm for the source of funds work. Legal fees for Direct EB-5s are usually higher than that of RC EB-5s because they include the cost of providing advice re: setting up the business.

12. RETURN OF CAPITAL

As discussed above, most EB-5 investments today are structured as loan products or preferred equity products that are made to mimic loans as closely as possible. For Loan Model products, the maturity dates, on average, is about 5 years. (But if you look closely, it is not uncommon to find that recently many investments give the borrower the option to extend the term for two one-year terms, making the total loan period 7 years.)

So generally, investors can expect to get a return of their capital in approximately 5 years.⁵

However, this assumes that the EB-5 investor has received an approval of the I-829 petition made to remove conditions on the conditional greencard. Unfortunately, with the backlog of EB-5 visas for people born in China, most Chinese investors will almost certainly not get their conditions removed within 5 year of investment.

Current EB-5 rules state that an EB-5 investment must be at-risk and sustained until the I-829 petition is made. The visa backlog coupled with the fact that the majority of investors are from China, this has thrown a huge wrinkle in the process of returning capital and more importantly, what Regional Centers should do with the funds that are repaid after 5 years if the investors' I-829s have not all been approved.

Recognizing this, the USCIS released a draft policy guidance in August of 2015 titled Guidance on the Job Creation Requirement and Sustainment of the Investment for EB-5 Adjudication of Form I-526 and Form I-829 which can be found here <http://tinyurl.com/draft12345>. This is a very technical but important issue for EB-5 that is outside of the scope of this booklet.⁶ But for our purposes, it is important to remember that investors cannot get their money back until their I-829 petitions have been adjudicated.

⁵However, the start date of the 5 year period EB-5 Loan depending on the project could be as long as one year after the funds are invested even without a traditional escrow because it is not uncommon for the EB-5 Loan start date to be the date the last investor invests or one year after the offering is launched, whichever comes earlier.

⁶Please read my analysis on the topic here: <http://www.aueb5.com/eb-5-investment-sustainment-requirement/>

13. HOW WILL THE RULES CHANGE IN THE FUTURE?

After much hand wringing and negotiations surrounding the draft language of a new bill that proposed to change the EB-5 program as we know it today, the US Congress came to an agreement to temporarily extend the program unchanged until September 30, 2016.

Due to the explosive speed at which the program has grown during the past 7 years, there are definitely elements of the current rules that do not scale easily to accommodate the larger projects on the market today. In addition, the proliferation of Regional Centers in recent years has increased the need for government oversight of the EB-5 program.

Reflecting this reality, efforts to reform the EB-5 program in 2015 fall into two broad categories: (1) Technical Rules addressing such topics as the TEA, minimum investment and visa quota allocations and (2) so-called Integrity Measures that are aimed at strengthening the government's oversight capabilities of the program to prevent fraud and protect investors.

The five bills that were floated in Congress in 2015 attempted to address all of these issues in one fell swoop. However, the EB-5 program is a complicated program that has many interrelated moving pieces.

So moving one piece inevitably affects other pieces. In addition there are different interests among the players in the EB-5 community. The bill that was negotiated up to the last minute on December 15, 2015, attempted to cram through too many changes with too little discussion and failed because it was difficult to reconcile all the technical issues but also because it didn't receive the support of the EB-5 community as a whole.

However, despite the disagreement over the Technical Rules, there was never much disagreement over need for Integrity Measures. Reflecting this, a new bill was introduced in the Senate in December 2015 by Senator Flake of Arizona. Listed as the EB-5 Integrity Act of 2015, or S. 2415, the bill was introduced by Senator Flake on Dec. 17 (two days after the more comprehensive bill) and co-sponsored by Sens. John Cornyn, R-Texas, and Charles Schumer, D-N.Y. It contains several provisions aimed at increasing regional center transparency and integrity, and some of its proposals are similar to ideas contained in the EB-5 legislation that failed to pass.

Most of the provisions of the bill are obviously aimed at regional centers (such as a \$25,000 annual fee for all RCs), but in this article I want to point out some provisions of the bill that would impact the Chinese marketplace and investors.

1

EB-5 capital may not be used to purchase municipal bonds or any other bonds if such bonds are available to the general public

2

An exemplar petition must be filed by the Regional Center before any investor can file their I-526. (Currently, it is considered best practice to do so, but it is not a rule that an exemplar must be filed. But unchanged from the current rules, the Exemplar Petition doesn't have to be approved for the investor to file.)

3

A person must be a U.S. citizen or permanent resident to be "involved with" a Regional Center. Being "involved in" a Regional Center is generally defined as having an ownership interest or being in a position of substantive authority to make operational or managerial decision.

4

A foreign government entity may not provide capital to, or be directly or indirectly involved with the ownership or administration of a Regional Center. (This is actually a looser restriction compare to the bill that almost passed in December 2015 which said that a foreign government entity may not be involved in not just the Regional

Center but also the NCE or JCE – which basically eliminated involvement of all U.S. affiliates of Chinese SOE from being involved in EB-5 in any way.)

5

Investors will be required to pay an additional \$1000 in addition to the \$1500 filing fee. (This number was \$12,000 in the bill that didn't pass.)

6

Migration agencies will have to register with the USCIS and disclose fee arrangements to the USCIS. The list of registered agencies may be made publicly available by the USCIS

7

Each investor's I-526 petition must include a disclosure document signed by the investor which discloses all fees and compensation paid by the Regional Center or the NCE in connection with that investor's investment

8

Investors must provide source of funds for administrative fees in addition to the \$500,000 investment. (The rather controversial new SOF rules of the bill that didn't pass didn't make it into the Integrity Bill. Ex. Only direct family members can gift; Only chartered banks or financial institutions can make EB-5 loans.)

9

Investors must disclose any monetary judgments against them as well as any pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions involving possible monetary judgment against the investor in any court in or outside the U.S.

10

The Integrity Bill provides procedures to save investors whose I-526 has been approved if the RC is terminated. This is great news for people who are inadvertently caught up in RC termination cases through no fault of their own. Basically if the investor already has an approved I-526 or already is a conditional resident and the RC that sponsors their investment is terminated, the investors will have 6 months to reinvest into a new project and not lose their I-526 approval or their conditional resident status. There is also an option for the entire NCE to associate itself with a non-tainted Regional Center which would be very helpful for lease deals.

There is a pretty good chance that this bill will be passed as it doesn't address any really controversial issues while also allowing Congress to save face in the face of criticism that they failed to pass EB-5 reforms due to lobbying pressure. So it is worth monitoring the movement surrounding this bill and also plan ahead for the possible new rules in the relatively near future.

