TACKLING THE COMPLEXITIES IN CONSULAR PRACTICE FOR EB-5 INVESTORS

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INTRODUCTION

This article discusses various problems arising when representing EB-5 investors in consular processing matters. Some of the problems encountered by EB-5 investors are not specific to EB-5 investor law or processing at all, but instead are general challenges faced by all categories of immigrants to the United States. The number of these general challenges has grown along with the general antiimmigrant policies adopted by the current U.S. administration. Where, on the other hand, the difficulties in consular processing cases stem from EB-5 category-specific issues, usually but not always counsel is able to highlight particular legal standards that typically help move a delayed application to EB-5 visa issuance. While a consular officer may deny EB-5 visa applications for any number of reasons, an I-526 petition approved by U.S. Citizenship and Immigration Services (USCIS) does establish EB-5 category eligibility in the first instance and a consular officer cannot deny the EB-5 visa merely for the reason that the I-526 petition might have been adjudicated differently if the consular officer were to assume the role of USCIS adjudicator.

We have previously cautioned practitioners not to assume that all EB-5 investors in a new commercial enterprise (NCE) would be able to synchronize their case processing such that they generally start and complete the immigration process (and enter and exit the NCE) at roughly the same time.[1] With ever-growing USCIS petition adjudication backlogs and the advent of EB-5 visa backlogs, more so than before it is likely the immigration cases of EB-5 investors in a single NCE will be stretched across a lengthy processing timeline.

This article updates our earlier introduction to consular processing in the EB-5 visa context,[2] while sharing experiences with actual EB-5 investor cases in order to illustrate the kinds of complications that may arise. Above all else, this article is a reminder of the need for case management at the outset of the attorney-client relationship, taking care to address well in advance of consular processing the main complicating factors presented herein:

- Lawful sources and path of invested funds
- Security clearance
- Criminal record
- Prior immigration applications and periods of stay in the United States
- Barriers facing nationals of specific countries

Use of an exhaustive client questionnaire, paired with meticulous attention to these issues, should help eliminate surprises and smooth out the consular processing phase of the case.

THE FUNDAMENTALS OF CONSULAR PROCESSING IN THE EB-5 CONTEXT

Complications in EB-5 investor case processing have numerous sources, including the uncertainties arising out of unclear adjudication standards used by USCIS, and the fluidity of business scenarios that prompt inquiries about "material change" that potentially dooms viability of an approved petition, just to name a couple general concerns. The consular processing-oriented problems include National Visa Center

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[1] *See* Lincoln Stone and Taiyyeba Skomra, "*Consular Practice for EB-5 Investors: Recurring Problems and Timing Complications*," *in* IMMIGRATION OPTIONS FOR INVESTORS & ENTREPRENEURS 237 (3d ed. 2014).

[2] *Id.*

(NVC) or consular delays relating to children,[3] visa retrogression,[4] security clearance and other administrative processing prior to immigrant visa issuance, and other typical consular processing issues. The case processing at a specific U.S. consulate can be further plagued by any one of other unhelpful circumstances, such as lack of volume of EB-5 cases leading to insufficient consular experience with EB-5 adjudication, inaccurate reference materials for consular officers in terms of the prevailing legal standards, required security processing that adds up to administrative delay, grounds of inadmissibility,[5] and limited consular review.[6] The standard processing of all immigrant visa applications follows a well-worn path, and tutorials for the novice are available in numerous sources.[7] The focus in this article, however, is on circumstances that in fact have arisen or are threatening to derail current EB-5 visa cases.

Overview of Typical Consular Processing in EB-5 Investor Case

Obtaining an EB-5 visa begins with a petition (on USCIS Form I-526) that is filed with and approved by USCIS. After petition approval, the file is transferred from USCIS to the Department of State ("the Department"), first to its contractors at the NVC for the assembly and packaging of immigrant visa application forms and the receipt of original or certified copies of civil documents (birth certificates, marriage and divorce certificates, police certificates) needed for review by the consular officer at the immigrant visa interview. In this respect, it is similar to most categories of immigrant visas processed at U.S. embassies and consulates worldwide.

A consular officer faced with an EB-5 applicant and his or her family with a petition and thick stack of documents (either electronic or hard copy, depending on the consular post) at the interviewing window will likely review the DS-260 immigrant visa applications, petition approval notice, the petition itself, and a legal memorandum in support of the petition that summarizes the applicant's qualifications for the EB-5 visa. A consular officer also may review some of the supporting documentation. But as a practical matter the consular officer is pressed for time, as a complete set of electronic fingerprints must be taken for each applicant 14 years or older, and more than likely the waiting room is filled with other applicants also requiring interviews. It therefore is likely that only a cursory review of the EB-5 application package is possible, and just a handful of questions are asked, aiming for an understanding of who the applicant is, the reasons for the particular investment, and the source of funds. Overall, an applicant who clearly articulates facts about the investment generally will do better in persuading the consular officer that the EB-5 visa should be issued. It is not uncommon for an officer to indicate to the applicant that a more thorough review of the documentation is required following the interview before being able to render a decision.

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[3] *See* Child Status Protection Act (CSPA), Pub. L. No. 107-208, 116 Stat. 927 (Aug. 6, 2002) for preservation of rights to immigrate as the dependent child of the principal applicant. *See also* Immigration and Nationality Act (INA) §203(h). As one example of confusion about CSPA, several EB-5 cases were held up in Johannesburg because the post refused to include dependent children under CSPA. The error stemmed from the consular officer misunderstanding the effective date for when a visa becomes available, applying the interview date rather than the date of the I-526 petition approval. The Advisory Opinions Division within the Department was helpful in resolving the matter. In one memorable EB-5 case, an analogy to the facts and reasoning in *Duarte-Ceri v. Holder*, 630 F. 3d 803 (2d Cir. 2010), helped to convince a consular officer that the time of day of the birth should be considered for CSPA eligibility.

[4] On April 23, 2018, at the IIUSA Annual Conference, Charlie Oppenheim, Chief of the Visa Control and Reporting Division of U.S. Department of State, warned there could be retrogression of EB-5 visa availability for Indians in addition to the existing visa backlog for Vietnamese and mainland Chinese investors due to per-country visa limits. Also, see "Visa Backlog" discussion, *infra.*

[5] *See generally* INA §212(a).

[6] *United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537 (1950) (exclusion of aliens is inherent in the power of executive branch). *See generally* the discussion of judicial review in *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (no further review of decision if facially legitimate and bona fide). *See Kerry v. Din*, 576 U.S. __ (2015) for discussion of due process in the context of consular processing. Certain individual cases, though, may be ripe for challenge if there is insufficient explanation for the denial. *See, e.g.*, *Munoz v. Department of State*, CV-17-0037 (Apr. 2, 2019) (magistrate judge granted discovery to the plaintiffs where it appeared the consul in San Salvador denied the immigrant visa application of the spouse of a U.S. citizen on account of his allegedly being a gang member as evidenced by his tattoos where expert evidence was to the contrary).

[7] *See, e.g.,* THE CONSULAR PRACTICE HANDBOOK (AILA 2017).

