

# **NON-TRADITIONAL CAPITAL STRUCTURES: EB-5 FINANCING**

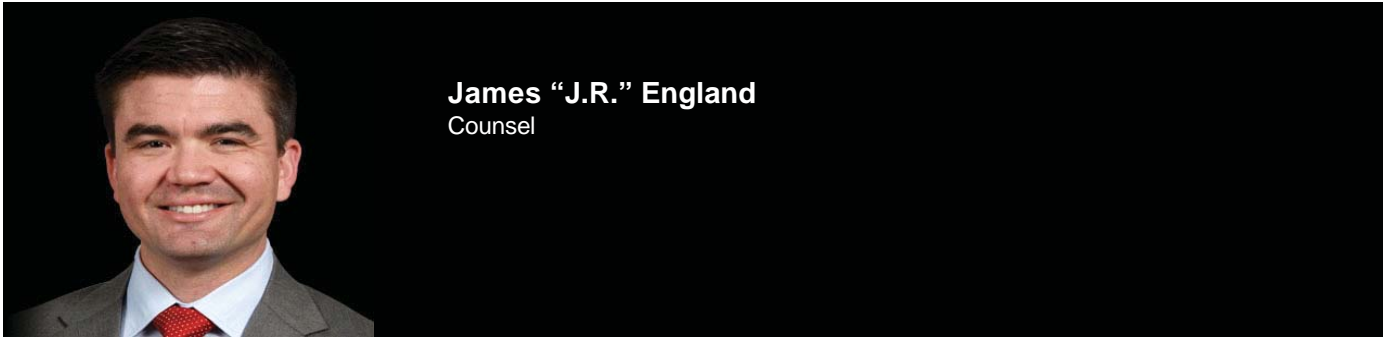
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**CHAPTER 7**





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- Representing a major hotel chain in connection with the purchase, sale and operation of hotel properties throughout the United States.
- Counseling a sovereign wealth fund and a US-based investment fund in connection with the formation and structuring of a joint venture for the acquisition of commercial properties in the UAE.
- Counseling a UAE government entity in the corporate structuring, construction, leasing and ongoing development of Masdar City, a carbon neutral city of 40,000 being constructed in the UAE.
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- Representing a large private equity fund and five of its principals through the gaming license process in 15 states, a pivotal gating event that opened the door to the leverage buyout of a major casino company.



### News

- Hunton & Williams Further Expands Global Real Estate Practice, James 'J.R.' England joins in Dallas, September 23, 2014

### Alerts

- Hunton & Williams Further Expands Global Real Estate Practice, James 'J.R.' England joins in Dallas, September 23, 2014

### Publications

- Author, Real Estate Investing In The Middle East: Foreign Ownership Restrictions In The GCC, *The Metropolitan Corporate Counsel*, February 2012
  - Author, Real Estate Chapter, *The Business Laws of the United Arab Emirates*, February 2011
  - Co-author, "The Nuts & Bolts of Purchasing a Real Estate Note: Issues, Approaches, and Forms," Texas State Bar Advanced Real Estate Law Course, July 2005
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# NON-TRADITIONAL CAPITAL STRUCTURES: EB-5 FINANCING

## I. INTRODUCTION

Over the last ten to fifteen years the real estate industry has seen many different types of project financing structures wax and wane in popularity. Certain structures that were in vogue in the early nineties have declined in popularity, while others have arisen to take their place due to changes in law, investment climate or simply due to their practicality.

The EB-5 program, sometimes referred to as the “Immigrant Investor Program” was created by Congress’ enactment of the United States Immigration and Nationality Act of 1990 (the “INA”).<sup>1</sup> The EB-5 program was established in order to provide economic stimulus to the U.S. economy by giving foreign entrepreneurs the opportunity to permanently live and work in the U.S. after they had invested substantial capital into an American commercial enterprise creating a sufficient number of jobs.

This article will focus on the EB-5 program and real estate financing structures utilizing EB-5 capital. The article is broken into six main sections: (a) history and the basics of the EB-5 program, (b) a brief summary of securities law considerations, (c) the immigration process, (d) EB-5 capital structure, (e) legislative developments, and (f) a brief conclusion. While there are dozens of possible issues to discuss in the most complicated EB-5 financings, the purpose of this article is not to provide a comprehensive analysis. Rather, this article is intended to be an explanatory document providing a basic level of understanding to real estate and finance practitioners who may be asked to represent a client in connection with a financing involving EB-5 capital. Finally, although this article will touch on related immigration, securities law and tax concerns, this article is primarily aimed at real estate and finance practitioners and a detailed analysis of these related topics is beyond the scope of this article.

## II. HISTORY AND BACKGROUND OF THE EB-5 PROGRAM

### A. History & Background

As previously noted, the EB-5 program was created in 1990 by the passage of the INA. The EB-5 program was later modified by Section 610 of Public Law 105-119, Section 402(a) of Public Law 106-396, Section 610 of Public Law 102-395, Section 4 of Public Law 108-156 and H.R. 719, among other laws modifying an extending the EB-5 program or components thereof. The EB-5 program is also subject to additional regulations found at 8 C.F.R. § 204.6 and 8 C.F.R. § 216.6, respectively. In addition, United

States Customs and Immigration Service (“USCIS”) has issued several policy memoranda, policy manuals and precedent decisions (the “Precedent Decisions”), all of which add to the body of EB-5 related laws and regulations.<sup>2</sup> The USCIS is the primary federal agency that regulates the EB-5 program, but the USCIS only regulates the immigration aspects associated with the EB-5 program. The Securities and Exchange Commission (“SEC”) also regulates EB-5 capital investment, though the vast majority of EB-5 projects and investment structures are exempt from securities law requirements.<sup>3</sup>

The term “EB-5” refers to the fifth category of the five permanent residency visas available in the “employment-based” preference system that prioritizes immigrants based on their skills.<sup>4</sup> The EB-5 program was intended to inject foreign capital into the U.S. economy and create jobs for American workers at very little cost to the government or the American taxpayer. Reporting from around the time of the INA’s passage suggests that Congress anticipated as many as 4,000 foreign investors and their families would seek EB-5 visas each year, bringing in fresh investment funds totaling \$4 billion and creating 40,000 new jobs.<sup>5</sup> However, early results from the program proved extremely anemic. Between fiscal year 1992 and fiscal year 2004, a total of 6,024 EB-5 visas were issued, an average of just over 460 visas per year.<sup>6</sup> The so-called “mainstream discovery of” and the rise in popularity of the EB-5 program is largely attributable to the financial crisis. The EB-5 program surged into the forefront in the years following 2008 when traditional bank financing became more difficult to obtain. In 2008, 1,258 EB-5 visa applications were filed, in contrast to 2014 when 10,928 applications were filed, representing a 769% increase in the number of EB-5 visa

<sup>2</sup> See <http://www.uscis.gov/laws>; The Precedent Decisions include: Matter of Izummi, 22 I&N Dec 169 (BIA 1998); Matter of Ho, 22 I&N Dec. 206, (BIA 1998); Matter of Soffici, 22 I&N Dec 158 (BIA 1998); Matter of Hsiung, 22 I&N Dec 201 (BIA 1998).

<sup>3</sup> See Rule 506 of Regulation D, as well as Rule 903 of Regulation S to the Securities Act of 1933. See also Section 12(g) of the Exchange Act of 1934 (as modified by the Jumpstart Our Business Startups Act of 2012), subject to the Investment Company Act of 1940 (the “Reg D & S Exemptions”).

<sup>4</sup> See <http://www.uscis.gov/eb-5>.

<sup>5</sup> Al Kamen, “An Investment in American Citizenship; Immigration Program Invites Millionaires to Buy Their Way In,” Washington Post (Sept. 29, 1991).

<sup>6</sup> U.S. Government Accountability Office Report to Congressional Committees, Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors, p. 2 (Apr. 2005) (GAO-05-256).

<sup>1</sup> Pub. L. No. 101-649, 104 Stat. 4978 (1990).

applications filed.<sup>7</sup> The growth in use of the EB-5 program was fueled by developers' and real estate entrepreneurs' desire to utilize EB-5 capital (due, at least initially, to the absence of other traditional sources), thus creating a greater supply of projects tailored to qualify for the EB-5 program. Further, as more developers and real estate companies began to employ EB-5 capital more regularly, they began to realize the flexible and inexpensive nature of EB-5 capital and have continued to employ it despite the fact that traditional sources of capital are now widely available. As more and more developers began to realize the benefits and potential of EB-5 capital, which can take the form of debt or equity at any location within the capital stack, it has led to explosive growth in the utilization of EB-5 capital in recent years.

