

# EB-5 Capital in Real Estate Transactions: The Fundamentals

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**This article discusses a U.S. immigration program commonly referred to as “EB-5” or the “EB-5 Program,” whose recent rise in popularity is one of the reasons for the increase in foreign capital available for real estate projects.**

Capital is an essential component of any real estate project. For real estate projects in the United States, the capital comes from a wide variety of sources, both within and outside of the United States. In recent years, the percentage of foreign capital invested in U.S. real estate projects has increased. This article will focus on a U.S. immigration program commonly referred to as “EB-5” or the “EB-5 Program,” whose recent rise in popularity is one of the reasons for the increase in foreign capital.

## **Understanding the EB-5 Program Requirements**

The United States established the federal Immigrant Investor Program in 1990. The basic premise of the program<sup>1</sup> is that the U.S. Citizen and Immigration Services (“USCIS”) will grant an EB-5 immigration visa, authorizing a two-year residency, to a foreigner (“Alien Investor”) (and his immediate family members under the age of 21) who invests capital into a new commercial enterprise in the United States provided that the investment results in the creation of new jobs. Upon satisfaction of the foregoing

conditions, the Alien Investor will receive a green card (*i.e.*, permanent residence status).

Two types of EB-5 visas are available. The first type requires the Alien Investor to invest<sup>2</sup> his own capital<sup>3</sup> directly into a commercial enterprise<sup>4</sup> which creates or preserves ten direct<sup>5</sup> full-time jobs for qualifying U.S. workers<sup>6</sup> within two years of the investment. Jobs that are “intermittent, temporary, seasonal or transient in nature do not qualify as full-time jobs for EB-5 purposes. Consistent with prior USCIS interpretation, however, jobs that are expected to last for at least two years generally are not intermittent, temporary, seasonal or transient in nature.”<sup>7</sup> In order to qualify for this type of EB-5 visa, the Alien Investor must also be actively involved in managing the commercial enterprise.

The second type of EB-5 visa, which is far more popular than the first,<sup>8</sup> does not require any material involvement by the Alien Investor in the commercial enterprise other than making his capital investment. To qualify for this second type of visa, instead of investing directly into the commercial enterprise, the Alien Investor

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invests through a regional center (“Regional Center”). A Regional Center is a public or private entity that is designated by the USCIS to sponsor commercial enterprises for Alien Investors and allows funds from multiple Alien Investors to be pooled into the same commercial enterprise. While the Alien Investor’s capital must still be used to create ten full-time jobs for qualifying U.S. workers, when the investment is made through the Regional Center, the ten-job requirement may be satisfied by ten direct and/or *indirect* jobs.<sup>9</sup> This expansion of the job requirement to include indirect jobs is significant not just because it broadens the types of jobs that can count toward the 10-worker requirement but also because a lower level of proof is required to establish the existence of the indirect jobs. The calculation of indirect jobs is based upon economic models rather than actual evidence of jobs.<sup>10</sup> Whether or not a job satisfies this requirement is “broadly construed. It can include workers at a new building, construction workers who built it, or service workers at nearby restaurants benefiting from the increased activity.”<sup>11</sup> It is worth noting that the validity of the economic models calculating “indirect” jobs has come under criticism in recent years resulting in greater scrutiny of the models by the USCIS. In response, the economic models have become more conservative and reflect lower job creation than that of prior models used in the EB-5 Program.

To qualify for either type of EB-5 visa, each Alien Investor must invest capital in the minimum amount of \$1 million unless the commercial enterprise is in a “Targeted Employment Area”<sup>12</sup> or “Rural Area,”<sup>13</sup> in which event the minimum required capital contribution is \$500,000. In this case, the exception has swallowed the rule. Each state determines how the

Targeted Employment Area in its state is drawn for purposes of the EB-5 Program. Gerrymandering<sup>14</sup> has resulted in prosperous neighborhoods in cities such as New York, Los Angeles, Miami and Seattle being classified as “Targeted Employment Areas.” Predictably, most Alien Investors offered the option of investing \$500,000 in an enterprise in New York City or Los Angeles or \$1 million elsewhere in the United States elect the former option. 98.4% of the EB-5 capital invested in 2014 was invested in Target Employment Areas.<sup>15</sup>

Additionally, in order to qualify for either type of EB-5 visa, the Alien Investor’s capital must be “placed at risk.”<sup>16</sup> The USCIS has never defined precisely what this means, but practitioners have interpreted it to mean that there must be uncertainty as to whether the Alien Investor will ever recoup all of his capital. In practical terms, this means that if an Alien Investor invests capital as debt, the underlying loan should be non-recourse. There can be a carve out guaranty and, depending upon the nature of the project, a completion guaranty, but there should not be a repayment guaranty. If the Alien Investor invests his capital as equity rather than debt, his capital must still be at risk. He will jeopardize his EB-5 visa status if he is assured a return of his original capital or an asset in exchange for it.<sup>17</sup> “Nothing, however precludes an investor from receiving a return on his or her capital (*i.e.*, a distribution of profits [on an equity investment or interest on a debt investment]) during or after the conditional residency period, so long as prior to or during the two-year conditional residency period, and before the requisite jobs have been created, the return is not a portion of the investor’s principal investment and was not guaranteed to the investor.”<sup>18</sup>

If an Alien Investor believes that he has satis-

fied the foregoing EB-5 Program criteria, he then takes the following steps in order to obtain his green card:

1. If an Alien Investor is applying for an EB-5 visa by making a direct investment in the commercial enterprise rather than investing through the Regional Center, the first step is for him to apply to the USCIS to confirm that the target of the investment meets the requirements of a for-profit commercial enterprise and is expected to generate the requisite number of jobs. Once he has that approval, he proceeds to No. 2 below.
2. This is the first step in the process for an Alien Investor who is investing through a Regional Center. The Alien Investor files a Form I-526 (Petition by Alien Investor) ("I-526 Petition"). The I-526 Petition should be accompanied by evidence that the Alien Investor has satisfied all of the EB-5 Program requirements including that he has already made the required investment. While the Alien Investor can contribute his money directly to the commercial enterprise or Regional Center, as applicable, most of the time he elects to deposit his money into a U.S.-based escrow<sup>19</sup> where it will remain pending approval of his I-526 Petition. It is also possible for him to deposit the money into an escrow outside of the United States, but in that instance, the amount deposited must be sufficient to ensure that devaluations in the foreign currency do not result in a reduction of his investment below the minimum EB-5 threshold. If money is deposited into any escrow, it should only be refundable to the Alien Investor if his I-526 Petition is

denied. Otherwise, the USCIS will deny his petition on the basis that his capital has not been committed to the commercial enterprise.