EB-5 Eligibility Issues

Confirming Petition Validity

Consular officers are prohibited from "readjudicating" I-526 petitions that already have been approved by USCIS, which is within the Department of Homeland Security (DHS). It is DHS that possesses exclusive authority over the approval and denial of immigrant visa petitions (with limited exceptions, inapplicable to the EB-5 category). Consular officers are reminded by the State Department's *Foreign Affairs Manual* (FAM)[8] to "bear in mind that the Department considers the approval of a visa petition prima facie evidence of the relationship between the petitioner and the beneficiary."[9] It has always been included within the role of a consular officer to be alert to material facts that might disrupt the basis for the approval of a petition. The FAM thus advises consular officers:

> [I]t is your responsibility to review, not to readjudicate petitions. However, in the course of that review, if you obtain sufficient facts so that you know or have reason to believe that the beneficiary is not entitled to the status approved in the petition, you will return the petition to the U.S. Citizenship and Immigration Services (USCIS) through the National Visa Center (NVC).[10]

Recent guidance issued in August 2018 by the Department concerning the responsibility of interviewing officers may be having the effect of encouraging more probing interviews. That guidance exhorts officers to "confirm petition validity" by verifying that there are no inconsistencies between the approved petition and the information provided by the applicant at the visa interview.[11]

The updated guidance expands on the consular officer's role by emphasizing that:

> The approval of a petition by USCIS does not relieve the alien of the burden of establishing visa eligibility. While the majority of petitions are bona fide, you should confirm during the visa interview that the facts as stated in the petition are true, and that nothing has changed that would affect the validity of the petition. Remember that the Department of Labor and USCIS generally interact solely with the petitioner in writing; the interview often is the first point during the petition-based visa process where a United States Government representative has the opportunity to interact with the beneficiary of the petition. Additionally, consular officers overseas benefit from cultural and local knowledge as a result of working and living overseas, making it easier to spot exaggerations or misrepresentation in qualifications.[12]

Reports from immigration practitioners reflect that consular officers worldwide are enthusiastically seeking out such factual inconsistencies that may serve as a basis for a petition revocation request to USCIS. This phenomenon is occurring in the practice of all petition-based visa categories, including EB-5 practice.

The consular officer will be concerned about material inconsistencies between the facts stated in the petition and the information provided by the applicant, as well as any new material factual circumstances that if known to USCIS could have led to a petition denial. The focus should be on "material" information, *i.e.*, information related to a ground of eligibility/ineligibility, which necessarily requires a firm understanding of

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[8] The FAM is a multivolume work published by the U.S. Department of State for use by the Department and by U.S. foreign service officers abroad in the administration and operation of U.S. foreign policy. Volume 9 is particular to the subject of visas. 9 FAM is the "holy book" on visas for the U.S. Department of State consular officer at U.S. embassies and consulates abroad, constituting a compendium of instruction and guidance to which the officer has been first exposed while in training at the U.S. Foreign Service Institute, prior to assignment to an overseas post. With it, consular officers are able to process the thousands of visa applications at U.S. embassies and consulates worldwide.

[9] 9 FAM 504.2-8(A)(a).

[10] 9 FAM 504.2-8(A)(b).

[11] 9 FAM 601.13-1.

[12] *Id.*

EB-5 category eligibility standards.[13] Adverse information could come to light during the visa interview process, or be revealed later in an investigation by consular staff.

Examples of more assertive consular officers appear to be multiplying. Applicants attending interviews at the U.S. consulates in Mumbai and New Delhi in 2018 report that consular officers there have used aggressive tactics to identify "inconsistencies" in EB-5 cases. Consular officers have focused on whether a gift documented in the I-526 petition was actually an unsecured loan.[14] Tactics used to uncover such "inconsistencies" involve aggressive interrogation, as well as asking the applicants to write out in their own words in their native language an explanation of the source of funds. The officers take the explanation for translation into English and have the applicant sign both statements. This causes confusion in some cases where the applicant may explain the source of funds in terms that are not perfectly consistent with the documentation filed with the I-526 petition. Compounding the problem is the consulate's practice of not providing the applicants with a copy of the statements they signed. Also, in somewhat of a "fishing expedition,"[15] consular officers in India have asked applicants to provide additional source of funds documents -- much more than USCIS required for I-526 petition approval -- in order to potentially identify inconsistencies between the facts appearing from the petition and the facts suggested by the new documents. This tactic, while clearly amounting to "readjudication," is nonetheless reflective of the new reality for immigration practitioners and their clients, wherein consular officers appear to be claiming wide authority in their actions to "confirm petition validity."

The fishing expeditions could be seemingly endless, should a consular officer decide the investment of additional time and resources in connection with further investigation is worthwhile. In one case in Hong Kong the consular officer requested source-of-funds documents going back more than 30 years to demonstrate how the investor earned his "first bucket of gold." In approving the I-526 petition, USCIS had been satisfied by the petitioner's declaration and documents from the last 10 years of the client's business ventures. Ultimately the case was resolved favorably after opening a line of communication, submission of additional documents, and a second interview. The case stands out as an unfortunate example of "readjudication," but also as a reminder that practitioners need to be prepared to argue to consular officers what is meant by "preponderance of evidence" in demonstrating a lawful source of funds.[16]

The new FAM guidance and these few case examples demonstrate that EB-5-related consular processing could involve several different variations on the theme of a consular officer probing the underlying assumptions of a petition approval. It follows that client preparation is important to ensure that there are no inconsistencies between the applicant's statements at the interview and the documents presented in the underlying I-526 petition, stressing familiarity with the details of source of funds. Counsel also must prepare to challenge the consular officer in cases where it appears the consular officer is fixated on immaterial matters

[13] USCIS applies the standard of *Kungys v. United States*, 485 U.S. 759 (1988), for determining materiality.

[14] In 2015, USCIS policy veered toward construing investment of the cash proceeds from an unsecured loan as "indebtedness" that rendered the investment noncompliant with regulations. *See* Lincoln Stone & Susan Pilcher, *"Investing Cash from Loan Proceeds: A New Interpretation of Indebtedness*," REGIONAL CENTER BUS. J. (2015), *also available at* www.sggimmigration.com/investing-cash-from-loan-proceeds-a-new-interpretation-of-indebtedness/. However, at least one federal court has decided that policy to be inconsistent with regulations. *Zhang v. USCIS*, No. 15-cv-995 (D.D.C. 2018) (case on appeal to D.C. Court of Appeals).

[15] A common objection to further discovery by an adversary in litigation is to label it a "fishing expedition" – a possibly onerous, wide-ranging intrusion that is vague in its underlying rationale and not guided by any specific circumstances that would justify it. Defenders of the practice might push back with a bit of EB-5 program history, contending that it was due to aggressive consular work that the government was able to unravel the kind of investment structures that prevailed during the 1990s, leading to a critical INS General Counsel opinion and ultimately to the four EB-5 precedent decisions issued by the USCIS Administrative Appeals Unit in 1998.