## B. EB-5 Program Basics

### 1. General Requirements.

The EB-5 program allocates 10,000 EB-5 visas per year to qualified individuals seeking permanent resident status. At its most basic level, the EB-5 program requires two things: (i) a potential immigrant must make a standard capital investment of \$1,000,000 in a "new commercial enterprise" (a "NCE") (or if the project for which the investment is designated is located with a "Targeted Employment Area" (a "TEA")<sup>8</sup> the amount of such investment is reduced to \$500,000); and (ii) the project to which the investment applies must directly create ten new, full-time jobs per immigrant investor.<sup>9</sup> However, if the project is affiliated with a regional center,<sup>10</sup> then "indirect jobs" may also be counted against the ten job per investor threshold. Skeptics often refer to the EB-5 program as the "visa for sale" or "green card for cash" program,<sup>11</sup> but each investor's capital is not actually utilized toward the purchase of a visa (and is not paid to the U.S. government), but is instead an investment in a job-creating U.S. enterprise with the expectation that the investor's capital will be returned at some point in the future. However, unlike a traditional investor, where the chief reason for making an investment is the

potential return generated, an EB-5 investor's main motivation is securing a visa. Thus, an EB-5 investor's primary objective is to ensure the project satisfies the EB-5 visa requirements.

### 2. Job Creation.

Job creation is the central focus and overall goal of the EB-5 program. Each EB-5 investment project must create 10 full time jobs for American workers for each EB-5 investor. Thus, the number of jobs that a project will create is the most critical factor in determining the size and viability of any EB-5 capital raise. Most EB-5 projects strive to create more jobs than the minimum required by EB-5 rules and regulations, primarily to create a cushion for investor marketing purposes. The cushion provides comfort to the EB-5 investors that a sufficient number of jobs will be created to have their EB-5 applications approved, in the event the actual development deviates from its original plans or the USCIS determines that certain jobs created are not eligible jobs. Jobs created can include construction jobs (if they last 2 years or longer), as well as the ongoing operation of the project following completion. A basic outline of the job creation requirements is set forth below.

#### a. Direct Jobs

If an EB-5 investor invests in a project that is not sponsored by a regional center, only direct jobs count towards the ten job per investor threshold. Direct jobs are generally full-time jobs filled by W-2 employees of a commercial enterprise.<sup>12</sup> An applicant demonstrates direct jobs to the USCIS by producing W-2 tax forms and other reasonable evidence of employment. The overwhelming majority of jobs associated with construction activity are not direct, but rather indirect jobs. Because indirect jobs can only be counted if the EB-5 project is sponsored by a regional center, the overwhelming majority of projects are affiliated with a regional center.

#### b. Indirect Jobs

Indirect jobs are those created as a result of the project. In contrast to direct jobs, indirect jobs serve those who provide goods or services to the project.<sup>13</sup> Indirect jobs, as well as a subset thereof called "induced jobs", are demonstrated to the USCIS based on a job model contained within an economic impact

<sup>7</sup> See

[http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526\\_performancedata\\_fy2014\\_qtr4.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_performancedata_fy2014_qtr4.pdf)

<sup>8</sup> See Section II, B4 of this article for further information on TEAs.

<sup>9</sup> INA, Sections 203(b)(5)(C) and 203(b)(5)(A).

<sup>10</sup> See Section II, B3 of this article below for further discussion on regional centers.

<sup>11</sup> See Patrick McGeehan and Kirk Semple, "Rules Stretched as Green Cards Go to Investors" by Patrick McGeehan and Kirk Semple, *New York Times* (December 18, 2011) (the "McGeehan Semple Article").

<sup>12</sup> Donald Neufeld, "Adjudication of EB-5 Regional Center Proposals and Affiliated Form I-526 and form I-829 Petitions; Adjudicator's Field Manual (AFM) Update to Chapters 22.4 and 25.2 (AD09-38)," (December 11, 2009); and Donald Neufeld, "EB-5 Alien Entrepreneurs – Job Creation and Full Time Positions," (June 17, 2009) (collectively, the "2009 Neufeld Memoranda").

<sup>13</sup> See 2009 Neufeld Memoranda.



report.<sup>14</sup> An economist prepares the economic impact report based on the business plans submitted by the developer and/or regional center. Generally, at the first step of the immigration review process, the business plan must reasonably demonstrate that the jobs will be created within two and one-half years after the USCIS approves an immigrant's I-526 petition.<sup>15</sup> Indirect jobs count even if the work is performed outside the geographic area of the project, and in fact, they can be performed anywhere in the United States. For example, indirect jobs include the steel mill workers in Ohio that create steel beams for a project in New York City as well as the factory worker manufacturing bath tubs in Texas for a hotel project in Los Angeles. Indirect jobs also include workers who supply linens to a hotel after it opens and those who perform professional services to the hotel, including accountants and lawyers. Induced jobs are generated when those with direct and indirect jobs spend part of their compensation on consumer goods and services. In practice, induced jobs are limited to those created within the geographic area of the project, due to the detailed reporting requirements to count induced jobs outside the geographic region of the sponsoring regional center. However, jobs generated by hotel guest spending or by tenants of the project following completion are not counted as indirect or induced jobs.<sup>16</sup>

### 3. Regional Centers.

The regional center concept was not part of the original legislation establishing the EB-5 program. However, it soon became apparent that very few businesses could generate a sufficient number of direct jobs to support EB-5 capital raises large enough to make the EB-5 program meaningful. In October 1992, Congress responded by creating the "Immigrant Investor Pilot Program" which provided for the concept of regional centers.<sup>17</sup> The law establishing regional centers (now rebranded the "Regional Center Program") is not permanent and has been extended several times, although the Regional Center Program is set to expire on December 11, 2015 unless Congress acts to extend it.<sup>18</sup> The term "regional center" lends itself to the mistaken impression that it is a governmental or quasi-governmental body. However, a regional center is simply an entity (public or private) that seeks and coordinates foreign investment in a

defined geographic area with the EB-5 legal framework.<sup>19</sup> A regional center does not have exclusive jurisdiction over a particular region and many geographic regions have multiple regional centers which can make investments anywhere within its geographic territory.<sup>20</sup> Each regional center, once established, can sponsor an unlimited number of EB-5 related projects.

The Regional Center Program imposes very few requirements or standards upon the structure and operation of regional centers. For example, a regional center's owners and executives do not have to pass any special test, demonstrate any particular level of qualification, educational background or investment experience. Additionally, no minimum net worth or capital requirements are required for a regional center's ownership or operations, and with the exception of the Vermont regional center, no accounting, audit or financial oversight is required. After its formation, a regional center is required to file an annual return, Form 924A, with USCIS, but no independent verification or audit of the form is required. The Form 924A only requires very basic information about EB-5 capital raised, jobs created and investor petitions, but the information is not required to be project specific, thus the filing represents only a very high level, non-detailed snapshot of the regional center's operations.<sup>21</sup>

Despite the lack of governmental oversight and regulation of regional centers, the vast majority of EB-5 projects associate with a regional center. The reason is simple, association with a regional center allows a project to satisfy the ten jobs per investor center requirement by counting indirect jobs as well as direct jobs.<sup>22</sup> The ability to count indirect jobs generally leads to a substantial increase in the amount of EB-5 capital that can be raised for a particular project.

### 4. Target Employment Areas.

A geographic area qualifies as a TEA if its unemployment rate is at least 150% of the national average. A location can also qualify as a TEA if it is located in a rural area as defined in INA Section 204.6. The majority of projects strive to qualify as a TEA in order to attract a greater number of immigrant

<sup>19</sup> 8 C.F.R. § 204.6(c).

<sup>20</sup> See <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers>.

<sup>21</sup> Jeanne Calderon and Gary Friedland, Esq., "A Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects, NYU Stern Center for Real Estate Finance Research (May 22, 2015) (the "Roadmap Paper").

<sup>22</sup> USCIS Policy Memorandum re EB-5 Adjudication Policy, PM-602-0083 (May 30, 2013) (the "May 2013 Policy Memo").

<sup>14</sup> 8 C.F.R. § 204.6(m)(7)(ii).

<sup>15</sup> See Section IV of this article for further information on the immigration process.

<sup>16</sup> See <http://www.uscis.gov/news/questions-and-answers/questions-and-answers-eb-5-economic-methodologies>.

<sup>17</sup> Pub. L. No. 102-395, 106 Stat. 1828 (1992).

<sup>18</sup> Continuing Appropriations Act, H.R.719 (2015).

investors by lowering the investment required to \$500,000 (rather than the \$1,000,000 otherwise required). The EB-5 program permits (and in fact delegates to) each U.S. state the authority to determine whether a particular property is located in a TEA and the USCIS defers to these state determinations.<sup>23</sup> Each state (through the entity or persons it has designated) issues a TEA designation letter if it determines that a project location satisfies the TEA requirements. Often the first step a developer will undertake is to attempt to secure a TEA designation letter. If the applicable state authority were to determine a project was not located in a TEA, many developers would simply forgo the use of EB-5 capital altogether because of the difficulty in attracting sufficient investor interest in a project with a minimum investment requirement of \$1,000,000 rather than \$500,000 if the project were located in a TEA. Many states have adopted a generous view of what qualifies as a TEA because each state is competing with every other state for development projects and the EB-5 capital associated therewith. Each state is different and the designated authority and the methodology applied by each state for making such determinations greatly differs.<sup>24</sup> Many states have approved TEAs in areas that most people presume wouldn't qualify, such as the Midtown, Chelsea and Tribeca areas of New York City, and affluent areas of Las Vegas and Los Angeles.<sup>25</sup> However, it has become commonplace for developers to utilize unemployment data to stitch together contiguous tracts to the project's census area in order to parcel together an area that qualifies as a TEA, despite the fact that certain parts of the combined TEA are basically in different worlds. Many critics have referred to the practice of manipulating census tracts as nothing more than gerrymandering, with some arguing the practice has made the original TEA concept practically meaningless.<sup>26</sup>

<sup>23</sup> 8 C.F.R. § 204.6(i).

