

*Panel 3B*

# *I-526 Petition Anatomy*

*Chad Ellsworth, Fragomen Worldwide*

*Jenny Thorvaldsen, IMPLAN Group LLC*

*Osvaldo Torres, Torres Law, P.A.*

*Phil Cohen, Strategic Element Consulting*

*Moderator: Nelson Lee, Lee & Lee P.S.*

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**eb5**  **investors**  
*Magazine*

**2016 LAS VEGAS**  
**EB-5 Conference**

# Welcome Speakers



## Phil Cohen

► STRATEGIC ELEMENT  
CONSULTING

Phil Cohen is the founder and president of Strategic Element Consulting. The company has successfully developed close to 100 EB-5 business plans since 2010, including plans for regional

centers, project plans under existing regional centers, and direct EB-5 plans. Mr. Cohen has a long history of developing businesses, business concepts, and products, dating back to 1993. With a career that began in the manufacturing sector, and grew to include new developments in technology and a variety of startups, Mr. Cohen has progressively built up experience in the area of new business development with a focus on transforming ideas into viable business models for large public corporations, start-ups, and everything in between. He is also the founder, lead author, and editor of The EB-5 Definitive Guide, and is one of the main authors and co-editors of The EB-5 Book. He is a well-known EB-5 blogger and regularly speaks at and participates in EB-5 industry events.



## Osvaldo Torres

► TORRES LAW P.A.

Osvaldo Torres is a securities attorney and head of his own boutique law firm, Torres Law P.A, based in Fort Lauderdale, Fla. His practice focuses on corporate, securities, and media law, providing

legal services and assistance to international entrepreneurs, businesspersons, and investors. Mr. Torres has extensive knowledge in EB-5 immigration matters, ensuring deals and contracts comply with U.S. investor immigration laws, along with expertise in litigation case strategies, legal department management, and coordination of lobbying efforts. With over 25 years of experience in sophisticated transactional law, Mr. Torres has helped numerous foreign investors operate their businesses in the United States and assisted hundreds of clients, including the HBO Latin America Group and the Telemundo Group, Inc. He completed his Bachelor's Degree at the University of Buffalo, graduating magna cum laude, and earned his Juris Doctor from the University of Pennsylvania Law School, where he served as editor-in-chief of the Penn Law Forum.

# Welcome Speakers



**Jenny Thorvaldson**

► IMPLAN GROUP LLC

Jenny Thorvaldson joined IMPLAN Group in 2010 and currently serves as economist and lead data specialist in the company's Huntersville, N.C. office. IMPLAN began creating economic

impact modeling data in 1976, and since then, has provided data to help numerous government agencies and businesses conduct studies and make decisions. In addition to managing most IMPLAN data products, Ms. Thorvaldson also performs analysis support and contributes to the website documentation and training materials. She received a B.S. in Biological Sciences and Spanish from Colorado State University in 2002 and a Ph.D. in Natural Resource Economics from Colorado State University in 2010. During her time as a graduate student in the Department of Agriculture and Resource Economics at Colorado State University, Ms. Thorvaldson used IMPLAN to study the economic impacts of reduced irrigated agriculture in Colorado. She also taught Microeconomics and Environmental Economics at Front Range Community College.



**Chad Ellsworth**

► FRAGOMEN WORLDWIDE

Chad Ellsworth joined Fragomen in 2002. His practice focuses on the representation of individual and business clients on a wide variety of corporate immigration and related employment

matters. He has advised human resource personnel, managers, executives and professionals, and multinational corporations on a variety of global immigration matters with an emphasis on the establishment and/or improvement of immigration-compliant global mobility programs including jurisdictions with less formalized immigration processes and procedures. Mr. Ellsworth also advises many high-net-worth individuals in their immigration-related investments. As Chinese citizens are the largest users of the EB-5 investor category, he regularly liaises with Chinese and other foreign investors to address their immigration needs. He is a member of the firm's Corporate Compliance and Private Client Practice Groups, a regular speaker at national and international immigration conferences, and the author of immigration-related articles. He earned his Juris Doctor cum laude from Tulane Law School, and his Bachelor's Degree from the University of Southern California.