[16] The standard involves showing that the existence of a fact is "more likely than not," and does not require removing all doubt. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). In accord is 6 *USCIS Policy Manual*, pt. G, ch. 2.E.

or is substituting a consular officer judgment for a matter already decided by the USCIS examiner, such as whether a business plan and job creation methodology are reasonable in the circumstances.[17]

Problems Attributable to Lack of Experience with EB-5 Cases and FAM Deficiencies

The EB-5 category of immigrant visas is one for which approximately 10,000 visas can be issued annually, and which, for more than 20 years, had never come close to reaching that mark until fiscal year (FY) 2014. While there has been dramatically increased usage of the EB-5 program in recent years, it is still a category of immigrant visa that is highly concentrated in a few consulates worldwide, [18] and is lesser known to the consular corps than the family-based categories of immigrant visas, or even the other employment-based categories. In FY2017, of the 365,323 immigrant visas issued worldwide, only 10,090, or 2.76 percent, were for the EB-5 category.[19] It would not be surprising that many consular officers are unfamiliar with EB-5 standards, and may be encountering the category for the first time when presented with an approved EB-5 petition by an applicant. Post-interview debriefings reveal, occasionally, that the client's application was the first EB-5 case reviewed by the particular officer.

Given that this category is less well known, consular officers may be more inclined to resort to the FAM in figuring how to process visa applications for an approved EB-5 petition. Unfortunately, the FAM notes relating to EB-5 visas are relatively short and have some deficiencies with respect to their articulation.

The FAM, for example, is incorrect in continuing to include the requirement that the investor have "established" the commercial enterprise. The investor does not need to form, create, or "have a hand" in creating the commercial enterprise, or significantly increase the business net worth. All FAM references to the contrary[20] are inconsistent with the prevailing statutory law.[21]

In one problematic case that could be attributable to incomplete FAM coverage, a consular officer was intent on reconsidering a USCIS finding that there indeed was a "troubled business"[22] as a basis for approval of the I-526 petition. Upon conclusion of the immigrant visa interview at the consulate in Montreal, the applicant received a letter requesting more "information regarding troubled business and job creation." In a later notice, the consulate sought the same information: "Specifically, the information submitted with the petition was insufficient to establish that the enterprise in question is a troubled business and meets the requisite job creation level." After several unsuccessful rounds with the consular officer over a two-month period, a supervisory review yielded the EB-5 visa.

In other cases, probably due to incomplete FAM notes, consular officers attempted to revisit whether the investor-petitioner would be sufficiently engaged in management. The FAM notes are lacking in terms of delineating the level of management participation in the commercial enterprise that is required by law. The FAM note concerning management refers to the alternative grounds of eligibility – either the investor is

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[17] This hypothetical, without more such as materially different facts, would be an example of a gross waste of government resources and ill-advised readjudication by a consular officer. A petition that is based on future job creation must be supported by a comprehensive business plan that is credible, 8 CFR §204.6(j)(i)(B); *Matter of Ho*, 22 I&N Dec. 206 (Assoc. Comm'r 1998), and a reasonable methodology for estimating job creation if it's a regional center-connected petition. 8 CFR §204.6(j)(4)(iii). Even USCIS grants deference to its earlier decisions concerning reasonableness of the business plan and job creation methodology. See 6 *USCIS Policy Manual*, pt. G, ch. 6.

[18] https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableVI-PartIV.pdf.

[19] https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport%20-TableV-PartIII.pdf.

[20] *See* 9 FAM 502.4-5(B)(a)(2), (c).

[21] Amendments enacted in 2002 eliminated the "established" requirement. Pub. L. No. 107-273, 116 Stat. 1758, tit. I, subtit. B, ch. 1, §11036 (2002).

[22] *See* 8 CFR §204.6(j)(4)(ii).

active in day-to-day management control, or the investor is active in policy formulation.[23] However, the FAM is silent on what is meant by policy formulation. By contrast, the binding regulation for EB-5 category eligibility specifies that a limited partner who has the rights conferred on a limited partner under the Uniform Limited Partnership Act is sufficiently engaged in the management of the commercial enterprise.[24] The regulation is controlling. At one client's interview in Dublin in 2011, the officer conceded he had heard of the EB-5 visa but knew nothing about it and asked the client to explain it to him. The officer then insisted that the client must be involved in the day-to-day running of the company to qualify. The issue was quickly resolved with a letter to the consulate explaining the controlling regulations, and the client received the visa and was admitted as a resident.

A similar explanation was provided to the Advisory Opinions Division[25] of the Department's Visa Office in 2009 after the consular officer in London refused visas to three EB-5 investors on the ground of being insufficiently engaged in the management of the commercial enterprise. The Advisory Opinions Division sent its guidance to the consulate to help rectify the situation.

Likewise, resort to the Advisory Opinions Division also was helpful in a case held up after an interview in December 2008 at the U.S. consulate in Bangkok. The consular officer declined to issue a visa and requested evidence that the applicant would play an active role in the day-to-day managerial control or in policy formulation, and that the applicant's investment would create the required expansion of the net worth of the business. A detailed response was submitted to the consulate, but the intervention of the Advisory Opinions Division was probably key to resolving the issue and receiving the EB-5 visas.

A different issue arose in a 2012 interview in Ciudad Juarez. The consular officer informed the EB-5 visa applicant that the petition was referred back to USCIS on account of allegedly "new evidence" that the $500,000 invested was "never owned" by him and therefore did not qualify him as an EB-5 investor who invested "capital" as defined by the regulation.[26] The original record was replete with specific references to the fact that the source of the applicant's investment was a gift of $535,000, and that the gift funds were sent directly from the donor's account to the escrow account on the petitioner's behalf. USCIS eventually reapproved the petition, but the applicant's admission as a conditional resident was delayed by 1½ years.

A similar experience was reported by an applicant attending a 2018 interview in Mumbai, when a petition was returned to USCIS for revocation because the petitioner did not satisfy the nonexistent requirement that he demonstrate that he had "sole control" of the investment funds. In this example, the EB-5 source of funds was a gift that was transferred to the NCE on the petitioner's behalf. Likely due to the language in the FAM relating to E-2 visa investment, the consular officer appears to have erroneously applied the "sole control" concept from the E-2 visa context and applied it to the EB-5 matter.[27] These two cases demonstrate the

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[23] 9 FAM 502.4-5(C)(b)(6). In earlier EB-5 consular cases circa 2006, the FAM note was even more deficient, and dozens of EB-5 applicants – all ultimately successful – were held up in Guangzhou for several months due to the same lack of articulation of the law on management participation.

[24] 8 CFR §204.6(j)(5)(iii). Also of relevance here is that several cases for EB-5 investors lacking business or investment experience, or of diminished capacity, have been successful as limited partner investors on the basis of having the assistance of qualified professionals, custodians, and the like.

[25] The Advisory Opinions Division can be contacted by immigration attorneys via LegalNet@state.gov.

[26] EB-5 law requires investment of "capital" and 8 CFR §204.6(e) defines capital as including cash. The petitioner must show the lawful source of capital. 8 CFR §204.6(j)(3).