3. Once the USCIS approves the I-526 Petition, the Alien Investor files a Form I-485 (Application to Register Permanent Residence or Adjust Status) ("I-485 Application"). Upon approval of the I-485 Application, the Alien Investor and his immediate family members (under age 21) will be granted conditional permanent residence to the United States for two years.
4. At least 90 days prior to the expiration of the two-year anniversary of the approval of his I-526 Petition, the Alien Investor files a Form I-829 (Petition by Investor to Remove Conditions) ("I-829 Petition"). Upon receipt of the I-829 Petition, the USCIS will again verify that all of the EB-5 Program requirements have been satisfied, and, if the I-829 Petition is approved, the Alien Investor and his immediate family members will receive a permanent residence visa.<sup>20</sup>

### The History of EB-5

The EB-5 program allows 10,000 EB-5 visas to be issued each year.<sup>21</sup> Between the inception of the program in 1990 and 2009, there was little demand for EB-5 visas, and only a small number were issued.<sup>22</sup> The complicated and intimidating approval process and high percentage of denials deterred Alien Investors from applying. Perhaps more importantly, prior to the Great Recession, capital was widely available from a large array of sources so there was no real need for EB-5 capital.

The Great Recession resulted in the conver-

gence of several events which significantly increased the demand for EB-5 visas, particularly with respect to real estate projects. First, most developers lost access to their prior capital sources and began to look for money in new places. Second, although the Great Recession significantly hurt the United States economy, on a relative basis, the United States fared better and seemed more secure than most other industrialized nations, making the United States an appealing target for investment. Third, but no less importantly, in 2011, the USCIS adopted a number of changes to the EB-5 program which simplified the application process for the Alien Investor.<sup>23</sup> In 2011, the number of EB-5 applications more than doubled over the prior year.<sup>24</sup> For the first time since the inception of the EB-5 program, 10,000 visas were issued in 2014, and the USCIS temporarily suspended the program until the commencement of the following year.<sup>25</sup> Demand for the visas continues to increase.<sup>26</sup>

There is a perception in the marketplace that most of the EB-5 Alien Investors are coming from China. That perception is accurate. Over the past couple of years, more than 85% of EB-5 visas have been issued to citizens of China.<sup>27</sup> While the United States restricts the aggregate number of employment-based visas of all types (there are five, including EB-5) that can be issued in any year<sup>28</sup> by providing that no more than 7% of the total number of such visas can be allocated to one country,<sup>29</sup> the United States does not impose any per-country limit within any particular category of employment-based visa. In May of 2015, the EB-5 program was again temporarily suspended (until October 1, 2015) for Chinese Alien Investors.<sup>30</sup>

The large increase in EB-5 applicants has resulted in delays in processing times. The

estimated processing time varies significantly from month-to-month. Current estimates can be found on the USCIS Web site.<sup>31</sup> In some instances, it can take more than a year for an I-526 Petition to be approved. The I-526 Petition may be expedited if the Alien Investor can demonstrate there would be a severe financial loss<sup>32</sup> if the visa is not expedited or it is in the national interest to expedite processing. In either instance, there must be detailed evidence supporting the claim.<sup>33</sup>

### **The Roles of the Regional Center and the EB-5 Company in Real Estate Transactions**

The rapid rise in EB-5 applicants has resulted in a huge increase in available EB-5 capital. Given the dearth of public information about the EB-5 Program, it is impossible to know exactly how much capital has been raised;<sup>34</sup> however, estimates suggest that approximately \$2 billion of EB-5 capital was invested in 2013.<sup>35</sup> A significant percentage of this capital has been invested in real estate.

The simplified EB-5 process which has resulted in a growth of applications is attributable, at least in part, to the expansion of the EB-5 Program to include investments through a Regional Center. The Regional Center typically has primary responsibility for procuring the EB-5 capital, obtaining the necessary approvals from the USCIS, creating all of the relevant documentation for the EB-5 investment and monitoring and servicing the EB-5 investment. By handling the vast majority of administrative responsibilities, the Regional Center enables the developer to focus on his project. It is not surprising, then, that the number of Regional Centers in the country has increased dramatically over the past few years.<sup>36</sup> As of June 1,

2015, the USCIS had approved approximately 676 Regional Centers.<sup>37</sup>

Anyone can seek a regional center designation from the USCIS by filing an I-924 application. Whether or not a developer elects to form his own Regional Center or affiliate with an existing one is typically a decision based upon the relative value to the developer of money and time. It is worth noting that there is an emerging third option, which is to “rent” a Regional Center (one formed but no longer active), essentially a combination of the other two options, but it has only been used in a couple of instances.<sup>38</sup>

From a cost perspective, it is frequently better for the developer to form his own Regional Center. Estimates of the cost to form a Regional Center vary widely from about \$100,000 to \$250,000.<sup>39</sup> This is a large sum, but much less than the fees that a developer would expect to pay to an unaffiliated Regional Center for a large real estate project.

From a timing perspective, it is much quicker to affiliate with an existing Regional Center. Obtaining approval for a new Regional Center from the USCIS can easily take a year or more. A small group of large developers have chosen to form their own Regional Centers,<sup>40</sup> but the majority of developers elect to work with an existing Regional Center, valuing the expedited timing over the higher cost.