# Welcome Moderator



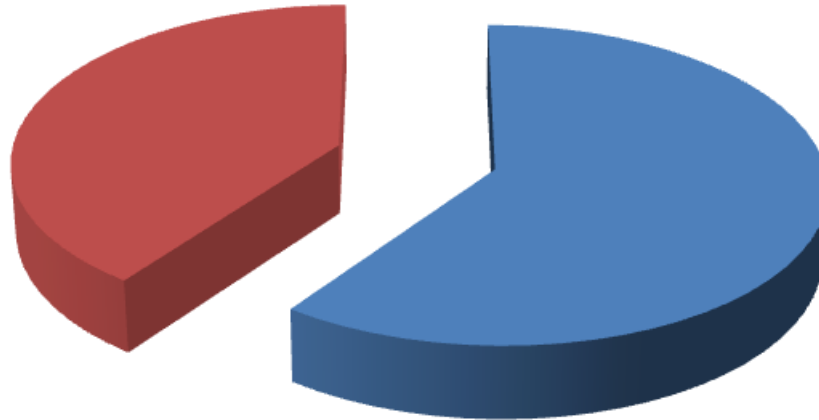
## Nelson Lee

► LEE & LEE PS

A partner in the Seattle-based Lee & Lee PS, Nelson Lee leads the firm's dedicated EB-5 team. He is a former senior deputy prosecutor with the King County Prosecuting Attorney's Office, with over 100 cases tried successfully before a jury during his 17-year career there, including a number of complex, high-profile cases. Mr. Lee has been voted as a Top 40 Lawyer Under 40 by the National Asian Pacific American Bar Association, along with being recognized as a Rising Star by Super Lawyers Magazine. He is a pro tempore judge for the cities of Lake Forest Park and Federal Way, and he volunteers regularly at the International District Legal Clinic. He has also served as an adjunct professor in trial advocacy at the University of Washington and Seattle University, and has coached moot court and trial advocacy contestants. In addition, Mr. Lee has served as a board member and officer of a number of local organizations, such as the Asian Bar Association of Washington.

# *Business Plan*

*Preparing/Vetting  
Data*



*Writing &  
Organizing  
Document*



# *DNA of a Successful Business Plan*

## **1. Program Requirements**



# Matter of Ho

- *Business Description: business, products and services, objectives, production process, location*
- *Market Analysis: **competitive products and pricing**, comparative strengths and weaknesses, target market, prospective customers*
- *Marketing Strategy: distribution channels, pricing, advertising, after sales service*
- *Development Plan: **timeline for development and implementation of the business***
- *Organization and Management: organizational structure, personnel experience, **permits and licenses**, legal form of the business, **role of the investor***
- *Job Creation: **staffing requirements, timetable for hiring, job descriptions, economic impact report (for indirect)***
- *Financial Information: sales, expenses, income projections, **detailed assumptions, sources and uses of capital***
- *Most importantly, the business plan must be credible*

## *Beyond Matter of Ho (Program)*

- *RFEs*
- *Memoranda*





# *DNA of a Successful Business Plan*

## *2. What Else to Consider*



## *Beyond Matter of Ho (Non-Program)*

- *Market-facing Considerations*
- *Experience:*
  - *Presenting plausibility*
  - *Unique situations*
  - *Investor perspective*
  - *Program knowledge*



# *DNA of a Successful Business Plan*

## *3. Supporting Material/Decisions*



# *Direct vs. Regional Center Approach*



## **Direct:**

- Direct jobs only
- Less Cost
- Quicker to prepare
- Not regionally limited
- Can be structured as a 'pooled direct'

## **Regional Center**

- Indirect jobs benefit
- Longer, more costly
- Must create RC or make a deal with an existing RC

# Job Creation



- *Indirect jobs: economist*
- *Preliminary indirect calculation*
- *Direct construction jobs: 24 months?*
- *Match to capital needs (buffer)*
- *Reasonability of direct jobs*
- *Reasonability of wages*



# Capital Stack Planning

- Breakdown (rule of thirds):
  - Owner Equity
  - EB-5
  - Other financing sources
    - EB-5 bridge component
- Tied into the stack:
  - Investor position
  - Backup financing
  - Bridge Capital



# Project Feasibility (Study?)

## 3<sup>rd</sup> Party Validation of Critical Elements:

- Market portrait, trends
- 3<sup>rd</sup> party competitive analysis
- Overall feasibility validation
- Pro forma and assumptions