[27] According to the law concerning E-2 visa investment, 22 CFR §41.51(b)(7), the applicant must have "control" over invested funds. But EB-5 law has no such requirement. Rather, the petitioner must show the lawful source of capital, and USCIS may require evidence of the identity of the transferor of the investment funds. *Matter of Izummi,* 22 I&N Dec. 169 (Assoc. Comm'r 1998). USCIS policy acknowledges gifted funds as a permitted source of capital, and it also states that the petitioner must be the "legal owner" of the invested funds. 6 *USCIS Policy Manual*, pt. G, ch. 2.A.4. The law on gifts, in turn, recognizes that the donor may complete the gift to the donee by passing the funds to a third party. The petitioner thus is the "legal owner" of funds received by gift, per the intent of the parties, even when funds are transferred to a third party such as to the escrow for EB-5 investment.

hazards EB-5 investors face when interviewing with consular officers who are more likely steeped in E-2 visa standards, not the EB-5 law.

There also is confusion in FAM notes regarding promissory notes in EB-5 cases. The FAM contains scant reference to the holdings of *Matter of Hsiung*[28] and *Matter of Izummi,*[29] but the treatment of the core holdings in those cases is hopelessly confused in the text of the FAM note.[30] No wonder a consular officer reviewing an EB-5 visa application that includes a promissory note anywhere in the I-526 petition would likely be flummoxed by USCIS approval of the I-526 petition. Sure enough, a consular officer in Islamabad denied the EB-5 visa application and recommended revocation of the approved I-526 petition where the applicant had borrowed from family members and friends the funds he used to make the EB-5 qualifying investment. He had executed promissory notes to each of the lenders, and those promissory notes appeared in the petition file reviewed by USCIS. Following return of the file from Islamabad, USCIS initiated the revocation process by alleging that the investment of the borrowed proceeds did not qualify as capital at risk. This matter was resolved with USCIS, because the I-526 petition actually complied with the requirements of the *Hsiung* and *Izummi* standards for promissory notes.[31]

Targeted employment area (TEA) eligibility is yet another example of an EB-5 eligibility issue a consular officer might revisit if allowed to examine notwithstanding the lack of thorough training. At a 2017 immigrant visa interview in Santo Domingo, a consular officer requested additional evidence that the investment was in a TEA, even though that determination is made as of the date of investment or the date of I-526 petition filing, and all such evidence was in the underlying I-526 petition. The matter was resolved but not without having to involve a consular manager at the post.

Changes and Petition Revocation

Until such time as the courts or Congress reign in USCIS, it effectively has broad authority to call for the return of an approved I-526 petition should it determine that its approval was issued in error or the petition is no longer approvable due to a change in adjudication standards at USCIS.[32]

The first round of sparring with USCIS over the tenant occupancy job creation methodology provides a good example of change in adjudication posture.[33] In a consular case headed for the post in Sydney in 2012, the NVC returned the file to USCIS, which sought to revoke the I-526 petition approval due to a new perspective on tenant occupancy. Litigation and a subsequent statement of USCIS policy on tenant occupancy eventually helped sort out this mess of a case.[34]

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[28] 22 I&N Dec. 201 (Assoc. Comm'r 1998).

[29] 22 I&N Dec. 169 (Assoc. Comm'r1998).

[30] 9 FAM 502.4-5(B)(e)(4) reads: "Placing the Capital at Risk – To qualify toward the amount of capital needed under the statutory requirements, money or assets must be placed at risk and made available to the business most directly responsible for the creation of the employment opportunities. For example, money or assets used as reserve funds, as a means to facilitate a debt arrangement, or as promissory notes not due in substantial part within the two-year conditional period (see FAM 502.4-5(D)) do not constitute a qualifying contribution of capital toward the amount required for an alien investor. Promissory notes, however, may constitute evidence of capital if they are due in substantial part prior to the end of the period. Until such time as an alien completes payments on such a promissory note, they may not enter into a redemption agreement with the new commercial enterprise. Further, if the new commercial enterprise is a holding company, the capital must be available to the business(es) most closely responsible for creating the employment upon which the petition is placed."

[31] This case perhaps previewed the policy position USCIS revealed in 2015, treating investment of cash proceeds of borrowed funds as "indebtedness" that renders the I-526 petition deniable. *See* discussion of *Zhang*, *supra* note 14.

[32] INA §205(a) and 8 CFR §205.2(a) provide that petition revocation requires a showing of "good and sufficient cause."

[33] This methodology seeks credit for job creation by independent tenant businesses that lease space in buildings developed with EB-5 funding. *See generally* John Barrett, *Building Successful Economic Arguments to Gain Credit for Tenant Jobs*, in IMMIGRATION OPTIONS FOR INVESTORS & ENTREPRENEURS 391 (AILA 3d ed. 2014).

[34] Although USCIS published in 2012 a policy supporting use of tenant occupancy methodology in certain narrow circumstances, USCIS Statement on Tenant Occupancy Methodolgy (Feb. 17, 2012), AILA Doc. No. 12022160; USCIS Guidance Memorandum, "Operational Guidance for EB-5 Cases Involving Tenant-Occupancy" (Dec. 20, 2012), AILA Doc.

Similarly, in a case at the Guangzhou post in 2012, a narrow interpretation by the consular officer of USCIS's (then-new) policy on bridge financing led the officer to send the case back to USCIS for revocation.[35] Litigation at USCIS's Administrative Appeals Office (AAO) helped to resolve the matter, but only after three years had passed from the original I-526 petition approval.

Changed factual circumstances could pose an even greater threat to EB-5 investors holding approved I-526 petitions. This threat looms large in an era of lengthy EB-5 visa backlogs. Considering the growing number of EB-5 enterprises that face business distress, even bankruptcy, if USCIS imposes a relatively stringent view of what constitutes "material" change, many hundreds of EB-5 investors could be challenged by USCIS petition revocation proceedings.[36]

Visa Backlog

The May 2015 *Visa Bulletin* was the first pronouncement of a cutoff date in the EB-5 category. That cutoff date applied only to mainland Chinese investors, allowing them to proceed to interview and visa issuance only if their priority date was earlier than May 1, 2013.