While there are several mechanisms for investing EB-5 capital through a Regional Center, it is most common for the Alien Investor to make a capital contribution to an entity (the “EB-5 Company”) in exchange for an ownership interest in that entity. The EB-5 Company will then cause all of the EB-5 capital to be

contributed to the qualifying project either directly, in the case of equity, or indirectly through loan advances to the developer. The EB-5 Company is typically either a limited partnership or limited liability company. The USCIS expressly authorizes the formation of an EB-5 Company as a limited partnership, and most take that form. Practitioners rely upon a reference in a USCIS policy memorandum to an “operating agreement”<sup>41</sup> as support for the contention that the EB-5 Company can also be a limited liability company.

When the EB-5 Company is initially formed, the Regional Center will probably hold an ownership interest in the EB-5 Company and will also have a key management role, particularly as it relates to the administration of matters related to the Alien Investors and the USCIS. At such time as all of the EB-5 Investors have received approval of their respective I-526 Petitions, the Regional Center may cease to be actively involved in the management of the EB-5 Company.

The developer will not have any management role in the EB-5 Company even though it may (but not necessarily will) receive an ownership interest in the EB-5 Company. To the extent that there are third-party advisors helping to facilitate the EB-5 capital investment, such advisors may also have certain management (but not ownership) rights in the EB-5 Company. At such time as the first Alien Investor contributes capital to the EB-5 Company in exchange for an ownership interest, all rights and interests of the developer (if any) in the EB-5 Company should terminate automatically.

There are no legal requirements or conditions governing when or how the EB-5 capital is to be contributed to the EB-5 Company. In a

perfect world, all of the EB-5 capital required for a project would be raised, and each of the applicable Alien Investors would have his I-526 Petition approved before any EB-5 capital is contributed to the Company. But a perfect world rarely, if ever, exists. Typically the EB-5 capital is placed in a US-based escrow where it is refundable to the Alien Investor only if his I-526 Petition is denied, thus satisfying the “at risk” requirement. There is then discussion among the developer, the Regional Center and the Alien Investors regarding when and how the EB-5 capital is contributed to the EB-5 Company. Most commonly, no money is contributed to the EB-5 Company until at least one Alien Investor has received approval of his I-526 Petition. After that, money is frequently contributed in blocks based upon the earlier to occur of approval of an Alien Investor’s I-526 Petition or the needs of the developer.

### Using EB-5 Capital in Real Estate Transactions

EB-5 capital can be used in connection with any type of real estate product as long as the EB-5 Program requirements are satisfied. In reality, the need to ensure that each Alien Investor’s capital results in at least 10 jobs drives a lot of the decision-making. Accordingly, EB-5 capital investments tend to favor large construction projects (where the length of the construction process results in construction workers being employed for at least two years) as well as service-intensive product types such as hotels, casinos, and assisted-living centers.

In a real estate transaction, EB-5 capital may be invested as equity or debt (mortgage, mezzanine or even unsecured). The developer works with the Regional Center in a manner similar to that of any other lender or equity

investor. The use of EB-5 capital, whether as equity or debt, mirrors that of its more conventional counterparts with a couple of significant distinctions, including that the debt and equity documents may be more streamlined and “user friendly” than bank debt documents.

Additionally, with conventional financing, there is typically a significant interest rate spread between mortgage debt and mezzanine debt/preferred equity—not so with EB-5 capital. Often there is little or no rate differential in the cost of EB-5 capital regardless of its place in the capital stack. EB-5 capital is generally priced at around 5% to 8% annually,<sup>42</sup> and fixed throughout the term. The actual return to the Alien Investor is even lower than the interest rate would suggest because of all of the fees and costs (in addition to the minimum required investment) incurred by the Alien Investor throughout the EB-5 process. The Alien Investor is not deterred by the low returns because his primary objective is obtaining a green card, preferably without losing his initial capital investment, not obtaining a significant return.

While the return to the Alien Investor may be low, it does not mean that the cost to the developer is also low. The “all-in” cost to the developer could be substantially higher than the interest rate on the EB-5 capital would suggest. The costs of the Regional Center, consultants, accountants, attorneys and servicers,<sup>43</sup> all of which are paid by the developer are quite significant (unless the developer has formed its own Regional Center), making the true cost of the capital to the developer close to (but generally less than) the cost of a comparable mezzanine loan or preferred equity and higher than that of a comparable first-priority mortgage loan.

Another difference between EB-5 capital and

other more traditional sources of capital concerns restrictions on prepayment. The entirety of the Alien Investor's investment must remain invested and at risk until his green card is issued. As a result, "[m]ost EB-5 investments are structured on a five-year term with a redemption of the investor's interest after the end of the term."<sup>44</sup> Depending upon the nature of the project and the negotiation of the parties, extension options may be available to the developer. What is not available to the developer is any type of prepayment until such time as all of the Alien Investors have received their green cards without condition.

Depending upon the structure of the transaction, the equity/loan documents may also need to address the following uncertainties associated with the EB-5 capital:

### **What happens if the capital is released before any of the Alien Investors receives approval of his I-526 Petition, and the USCIS subsequently concludes that the project does not satisfy the EB-5 requirements?**

If money is used prior to the approval of any I-526 Petition, "best practices" dictate that the Alien Investors acknowledge and agree to the "early release" in writing. Sometimes there will be restrictions upon the amount of capital that can be released early, e.g., no more than 20%. In some cases, in order to induce the Alien Investor to agree to the early release of funds, the developer may pay an additional fee and/or guaranty repayment to the Alien Investor if the I-526 Petition is denied. In such a case, it is critical that the repayment guaranty terminate as soon as the I-526 Petition is approved so that it is clear that the EB-5 capital is "at risk."

### **What happens if, after the project has been approved by the USCIS, but before the USCIS approves all of the Alien Investors' I-526 Petitions, the money is released to the developer and then one or more of the Alien Investors are disapproved by the USCIS?**

The guidance set forth above applies here as well. Beyond that, this scenario does not typically cause great concern for developers. At this time there is such a large demand for green cards through the EB-5 capital program that most developers believe that the capital of any Alien Investor(s) whose I-526 Petition is denied can be replaced easily.