## *Deciding on Team Members*

- *\*Immigration Attorney*
- *\*Securities/Corporate Attorney*
- *\*Business Plan Writer*
- *\*Economist*
- *\*Feasibility Study Provider*
- *\*Regional Center*
- *\*Marketing Consultants*
  - *Migration Agents*
  - *Broker Dealers*
- *Bank/ Escrow Agents*
- *Real Estate And Other Specialty Legal Advisors*
- *Data Management Services*
- *Due Diligence*

# Understand EB-5 Market/Marketing

## Standing Out

### Team history

- Job creation buffer
- ‘Likelihood of job creation’
  - Economic inputs/ Bridge fin./ Backup fin./ Dev. underway
- Feasibility study
- Fair returns
- Minimize ‘sizzle’
- Property status
- Unique deal advantages
- Redeployment: ‘at risk’ capital
- Escrow terms



## *Exemplar vs. Hypothetical Plans*

- *Hypothetical:*
  - to form RC
  - to begin marketing
  - quicker and cheaper now, but...
- *Exemplar:*
  - more for investors
  - 'cleaner'



## *Establish TEA*

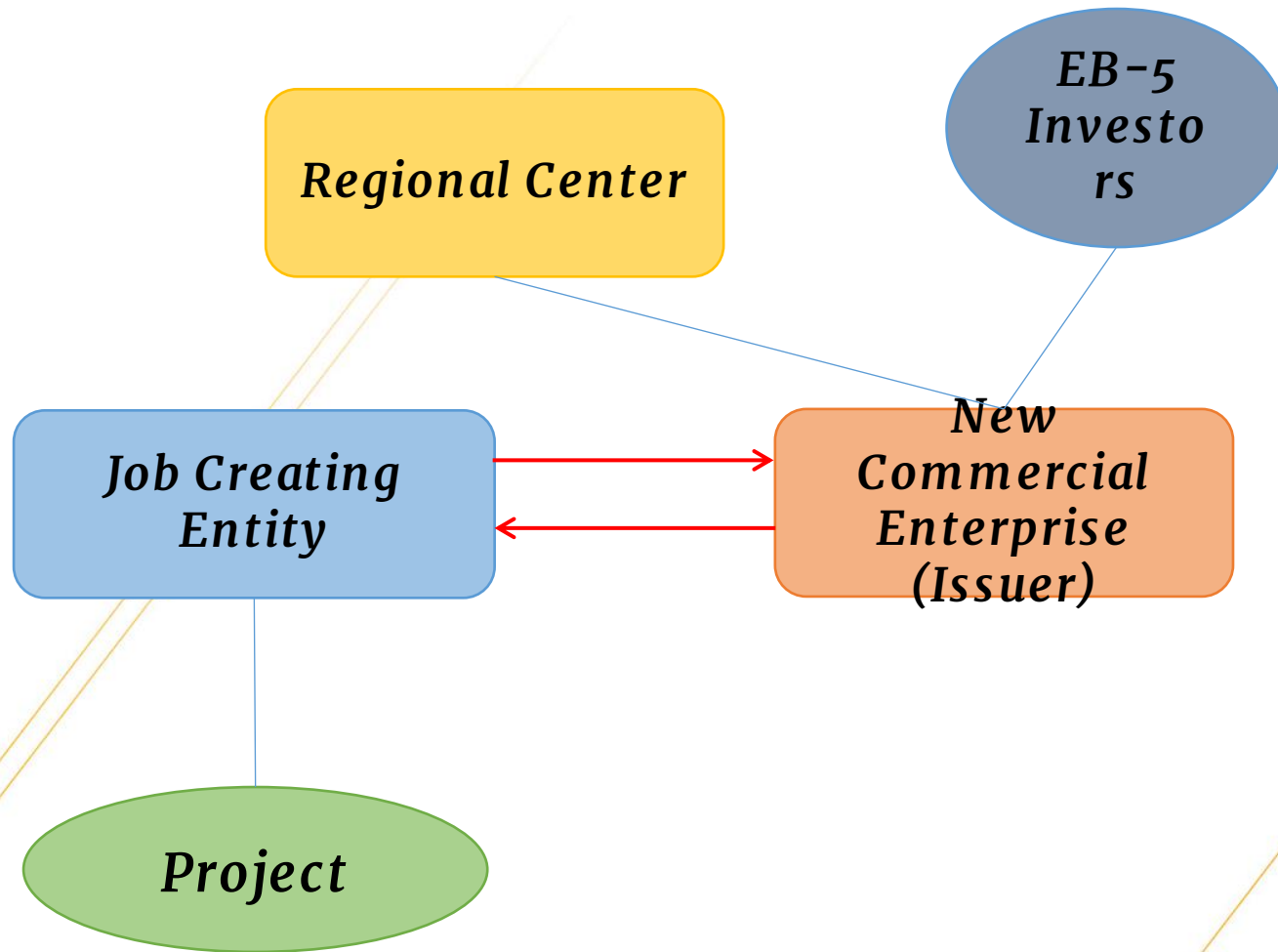
- *Project located in TEA?*
- *Develop TEA?*