Under the April 2019 *Visa Bulletin*, mainland Chinese investors are subject to September 15, 2014, "final action date," meaning they can proceed to interview and visa issuance only if their priority date is earlier than September 15, 2014.[37] In over three years (41 months), the cutoff date has moved 16.5 months. At that rate alone, it would be another three years before a visa would be available to a Chinese investor whose priority date was August 15, 2015. But FY 2015 saw a surge in I-526 petition filings due to the scheduled sunset of the Immigrant Investor Program on September 30, 2015, and much anticipation of legislation to change the minimum investment amounts among other requirements. And since the *Visa Bulletin* reflects a careful calibration of visa use and expected availability, the rate of change in the final action date for mainland China will necessarily decrease in the *Visa Bulletins* to come for FY 2019 and FY 2020. As a result, an investor from mainland China can expect to wait approximately 14 years to immigrate after making an at-risk investment of $500,000 and filing an I-526 petition.[38]

The May 2018 *Visa Bulletin* announced the first cutoff date for Vietnamese investors and matched the cutoff date for mainland China – July 22, 2014. However, under the April 2019 *Visa Bulletin*, Vietnam is subject to a August 22, 2016 final action date. A Vietnamese investor can expect to wait 7.2 years from the date of filing the I-526 petition until visa availability.[39]

The Department of State expects to impose cutoff dates for India in FY 2019. An Indian investor may have to wait 5.7 years from the date of filing the I-526 petition until visa availability.[40] South Korea, Taiwan, and Brazil may be next in line for cutoff dates. The investors, and their dependents, all essentially compete

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No. 12122850, in 2018 USCIS announced it would not accept the methodology as of May 15, 2018. But it also indicated all changes would be prospective and should not imperil already-approved petitions. *See* 6 *USCIS Policy Manual*, pt. G, ch. 2.D.6.

[35] This refers to an adjudication policy, confirmed in 6 *USCIS Policy Manual*, pt. G, ch. 2.D.1, that credits job creation for job-creating activities occurring before use of EB-5 capital, but in certain cases the USCIS may interpret the parameters very narrowly.

[36] 6 *USCIS Policy Manual*, pt. G, ch. 4.C. In such cases, the investor would have just 30 days to respond to a USCIS notice. A response, and any subsequent litigation, would likely revolve around the meaning of what is "material" and whether the USCIS interpretation of such is arbitrary and capricious under the Administrative Procedure Act.

[37] https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2019/visa-bulletin-for-april-2019.html.

[38] Projection by Charlie Oppenheim, Chief, Immigrant Visa Control & Reporting, U.S. Department of State at 2018 AILA & IIUSA EB-5 Industry Forum, October 30, 2018. "Wait time estimate is the number of years between the time an I-526 petition is filed today [October 30, 2018] and the time when an EB-5 visa is likely to be available based on current number use patterns, including the processing time of adjudicating an I-526 petition. These estimates cannot encompass all variables, such as dissipation from petition revocations, deaths, age-outs, withdrawals, etc.; or increases from family 'acquired' before visa issuance, possible legislation, or other governmental action that might impact the amount of numbers available for use each year."

[39] *Id*.

[40] *Id*.

for the annual 10,000 visas. Increased use of EB-5 visas by investors from other countries naturally suppresses visa availability for Vietnamese and mainland Chinese investors even further.

The backlog is a major source of problems for consular processing, frustrating client expectations and in some cases jeopardizing the client's ability to immigrate at all. As discussed above with respect to petition revocation, the investor who has not been admitted as a conditional resident may have to start over and file a new I-526 petition.

Administrative Processing and Security Checks

For optimists, what first may seem to be the dreaded rebuff of "administrative processing" could contain the silver lining that the applicant's visa application is approvable – otherwise there is no reason to keep the application alive. Consular officers are instructed to use the phrase "administrative processing" to refer to clearance procedures or the referral of a case to the Department.[41] The Orwellian nature of administrative processing arises out of not knowing the precise reason for it or the amount of time it will take to resolve.

Generally, though, the reasons for administrative processing can be categorized along the following lines: (1) further consultation is required before making a decision about visa eligibility due to information in the record or revealed during an interview, which may require an advisory opinion from the Department; (2) clearance is required due to a security database "hit" for the applicant's biographic and biometric data; or (3) further advice is required due to concern about technology transfer pursuant to the Technology Alert List (TAL).[42] The latter two scenarios trigger a request for a Security Advisory Opinion (SAO),[43] with visa Donkey referring to name hits and visa Mantis involving the TAL.

All visa applicants are subject to security checks through a variety of databases.[44] It is essential to know in advance the types and level of scrutiny to which the client will be subjected, not only to manage the client's timeline expectations, but also to better prepare the visa application and avoid even longer delays. Variations in spellings of the applicant's name between the visa application and records screened may create avoidable delay. Providing a comprehensive list of aliases in the visa application may help. The Department advises applicants subject to administrative processing to wait "at least 60 days from the date of interview or submission of supplemental documents, whichever is later."[45]

Importantly, EB-5 investors with a scientific or technical background and experience in fields listed in the TAL may prompt a consular officer to request a visa Mantis check. But do not expect to become expert in the TAL, since it was August 2002 when the government last published on the topic in the form of a Department of State cable.[46] That cable explains that the objective of the TAL is to help further four important security objectives: stem the proliferation of weapons of mass destruction, restrain development of destabilizing conventional military capabilities, prevent transfers of munitions and dual-use items to terrorist states, and maintain U.S. advantages in certain military critical technologies. Drawing further from the same cable, the TAL has two parts – the Critical Fields List, which identifies the major fields of technology transfer concern, and a listing of designated State Sponsors of Terrorism. When considering the TAL, the consular officer is

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[41] Former 9 FAM 601.7-4 (now unavailable).

[42] See the AILA Practice Pointer on Administrative Processing, AILA Doc. No. 12091850.

[43] *See* former 9 FAM 40.31 N3. The new FAM section on SAOs is unavailable, although it appears to be contained in 9 FAM 304.

[44] A Department of Homeland Security publication, "Visa Security Program Tracking System" (Aug. 27, 2009), www.dhs.gov/xlibrary/assets/privacy/privacy_pia_ice_vsptsnet.pdf, generally describes interagency procedures for handling SAOs.

[45] https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/administrative-processing-information.html. Actual timing can vary widely. An EB-5 visa applicant in Mumbai waited for over seven months without explanation for the extraordinary delay. Another Indian EB-5 investor living in the United Arab Emirates waited more than nine months for the Embassy in Abu Dhabi to issue the visa. An Iranian EB-5 investor who waited 15 months for a decision by the Embassy in Abu Dhabi finally resorted to federal court to compel action, which resulted in visa issuance but not any information about the reasons for delay.

[46] *See* AILA Doc. No. 03030449.

responsible for ascertaining the visa applicant's proposed plans for advanced research, studies, or business activities. Accordingly, it is best practice to advise applicants to provide detailed information about their experience in order to facilitate a smooth, prompt SAO clearance.[47]

Delays for Applicants from Select Countries

A wide array of sanctions is in place affecting visa issuance for nationals of a handful of countries. Of the three kinds of sanctions covered here – state sponsors of terrorism, Office of Foreign Asset Control (OFAC), and the president's travel ban – the nationals of Iran, North Korea, and Syria are targeted in all three. Visa applicants from these countries in particular should prepare for extraordinary complications and very lengthy delays in visa processing.

State Sponsors of Terrorism

Currently, four countries -- Iran, North Korea, Syria, and Sudan -- are designated by the secretary of state as "state sponsors of terrorism," as that term is defined in certain federal arms control and foreign assistance statutes.[48] Visa applicants from those countries can expect additional time needed before any immigrant visa is issued, even if the consular officer is satisfied at the time of the interview that the applicant qualifies for issuance of the visa. Indeed, with reference to Iranian EB-5 visa applicants, the websites for the U.S. Embassy Abu Dhabi and U.S. Embassy Ankara advise that administrative processing will be required.[49] Pursuant to the underlying federal statutes concerning state sponsors of terrorism, the SAO clearance would necessarily require investigation for financial support of terrorist activities, trafficking in weapons and dual-use technologies, indicators of export control violations, and the like.