<sup>24</sup> See e.g.,

<http://www.business.ca.gov/International/EB5Program.aspx> (describing the State of California process to request a TEA letter which has been automated by a new interactive database tool that allows up to 12 contiguous census tracts to be combined);

[http://www.labor.ny.gov/stats/immigration\\_act.shtm](http://www.labor.ny.gov/stats/immigration_act.shtm) (explaining that New York State delegates the determination making authority to the Empire State Development Agency); [http://www.impactdatasource.com/Download\\_Files/Texas%20TEA%20Designations.pdf](http://www.impactdatasource.com/Download_Files/Texas%20TEA%20Designations.pdf) (explaining that Texas delegates this authority to local mayors or county judges).

<sup>25</sup> McGeehan Semple Article; See also

<http://nreonline.com/hotel/using-eb-5-capital-stack-new-hotel-developments>.

<sup>26</sup> See

[http://eb5news.com/system/uploads/newsletter/file/7/Nov\\_Dec\\_2011\\_Newsletter.pdf](http://eb5news.com/system/uploads/newsletter/file/7/Nov_Dec_2011_Newsletter.pdf).

### III. SECURITIES LAW CONSIDERATIONS

Detailed securities law considerations in EB-5 financings are beyond the scope of this article. However, as with the immigration process, a basic understanding of the application of securities laws and applicable exemptions is critical to understanding the EB-5 investment process and structure.

When a developer or third party solicits EB-5 investors to contribute capital to the NCE (whether in the form of debt or equity) such offering typically constitutes a “security” for purposes of federal securities laws.<sup>27</sup> As mentioned previously, the securities offered in connection with most EB-5 projects will usually be exempt from the registration requirements of federal securities laws. In conventional real estate projects the developer relies upon the “private offering” exemption under SEC Rule 506 of Regulation D. The NCE, as issuer, typically also relies on the same exemption. However, in light of the fact foreign investors that may be solicited abroad, an NCE may also rely on the safe harbor created by Regulation S with respect to “offerings made outside the United States.”<sup>28</sup> Due in part to the necessity of securing an exemption from SEC registration requirements, securities offering documents, including a private placement memorandum and subscription agreement, are a necessary part of the EB-5 offering documents provided to all solicited investors.

### IV. IMMIGRATION PROCESS

#### A. Introduction

Although this article's focus is not a deep dive into immigration law, a basic understanding of the immigration process as it relates to obtaining an EB-5 visa is important to understanding EB-5 investment structure, investor exit strategy and the timing of a developer's access to EB-5 funds.

After an investor selects a target investment project, the investor will typically execute a subscription agreement and wire the required investment to the regional center together with the one-time administrative fee charged by the regional center. The funds are wired prior to the investor's visa petition being filed.<sup>29</sup>

#### B. Visa Steps and Timing

The first step of the visa application process is the filing of a Form I-526 petition for conditional permanent residency with the USCIS. The USCIS reviews or “adjudicates” (i.e., approves or denies) the petition. The assigned adjudicator conducts a review

<sup>27</sup> See Section 2(a)(1) of The Securities Act of 1933 (setting forth the definition of a “security”).

<sup>28</sup> Reg D & S Exemptions.

<sup>29</sup> Roadmap Paper.

of (i) the project itself, and (ii) the individual investor. During the project review, the USCIS' main consideration is whether the project creates a sufficient number of qualifying jobs based on the planned amount of EB-5 capital raised. Typically, the project level documents are supplied to the investor by the regional center, including the organizational, transactional and investor documents as well as the economic impact report utilized to justify the number of jobs to be created. At the individual level, the USCIS determines whether (i) the investor's funds have been obtained from a lawful source, and (ii) whether the investor's funds will be placed "at risk".<sup>30</sup> Ultimately, the USCIS either approves or denies the I-526 petition. Approval signifies that the USCIS has accepted the business plan of the project, including its job creation assumptions.

The second step of the visa application process is the filing of a Form I-485 with the USCIS (or Form DS-230 with the U.S. Department of State if the applicant resides abroad). If application is successful, the U.S. Department of State issues a conditional visa (or "temporary green card"). The conditional visa entitles the investor to "conditional permanent resident" status, which permits residency in the U.S. for a period of two years. It is important to note that as soon as the I-485 (or DS-230) petition is approved, the immigrant investor becomes taxable as a U.S. person and his worldwide income is subject to U.S. tax. However, if the investor does not ultimately have his final I-829 Form approved (granting unconditional permanent citizenship) as described below, such person will no longer be subject to U.S. tax.<sup>31</sup>

The third step of the visa application process requires the applicant to file a Form I-829 application which seeks to convert the investor's status from conditional to permanent resident. The Form I-829 must be filed 21 to 24 months following the issuance of the conditional permanent resident visa. Similar to the I-526 review, an assigned adjudicator conducts a review of (i) the project itself, and (ii) the individual investor. At project level, the USCIS' main consideration is whether the project has created a sufficient number of jobs or that a sufficient number of jobs can be expected to be created within a reasonable period of time.<sup>32</sup> The project review entails verification that all of the business plan commitments are still valid, including confirmation of the actual

expenditure of project funds. It is not necessary that all business plan assumptions or expenditures remain unchanged, but if the actual project expenditure is less than as set forth in the original business plan, fewer jobs are likely to be created and verified, which could lead to the denial of the I-829 petition unless the project has a sufficient job cushion to provide a comfortable margin of error. At the individual level, the USCIS' review centers on whether the immigrant investor has sustained his investment in the project and the investment continues to be "at risk."

If the I-829 petition is approved, unconditional permanent resident status is granted, a "permanent green card" is issued, and the investor may permanently live and work in the United States. From start to finish, the process of obtaining an unconditional permanent resident visa typically takes between four and five years from the date the original I-526 petition is filed. Lastly, if the immigrant investor so desires, he/she may, after a five-year residency period (inclusive of both the conditional visa and permanent visa period), apply for U.S. citizenship.<sup>33</sup>

### C. At Risk and Lawful Source Requirements

#### 1. "At Risk".

The EB-5 program requires that an immigrant investor's capital be placed at risk<sup>34</sup> and be continuously maintained until the I-829 petition is approved.<sup>35</sup> The mere intent to invest is not sufficient and prospective arrangements without a present commitment do not suffice. While the degree of risk is not specified by the USCIS regulations, a Precedent Decision issued by the Administrative Appeals Office ("AAO") of USCIS (Matter of Izummi, 22 I&N Dec 169 (BIA 1998)) provides examples of when an investment is not considered at risk. In Matter of Izummi, the AAO stated that if the immigrant investor is guaranteed the return of a portion of his or her investment or is guaranteed a rate of return on a portion of his or her investment, then the portion of the capital is not at risk.

For the capital to be considered "at risk" there must be a risk of loss and a chance for gain. In Matter of Izummi, the immigrant investor's capital was deemed not to be "at risk" because the investment included a redemption agreement protecting against the risk of loss which constituted an impermissible debt arrangement under 8 C.F.R. § 204.6(e). In the case of a promissory note, in order for the investment to be considered at risk, it must be secured by assets

<sup>30</sup> See 8 C.F.R. § 204.6(j); See also Matter of Izummi, 22 I&N Dec 169 (BIA 1998) ("Matter of Izumi"); Matter of Ho, 22 I&N Dec. 206, (BIA 1998).

<sup>31</sup> See IRS section 7701(a)(30)(A) (which defines "United States person" to include lawful residents); 8 C.F.R. § 216.6 (d)(2); and <http://www.irs.gov/publications/p519/ch01.html>

<sup>32</sup> May 2013 Policy Memo.

<sup>33</sup> 8 C.F.R. § 316.2(3).

<sup>34</sup> 8 C.F.R. § 204.6(j)(2); May 2013 Policy Memo.

<sup>35</sup> 8 C.F.R. § 216.6(a)(iii); May 2013 Policy Memo.