## *Recap: Before Starting on Your Plan*

- *Educate: consider...*
  - *the program and selling the deal*
- *Consider program choices: (direct? exemplar? TEA?)*
- *Job creation: critical to getting what you need*
- *Capital: How will you manage your stack?*
- *Support: Demonstrate feasibility & prove numbers*
- *Team: don't wait/ team strength*
- *Marketing: Understand & meet the investor market*

# Simple Loan Model



# The Offer & Sale of Securities

- **Securities Act of 1933**
  - Offer and sale must be registered or exempt
    - Most common exemptions:
      - Reg D
      - Reg S
- **Blue sky laws**
  - Apply for state where offer is made from, even if offer entirely to foreign investors
  - Some states do not have Regulation S exemption – e.g., California
- **Antifraud**
  - Investors will be layers removed from developers
  - Investor concerns are primarily getting visa and safety of principal
  - Sophistication may be questionable
  - Higher level of care needed than for typical PPM

# Sanctions & Remedies

- **State & Federal Regulators**

- Cease and Desist Orders
- Disgorgement
- Substantial Fines and Penalties
- Possible Criminal Charges

- **Private Remedies**

- Damages Awards
- Rescission
- Statutory Interest and Attorneys fees



# Issuer Exemption

- Issuers and the associated persons of an issuer, such as officers, directors or employees, who participate in a sale of the issuer's securities are generally exempt from registration because they only sell securities for their own account (i.e., NOT OTHERS)
- However; the associated person must meet three conditions:
  - May not be paid a commission or other transaction-related compensation;
  - Is not at the time of his or her participation an associated person of a broker or dealer; and
  - must have other substantial responsibilities other than the sale of the security
- There are no exceptions for payment to Immigration attorney's, regional centers, or other consultants claiming to be EB5 experts with overseas connections

# Broker/Dealer Registration

## *Broker registration requirement under Section 15(a):*

- It is unlawful for any unregistered broker or dealer to effect any transactions in or otherwise engage in the business of purchasing or selling securities.*
- Section 3(a)(4)(A) of the Exchange Act defines a broker as “any person engaged in the business of effecting transactions in securities for the account of others.”*

# Broker-Dealer

- Potentially applicable to:
  - Regional Center
  - RC's employees/consultants
  - Sponsor
  - Sponsor's employees/consultants
  - Marketing firms
- Raising funds through unregistered broker-dealer involves risk of rescission liability to:
  - Unregistered BD
  - Issuer
- Use of broker-dealers is emerging trend

## Where Do Finders Fit In?

- The term “finder” is also not defined in the Exchange Act or the rules promulgated thereunder
- The finder exemption from broker-dealer registration has been carved out largely in response to a series of SEC no-action letters
- It is generally recognized that an individual or entity will come within the finder exemption if they do nothing more than provide the contact information of a potential investor to an issuer
- However, because the finder exception is merely a product of the interpretation of a number of no-action letters, the SEC is free to narrow the scope of permitted finder activities at any time

# *When a Finder Becomes a Broker*

- *Review of SEC no action letters suggests that the following factors are indicative that a finder is a broker-dealer required to register:*
  - *conducting or assisting with sales efforts*
  - *participating in negotiations between the issuer and investors*
  - *receiving commissions or transaction-based compensation*
  - *holding investors' funds or securities*
  - *previous involvement in the offer/sale of securities for other issuers*