### **What happens if capital is released to the developer, and the offering fails to raise all of the EB-5 capital that was required for the project?**

This scenario is typically addressed by giving the developer the right to prepay the entire loan (or equity contribution) so the developer can obtain other financing sufficient in amount to satisfy his needs. This solution aids the developer at the expense of the Alien Investors because prepayment will cause all of the Alien Investors who had contributed capital to fail to maintain their investment for the two-year period required by the EB-5 Program. Thus, the Alien Investors would not satisfy the requirements for permanent residency in the United States, and each Alien Investor would need to start the EB-5 process again with a different project.

During the Great Recession, developers were unable to find conventional sources of capital for their projects. EB-5 capital became a viable resource for small and medium-sized projects. Initially there was not enough EB-5 capital avail-

able for it to be used in large projects, but as the capital market improved, and more capital providers re-entered the market, developers stopped using EB-5 capital as mortgage debt because of its high cost relative to other more traditional capital providers such as banks and insurance companies. Instead, as the amount of available EB-5 capital increased, EB-5 capital was used as one piece (typically mezzanine debt or preferred equity) in a multi-layered capital stack in large real estate projects. Not only does the developer benefit from the relatively lower cost of EB-5 capital vis-à-vis traditional mezzanine debt or preferred equity, but, with a large project, it is easier for the developer to satisfy the EB-5 job requirement, which applies to the project as a whole, not just the EB-5 funds. Assume, for example, \$50 million of EB-5 capital (invested through a Regional Center) is the sole source of capital for a real estate project, the project must produce at least 100 direct or indirect jobs. If, however, the \$50 million is just one piece of a \$500 million capital stack, the job requirement remains unchanged, but the likelihood that a project of such a large magnitude will create the required number of jobs increases significantly.

As between mezzanine debt or equity, both the developer and the Alien Investor tend to prefer mezzanine debt over equity because of the options for the Alien Investor to recoup his capital. If the developer were offered a large price to sell the project in year three, he might want to sell, but if the EB-5 capital were equity, the developer would not be able to sell because of the prohibition on early redemption of the equity. Alternatively, if the EB-5 capital were debt, the new buyer could assume the debt, preserving the position of the Alien Investor but still allowing the developer to sell. Thus, EB-5

capital as debt gives the developer greater flexibility on an early disposition of his interests.

By structuring the investment as mezzanine debt rather than preferred equity, the Alien Investor also has a greater likelihood of recouping his investment by the targeted date. If the EB-5 capital is debt, the Alien Investor should get repaid at the end of the loan term. When the loan matures, the developer has the option of selling the existing project or replacing the EB-5 loan with a new loan. In an equity context, there is more uncertainty surrounding the timing of an Alien Investor's recoupment of its capital. The *Matter of Izumi* case makes it clear that mandatory redemption of capital violates the "at-risk" requirement of the EB-5 Program. In order to avoid a mandatory redemption, the joint venture documents typically provide that the Alien Investor will be entitled to receive a return of his capital in connection with a sale or refinancing of the property. While this works in theory, in reality, an Alien Investor will only recoup his preferred equity investment if the project increases significantly in value such that the proceeds of a loan refinancing are enough to repay all of the debt *plus* the preferred equity. Otherwise, the developer would need to sell the project to repay the Alien Investor. A developer will want to control when the property sells and is not likely to want to agree to a mandated sale at a particular time and risk a lower sales price if there are issues in the market. The Alien Investor, on the other hand, is unlikely to want to agree to an open-ended investment.

The third reason that EB-5 capital is structured as debt more frequently than equity is that it minimizes due diligence. If the Alien Investors hold ownership interests in the EB-5 Company which holds an ownership interest in the borrower, lenders to the borrower will need



to perform “Know Your Customer” diligence on the Alien Investors. It is unlikely that this diligence will reveal an issue if the Alien Investors have been approved by the USCIS, but it could pose a significant administrative burden in a large transaction. If the EB-5 capital is invested as debt rather than equity, it should not be necessary for other capital providers to perform the “Know Your Customer” diligence on the Alien Investors.

### Steps and a Timeline for Investing EB-5 Capital in a Real Estate Project

While each project is unique, and the order in which events occur may vary slightly, the basic steps to funding a real estate project with EB-5 capital are as follows:

1. The developer seeks confirmation from the state in which the project is located that the project is in a Targeted Employment Area. Absent that confirmation, it is unlikely that the developer will be able to develop the project with EB-5 capital because the Alien Investor would have to invest \$1,000,000 in that project whereas it could achieve the desired result, a green card, with a \$500,000 investment in a different project.
2. The developer decides whether to form his own Regional Center, whether to affiliate with an existing Regional Center or whether to “rent” a Regional Center.
3. If the developer decides to affiliate with an existing Regional Center, then the developer must seek approval of his project from the Regional Center.
4. Once the Regional Center approves the project, the developer needs to determine

in what form he wants the EB-5 capital to be contributed to the project. Will it be preferred equity? Mortgage debt? Mezzanine debt? The answer to this question will depend in large part upon the aggregate amount of capital that the developer requires and the aggregate amount of jobs that he expects the project to generate. For example, if construction of a hotel requiring \$60 million in capital were expected to generate 1,500 qualifying jobs (*i.e.*, 12.5 per Alien Investor), then the developer could fund the entire project with EB-5 capital, or if cheaper mortgage debt were available, the developer could use another lender for the senior mortgage debt and use EB-5 capital to fill the gap as either a second mortgage loan, mezzanine loan or preferred equity. On the other hand, if that same project only generated 150 jobs, the developer would not be able to use more than \$7,500,000 in EB-5 capital for the project, making it unlikely that the EB-5 capital would be used for a mortgage loan. In determining where to fit the EB-5 capital in the capital stack, the developer will also need to consider the preferences of the other capital providers (who may prefer a mezzanine loan or preferred equity to a junior mortgage loan) and the Alien Investors (who may prefer a mezzanine loan to preferred equity). The developer should also bear in mind that it will be easier to market the project to Alien Investors if the developer has some cushion built into his job count. If an Alien Investor is considering two projects, one of which produces 10 jobs per Alien Investor, and the other produces 13, the Alien Investor is going to

prefer the latter (everything else being equal) because if the USCIS were to use a more conservative economic model to determine the jobs generated by the project, the first project would not qualify for EB-5 capital.