The "continuously maintained" requirement often leads investors to require that their funds be escrowed.

enforceable in a U.S. court for which the investor is primarily liable.<sup>36</sup>

In addition, an investment with a promise to return any portion of the immigrant investor's minimum required capital would also not be considered "at risk" (if the return was guaranteed prior to the I-829 visa approval). If an agreement between the NCE and the immigrant investor, such as that of a limited partnership agreement or operating agreement, states that the investor may demand return of or redeem some portion of capital after obtaining conditional lawful permanent residence status (as opposed to unconditional status), that portion of capital is also not at risk. Further, if the investor is individually guaranteed the right to eventual ownership or use of a particular asset in consideration of the investor's contribution of capital (such as a home, real estate interest or item of personal property), the expected present value of the guaranteed ownership or use of such asset does not count toward the total amount of the investor's capital contribution in deciding how much money was placed at risk.

It is important to note that an investor is not prohibited from receiving a return on his or her capital (prior to approval of the I-829 application), so long as the return is not a portion of the investor's principal investment and the return was not guaranteed to the investor.<sup>37</sup> Although the NCE cannot directly guarantee return of the investor's capital investment, if the NCE utilizes the capital to loan money to another entity actually owning and operating the project, the repayment of the loan to the NCE can be guaranteed by a third party. This third party guaranty structure is permitted even though repayment of the loan is essentially equivalent to mandatory redemption of an equity interest (if the investment were structured as equity rather than debt). In contrast, a third party guaranty structure is not viable in an EB-5 investment structured as equity.<sup>38</sup>

## 2. Lawful Source.

An EB-5 visa applicant must have invested or be in the process of investing the requisite amount of "lawfully obtained" capital at the time of filing its I-526 petition.<sup>39</sup> There are multiple methods to prove lawful source of funds. The key is to provide solid documentation showing both the source and path of the money utilized.<sup>40</sup> On February 26, 2015, USCIS hosted a teleconference which was the first in a series of

"interactive" engagements designed to address adjudicative issues reviewing EB-5 filings. This teleconference focused on how to deal with requests for evidence ("RFEs") in EB-5 source of funds issues. The teleconference stressed the importance of credible, third party documentation. USCIS representatives noted that self-serving documents prepared by the petitioner or friends are not as useful as documents from third parties, such as governmental authorities and banks.

USCIS officials explained common EB-5 source of funds scenarios and the proper methods to document them. For example: (i) Earned Income: The investor should present proof of his/her salary, employment certificates, affidavits from past employers, income tax records and bank statements showing deposits over time; (ii) Investment Proceeds: The investor should show: (1) that the money used to make the initial investment were obtained lawfully; (2) that the investor owned the investment; and (3) receipt of the capital from the investment proceeds. Bank statements and documents of the sale of the investment are the most important evidentiary documentation; (iii) Sale of Property: The investor should include the purchase contract for the property, the ownership registration or deeds, and tax receipts for property taxes paid on the property. If a mortgage has to be paid off as part of the property sale, include documentation of that payoff in the source of funds package; (iv) Property Loans: The investor should include documentation of the loan or mortgage contract, the notation of the lien on the ownership documents, evidence of the value of the property compared to the value of the loan and any relevant bank records. The investor must be personally liable to repay the loan; (v) Ownership in a Company: The investor should show the lawful source of the money used to buy an ownership interest in the company; (vi) Company Loans: The investor must show that the company has enough assets to make the loan to the investor. If the investor is a shareholder, include financial audit reports, bank statements, etc. Further, the investor should submit a copy of the shareholder meeting minutes documenting and approving the loan; and (vii) Gifts: The donor must show how he/she lawfully obtained the money provided to the investor. For example, if a parent earned money over many years, the documentation described above concerning earned income would apply to show that the parent lawfully earned the money given to his or her child for the EB-5 investment. Finally, the USCIS concluded the call with general tips for avoiding a source of funds RFE: (w) explain any inconsistencies in the documents provided; (x) if a required document is unavailable, explain why; (y) consider the probative value of evidence (i.e., evidence from an objective third party is

<sup>36</sup> 8 C.F.R. § 204.6(e); May 2013 Policy Memo

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See generally 8 U.S.C. 1153(b)(5)(A).

<sup>40</sup> See generally Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ronald Y. Wada, *Immigration Law and Procedure* § 39.07 (rev. ed. 2015).

better than evidence from the investor, his or her friends or family members, or his or employer); and (z) provide full translations of foreign documents rather than translations of just part of a document.<sup>41</sup>

In practical terms, most experienced regional centers are skilled at structuring EB-5 investments such that they comply with the at risk requirement. Although more exotic structures have passed USCIS muster in the past,<sup>42</sup> in general, the project proposal submitted to the USCIS will pass the at risk requirement if the investment is viewed as a pooled equity investment into an NCE where the return of the investment is tied to the success of the project itself.<sup>43</sup>

#### D. Visa Caps and Limitations

As mentioned previously, the EB-5 program allocates 10,000 EB-5 visas per year to qualified individuals seeking permanent resident status. The EB-5 visa is available not only to the investor, but also to his or her spouse and their unmarried children under the age of 21 (“Derivative Family Members”). Each Derivative Family Member does not require any additional investment, thus EB-5 visas, if ultimately approved, are granted to the investor and each of his Derivative Family Members based solely on a single \$1,000,000 or \$500,000 investment, as applicable. However, each investor and each Derivative Family Member does count against the overall annual 10,000 EB-5 visa cap.<sup>44</sup> Thus, if the average number of Derivative Family Members was 3 per investor, then only 2,500 visas per year would be issued to investors themselves. In addition to the aggregate 10,000 visa limit, an annual per country visa limit applies. No more than 7.1% of EB-5 investor visas can be issued to a single nationality. However, if the 10,000 annual cap has not been reached, the remaining visas can be reallocated.<sup>45</sup> During fiscal year 2013, more than 85% of EB-5 visa applicants were mainland Chinese.<sup>46</sup> Though the EB-5 program is dominated by Chinese investors, other nationalities participate in the program as well, albeit in much smaller numbers. Exhibit A to this article provides a country by country breakdown

for fiscal year 2014 as to the number of EB-5 visas issued.<sup>47</sup>

## V. EB-5 CAPITAL STRUCTURE

### A. Introduction

EB-5 capital is extremely flexible and can fill any space in the capital stack. EB-5 capital can take the form of debt (secured or unsecured) or equity. Individual EB-5 capital raises have ranged from \$500,000 to more than \$600 million. In the past five years, EB-5 capital played a significant role in several large-scale projects, particularly in major urban areas. Examples of such projects include: The Related Companies’ \$600 million raise for the Hudson Yards project on the West side of Manhattan; Forest City Ratner’s \$477 million raise for the Atlantic Yards project in New York City; Silverstein Properties pending raise of \$250 million for the mixed-use, Four Seasons Hotel and luxury condominium in Tribeca; and Stockbridge/SBE’s nearly \$400 million raise for the renovation of the SLS Hotel and Casino Las Vegas. Although investor’s funds can be deployed as either debt or equity, directly or indirectly, recent EB-5 investments have most commonly been structured as gap financing in the form of mezzanine loans or preferred equity and have been associated with a regional center.<sup>48</sup>

### B. Capital Raise & Structuring Basics

Typically, five players are involved at the capital raise stage of an EB-5 project (i) the immigrant investor, (ii) the regional center, (iii) the NCE, typically an entity formed by the regional center serving as an investment vehicle into which the immigrant investor contributes its capital, (iv) the job creating entity (“JCE”), typically the entity that owns the project, and (v) the migration agent located overseas, or broker in the U.S., who solicits the immigrant investor.

Once a developer and NCE determine a project is suitable for EB-5 investment, a variety of documents are created to solicit immigrant investors, including: (i) project business plan, (ii) economic impact analysis report supporting the number of jobs created, (iii) regional center designation letter (also called 924 approval) issued by the USCIS, (iv) TEA designation letter, (v) offering documents including private placement memorandum, (vi) subscription agreement, (vii) escrow agreement, if any, pursuant to which investors funds are held pending satisfaction of certain conditions (e.g., attainment of conditional permanent resident status, or in some cases unconditional permanent resident status), (viii) limited partnership or

<sup>41</sup> See <https://iiusa.org/blog/government-affairs/uscis-government-affairs/uscis-explains-deal-eb5-source-funds-issues-stephen-yaleloehr/> (providing a summary of the interactive teleconference).

<sup>42</sup> See <http://www.law360.com/articles/569937/the-elusive-at-risk-element-of-eb-5> (e.g., regarding a municipal bond structure).

<sup>43</sup> *Id.*

<sup>44</sup> INA, Section 203.

<sup>45</sup> INA, Section 202(a)(2).

<sup>46</sup> See <https://iiusa.org/blog/research-analysis/quarterly-retrospective-january-issue-regional-center-business-journal/>.

<sup>47</sup> U.S. State Department Report of the Visa Office, Table V, Part 3 (2014).