U.S. Department of Treasury and Office of Foreign Assets Control

OFAC,[50] within the U.S. Department of Treasury, is entrusted with overseeing a broad array of programs that have been created as a result of numerous federal statutes and regulations. OFAC imposes comprehensive economic sanctions on Cuba, Iran, North Korea, Syria, and Crimea, including blocking orders or asset freezes against their governments, agents, or instrumentalities.[51] OFAC also restricts U.S. persons from transactions, dealings, and services (including legal services) benefiting designated entities and individuals – Specially Designated Nationals (SDN) -- that have been deemed to be involved in terrorism, narcotics trafficking, proliferation of weapons, transnational criminal organizations, etc. The names of thousands of entities and individuals appear on the SDN list.[52] Of special interest to service providers in the EB-5 program is that a license issued by OFAC must be obtained prior to providing services in connection with the restricted countries or individuals designated as SDNs, unless a general license applies.[53]

Among the sanctions imposed by OFAC are the comprehensive sanctions targeted at Iran specifically, subsumed in the Iranian Transactions and Sanctions Regulations (ITSR).[54] Prior to October 22, 2012, representation of any Iranian investor would require OFAC review of the intended investment, prior to the actual investment, to ensure that the intended investment was not prohibited by U.S. regulations. USCIS would require either a letter from OFAC that stated that neither the investor, nor the intended investment was

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[47] Certain U.S. universities offer helpful reference materials to their international students about the requirements of the TAL. *See, e.g.*, www.cmu.edu/oie/foreign-students/docs/tal-students.pdf; www.bu.edu/isso/files/pdf/tal.pdf.

[48] U.S. Department of State, "State Sponsors of Terrorism," www.state.gov/j/ct/list/c14151.htm.

[49] *See* U.S. Embassy Abu Dhabi, http://abudhabi.usembassy.gov/note-to-iranians.html; U.S. Embassy Ankara, http://turkey.usembassy.gov/iranian_applicants.html.

[50] *See generally* www.treas.gov/offices/enforcement/ofac/.

[51] *See* Edward Krauland & Jack Hayes, *"Anti-Money Laundering and OFAC Sanctions Concerns for Immigration Practitioners Assisting Foreign Investors*," elsewhere in this volume.

[52] Specially Designated Nationals and Blocked Persons List, www.ustreas.gov/offices/enforcement/ofac/sdn/index.shtml.

[53] *See* Department of the Treasury, *Guidance on the Provision of Certain Services Relating to the Requirements of U.S. Sanctions Laws* (Jan. 12, 2017), www.treasury.gov/resource-center/sanctions/Programs/Documents/compliance_services_guidance.pdf (Jan. 12, 2017).

[54] 31 CFR Part 560.

prohibited, or a specific license authorizing the transaction in question. Absent such OFAC "clearance" USCIS was certain to subject the petition to a Request for Evidence for such, or even a denial.[55] OFAC, however, promulgated a new general license in October 2012, permitting much of the activity surrounding EB-5 investments without the need to obtain a specific license.[56] But transactions involving blocked Iranian banks continue to be prohibited.

Insofar as ITSR is a complex body of law, and the foreign policy stakes with Iran continue to rise with ever-tightening sanctions,[57] it is reasonable to expect that notwithstanding the general license issued by OFAC, there will be considerable confusion about compliance with ITSR. Thus, our past experience with such cases is telling in terms of the likely delays that future EB-5 cases will encounter. One Iranian client travelled from Iran to three separate interviews at the U.S. consulate in Ankara, Turkey. He was instructed to bring his entire family for issuance of their immigrant visas. Upon arrival, he was informed the visas were "still not issuable." After numerous emails to the consulate, the consulate informed the client of the plan to send the file to OFAC for a "formal finding to solve the legal issues." Because requirements imposed by ITSR continue to be applicable in the consular processing phase, and it is the rare consular officer who would be an ITSR expert as applied to EB-5 cases, one can expect consular officers to delay resolution of cases until another opinion can be obtained.

President's Travel Ban and Waiver

Iranians and nationals of a half-dozen other countries face further obstacles as a result of presidential action taken under the broad authority provided by statute to act by proclamation to ensure national security.[58] On September 24, 2017, President Trump issued a revised proclamation 9645 ("Travel Ban"),[59] based on findings of insufficient information-sharing protocols and practices that signaled it "would be detrimental to the interests of the United States" to admit certain nationals. Subsequently in June 2018 the U.S. Supreme Court upheld the constitutionality of a U.S. president issuing executive orders barring entry of foreign nationals in order to protect national security.[60] As modified, the Travel Ban substantially restricts the issuance of certain classes of nonimmigrant and immigrant visas to nationals of Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen. Notably, the Travel Ban is applicable to EB-5 immigrant visas for all affected countries with the exception of Venezuela. Out of the population of affected EB-5 visa applicants, it

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[55] *See* Edward Krauland & Jack Hayes, *"Anti-Money Laundering and OFAC Sanctions Concerns for Immigration Practitioners Assisting Foreign Investors*, *in"* IMMIGRATION OPTIONS FOR INVESTORS & ENTREPRENEURS 159 (AILA 3d ed. 2014); *see generally* Jack Hayes & Lincoln Stone, *"U.S. Economic Sanctions and Their Intersection with EB-5 Immigrant Investor Practice*," INSIDE IMMIGRATION (AILA July 2012), www.ailadownloads.org/agora/pubs/monographs/MO-108_Economic_Sanctions-Sample.pdf.

[56] Effective October 22, 2012, OFAC promulgated a new general license set forth in §560.505 *et seq*. of the ITSR, permitting U.S. persons to engage in all transactions necessary to export "financial services" to Iran in connection with E-2 and EB-5 visa categories.

[57] In connection with withdrawal from the Iran Joint Comprehensive Plan of Action, President Trump reimposed certain economic sanctions that had been previously in force related to Iran. *See* Exec Order No. 13846, 83 Fed. Reg. 38939 (Aug. 6, 2018). At that time, the president announced his intention to reimpose additional sanctions, and possibly to impose new sanctions with the goal of "applying maximum economic pressure on the Iranian regime," as of November 5, 2018. *See* Statement from the President on the Reimposition of United States Sanctions with Respect to Iran, www.whitehouse.gov/briefings-statements/statement-president-reimposition-united-states-sanctions-respect-iran/ (Aug. 6, 2018). *See also* "Frequently Asked Questions Related to the Reimposition of Iranian Sanctions in November, 2018," www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_iran.aspx#630.

[58] INA §212(f) provides the U.S. president with the legislative authority for issuing a proclamation suspending the entry of aliens or class of aliens if such entry would be detrimental to the United States.

[59] Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats ("Proclamation"), www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/.