5. The EB-5 Company is formed. Counsel for the EB-5 Company should pay close attention to the ownership and management of the EB-5 Company to be sure that he can fulfill his professional responsibilities to his client because it is easy for lines to be blurred. Assume, for example, that the EB-5 Company will be the mortgage lender for a loan to a developer. Assume further that when the EB-5 Company is initially formed as a limited liability company, it has two managers: the Regional Center and the developer's President. Obviously there is a potential conflict between the developer and its lender because the same individual is wearing both hats. Navigating this situation may be tricky for lender's counsel.
6. Once the developer has determined how much EB-5 capital he wants to raise and for what position in the capital stack, the offering materials need to be prepared. This may be done by the developer but is more frequently handled by the Regional Center. U.S. Securities laws will apply to the offering even if the offering is conducted entirely outside of the United States. A private placement memorandum will often be sufficient as it is for many other types of real estate offerings; however, counsel will need to ensure that the offering materials comply with all applicable securities laws. The

overseas solicitations can be spectacles. One began with a dance program and light show while another offered a free iPad to the first 100 Alien Investors to commit \$500,000 to a project.<sup>45</sup> It is worth noting that certain U.S. law firms have made a policy decision not to become involved in the offering materials for smaller projects because the anticipated revenues to the firm are insufficient to compensate for the perceived risks involved in the firm's inability to control the process overseas and the potential liability to an Alien Investor if the materials are not accurate, and the project fails.

7. It can take a significant amount of time, as much as two to three years, between the developer's decision to use EB-5 capital for a project and the date on which the Alien Investor's I-526 Petition is approved. This delay could adversely affect the project, particularly when there are multiple players with different timing or when the project is a construction project where timing of the draws can be critical. Many developers seek short-term financing which will remain in place until the EB-5 capital can be funded. In an environment where competition among capital providers is fierce, it is not surprising that more capital providers are trying to provide this type of bridge financing; however, providing this type of bridge financing is different than the more traditional types of bridge financing because of the risks and uncertainty associated with the "takeout lender," *i.e.*, the EB-5 capital.<sup>46</sup>
8. At the same time that the EB-5 capital solicitation is taking place, the developer,

the Regional Center, the brokers and consultants are often negotiating (and even executing) the terms of the documents that will provide the EB-5 capital, *i.e.*, the loan documents or joint venture agreement. Their objective in doing so before the EB-5 capital is raised, is to ensure that the actual funding can occur as soon as possible after the capital is raised. As noted above, it is important for the lender's/equity provider's lawyer to pay close attention to the actual persons making decisions on behalf of his client.

9. As soon as an Alien Investor commits his capital to a project, he files his I-526 Petition.
10. The "next step" varies among projects. The least risky option for a developer and the Alien Investors is to have the EB-5 capital remain in a U.S.-based escrow until all of the required EB-5 capital has been deposited into escrow, and each of the Alien Investors has received approval of his I-526 Petition. Lengthy processing times mean this option works better in theory than in practice, particularly where large sums of EB-5 capital are involved. As a result, EB-5 capital is often released to the developer (as contributed equity or a loan advance) before even a single I-526 Petition has been approved. As discussed above, the terms of the "early release" should be clear and well documented.
11. The EB-5 capital is contributed to the project as debt or equity pursuant to the negotiated documents, and the project moves forward to completion.

12. Once the USCIS approves the I-526, the Alien Investor files the I-485 Application.
13. 90 days prior to the two-year anniversary of the approval of the Alien Investor's I-526 Petition, the Alien Investor files the I-829 Petition. The project may or may not be completed at this time. The status of the project is not part of the USCIS' consideration, but, it will verify whether the number of jobs required to be created by the project still exists.
14. If the I-829 Petition is approved, the Alien Investor receives his green card.
15. After five years, more or less, the Alien Investor recovers his initial investment.

### Recent Examples of EB-5 Capital in Real Estate Transactions

There are many examples of the successful implementation of EB-5 in real estate developments. Lennar Homes is redeveloping a former naval shipyard into a mixed-use master planned community using EB-5 capital. According to Golden Gate Global, an EB-5 investment fund, Lennar has 450 Alien Investors who have committed or agreed to commit EB-5 capital to the project.<sup>47</sup>

On the other coast, New York City is a hotbed of EB-5 activity. Forest City Ratner Companies is in the process of developing Pacific Park, a \$4.9 billion business and residential complex which includes the newly-built Barclays Center, a multi-purpose indoor arena, home to the Brooklyn Nets. Forest City raised \$475 million in EB-5 capital in connection with the project although concerns that the EB-5 capital was used to repay other debt on the project rather than invested directly into hard costs of the project, has created controversy.<sup>48</sup>

The greatest EB-5 success story, at least for now, is Related Companies' Hudson Yard development in New York. "Hudson Yards is the largest private real estate development in the history of the United States and the largest development in New York City since Rockefeller Center . . . The site will ultimately include more than 17 million square feet of commercial and residential space, 5 state-of-the-art office towers, more than 100 shops, a collection of restaurants, approximately 5,000 residences, a unique cultural space, 14 acres of public open space, a 750-seat public school and an Equinox branded luxury hotel with approximately 200 rooms."<sup>49</sup> Related Companies has raised almost \$600,000,000 in EB-5 capital for the project, setting a record for EB-5 capital in a single project.<sup>50</sup>

Not every EB-5 project is a success story. Access the USA *doing business as* the Washington State Regional Center sought to use EB-5 capital to buy GARVEE (Grant Anticipation Revenue) bonds issued by the State of Washington (rated AA++) to pay for the replacement of the longest floating bridge in the world, the SR 520 floating bridge. Advertising to the Alien Investors stated the bonds were "Washington State Issued, triple backed, tax free, General Obligations Bonds." The Alien Investors were enticed by the perceived security of the investment, and the required EB-5 capital was raised very quickly.<sup>51</sup> The USCIS disapproved the project about a year after the initial Alien Investors made their investment. The USCIS has never publicly stated its reasons for the denial; however, the consensus is that the USCIS considered the bonds to be a riskless investment, meaning that the EB-5 capital was not "at risk."<sup>52</sup> The very security that drew Alien Investors to the project is what caused their investment to fail for EB-5 purposes.