<sup>48</sup> See *generally* Roadmap Paper.



limited liability company agreement of the NCE and the JCE, (xi) if the funds are contributed as a loan, loan and security documents, (x) commitments from other capital sources to fund the balance of the project costs, (xi) documents supporting the regional center's history and track record, and (xii) description of developer's exit strategy (including repayment of the EB-5 capital).<sup>49</sup>

There are two basic options to invest the immigrant investor's capital into an EB-5 project – the loan model and the equity model. The immigrant investor's capital must be initially provided as equity – either investing indirectly into a NCE or directly into a JCE. An immigrant investor cannot loan funds directly to a JCE because it would violate the EB-5 “at risk” requirements and/or would be prohibited debt capital.<sup>50</sup> This prohibition is part of the reason the two-tier loan model is more popular. Under the loan model, the immigrant investor's capital is invested into an NCE as equity and in turn loaned to the JCE. This indirect loan is not considered prohibited debt capital. The loan can be secured by a senior or junior mortgage, equity interests, or even be unsecured entirely. The equity model can be either a one-tier or two-tier structure. In the case of a one-tier model, the immigrant investors contribute capital directly to the JCE in the form of equity and they are equity owners of the JCE (i.e., the project owning entity and the job creating entity are one in the same). The equity ownership stake can be in the form of common or preferred equity. In the two-tier equity structure the NCE is most commonly a preferred equity owner in the JCE.

The structure of the capital stack for each EB-5 project varies from deal to deal, but the amount of EB-5 capital that a project can support (based on how many jobs the project will create) is a material determinant in where EB-5 capital will fit in relation to other capital sources funding the project. Although in the run up to the financial crisis many senior mortgage lenders were willing to lend up to 90% of a property's market value, senior lenders today are only willing to lend 50-70% of total project costs. Lenders typically require a developer to invest some equity in the project to evidence its commitment to the project and ensure it has “skin in the game.” The amount of equity required varies by lender, but generally ranges from 5-10%. If you add up the senior mortgage loan slice and the developer equity slice, it leaves a capital stack funding gap somewhere in the range of 20-45%. Sometimes senior lenders will permit a second, junior mortgage

loan to fill the gap, but many lenders, especially those desiring to bundle and securitize the loan into a pool of commercial mortgage backed securities (“CMBS”), prohibit junior mortgage debt because the national credit rating agencies prohibit the practice if the loan is to be securitized. Mezzanine debt or preferred equity on the other hand, is not considered junior or secondary mortgage debt and deployment of such debt or preferred equity, in general, will not prohibit the securitization of the senior mortgage loan.<sup>51</sup> Although there are exceptions, it is typically very difficult for any large scale project to support a sufficient number of jobs to include EB-5 capital as a senior-secured funding source. For example, if total project costs are \$200 Million, but the project only supports a sufficient number of jobs to raise \$10 Million of EB-5 capital, the EB-5 piece is obviously not going to be a senior mortgage loan. Because of job creation constraints, the EB-5 slice is most often structured as mezzanine debt or preferred equity lower down in the capital structure. Although this location in the capital structure carries inherently more risk, the main concern of the immigrant investor is securing a visa, not return on investment, and a junior location in the capital stack is typically not a deterrent to investment. Additionally, certain immigrant investors actually assume that a project is more likely to succeed if there are larger senior lenders willing to lend funds to the project because they consider the project to have been “vetted” by such larger institutional lenders.<sup>52</sup>

#### 1. Mezzanine Loans.

Mezzanine debt is a loan secured by the mezzanine borrower's equity in another entity. The other entity is typically the owner of the real property which is the security for the senior mortgage loan. The mezzanine borrower does not directly own any real property and does not operate a business. Therefore, the mezzanine lender's only collateral is the mezzanine borrower's indirect interest in the underlying real property, the project and improvements thereon.

The term of a typical EB-5 loan is generally five years. This period is utilized because a term of this length will generally ensure the investor's capital is sustained and remains “at risk” through the entire four to five year unconditional visa approval process. In certain cases, the loan will provide for additional extensions of the maturity date if the project runs into delays and/or investors' visa applications are delayed. Reportedly, some loan documents even provide that the maturity date does not occur until the later to occur of 5 years or the approval of the I-829 petition

<sup>49</sup> See Initial Evidence Requirements section of Instructions to Form I-924, Application for Regional Center. <http://www.uscis.gov/sites/default/files/files/form/i-924instr.pdf>

<sup>50</sup> 8 C.F.R. § 204.6(e); May 2013 Policy Memo; Matter of Izumi.

<sup>51</sup> Paul Rubin, “Strategic Thinking for the Mezzanine Lender”, American Bankruptcy Institute Journal 28:8, 422-43, 88 (2009).

<sup>52</sup> See generally Roadmap Paper.

(granting unconditional permanent residency status).<sup>53</sup> Most EB-5 investors prefer to utilize the loan structure, because such structures typically include a fixed maturity date, periodic interest payments and a foreclosure remedy in the event of a default by the JCE. It is perceived that all of these features will create an additional incentive for the developer to complete the project in a timely fashion.

## 2. Preferred Equity.

Preferred equity structures do not constitute loans. Instead they effectuate direct ownership interests in a particular entity. Often in preferred equity deals, an investor makes a capital contribution to the property owner in exchange for an equity stake in the project owning entity. However, some senior mortgage lenders (similar to a mezzanine loan situation) will require that the preferred equity is invested into a special purpose entity that in turn owns a direct equity interest in the project owning entity. The term “preferred” refers to the investor’s preferential rights (usually with respect to capital distributions) which are superior to the common equity owners. In a conventional real estate project, available free cash flow is periodically distributed to the equity holders. However, if preferred equity is involved, the preferred equity investors are typically paid in full first, until a particular return “hurdle” is met (typically ranging from 6% to 10% per annum on the funds invested). Once the hurdle is met, any remaining free cash flow will be passed on to the common equity holders in a manner specified by the governing documents of the applicable entities. In contrast to the loan model, the preferred equity model typically lacks a fixed “maturity” or redemption feature and generally a guaranty overlay (whether in full or for “bad boy” acts) is also not appropriate. The preferred equity model imposes less pressure on the developer to make payments during the term of the project and there is typically no deadline to returning the investors’ capital. Generally, only the future sale of the project or other “exit event” by the JCE will result in a return of the investors’ capital. The preferred equity model is thus not preferred by investors, however, sometimes the preferred equity model is utilized because the senior lender prohibits all forms of junior debt, including mezzanine debt.<sup>54</sup> Occasionally in the EB-5 context a “fixed rate” preferred equity structure is utilized that has features very similar to debt. In this “fixed rate” structure the NCE is entitled to a dividend set at a fixed rate, payable to the extent the JCE has adequate cash flow. Typically, the dividend is cumulative, so if a dividend payment is missed due to lack of adequate

cash flow, “catch-up” payments are made in future periods to make the investor whole for missed dividend payments. This dividend feature makes the investment slightly more attractive to investors for many of the same reasons mentioned in the discussion of the loan model, but the JCE may be required to pay a higher dividend rate to investors in the preferred equity model compared to the interest rate in a loan structure to compensate for perceived greater risk associated with a lack of a maturity date or redemption feature. Occasionally, preferred investors are entitled to a profit split on top of their preferred return, but this is not as common in the EB-5 context as it would be in traditional non-EB-5 projects.<sup>55</sup>

## C. Immigration Risk & Capital Structure

In a conventional real estate project without EB-5 capital, the rate of return applicable to each source of capital is adjusted by market forces based on financial risk. However, a project with an EB-5 component also introduces immigration risk. As noted previously, an EB-5 investor’s primary concern is securing a visa, not maximizing its return on the capital invested. Thus, the primary concern of EB-5 investors is the project’s ability to satisfy the job creation requirements. Since all of the jobs created by a particular project can be allocated to the EB-5 investors, the lower the percentage of EB-5 capital sought vis-à-vis the rest of the capital stack, the greater likelihood the project will meet the job creation requirements. Thus, as the percentage of EB-5 capital employed in the capital stack declines, often too does the immigration risk.<sup>56</sup>

## VI. LEGISLATIVE DEVELOPMENTS

The EB-5 program was temporarily extended on September 30, 2015 by H.R.719 (the “Continuing Appropriations Act”) until December 11, 2015. The EB-5 program has come under heavy scrutiny in the media lately and many members of Congress feel the EB-5 program should be reformed (if not terminated entirely). The Continuing Appropriations Act, at least as it relates to the EB-5 program, is largely seen as simply “kicking the can down the road” to give Congress more time to debate substantive reforms to the EB-5 program. The positions of Congressman on the EB-5 program range from those that wish to end the program entirely, to those that want to make it permanent and expand it significantly. Most industry insiders do not believe the EB-5 program is at any real risk of being eliminated, but many believe the EB-5 program will be reformed (at least at some point).

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<sup>53</sup> *Id.*

<sup>54</sup> See *Generally* Roadmap Paper.

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<sup>55</sup> *Id.*

<sup>56</sup> See Section II, B(2) hereof discussing the “jobs cushion” concept.