# Who Might be Selling a Security?

- *Broker-dealers, foreign agents, investment advisors, finders, foreign consultants, lawyers, marketers...*
- *Factors*
  - *structuring prospective securities transactions*
  - *helping identify potential participants*
  - *involvement in negotiations*
  - *making valuations or giving advice*
  - *taking, routing or matching orders*
  - *previous involvement in the sale of securities*
  - *transaction-based compensation*
- *Issuer exemption (Rule 3a4-1)*

# Disclosure Issues

- *Is compensation to any foreign finder or third parties properly disclosed?*
- *Are conflicts of interest fully disclosed?*
- *Are risk factors, including “Immigration Risk” properly disclosed?*
- *Are Use of Proceeds complete?*
- *Have officers, directors, affiliates and solicitors been vetted for new Regulation D “Bad Boy” provisions?*

# *Special EB-5 Due Diligence Items*

- *EB-5 program compliance*
- *Licensing of foreign migration agents*
- *Securities registration/investment adviser/investment company compliance*
- *Underwriting procedures and assessment of financial, market and EB-5 viability*
- *Issue management/principals background checks*
- *FinCen, OFAC and evaluation of U.S. and international Anti-Money Laundering procedures*
- *Investor suitability requirements and accredited investor assessment*

# Who May Provide Securities Advice?

*Under the Investment Advisors Act of 1940 and corresponding state laws, only Investment Advisers may advise on the sale of securities.*

- Investment Adviser is:
  - any person or group that makes investment recommendations or conducts securities analysis **in return for a fee,**
  - whether through direct management of client assets or via written publications.
- Required to be registered with the SEC or the appropriate State Administrator

# Investment Company Act of 1940

- *The Investment Company Act requires funds to do the following:*
  - *Register with the SEC.*
  - *Have a board of directors, 75% of whom must be independent.*
  - *Limit their investment strategies, such as the use of leverage.*
  - *Maintain a certain percentage of their assets in cash for investors who might wish to sell.*
  - *Disclose their structure, financial condition, investment policies and objectives to investors.*
- *How does this apply to EB-5 Funds?*
  - *<100 investors vs. >100 investors?*
  - *500 or more investors and \$10M in assets – reporting*

# *Generating Reliable Job Impacts for EB-5 Applications*

## *IMPLAN and EB-5*



## *What are direct, indirect, and induced jobs?*

- *Direct jobs are formed in the business in which the foreign entrepreneur invested EB-5 capital per the program's requirements*
- *Indirect jobs stem from local input purchases*
- *Induced jobs stem from employees' local expenditures of labor income*

# *Top Tools for Estimating Job Impacts*

- *Multipliers*
  - *RIMS II (from the BEA)*
  - *I-RIMS (from IMPLAN)*
- *Full-service economic impact modeling system*
  - *IMPLAN Pro*
  - *IMPLAN Online*