While the SR-520 project did not yield the result that its prospective Alien Investors desired, they were luckier than some Alien Investors who have been the victims of fraud. One such example involves a Regional Center in Chicago which sold more than \$145 million in securities and collected \$11 million in administrative fees from more than 250 Alien Investors, primarily from China. The principals sought EB-5 capital to finance construction of the "World's First Zero Carbon Emission Platinum LEED certified" hotel and conference center near Chicago's O'Hare Airport. The offering materials stated that all of the required permits had been obtained and several major hotel chains had committed to the project. According to the Securities and Exchange Commission ("SEC"), which shut down the project and prosecuted several people, many of the developer's claims were false as were the documents delivered to the Alien Investors in support of the developer's claims. The Alien Investors lost a significant amount of money on this project.<sup>53</sup>

It is clear that EB-5 capital is a viable form of financing for real estate projects and can be instrumental in getting the project done. On the other hand, the Alien Investor's strong desire for a green card makes him a target for exploitation. The SEC has issued a warning to Alien Investors.<sup>54</sup> The Washington Times reported "about high-profile incidents of EB-5 fraud and skepticism about the government's job creation claims"<sup>55</sup> and now the program is the subject of an audit by the Government Accountability Office.<sup>56</sup> To the extent that the EB-5 capital is just one slice of a capital stack, it is likely that the non-EB-5 investors are doing their own diligence; however, if the EB-5 capital is the only part of the capital stack, lawyers who are involved in these transactions, regard-

less of whom they are representing, should pay extra attention to the facts of the project and its legitimacy if they want to avoid being the “deep pocket” if the developers, consultants and Regional Centers fail to act in good faith, and the lawyer is the last one standing. The SEC has identified a number of factors that an Alien Investor should consider before making his investment.<sup>57</sup> Reviewing these factors could benefit the lawyer as well.

### Conclusion

Almost \$2 billion of EB-5 capital was invested during 2014.<sup>58</sup> While this amount is unlikely to increase significantly unless the USCIS increases the minimum required investment or the number of visas that are available, all indications are that it will continue to be available at the current level and as a viable source of funding for large real estate projects. Therefore, lawyers who understand the fundamentals of EB-5 capital and its relationship with real estate are better positioned to help their developer clients maximize this resource.

### NOTES:

<sup>1</sup>The EB-5 program is set to expire on September 30, 2016. It is highly likely that the EB-5 Program will be renewed. There is less certainty that the EB-5 Program will be renewed in exactly the same form as it currently exists. See *Real Estate and Green Cards: EB-5 Debate Heats up in Washington*, WALL STREET JOURNAL (November 11, 2015), <http://blogs.wsj.com/washwire/2015/11/11/real-estate-and-green-cards-eb-5-debate-heats-up-in-washington/>; and S. 2415: EB-5 Integrity Act of 2015, <http://www.congress.gov/114/bills/s2415/BILLS-114s2415is.pdf>. Rather than speculating about possible changes in the program, this article will address the EB-5 Program requirements in effect at the time of this writing.

<sup>2</sup>Invest means to contribute capital. A contribution of capital *in exchange for* a note, bond, convertible debt, obligation or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital . . . .”

(emphasis added) 8 C.F.R. § 204.6(e).

<sup>3</sup>“Capital means cash, equipment, inventory, other tangible property, cash equivalents and indebtedness secured by assets owned by the alien Investor, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair-market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act.” *Id.* The capital must belong to the Alien Investor but can be borrowed as long as the Alien Investor’s obligation is secured, and none of the assets of the commercial enterprise serves as security.

<sup>4</sup>A commercial enterprise is “any for-profit activity formed for the ongoing conduct of lawful business.” EB-5 Immigrant Investor, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Mar. 31, 2015), <http://www.uscis.gov/eb-5> (“USCIS EB-5 Policy”).

<sup>5</sup>“Direct jobs are actual identifiable jobs for qualified employees located within the commercial enterprise into which the EB-5 investor has directly invested his or her capital.” *Id.*

<sup>6</sup>A qualified U.S. worker is a U.S. citizen, lawful permanent resident, or other immigrant lawfully authorized to be employed in the United States. 8 C.F.R. § 204.6(e).

<sup>7</sup>U.S. CITIZENSHIP AND IMMIGRATION SERVICES, POLICY MEMORANDUM NO. PM-602-0083 17 (May 30, 2013) (“USCIS May 2013 Memorandum”).

<sup>8</sup>In 2014, 97% of EB-5 visa applicants invested through a Regional Center rather than through direct investment. *New Department of State (DOS) FY2014 Statistics Reveals Important Trends in EB-5 Visa Usage, Market Diversification*, Invest In The Usa Blog (Dec. 23, 2014), <https://iiousa.org/blog/research-analysis/economic-impact-research-analysis/department-state-dos-fy2014-statistics-reveals-important-trends-eb5-visa-usage-market-diversification/> (“IIOUSA 2014 Statistics”).

<sup>9</sup>“Indirect jobs are those jobs shown to have been created collaterally or as a result of capital invested in a commercial enterprise affiliated with a regional center by an EB-5 investor.” USCIS EB-5 Policy.

<sup>10</sup>“USCIS relies upon the reasonable economic models to determine that it is more likely than not that the indirect jobs are created and will not request additional evidence to validate the job creation estimates in the economic models to prove by a greater level of certainty that the indirect jobs created, or to be created are full-time or permanent. USCIS may, however, request additional evidence to verify that the direct jobs will be or are full-time and permanent.” USCIS May 2013 Memorandum at p. 17.

<sup>11</sup>Deirdre Fernandes, *Creating Jobs Can Speed US Visas-Special Program Helps Developers Recruit Investors*, BOSTON GLOBE (Apr. 15, 2015), available at 2015 Westlaw NewsRoom 10929847.