Several bills have been proposed in the House of Representatives and in the Senate this year, including, but not limited to:

- (1) S. 2115, the Targeted Employment Areas Improvement Act, introduced by Senator Jeff Flake (R-AZ), which is narrowly focused on TEAs;
- (2) H.R. 606, the American Entrepreneurship and Investment Act of 2015 introduced by representatives Jared Polis (D-CO) and Mark Amodei (R-NV), which would, in pertinent part (a) make the Regional Center Program permanent, (b) codify the state designation authority with respect to TEAs, (c) require the Secretary of Homeland Security establish a preapproval procedure for business plans, (d) require the USCIS defer to its prior rulings except in the case of material change, fraud or legal deficiency, (e) enhance regional center transparency and accountability, (f) provide an expedited adjudication process for I-924 or I-526 filings, and (g) affirm the applicability of the Foreign Corrupt Practices Act to any EB-5 petition;
- (3) S. 1501, the American Job Creation and Investment Promotion Reform Act of 2015 introduced by Senators Chuck Grassley (R-IA) and Patrick Leahy (D-VT), which is a comprehensive bill that would (a) reauthorize the Regional Center Program for five years, (b) provide additional oversight tools, security enhancements, and anti-fraud protections, (c) increase the required minimum investment amount in a TEA from \$500,000 to \$800,000 and from \$1 million to \$1.2 million for non-TEA investments, (d) revise the definition of a TEA, (e) modify the counting of indirect jobs, (f) require that regional centers provide an annual certification, (g) limit the use of gifts and loans as the source of EB-5 investments, and (h) modify requirements for children whose parents have had I-829 petition terminated, among other modifications;
- (4) S. 2122, the Invest in Our Communities Act introduced by Senator Rand Paul (R-KY), which combines many of the accountability measures found in S. 1501 and other programmatic changes similar to H.R. 616, together with the following key reforms (a) permanent reauthorization of the Regional Center Program, (b) elimination of Derivative Family Members from the annual 10,000 visa cap, (c) increasing the number of EB-5 visas available each year, and (d) eliminating certain per country quotas; and
- (5) H.R. 3370, The Entrepreneurial Business Creating Jobs Act of 2015 introduced by Representatives

Zoe Lofgren (D-CA) and Luis Gutierrez (D-IL). The bill is a hybrid of H.R. 616 and S.1501 and focuses on reforming and strengthening the integrity of the EB-5 program. The bill proposes (a) permanent reauthorization of the program, (b) allowing additional visa numbers if the 10,000 cap is reached, (c) additional security and compliance measures for the regional centers, (d) a process for timely adjudication of all cases, and (e) a revised, workable definition for designating TEAs.

For ease of reference, a summary and comparison of the material pending legislation on the EB-5 program is attached hereto as Exhibit B.<sup>57</sup> While no one is exactly sure what legislation will be passed on the EB-5 program (if any), most commentators acknowledge that the EB-5 program is likely here to stay, but it is also likely to be subject to continual reform and refinement in the coming years.

## VII. CONCLUSION

The rise in the use of, and consequently the public's awareness of, the EB-5 program has exploded over the last few years. Sophisticated U.S. businesses that have long relied on financing from traditional sources are now turning to EB-5 financing (even where the project could have been funded entirely with traditional sources) simply to lower their overall weighted average cost of capital. Businesses of all shapes and sizes, from assisted living facilities to hotels, sports complexes and restaurants, have raised billions through the EB-5 program, with new EB-5-funded projects coming on line all the time. An entire cottage industry has been created due to the program creating hundreds if not thousands of jobs across the country simply to facilitate EB-5 investment (in addition to the jobs created by the EB-5 projects themselves). As more and more sophisticated businesses employ EB-5 capital as a matter of course in their real estate projects, support for the program in the business community will rise and inertia supporting the permanence of the EB-5 program will begin to set in. While there will no doubt be scrutiny in the media and by members of Congress highlighting perceived (and actual) abuses of the original intentions of the EB-5 program, ultimately, this author believes such scrutiny will lead to positive reform of the program rather than its demise.

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<sup>57</sup> See <http://eb5coalition.org/resources/bill-comparison-chart/>.



## EXHIBIT A

FY2014 EB-5 Visa Statistics by Immigrant Origin						
	Direct Investments		RC Investments		5th Total	% of Total
	\$1M not in TEA	\$500K in TEA	\$1M not in TEA	\$500K in TEA		
	5th Employ. Creation	5th Target Employ Areas	Regional Pilot Program	Regional Target Areas		
China Mainland born	67	95		8,966	<b>9,128</b>	85.4%
South Korea	8	10		207	<b>225</b>	2.1%
Mexico	11			118	<b>129</b>	1.2%
China Taiwan born	4			122	<b>126</b>	1.2%
Vietnam				121	<b>121</b>	1.1%
Russia	8			92	<b>100</b>	0.9%
India	5	8		83	<b>96</b>	0.9%
Iran	10	1		65	<b>76</b>	0.7%
Canada	6	3		43	<b>52</b>	0.5%
Nigeria	5			45	<b>50</b>	0.5%
Japan		2		47	<b>49</b>	0.5%
Great Britain	3	4	1	33	<b>41</b>	0.4%
Egypt				37	<b>37</b>	0.3%
Hong Kong		1		29	<b>30</b>	0.3%
Brazil		2		28	<b>30</b>	0.3%
South Africa				22	<b>22</b>	0.2%
All other countries	34	29	-	317	<b>380</b>	3.6%
<b>Total</b>	<b>161</b>	<b>155</b>	<b>1</b>	<b>10,375</b>	<b>10,692</b>	100.0%
% of total	1.5%	1.4%	0.0%	97.0%	100.0%	

Source: US State Department Report of the Visa Office 2014, Table V (Part 3)

<http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2014AnnualReport/FY14AnnualReport-TableV-PartIII.pdf>



**EXHIBIT B**

Comparison of S. 1501, H.R. 616, H.R. 3370, H.R. 2122, H.R. 2115, & SKILLS Act

	Senate Bill S. 1501	Page on Bill	House Bill H.R. 616	Page on Bill	H.R. 3370	Page on Bill	S. 2122	Page on Bill	S.2115	SKILLS ACT (113th Congress)
<b>Permanency?</b>	September 30, 2020 (5 years)	p. 2	Permanent	p. 3-4	Permanent	p. 17	Permanent	p. 3		Permanent
<b>Job Creation Methodology</b>	Revised methodology (repeals in part section 610 of Public Law 102-395); 90% can be indirect; 10% must be direct; Can have credit of jobs from non-alien investors only for percentage of total jobs created that is equal to	p. 4-7	No change to existing law. "Reasonable methodologies" for determining jobs created indirectly through revenues generated from increased exports, improved regional productivity, or increased domestic capital investment.	p. 5	Methodology to be approved by DHS and Commerce; job creation outside the geographic boundary of the RC may be considered if the estimated job creation is supported by substantial evidence and is no more than 50% of	p. 19-20	"Reasonable" methodologies for determining the number of jobs, including jobs created indirectly from: increased exports; improved regional productivity; or increased domestic capital investment resulting from the RC.	p. 5-6		Not addressed in legislation.

	Senate Bill S. 1501	Page on Bill	House Bill H.R. 616	Page on Bill	H.R. 3370	Page on Bill	S. 2122	Page on Bill	S.2115	SKILLS ACT (113th Congress)
	percentage of total investment, but cannot exceed 30%; No tenant occupancy allowed. Bureau of Economic Analysis (BEA) must accept methodology.				estimated jobs.					
<b>Amendment to Regional Center</b>	Any changes, need to file an amendment, including sale or rental.	p. 7	Not addressed in legislation.		Not addressed in legislation.		Not addressed in legislation.			Not addressed in legislation.
<b>Preapproval of NCE</b>	Required, and will need the following for adjudication: 1) comprehensive business plan; 2)	p. 8-12	Optional preapproval process included in legislation.	p. 5-6	Optional preapproval process included in legislation.	p. 20	Optional; preapproval eliminates the need to submit project documents with any I-526 petition.	p. 6-7		Not addressed in legislation.

	Senate Bill S. 1501	Page on Bill	House Bill H.R. 616	Page on Bill	H.R. 3370	Page on Bill	S. 2122	Page on Bill	S.2115	SKILLS ACT (113th Congress)
	<p>economic report; 3) SEC documents; 4) investment and offering documents, 5) including marketing materials; description of policies and procedures to confirm compliance with securities law; 6) certification that persons involved have complied with securities laws; 7) economic analysis for TEA/CSA.</p>									

	Senate Bill S. 1501	Page on Bill	House Bill H.R. 616	Page on Bill	H.R. 3370	Page on Bill	S. 2122	Page on Bill	S.2115	SKILLS ACT (113th Congress)
<b>Effect of Preapproval</b>	Will be binding on subsequent petitions and afford deference unless there is evidence of “fraud, misrepresentation, criminal misuse, a threat to public safety or national security, a material change that affects the approved economic model, other evidence affecting program eligibility that was not disclosed during the approval process, or a	p. 12	Deference given.	p. 7	Deference given: legislation requires that the “Secretary make final decisions on all issues . . . other than those issues unique to an individual investor in the new commercial enterprise.” Eliminates the need for repeated submission of project documents once preapproved.	p. 20-21	Deference given for both the I-526 and I-829 stages.	p. 7-8		Not addressed in legislation.

