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US IMMIGRATION & NATIONALITY LAW

PROVING LAWFUL SOURCE OF FUNDS FOR THE EB-5 IMMIGRANT VISA PROGRAM

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by

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Today, foreign nationals seeking permanent resident status in the U.S. through employment, face increasingly dwindling options. For many U.S. employers, sponsorship of a foreign national is less of a priority, or even a possibility, as they struggle to weather the continuing economic downturn. More often than not, even those individuals fortunate enough to obtain U.S. employer sponsorship face interminable visa backlogs specifically in the second (EB-2) and third (EB-3) preference categories for persons born in India and China. On May 1, 2009, the EB-3 category became completely unavailable for all countries of the world. This severe lack of options has led to significantly increased interest in the still underused Employment-Based Fifth Preference (EB-5) visa category as foreign nationals are finding that the investment route may indeed be their best (or only) option toward obtaining permanent resident status in the U.S.

Under Section 203(b)(5) of the Immigration and Nationality Act, approximately 10,000 immigrant visas per year are available to qualified individuals through the EB-5 category. Qualification for EB-5 status is a complex and difficult process requiring an investment of $1 million (or $500,000 if targeted employment area i.e. rural or high unemployment) in a commercial enterprise that must Tbenefit the U.S. economyУ and create at least 10 full-time jobs.[1] The foreign national may choose to invest in his or her own commercial enterprise or to invest through a Regional Center P a USCIS approved entity, organization or agency that focuses on a specific geographical area within the United States and seeks to promote economic growth through increased export sales,

improved regional productivity, creation of new jobs, and increased domestic capital investment[2].

Virtually all of the approved Regional Centers have been approved as Ttargeted employment areaУ investments, thus qualifying them for the reduced $500,000 investment requirement. Regional Center investors are permitted to demonstrate through Treasonable methodologiesУ that their investment resulted in the creation of ten or more direct *or indirect* jobs. Investors within EB-5 Regional Centers are permitted to use statistical formulas and models to demonstrate a correlation between their investment of capital into a specific business and indirect jobs created in other businesses within the greater community. In Regional Center cases, these indirectly generated jobs may be used to satisfy the job creation requirement unlike investment in oneXs own commercial enterprise where the investor has to provide proof of full-time employment of 10 *direct* employees of the enterprise.

But, while the EB-5 route may seem very attractive to a foreign national with $500,000 or $1 million to spare, in preparing the application, the EB-5 investor must be aware of various hurdles involving selecting the appropriate investment or Regional Center, tax, corporate and immigration law concerns and tracing the source of investment funds. This article will focus on the requirement that often proves to be the most challenging for the investor Р documenting lawful source of funds. The same documentation is required whether the investment is an individual investment or a regional center investment.

The EB-5 regulations require that the investor prove the invested capital was Tobtained through lawful means.У[3] To show that the investor has invested or is in the process of investing capital obtained through lawful means, the regulations at 8 C.F.R. ¤204.6(j)(3) require that the EB-5 petition include, as applicable, foreign business registration records, corporate, partnership and personal tax returns filed within 5 years, evidence identifying any other source of capital, or documentation of court judgments or pending court cases. The USCIS wants to see (1) how the investor obtained the money used for the investment[4] and (2) a clearly documented Tpath of fundsУ from the original source to the commercial enterpriseXs bank account.[5] In practice, the USCIS is prone to hyper- technicality and requires much more extensive documentation

than anticipated in the regulations. The stated governmental interest behind these hypertechnical requirements is to confirm that the funds utilized are not of suspect origin.[6] A mere declaration that the funds were lawfully obtained will not suffice. Also, an investor cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds.[7] Without documentation indicating the precise path of funds, the investor cannot meet the burden of establishing that the funds are his or her own funds.[8]

The investor may encounter varying degrees of difficulty in documenting source of funds depending on his or her nationality. Some countries do not require that the individual file tax returns, thus making it exceedingly difficult to document source of funds. In some instances, the investorXs tax returns may indicate very little income thereby casting doubt as to how he or she obtained the investment funds. In both these cases, it becomes necessary to provide USCIS with an abundance of evidence that will serve to counter any negative inferences that may be drawn.

In all cases, it is advisable to provide the USCIS with a narrative description and/or diagram to aid in painting the entire picture. A good place to start is with the individual who *originally* obtained the funds. This is an important factor often overlooked when deciding whether to pursue the EB-5. The investor must consider that in filing an EB-5 petition, he or she may bring other individuals under investigation and these individuals must be prepared to also withstand USCIS scrutiny. For instance, if the investor obtained the funds as an inheritance from his deceased father, it will be necessary to document that the father lawfully obtained the funds. If the investor received the funds as a gift from her Aunt Martha, it will be necessary to document the lawful source of Aunt MarthaXs funds, including whether a gift tax was paid. If Aunt Martha obtained the funds as a loan from her friend Bill, then the lawful source of BillXs funds need to be documented as well as the lawful source of any collateral that Aunt Martha put up for the loan.

Similarly, if the investment is in the form of equipment, inventory or other tangible property, the EB-5 investor must document that said equipment, inventory or property was obtained through lawful means. The USCIS has not provided a clear mandate as to how far back the investor must go to obtain documentation. Generally, the investor and his or her attorney should utilize

their own judgment as to how much documentation can reasonably be expected. In many instances, it may very well be impossible to provide documentation of transactions which occurred several years ago and led to the investorXs possession of the funds today. If possible, the investor should submit affidavits to fill any gaps in primary documentation.