<sup>12</sup>A “Targeted Employment Area” “is an area that, at

the time of investment, is a rural area or an area experiencing unemployment of at least 150% of the national average rate." USCIS EB-5 Policy.

<sup>13</sup>A "Rural Area" is any area outside a metropolitan statistical area (as designated by the Office of Management and Budget) or outside the boundary of any city or town having a population of 20,000 or more according to the decennial census." *Id.*

<sup>14</sup>"The [EB-5] rules allow them to string together several areas of high unemployment with one of low unemployment, like Manhattan or downtown Seattle, then build their project in the more prosperous area. Henry Liebman, founder and CEO of Seattle-based American Life, one of the most prolific developers nationwide using EB-5 money, says the industry is simply doing what the government allows. 'If you don't like gerrymandering,' he said, 'change the rules.'" Sanjay Bhatt, *Money from Investor Visas Floods U.S., but Doesn't Reach Targeted Poor Areas*, SEATTLE TIMES (Mar. 8, 2015), available at 2015 Westlaw NewsRoom 7059758.

<sup>15</sup>IIUSA 2014 Statistics.

<sup>16</sup>The Alien Investor must place "the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the [Alien Investor] is actively in the process of investing. The alien must show actual commitment of the required amount of capital." 8 C.F.R. § 204.6(j)(2).

<sup>17</sup>"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 that portion of the capital is not at risk. *Matter of Izummi*, 22 I&N Dec. at 180-188. For the capital to be 'at risk' there must be a risk of loss and a chance for gain. In our precedent decision *Matter of Izummi*, 22 I&N Dec. at 183-188, the [Administrative Appeals Office] found that the capital was not at risk because the investment was governed by a redemption agreement that protected against the risk of loss of the capital and, therefore, constituted an impermissible debt arrangement under 8 C.F.R. 204.6(e) as it was no different from the risk any business creditor incurs. *Id.* at 185. . . . Similarly, 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 into the new commercial enterprise, such as a home (or other 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 determining how much money was truly placed at risk. *Cf. Izummi* at 184 (concluding that an investment cannot be considered a qualifying contribution of capital at risk to the extent of a guaranteed return)." USCIS May 2013 Memorandum at p. 5.

<sup>18</sup>*Id.* at p. 5-6.

<sup>19</sup>Not surprisingly, as the role of EB-5 capital has grown, companies have begun to specialize in EB-5

escrows. NES Financial markets itself as "the only company that has developed a purpose-built suite of solutions to address the needs of all the key stakeholders in the EB-5 industry." *EB-5 Solutions*, NES FINANCIAL, <http://nesfinancial.com/solutions/eb-5/> (last visited June 1, 2015).

<sup>20</sup>*EB-5 Immigrant Investor Process*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (June 25, 2014), <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor-process>.

<sup>21</sup>Immigration and Nationality Act ("INA") § 203(b)(5), 8 U.S.C. § 1153(b)(5) (2012). Each year is a federal government fiscal year which runs from October 1 of one year through and including September 30 of the following year.

<sup>22</sup>Prior to 2009, no more than 1500 EB-5 visas were issued in any year. ICF INTERNATIONAL, STUDY OF THE UNITED STATES IMMIGRANT INVESTOR PILOT PROGRAM (EB-5) 2 (May 18, 2010) available at <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/EB-5/EB5-Report-2010.pdf>.

<sup>23</sup>OFFICE OF PUBLIC ENGAGEMENT, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, IMPLEMENTATION OF ENHANCEMENTS TO THE EB-5 PROGRAM (Sept. 13, 2011).

<sup>24</sup>Shannon Van Sant, *Chinese Investors Flood U.S. Entrepreneur Visa Program*, STATE NEWS SERVICE, May 14, 2015 ("State News Service").

<sup>25</sup>*Id.*

<sup>26</sup>U.S. CITIZENSHIP AND IMMIGRATION SERVICES, NUMBER OF I-526 IMMIGRANT PETITIONS BY ALIEN ENTREPRENEURS BY FISCAL YEAR, QUARTER, AND CASE STATUS 2008-2015.

<sup>27</sup>IIUSA 2014 Statistics.

<sup>28</sup>INA § 201, 8 U.S.C.A. § 1151 (2012).

<sup>29</sup>INA § 202, 8 U.S.C.A. § 1152 (2012).

<sup>30</sup>State News Service.

<sup>31</sup>*USCIS Processing Time Information*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://egov.uscis.gov/cris/processTimesDisplay.do> (last visited June 1, 2015).

<sup>32</sup>In evaluating whether a severe financial loss merits expedition of an EB-5 application, the USCIS may consider the following factors: "(1) whether senior or mezzanine financing that has been secured is at risk due to the delays in obtaining EB-5 financing; (2) whether other pieces of the capital stack are expiring or backing up against a deadline for securing the EB-5 financing; (3) whether a significant amount of interest expense is being incurred by the developer as a result of carrying senior, mezzanine, or bridge financing while the project waits for EB-5 financing; (4) whether the developer can continue to carry those financing costs; and (5) whether the whole project is in jeopardy as a result of the delay in securing the EB-5 financing and the accruing financing expenses for the

other parts of the capital stack.” Jennifer Hermansky, *Anatomy of a Successful EB-5 Expedite Request*, NATIONAL LAW REVIEW (May 14, 2013), available at 2013 Westlaw NewsRoom 11765672.

<sup>33</sup>*Id.*

<sup>34</sup>Although Regional Centers provide extensive information and documentation to the USCIS, that information is generally not released to the public. There are no public databases tracking the information, and any public information about a Regional Center is attributable to self-reporting. As a result, it is difficult to get significant amounts of reliable information regarding the Regional Centers and their projects.

<sup>35</sup>IIUSA Press Release: *National Program Contributed \$3.58 Billion to U.S. GDP and Supported Over 41,000 Jobs*, INVEST IN THE USA BLOG (May 28, 2014), <https://iiousa.org/blog/category/research-analysis/economic-impact-research-analysis/> (“IIUSA Press Release”) (“Participants in the EB-5 program invested approximately \$1.998 billion through EB-5 Regional Centers in FY2013.”).