	Senate Bill S. 1501	Page on Bill	House Bill H.R. 616	Page on Bill	H.R. 3370	Page on Bill	S. 2122	Page on Bill	S.2115	SKILLS ACT (113th Congress)
	material mistake of law or fact in the prior adjudication.”									
<b>Processing times</b>	“On average”: 120 days for I-924, 150 days for I-526, and 180 days for I-829. Fees may be adjusted to achieve these processing timeframes.	p. 67-68	Adjudication within 180 days; if RFE, 30 days upon receipt of response	p. 7-8	Does not address or prescribe processing times. Preapproval process provided—see below.		Adjudications within 180 days. Requests for evidence shall be issued within 30 days of filing, and adjudication of RFEs shall be within 30 days after it is received.	p. 8-9		Not addressed in legislation.
<b>Grounds for Denial or Revocation of Investor’s Visa or Status</b>	Secretary has unreviewable discretion to deny or revoke investor status at any point, including based on “fraud,	p. 14	Not addressed in legislation.		The Secretary “may” deny or revoke an investor’s petition for classification as an immigrant investor or a petition to remove		Not addressed in legislation.			Not addressed in legislation.

	Senate Bill S. 1501	Page on Bill	House Bill H.R. 616	Page on Bill	H.R. 3370	Page on Bill	S. 2122	Page on Bill	S.2115	SKILLS ACT (113th Congress)
	misrepresentation, criminal misuse, or threats to public safety or national security.” Secretary not required to disclose the basis for any determination.				conditions based on participation that is “contrary to the national interest,” “poses a threat to national security,” or because the individual “seeks to engage in any criminal or civil violation of any law relating to fraud, deceit, misrepresentation, or criminal misuse.”					
<b>Site visits</b>	Mandatory site visits. “Secretary shall perform at least 1 site visit to each regional center associated	P. 14	Not addressed in legislation.		Requires site visits to be performed on a random basis of not less than 5% of all approved regional center	p. 21	Not addressed in legislation.			Not addressed in legislation.



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	commercial enterprise . . . “				capital investment projects per fiscal year.					
<b>Premium processing</b>	Premium processing option provided for Business Plan and project documents, and can also expedite site visit. Secretary will impose the fee.		Not addressed in legislation.		\$5,000 fee that can be adjusted per CPI. Premium processing option only available to petitions associated with preapproved investment offering. 60 days for adjudication.	p. 47-49	Not addressed in legislation.			Not addressed in legislation.
<b>Job Creation Counts in a TEA</b>	If investment is in TEA, at least 50% of job creation must be in TEA/CSA. If it is below 50%, the total number	p. 15-16	Not addressed in legislation.		Not addressed in legislation.		Not addressed in legislation.			Not addressed in legislation.

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	of jobs created will be limited to the number at which 50% of the job creation occurs.									
<b>Annual Statement</b>	Each year, the RC must submit a statement certifying compliance, disclosing any litigation or bankruptcy, accounting of foreign investor money, evidence 100% of capital is committed, a detailed progress, accounting of direct jobs created/preserve	p. 17-19	Not included		Annual statement submitted to USCIS including: description of litigation or bankruptcy proceedings; accounting of all foreign investor money into the RC and projects; accounting of capital invested for each project; description of how capital is deployed per business plan;	p. 21-24	Not addressed in legislation.			Not addressed in legislation.

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	d, and description of all funds. Disclosure of whether there has been a material change.				evidence the capital is 100% committed to the project; evidence progress is made to completion of the project; accounting of all the jobs counted (direct and indirect); fees collected from investors other than for the investment, including a description, entities that received the fees, and the purpose for the fees; and a statement certifying the accuracy.					

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<b>Sanctions</b>	The Director may implement graduated sanctions if there is a violation, including monetary, temporary suspension, and permanent bar.	p. 20-21	Not included		Authorized sanctions will be graduated, including fines, temporary suspension, a permanent bar from program participation, and termination of RC status.	p. 25-26	Not addressed in legislation.			Not addressed in legislation.
<b>Regional Center Operators-Bona Fides</b>	Must have a clean record in general (criminal, civil) for 10 years.	p. 22-25	Clean record for 5 years.	p. 8-10	Must have a clean record in general (criminal, civil) for 5 years.	p. 26-27	Must have a clean record in general (criminal, civil) for 5 years.	p. 10-14		Must not be an aggravated felon, inadmissible.
<b>Regional Center Principals</b>	Must be U.S. citizen or LPR.	p. 26	Not included		Must be U.S. citizen or LPR.	p. 29	Must be U.S. citizen or LPR.	p. 14-15		Not addressed in legislation.

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<b>Foreign Government Ownership/ Admin.</b>	Not allowed.	P. 26	Not included		Not allowed.	p. 29	Not allowed.	p. 15		Not addressed in legislation.
<b>Background checks on RC principals</b>	Background checks required and Secretary is authorized. Includes fingerprinting as part of the background check.	p. 27	Secretary "shall perform such background checks as the Secretary in the Secretary's discretion considers appropriate." Attestation and fingerprints required of regional center principals.	p. 10	Secretary "shall" require attestations concerning criminal history, including submission of fingerprints to the FBI and shall perform criminal record and other background checks as the Secretary deems appropriate.	p. 29-30	Background checks required and Secretary is authorized. Includes fingerprinting as part of the background check.	p. 15		Background checks conducted by DHS.
<b>Termination of Regional Center</b>	Secretary has unreviewable discretion to	p. 28	Secretary authorized to terminate regional	p. 11	Secretary has unreviewable discretion to	p. 30-35	Secretary authorized to terminate regional center based on	p. 15-16		DHS Secretary given

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	terminate regional center based on violations.		center and shall provide procedures for appeal.		terminate or suspend the RC if it is found to have violated SEC rules and regulations, or fails to provide a certification related to SEC compliance ; effective immediately. Secretary may terminate based on other enumerated violations such as fraud, misrepresentation etc.		violations such as failure to provide attestations or engaged in fraud.			unreviewable authority to suspend or terminate regional center.
<b>Securities Attestations</b>	Regional Center needs to certify compliance and has policies and	p. 29-30	Not addressed in legislation.		RC needs to certify that the RC, to the best knowledge of the	p. 31-32	Regional Center needs to certify compliance and has policies and	p. 17-19		RC must certify compliance

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	procedures in place and must annually reissue such certification.				applicant, and all parties to the RC are in compliance with securities laws. RC will be responsible to monitor and supervise all offers and sales of securities and to maintain the records. Annual certification.		procedures in place and must annually reissue such certification. RC will be responsible to monitor and supervise all offers and sales of securities and to maintain the records. Annual certification.			
<b>Securities Attestations-remedies?</b>	Can remedy if RC discovers there was noncompliance, need to describe the actions taken to remedy it and certify compliance.	p. 31-32	Not addressed in legislation.		Does not include.		Can remedy if RC discovers there was noncompliance, need to describe the actions taken to remedy it and certify compliance.	p. 19-20		Not addressed in legislation.

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<b>Oversight</b>	RC has burden to maintain all records of securities/sales for 5 years.	p. 32	Not addressed in legislation.		RC has burden to maintain records, data, and information relating to the offers and sales of securities.	p. 32	RC has burden to maintain records, data, and information relating to the offers and sales of securities.	p. 20		Not addressed in legislation.
<b>Effect of failure to provide securities certification</b>	Suspension or termination.	p. 32-34	Not addressed in legislation.		Suspension or termination (unreviewable discretion) for failure to provide certification, is enjoined in connection with offer, purchase, or sale of a security; subject to a final order of the SEC, or submitted a knowingly false certification.	p. 32-34	Suspension or termination (unreviewable discretion) for failure to provide certification, is enjoined in connection with offer, purchase, or sale of a security; subject to a final order of the SEC, or submitted a knowingly false certification.	p. 20-22		Regional center designation shall be revoked for SEC violations.



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<b>Delegation authority</b>	Not addressed in legislation.		Not addressed in legislation.		Secretary of Homeland Security may delegate to the Secretary of Commerce authority and responsibility to adopt rules, and determine whether job creation requirements have been met.	p. 36	Not addressed in legislation.			Not addressed in legislation.
<b>EB-5 Integrity Fund</b>	From Jan. 1, 2016, \$20,000 fee for RC to go fund audits, site visits, investigations outside the U.S., and generally combat fraud. Must be paid	p. 35-37	Not addressed in legislation.		Immigrant Entrepreneur Account created to administer the program.	p. 47-48	Not addressed in legislation.			Not addressed in legislation.

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	within 90 days.									
<b>Promoters/ Agents</b>	Must register or be barred. RC must have compliance and signed agreement with individual.	p. 38-39	Not addressed in legislation.		Not addressed in legislation.		Not addressed in legislation.			Not addressed in legislation.
<b>Source of Funds</b>	Lays out specific guidelines. Gift restrictions-limited to family. Loan restrictions-must be secured by investor's assets and issued by reputable bank	p. 40-43	Not addressed in legislation.		Not addressed in legislation.		Not addressed in legislation.			Not addressed in legislation.

