

The Investor's Path to Success: A Roadmap for 2017

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Topics

1. Project considerations for investors
2. Filing for investors under 18
3. Individual (non-RC) investors
4. Pending Indebtedness Cases
5. USCIS Policy Manual updates
6. Compliance considerations in 2017

1. Project-side considerations for investors

- Project selection factors in current environment
 - Proposed legislative reforms to the EB-5 Program (changes to TEA definition, minimum investment amounts) could abruptly preclude a project from being fully capitalized.
 - Potential problems for borrowers and investors who make investments in a project that cannot be fully capitalized because of changes to the EB-5 Program.
 - Important that borrowers have a viable contingency plan in case the entire EB-5 capital raise cannot be completed before any change in the EB-5 Program.
 - Focus on “type” of projects currently being marketed – rural v. urban; infrastructure/manufacturing.
 - Potential visa set-asides for certain types of projects that could prioritize visas for investors who would otherwise be subject to a backlog
 - Greater investor focus on term of EB-5 Loan in light of retrogression
 - Legal and practical uncertainty regarding the need / authority for NCE to redeploy repaid investor funds

Project-side considerations for investors (Cont'd)

- Managing change & communicating with investors
 - Starts With Thorough Underwriting
 - Regularly Monitor Borrower / Monitor Project Status
 - Track Development / Spending Progress Early and Often
 - Project changes will happen – important to understand when a change is likely “material” and how it might affect investors’ immigration status
 - Important to update investors on progress / changes to projects that impact their legal rights /immigration status
 - Communications via formal updates, letter and email notices communications, possible supplements to offering.



Project-side considerations for investors (Cont'd)

- EB-5 Loan Administration
 - Investors more cautious about funds transactions given recent cases of fraud / misappropriation
 - Investors increasingly asking for independent proof confirming deposits/transfers of funds into escrow/into NCE's account/deployment to JCE (Borrower)
 - Recent proposed legislative reforms include a "Fund Administration" provision
 - Requires NCEs to maintain separate accounts for each project that will only hold EB-5 funds for that specific project
 - Requires NCEs to retain an independent fund administrator to monitor/track funds transfers and compliance with governing documents



2. Filing for investors under the age of 18

- Immigration guidance – USCIS, FAM, Stakeholders
 - USCIS Stakeholder meeting July 2016
 - 7 FAM 1292
- Other applicable laws
 - Ex: UTMA
 - Rescission rights
- Other SOF changes to possibly come
 - Gift relationships
 - Tax return history
- Best practices – client communication

3. An investor without an RC – advising investors in cases of contract termination/dispute between RC and project

- Getting notice
- Limits imposed by partnership/operating agreements
- Preserving the RC
- Preserving the affiliation
- Remedies

4. Pending Indebtedness Cases

- What can be argued successfully on RFE
- When to withdraw and re-file
- Update on lawsuit



5. USCIS Policy Manual EB-5 section updates published November 30, 2016

- Highlights on changes from May 2013 memo;
 - Sustainment
 - Material change
 - TEA
 - Priority for Job Creation Credit
 - RC oversight

6. Compliance considerations investors should keep in mind with the changing landscape in 2017

- **RC compliance changes**
- **Issuer and Broker compliance**
- **Investors**
- **Pros and Cons?**

RC Compliance

- **Proposed legislation requires RC to give at least 45 days advance notice to DHS of significant proposed changes to its organizational structure, ownership, or administration and to publicly disclose such changes not less than 10 days after implementation through a website hosted by USCIS for a period of not fewer than 30 days**
- **RC Record keeping for not less than 3 years of books, ledgers, documents, and associated petitions by investors**
- **DHS will perform at least 1 audit of each RC not less than 3 years + site visits**
- **Business Plans for RCs and Heightened Requirements for Application for Approval of an Investment in a Commercial Enterprise**
- **More detailed RC Annual Statements**
- **RC Fund Transparency/Fund Administrator to monitor and track funds with specific qualifications for Fund Administrator**

Issuer and Broker Compliance

- Any fees, ongoing interest, or other compensation paid by the RC, NCE, or any issuer of securities to be offered to EB-5 investor to agents, finders, or broker dealers must be disclosed including a description of the services performed and the name and contact information of any such person
- Certification from RC and any issuer of securities that their respective agents and employees, and any parties associated with the RC and issuer of securities are in compliance with U.S. securities laws and the laws of the applicable States to the certifier's knowledge after due diligence investigation
- Bona fides of persons involved in RC program – no person shall be permitted to be involved if the person has certain criminal or civil violations
- Direct and third-party promoters including migration agents or an issuer of securities must register with USCIS and comply with rules and standards set forth by DHS, and any applicable Federal or State securities laws

Investors

- Greater scrutiny of background and source of funds – for example, may require tax returns filed during the past 7 years
- Certain age restrictions – for example, no petitioners under 18
- Certain gift restrictions
 - For instance, gifted funds may be counted towards capital investment if funds were gifted to investor from spouse, parent, son, daughter, sibling, or grandparent, or in DHS' discretion by another party whom the investor has demonstrated a personal relationship
- Certain loan restrictions
 - For instance, capital derived from indebtedness must be secured by assets owned by alien investor and issued by a banking or lending institution properly chartered and licensed that is not sanctioned or restricted according to relevant commercial or government databases

Pros and Cons of Increased Compliance

Pros:

- Sets expectations and remedies
- Increases investor confidence in the EB-5 Immigrant Investor Visa Program
- Provides much needed framework for many actors within the EB-5 industry
- More detailed sanctions against violators
- Many major RCs have the organizational structure and resources to be compliant

Cons:

- May make it harder for others to participate in the EB-5 Immigrant Investor Visa Program
- Will increase RC administrative fees
- Additional compliance requires additional government funding and oversight
- Implementation/enforcement of compliance may take some time
- May increase government backlog for adjudicating I-924, I-526, and I-829 petitions

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