The investor can look to existing case law for guidance on what to expect when trying to prove source of funds:

> The investor cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Izumii*, 22 I&N Dec. 169, 194-95 (Assoc. Comm. 1998).
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> A joint account of father and son cannot be attributed solely to the investor. *Matter of Soffici*, 22 I&N Dec. 158 (Assoc. CommXr Examinations 1998). Also, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof. *Id.*
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> The investor must establish that the investment comes from accounts under his name. *Matter of Ho*, 22 I&N Dec. 206 (Assoc. Comm. 1998).
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> Whether an investor uses a promissory note as capital or as evidence of a commitment to invest cash, he must show that he has placed his assets at risk. In establishing that a sufficient amount of his assets are at risk, he must demonstrate, among other things, that the assets securing the note *are his*, that the security interests are perfected, that the assets are amenable to seizure, and that the assets have an adequate fair market value. *Matter of Hsiung*, 22 I&N Dec. 201 (Assoc. CommXr Examinations 1998).
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> The assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988).
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> In a decision posted on AILA InfoNet, Doc. No. 01101101 (October 11, 2001), the AAO found that the investor *did* demonstrate his investment of $1 million by submitting copies of cancelled checks proving that the payments had been made. However, the maximum expenditures in the record were not clearly attributed to petitioner's funds and they accounted for less than one third of the total capital investment.
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> In *Matter of* (AAO Mar. 15, 2001), the investorXs appeal was dismissed for

failure to establish her salary or that of her husband. Counsel asserted that the investorXs husband served in the TaiwaneseXs military and was not required to pay taxes. Counsel was unable to prove lawful source of funds because neither the investorXs husbandXs military service nor his salary while in the military could be verified. It was also unclear whether the investor still had access to her husbandXs assets when the family register indicated he had left the household. Investor was unable to provide evidence to explain her large bank account or valuable property.

In a *Matter of , WAC-98-23 1-54300 (AAO, Mar. 30, 2001), the investorXs appeal was dismissed in part for insufficient evidence to prove that the balance of $520,000 in her Chinese bank account had been earned within 5 years from the date of filing the petition, that she worked in a certain occupation through which she acquired the capital over time or evidence of the path of funds.*

In *Matter of , WAC 00 070 52366 (AAO, Apr. 21, 2005), the investor was unable to provide evidence proving that the trust from which the funds were obtained was set up by her father or that she was a beneficiary of that trust.*

More recently, in *Matter of , SRC-05-263-51614 (AAO, Feb. 5, 2009), the AAO acknowledged that the investor held the resources to make the $500,000 cash investment based on the $5,000,000 lottery prize he won. However, the investor failed to adequately document the path of funds when one out of several checks was omitted from the record. The AAO held that despite how TreasonableУ it was to conclude that the funds in escrow were transferred there by the investor, it is the investorXs burden to provide evidence tracing the path of those funds such as cancelled checks or wire transfer receipts.*

Clearly, documenting source of funds could prove to be the most difficult part of the EB-5 process. It is never a good idea to throw Teverything but the kitchen sinkУ at the adjudicator in the hope that he or she will either make sense of it all or be too overwhelmed to find fault. A practitionerXs best approach is to ensure that he or she fully comprehends where the investment funds came from. Having done that, the practitioner can better provide USCIS will an organized petition carefully demonstrating the lawful source of funds and the path of those funds from the hands of the investor to the enterprise.

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[1] An investment is a *contribution* of funds and does not include a failure to remove funds from the enterprise i.e. the reinvestment of the enterpriseXs proceeds. *See generally De Jong v.* INS, No. 6:94 CY 850 (E.D. Tex. Jan 17, 1997) and *Matter of Izummi,* 22 I&N Dec. 169, 195 (Comm. 1998) for the propositions that the reinvestment of proceeds cannot be considered capital and that corporate earnings cannot be considered the earnings of the petitioner even if he or she is a shareholder of the corporation.

[2] See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, sec. 610(c), Public Law 102-395, 106 Stat. 1874 (1992), 8 U.S.C. 1153 note.

[3] Under 8 C.F.R.¤ 204.6, *capital* includes cash, equipment, inventory, other tangible property, cash equivalents and indebtedness secured by assets owned

by the alien entrepreneur, 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.

[4] It is only necessary that the investor prove where he or she obtained the $500,000 or $1 million investment. It is not necessary for the investor to prove where/how he or she obtained every dollar they ever had.

[5] Often, investors from countries with restrictions on the outflow of currency, will encounter difficulty in proving Tpath of funds.У The investor may be forced to execute several transactions between the time that the funds leave the investorXs account and reach the account of the U.S. commercial enterprise. Documentation of each step must be submitted in the EB-5 petition and the investor must allow for various bank fees, etc. that may cause the investment amount to drop below the EB-5 requirement. Note also that the investment must come from a bank account owned and controlled by the investor and not from an account held for the benefit of the investor. *Matter of Ho*, 22 I&N Dec. 206, 210-211 (Comm. 1998)

[6] *See Matter of* , EAC 98 076 50508 (AAO Jan. 18, 2005), at 8 *citing Spencer Enterprises v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Cal. 2001), *affXd*, 345 F. 3d. 683 (9th Cir. 2003).

[7] *Matter of Ho,* 22 I&N Dec. 206; *Matter of Izummi,* 22 I&N Dec. at 195.

[8] *Id.*