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<b>Safe Harbor for Investor If Regional Center is terminated</b>	CPR still goes on. No unlawful presence for 180 days, but CPR will be terminated in 6 months, unless the investor invests again and can have CPR removed 2 years after the investment.	p. 44-46	Not addressed in legislation.		The legislation includes a safe harbor provision for investors who cannot meet the requirements under 203(b)(5) and 216A after two years and permits a two-year extension. This may be drafted in a way that an investor in a terminated regional center could obtain an extension.	p. 44	Not addressed in legislation.			Not addressed in legislation.
<b>GAO Report</b>	Must submit a report no later than December 31, 2018- economic benefits, USCIS	p. 48-50	Not addressed in legislation.		Not included, but requires a report to the Committee on the Judiciary of the House and Senate, in	p. 45-47	Not included, but requires a report to the Committee on the Judiciary of the House and Senate detailing the	p. 24-25		Not addressed in legislation.

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	compliance, records, SOF, and use of EB-5 integrity fund.				addition to an Annual Site Visit and Biennial Report from DHS.		percentage of completed and pending projects in all areas; whether Federal financial assistance is given; and whether market demands exceed visa allocation.			
<b>Inspector General Report</b>	Must submit report no later than December 31, 2018- assessing vulnerabilities, threats.	p. 50- 51	Not addressed in legislation.		Not included, but requires a report to the Committee on the Judiciary of the House and Senate, in addition to an Annual Site Visit and Biennial Report	p. 45-47	Not included, but requires a report to the Committee on the Judiciary of the House and Senate detailing the percentage of completed and pending projects in all areas; whether Federal financial assistance is given; and whether market demands exceed visa	p. 24-25		Not addressed in legislation.

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							allocation.			
<b>Site visit for Project</b>	Secretary shall perform a site visit to JCE any time after an application for approval is filed.	p. 53	Not addressed in legislation.		Performed on a random basis of not less than 5% of all approved regional center capital investment projects per fiscal year.	p. 21	Not addressed in legislation.			Not addressed in legislation.
<b>TEA designation</b>	5,000 visa set aside for TEA; valid for 2 years. Authority rests within DHS and not bound by Federal or State governmental or non-governmental entity.	p. 56-57; p. 62-63	5,000 visas set aside; determined by State agency. DHS shall defer to State. Valid for 2 years.	p. 2-3	4,000 visas set aside for high unemployment areas; 2,000 for rural areas, and 2,000 for counties with a 20% or greater decrease in population since 1970, a state or federal economic development	p. 36-40	Not addressed in legislation.		Reserves 5,000 visas under the annual cap for investments made in targeted employment areas; Provides that an area designated as a targeted employment area shall be valid for five	TEA designation determined based upon Department of Labor determination of geographic boundary of high unemployment area.

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					incentive program, or an area within the boundaries of a military installation closed under the BRAC law. TEA valid for 5 years.				years, with the possibility for renewal in five-year increments; Provides that an investor who invests in a targeted employment area shall not be required to increase the investment should the designation expire; Deems as a targeted employment area a “community adversely affected” a military base closure pursuant to a recommendation	Secretary of Homeland Security has ultimate discretion to determine TEA for purposes of the program.

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									from the Defense Base Closure and Realignment Commission	
<b>High un-employment definition</b>	High unemployment area for TEA purposes is limited to a single census tract with 150% of the national average unemployment rate.	p. 62	No change to existing law.		High unemployment area is defined as an area comprising of one or more contiguous census tracts within one Core Based Statistical Area with unemployment rate of at least 150% of national average.	p. 39-40	Not addressed in legislation.		High unemployment area defined as: a "census tract or group of census tracts that are economically integrated" and which take into consideration commuter flow patterns, that meet the unemployment threshold of 150 percent of the national unemployment	TEA definition tightened to only include an area which has an unemployment rate of 150% and fits entirely within a geographical unit the Secretary of Labor has determined

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									average; an area within the boundaries of a Federal or State development incentive program such as an enterprise zone, renewal community, promise zone, or empowerment zone, or any Federal or State program “designed to create jobs, start small businesses, or revitalize neighborhoods” Defines rural area as: any area outside of a metropolitan statistical area,	has an unemployment rate of 150%+



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									and areas within a metropolitan statistical area that are 1) a city or town with a population of 20,000 or fewer residents “on the outer boundary” of an MSA, 2) a city or town with a population of 20,000 or fewer residents that is within a state with a population of fewer than 1.5 million residents, or 3) an area located in a census tract within an MSA that as a population	

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									density of fewer than 500 people per square mile	
<b>Minimum Investment Amount</b>	\$1,200,000 for non- TEAs, and \$800,000 for TEAs. Automatically adjusted every 5 years, or can be annual as well-based on CPI.	p. 57-58	Not addressed in legislation.		\$1,000,000 for TEA, \$2,000,000 for non-TEA. Effective for first fiscal year that begins more than 6 months after date of enactment. Adjusted every 3 years per CPI.	p. 42-43	Not addressed in legislation.			Will be increased based on changes in CPI. Adjustments will take place on an annual basis.
<b>FTE definition</b>	position requiring at least 35 hours of service per week for 24-month period	p. 62	Not addressed in legislation.		Position requiring at least 35 hours per week, and expected to last for 2 years. May be satisfied on a full-time equivalent basis by calculating the	p. 40-41	Not addressed in legislation.			Not addressed in legislation.

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					number of full time employees that could have been employed if the reported number of hours worked by part-time employees had been worked by FTE.					
<b>I-526 Petition processing times</b>	Not addressed in legislation.		Adjudication within 180 days; if RFE, 30 days upon receipt of response	p. 11-12	Does not address		Not addressed in legislation.			Not addressed in legislation.
<b>Numerical Limits</b>	Not addressed in legislation.		Spouse and child eliminated from 10,000 numerical limitation, and eliminates per country quotas.	p. 13	If the visa numbers have been exhausted, an additional 10,000 may be made available for that fiscal year unless a joint		Spouse and child eliminated from 10,000 numerical limitation, and eliminates per country quotas. Adds additional visa numbers.	p. 2-3		Per country limits are eliminated for employment-based categories. For family

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					resolution is enacted.					cases, the limit is raised from 7% to 15%.
<b>Age-out children</b>	If a petition is terminated, will still be considered a child if the parents file another petition in one year and the “child” does not marry. May only file one more.	p. 63-64	If a petition is terminated, will still be considered a child if the parents file another petition in one year and the “child” does not marry. May only file one more.	p. 13-14	Does not address		If a petition is terminated, will still be considered a child if the parents file another petition in one year and the “child” does not marry. May only file one more.	p. 24-25		
<b>Conditional Permanent Residence Extended</b>	Not specifically addressed in legislation but there is some investor safe		Not addressed in legislation.		If there is a delay in filing the petition (case-by-case), the second anniversary in	p. 44-45	Not addressed in legislation.			One year extension possible at Secretary’s discretion

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	harbor if RC terminated.				which to remove conditions will be extended to the fourth anniversary					if facts and circumstances warrant.
<b>Concurrent filing of I-526 and AOS</b>	Allowed if there is a visa available.	p. 65	Allowed if there is a visa available	p. 15-16	Allowed if there is a visa available.	p. 47	Not addressed in legislation.			Not addressed in legislation.
<b>Order of filing</b>	Cannot file I-526 without I-924 approval.	p. 66	Not addressed in legislation.		Not addressed in legislation.		Not addressed in legislation.			Not addressed in legislation.
<b>Transparency</b>	No preferential treatment by any agency employee in relation to any individual connected with EB-5 program. Improper	p. 69-77	Not addressed in legislation.		Not addressed in legislation.		Not addressed in legislation.			Not addressed in legislation.

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	<p>activities enumerated in the bill. All communications must be recorded between agency and Eb-5-associated individual and included in case file. Oral communications must be recorded electronically or with notes. Any information received from law enforcement or intelligence agencies, or from any whistleblower, shall be protected and</p>									

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	<p>included in record. Protect whistleblowers.</p> <p>DHS will establish an email account for inquiries, which will be an appropriate channel. USCIS will log all communications, identity of participants, and subject matter, and will make such log public under FOIA.</p> <p>General requirements for agency employees: shall act impartially and may not give preferential</p>									

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	<p>treatment to any organization or individual, including expediting or influencing cases, meeting or communicating with parties associated with the entities at their requests that is not available to others.</p> <p>Sanctions for violation include “written reprimand; suspension; demotion; or removal.”</p>									



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<b>Appellate Rights</b>	Not addressed in legislation.		Not addressed in legislation.		Not addressed in legislation.		Any persons subject to suspension or termination due to the discretion of DHS will be entitled to a hearing before an administrative law judge with all facts and documents. DHS has the burden to prove, by a preponderance of the evidence, that the suspension or termination was valid. The ALJ has final decision-making authority.	p. 9-10		