[60] *Trump v. Hawaii*, 585 U.S. __ (2018), www.supremecourt.gov/opinions/17pdf/17-965_h315.pdf.

appears Iranian nationals have experienced the negative consequences of this restrictive policy more than any other applicants. The Department of State website[61] details the impacts the Travel Ban:

Country	Nonimmigrant Visas	Immigrant and Diversity Visas
Iran	No nonimmigrant visas except F, M, and J visas	No immigrant or diversity visas
Libya	No B-1, B-2, and B-1/B-2 visas	No immigrant or diversity visas
North Korea	No nonimmigrant visas	No immigrant or diversity visas
Somalia		No immigrant or diversity visas
Syria	No nonimmigrant visas	No immigrant or diversity visas
Venezuela	No B-1, B-2 or B-1/B-2 visas of any kind for officials of the following government agencies Ministry of Interior, Justice, and Peace; the Administrative Service of Identification, Migration, and Immigration; the Corps of Scientific Investigations, Judicial and Criminal; the Bolivarian Intelligence Service; and the People's Power Ministry of Foreign Affairs, and their immediate family members.	
Yemen	No B-1, B-2, and B-1/B-2 visas	No immigrant or diversity visas

Although waivers of the Travel Ban are technically available to individuals with established ties to the United States or for other compelling reasons, the waiver process is extremely stringent and nontransparent. It appears that very few Travel Ban waivers have been granted to EB-5 applicants. In the words of a U.S. Supreme Court justice, only "a miniscule percentage" of waiver applications have been approved, which is consistent with internal Department of State correspondence indicating that only 2 percent of all waiver requests have been cleared for approval. Adding to the problem, there is no appeal from the denial of an application for waiver and no appeal from the denial of an application for an EB-5 immigrant visa.

This inadequate system for waiver applications has fueled at least two more lawsuits, both now pending in the U.S. district court in San Francisco.[62] Both of these class action cases seek an order requiring the U.S. government agencies to establish a rational and orderly process for review of waiver applications based on clear guidance and well-established standards. In one of those cases the district court judge issued an order in February 2019 that denied the government's motion to dismiss, ruling that the plaintiffs alleged a systemic failure of the relevant government agencies to provide a waiver application process in fact, and the mere "window dressing" of a waiver program (words of Justice Breyer in his *Trump v. Hawaii* dissenting opinion)

[61] https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/presidential-proclamation-archive/june_26_supreme_court_decision_on_presidential_proclamation9645.html.

[62] *Emami v. Nielsen*, 3:18-cv-01587 (N.D. Cal.), and *PARS v. Pompeo*, 3:18-cv-07818 (W.D. Wash) (transferred between U.S. district courts, from Seattle to San Francisco).

is being used to cover a *de facto* policy of blanket denials. The judge reasoned that the complaint alleges the government agencies are not following their own procedures and rules in administering the waiver program.[63]

Until such time as the intervention of the courts (or other political processes) operates to modify the requirements of a waiver application, applicants are left with the plain language of the proclamation, which states that a consular officer may grant a waiver to the Travel Ban on a case-by-case basis when an applicant demonstrates that:

- Denying entry would cause the foreign national undue hardship;
- The entry of the applicant would not pose a threat to national security; *and*
- The issuance of the visa is in the national interest.[64]

The text of the proclamation also offers examples that should make the applicant eligible for the waiver "in the national interest," such as these scenarios:

- Has previously been admitted to the United States for a continuous period of long-term activity, is outside the United States on the effective date of the proclamation, seeks to reenter the United States to resume that activity, and the denial of reentry would impair that activity;
- Has previously established significant contacts with the United States but is outside the United States on the effective date of the proclamation for work, study, or other lawful activity;
- Seeks to enter the United States for significant business or professional obligations and the denial of entry would impair those obligations;
- Seeks to enter the United States to visit or reside with a close family member who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry would cause undue hardship.[65]

If an applicant is able to satisfy the consular officer that the issuance of a visa is in the national interest, the next step would be to convince the officer that denying entry would cause undue hardship to the applicant. The Department of State defines "undue hardship" as "an unusual situation that compels immediate travel by the applicant and that delaying visa issuance and the associated travel plans until after visa restrictions … are lifted would defeat the purpose of travel."[66] The typical EB-5 visa applicant faces great difficulty in satisfying the "undue hardship" requirement.

If an applicant is able to satisfy the undue hardship requirement, the government then must be satisfied that the applicant would not pose a threat to national security. There is nothing an applicant can do to affirmatively satisfy this requirement. To the contrary, this requirement can only be satisfied through a lengthy security check, wherein the applicant's immigrant visa case is placed into administrative processing along the lines discussed earlier in this article.

Given there is a very high risk of denial of the waiver application, and the class action litigation concerning the Travel Ban waiver application process is making its way through the courts, one approach is to defer applying for the waiver and the EB-5 immigrant visa until the surrounding circumstances improve substantially.

SELECTED GROUNDS OF INADMISSIBILITY IN EB-5 CONSULAR CASES

Every visa applicant, including the EB-5 investor, is reviewed for the various grounds of inadmissibility that may apply under section 212 of the INA, such as health-related issues, crimes, security risks,

[63] For a further discussion of the allegations in the complaint and implications, see Lincoln Stone, *The Travel Ban Waiver: A Real Adjudication or Mere Window Dressing?* (Apr. 8, 2019), www.sggimmigration.com/the-travel-ban-waiver-a-real-adjudication-or-mere-window-dressing/.

[64] Proclamation, §3(c)(i).

[65] Proclamation, §3(c)(iv).

[66] *See* Internal Redacted DOS guidance, dated January 23, 2018, produced pursuant to a FOIA request: https://refugeerights.org/wp-content/uploads/2018/09/FOIA-Waiver-Guidance.pdf.

nondisclosures of past infractions or convictions, past visa refusals and immigration violations, and whether the person could be at risk of using means-tested public benefits. It will be in the consular officer's province to ultimately determine inadmissibility, but that process and perhaps even outcome will be affected by the level of preparation by the client and attorney.

Following any I-526 petition approval, NVC will request completed DS-260 application forms from the client and accompanying family members. The application includes a lengthy list of questions intended to address the relevant grounds of inadmissibility. These questions of course should be reviewed carefully by the client, but they contain legal terms that require the attorney's assistance in explaining and the attorney's analysis to determine if any inadmissibility grounds may be triggered.

The Department's records are now interconnected with those of DHS. Beyond the contents of the DS-260 application, the consular officer will have access to the applicant's records from previous visa applications, U.S. arrivals and departures, and USCIS adjudications.[67] The information provided in the DS-260 application should be consistent with the records available to the consular officer. Moreover, in connection with the immigrant visa interview, the Department will conduct biometrics checks and name checks through the Consular Lookout and Support System (CLASS) that could uncover something in the applicant's past that may result in a finding of inadmissibility. These grounds of inadmissibility, when not discovered in advance, can cause costly delays, and potentially derail the applicant's ability to immigrate.