<sup>36</sup>Audrey Singer, an author of “Improving the EB-5 Investor Visa Program: International Financing for U.S. Regional Economic Development” published by the Brookings Institution said, “When I started working on that project [EB-5] that resulted in the Brookings paper, there were a little over 200 regional centers. Just five years before, there were about a dozen. And now there are over 600.” State News Service.

<sup>37</sup>*Immigrant Investor Regional Centers*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (June 4, 2015), <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers>.

<sup>38</sup>For example, the Durst Organization rented a Florida-based regional center to raise \$80 million to develop a 41-story mixed-use tower in New York. Guelda Voien, *More NYC Developers Tap Cheap EB-5 Capital*, THE REAL DEAL (Nov. 1 2013), [http://therealdeal.com/issues\\_articles/eb-5-in-overdrive/](http://therealdeal.com/issues_articles/eb-5-in-overdrive/).

<sup>39</sup>Wassem Amin, *Important Considerations in Developing an EB-5 Immigrant Investor Regional Center*, DHAR LAW, LLP (Apr. 17, 2013), <https://dharlawllp.wordpress.com/2013/04/17/important-considerations-in-developing-an-eb-5-immigrant-investor-regional-center/>.

<sup>40</sup>E.B. Solomont, *City Connections Aims to Become an EB-5 Macher*, THE REAL DEAL (Feb. 11, 2015, 1:37 PM), <http://therealdeal.com/blog/2015/02/11/city-connections-aims-to-become-an-eb-5-macher/> (“Related [Companies] has its own regional center, as does Extell Development and the Lightstone Group.”).

<sup>41</sup>USCIS 2013 Memorandum at p. 5 (“Thus, if the agreement between the new commercial enterprise and immigrant investor, such as a limited partnership agreement or operating agreement . . .”).

<sup>42</sup>Ali Jahangiri & John Tishler, *Using EB-5 Capital in*

*the Capital Stack for New Hotel Developments*, NATIONAL REAL ESTATE INVESTOR (Mar. 4, 2015), available at 2015 Westlaw NewsRoom 6542903.

<sup>43</sup>Finder’s fees are not legal for solicitation in the United States, but there may be “servicing fees.”

<sup>44</sup>Victor Shum & Catherine D. Holmes, *10 Keys to Making Your Real Estate Development Project Attractive to Immigrant Investors in the EB-5 Marketplace*, MONDAQ (Oct. 21, 2011), available at 2011 Westlaw NewsRoom 21611496.

<sup>45</sup>Julie Satow, *Want a Green Card? Invest in Real Estate — U.S. Visa Program Gives Foreigner, Mostly from China, Path to Residency*, INT’L N.Y. TIMES, May 20, 2015, at 15, available at 2015 Westlaw NewsRoom 14639474.

<sup>46</sup>Andrew McIntyre, *5 Considerations for Banks Eyeing EB-5 Bridge Lending*, LAW360 (May 26, 2015, 3:53 PM), <http://www.law360.com/articles/659357/print?section=realestate> (“As the EB-5 program . . . continues to pick up steam and funnel hundreds of millions of dollars into U.S. projects, banks are increasingly eyeing an opportunity to help developers bridge a common funding gap inherent in the process.”).

<sup>47</sup>*Hunters Point Shipyard*, GOLDEN GATE GLOBAL, <http://www.sfbarc.com/projects/hunters-point-shipyard/> (last visited June 1, 2015).

<sup>48</sup>*America’s Most Notable EB-5 Financed Developments*, BISNOW (Dec. 10, 2014), <https://www.bisnow.com/national/news/capital-markets/Americas-Most-Notable-EB-5-Financed-Developments-41065> (“Forest City execs said most of the EB-5 money would go toward a new rail yard and some toward loan repayments, with critics contending the financing largely went toward the latter.”).

<sup>49</sup>*The Story*, HUDSON YARDS, <http://www.hudsonyardsnewyork.com/the-story> (last visited June 1, 2015).

<sup>50</sup>Eliot Brown, *Hot Source of Property Financing: Visa Seekers*, WALL ST. J. (Dec. 9, 2014, 12:33 PM), <http://www.wsj.com/articles/hot-source-of-real-estate-financing-green-card-seekers-1418146394>.

<sup>51</sup>In Phase I of the project, the developer raised the necessary capital from 99 Alien Investors in 37 days. In Phase II, capital was received from 150 Alien Investors in 34 days. Wen Liu, *Highway 520 Project Was a Bridge to Nowhere for Chinese EB-5 Investors*, CONTEXTCHINA (May 13, 2013), <http://contextchina.com/2013/05/520-project-was-a-bridge-to-nowhere-for-chinese-eb-5-investors/>.

<sup>52</sup>*Id.*

<sup>53</sup>U.S. SEC. AND EXCH. COMM’N, SEC HALTS \$150 MILLION INVESTMENT SCHEME TO DUPE FOREIGN INVESTORS AND EXPLOIT IMMIGRATION PROGRAM, LITIGATION RELEASE NO. 22615 (Feb. 8, 2013), available at <https://www.sec.gov/litigation/litreleases/2013/lr22615.htm>.

<sup>54</sup>*Investor Alert: Investment Scams Exploit Immigrant Investor Program*, U.S. SEC. AND EXCH. COMM'N (Oct. 9, 2013), [http://www.sec.gov/investor/alerts/ia\\_\\_immigrant.htm](http://www.sec.gov/investor/alerts/ia__immigrant.htm) ("The U.S. Securities and Exchange Commission's Office of Investor Education and Advocacy and U.S. Citizenship and Immigration Services are jointly issuing this Investor Alert to warn individual investors about fraudulent investment scams that exploit the Immigrant Investor Program, also known as 'EB-5.'") ("In-

vestor Alert").

<sup>55</sup>Jennifer Magalhaes, *The EB-5 Visa Program: A Popular Real Estate Financing Program's Reauthorization is Uncertain*, MONDAQ (Jan. 20, 2015), available at Westlaw NewsRoom 1854850.

<sup>56</sup>*Id.*

<sup>57</sup>See Investor Alert.

<sup>58</sup>USA Press Release.