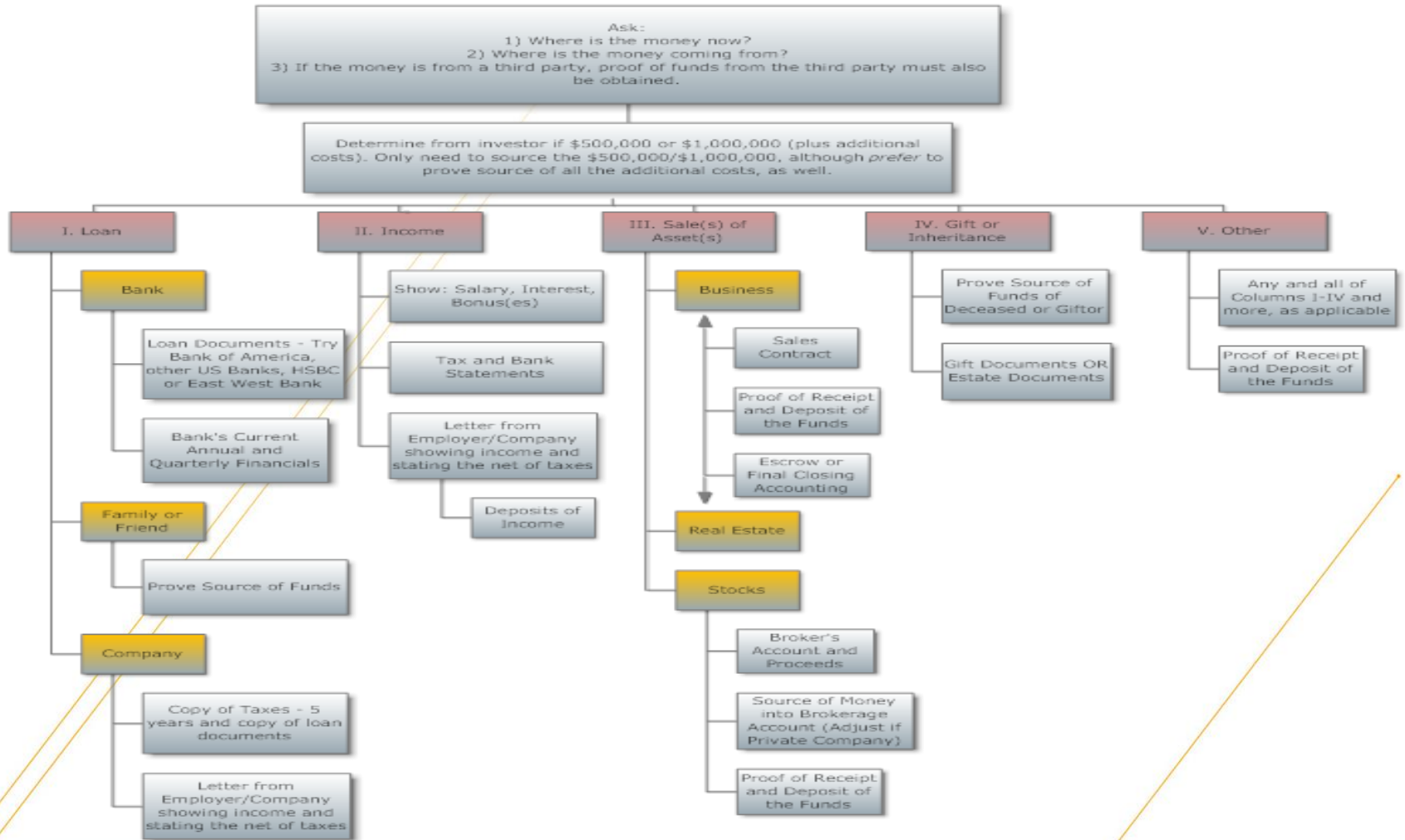
## *i-rims vs. RIMS ii*

<i>I-RIMS (multipliers from IMPLAN)</i>	<i>RIMS II (multipliers from the BEA)</i>
<i>13 construction sectors and 12 retail sectors</i>	<i>1 construction sector and 1 retail sector</i>
<i>Uses the gravity model method for estimating local purchase rates (accounts for cross-hauling)</i>	<i>Uses the LQ method for estimating local purchase rates (ignores cross-hauling and overstates local impacts)</i>
<i>Released a year before RIMS II</i>	<i>Released a year later than I-RIMS</i>
<i>Priced the same</i>	

# Source of Funds Analysis

- *Types of Investments*
  - *Defining source of capital*
    - *Loan*
    - *Income*
    - *Sale of Assets*
    - *Gift or Inheritance*
  - *Determining legitimacy of funds*
    - *Originating timeframe for the source of funds*
    - *Tracing the path of funds*
  - *Investor's net worth*
    - *Household budget*
    - *Assets and liabilities*
    - *Access to evidentiary items – country specific*

# Source of Funds Flow Chart



# Source of Funds

- *Evidence*
  - *Tax returns*
  - *Financial statements*
  - *Bank statements*
  - *Investment account statements*
  - *Business registration documents*
  - *Real estate transaction documents*
  - *Employment records*
  - *Inheritance documents*
  - *Divorce or family-related documents*
  - *Affidavit of gift*
  - *Record of loan*
- *Government sanctioned documents preferred*



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# *Questions?*

# For More Questions, Contact:

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## Disclaimer

*This presentation outline and the presentation itself are for general educational purposes only and are not intended to provide specific guidance or legal advice about what to do or not to do in any particular case. You should not rely on this general information to make decisions about specific immigration matters. If you are not yourself a lawyer, you should seek the assistance of an immigration lawyer to help you resolve these issues.*

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