The attorney should review the previous immigration history of the client for any missteps in the past. It is best to learn of these issues at the outset, through a comprehensive questionnaire when entering the attorney-client relationship. Perhaps if an admissibility issue arises, there may be a way of structuring the investment so that the spouse of an otherwise inadmissible investor becomes the investor, and the inadmissible party seeks and obtains a waiver of the inadmissibility, if available. Proactively addressing any issues is much better for all parties than dealing with a denial and consular nonreviewability years down the road. The attorney should also remain in somewhat frequent contact with the client through the years to learn of any issues that arise between the approval of the I-526 petition and the years before a visa application is submitted.

Crimes

Crimes, and even all encounters with law enforcement, must be thoroughly vetted by experienced counsel. In some cases, the client does not consider an event in his life to have any criminal implications, perhaps based on the disposition or by operation of foreign law. One of our clients attended his interview in Seoul and presented police records of a traffic conviction involving the death of a pedestrian. After researching the Korean criminal code and potential inadmissibility grounds, and over a month of administrative processing of the information by the consulate, the family's visas were issued. The client had not disclosed the event earlier, considering it a traffic infraction and not a criminal conviction. Clients need to know that all matters should be discussed with counsel lest the failure to disclose facts material to the application result in a finding of misrepresentation.

Sometimes despite whatever due diligence an attorney exercises at the outset of the case, a client reveals right before or at the consular interview a prior criminal event. He perhaps did not remember the arrest before or thought it need not be disclosed by operation of foreign law. One client revealed in the weeks before the interview a theft offense in Scotland from 40 years earlier. None of his subsequent efforts to obtain records were sufficient to prove the crime qualified for the "petty offense exception" under immigration law.[68] We retained a Scottish attorney to produce an advisory opinion on the maximum possible sentence for the offense under Scottish criminal procedure in 1976. We successfully proved that our client's ancient crime qualified for the petty offense exception to inadmissibility.

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[67] USCIS is also consulting Department of State records during its adjudication of I-526 petitions. We have received RFEs requiring reconciliation between employment history in a petitioner's previous B1/B2 visa application or L-1 visa application and that submitted with the I-526 petition.

[68] INA §212(a)(2)(A)(ii)(II) provides an exception to inadmissibility for crimes involving moral turpitude if the maximum possible penalty is not greater than one year, and the actual sentence imposed is not greater than six months.

In the United Kingdom, historically the police had the option to handle certain minor offenses expeditiously through a "caution," without resorting to court action. These cautions did not amount to a "conviction" under immigration law.[69] However, since July 2008, the UK police's caution process changed to require the offender to admit to committing the essential elements of the offense. Therefore, any caution issued on or after July 10, 2008, might be considered an "admission" and may satisfy the grounds of inadmissibility for crimes involving moral turpitude and controlled substance violations.[70]

Fraud

Illustrating the point on both crimes and fraud, the U.S. embassy in London denied a client's immigrant visa application on the fraud ground,[71] asserting he had willfully misrepresented his prior criminal history while seeking admission to the United States under the Visa Waiver Program on 24 occasions. He had two theft convictions from 1983 and 1985, and was therefore also inadmissible for a crime involving moral turpitude.[72] In declining to disclose his criminal history, the investor had relied on his own understanding of the UK Rehabilitation of Offenders Act 1975, which essentially expunges certain convictions and authorizes a rehabilitated person to state that he has never been arrested. He also was not aware that the term "moral turpitude" encompasses theft offenses. The client then withdrew the I-526 petition and his wife re-filed as the petitioner. Once she immigrated with their two children, the husband sought inadmissibility waivers for fraud[73] and crimes.[74] His failure to disclose his criminal history substantially delayed his family's immigration and severely complicated the process.

In another case, the EB-5 investor's immigration was delayed substantially by the determination of fraud in an earlier-adjudicated employment-sponsored case. USCIS had denied the I-140 petition for a multinational executive because the petitioner did not have a qualifying relationship with the beneficiary's foreign employer at the time of filing. USCIS also made a finding of fraud because the beneficiary's employment history was allegedly inconsistent with a previous visa application. The AAO dismissed the appeal and affirmed the finding of fraud. We were hired and promptly filed a motion to reopen and reconsider with the AAO with additional evidence corroborating the beneficiary's employment history and explaining the inconsistencies. The AAO withdrew the finding of fraud as to the beneficiary. The EB-5 visa issued and the investor was finally admitted as a conditional resident some five years after the original denial of the I-140 petition.

Unlawful Presence for F, M, and J Nonimmigrants

On August 9, 2018, USCIS issued a new policy affecting the determination of whether nonimmigrants in F, M, and J status accrue unlawful presence.[75] Previously, a foreign student or exchange visitor admitted for duration of status would not accrue unlawful presence until the earlier of the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit, or the day after an immigration judge ordered him or her excluded, deported, or removed. Under the new policy, effective August 9, 2018, a foreign student or exchange visitor begins to accrue unlawful presence on the *earliest* of:

- The day after he/she no longer pursues the course of study or authorized activity, or the day after he/she engages in unauthorized activity;

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[69] INA §101(a)(48).

[70] INA §212(a)(2)(A)(i) provides that a person "convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of" a crime involving moral turpitude or a violation of any law relating to a controlled substance is inadmissible. *See* AILA Department of State Liaison Committee, Practice Pointer: Dealing with U.K. Cautions at the U.S. Embassy, AILA Doc. No. 14021952.

[71] INA §212(a)(6)(C).

[72] INA §212(a)(2)(A)(i)(I).

[73] INA §212(i).

[74] INA §212(h)(1)(A).

[75] USCIS Policy Memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants," AILA Doc. No. 18081000.

- The day after completing the course of study or program (including any authorized practical training plus any authorized grace period);
- The day after the expiration date of an I-94, if he or she had been admitted until a date certain; *or*
- The day after an immigration judge issues a removal order (whether or not the decision is appealed).

The accrual of unlawful presence could have serious consequences and may subject the foreign student to grounds of inadmissibility, barring him or her not only from adjustment of status but also from consular processing. A significant number of EB-5 clients are F-1 students. The unwitting failure to maintain status, such as through an unauthorized drop in course load, could lead to a 3- or 10-year unlawful presence bar.[76] If the student is the investor and has no qualifying relative for the waiver, namely a U.S. citizen or lawful permanent resident spouse or parent,[77] the petitioner may be ineligible to immigrate for up to 10 years.

Historically, there has been authority in the form of a 2009 letter from the USCIS Office of Chief Counsel to argue that time spent in the United States subsequent to admission in nonimmigrant status could be counted toward satisfying the bar:

> [The] 212(a)(9)(B) inadmissibility period begins to run with the initial departure from the United States. *Matter of Rodarte*, 23 I&N Dec. 905, 909 (B1A 2006). The inadmissibility period continues to run even if the alien is paroled into the United States or is lawfully admitted as a nonimmigrant under section 212(d)(3), despite his or her inadmissibility under section 212(a)(9)(B).[78]

However, a recent unpublished AAO decision limits the applicability of the reasoning of the chief counsel's position to situations where the subsequent admission is preceded by the nonimmigrant waiver of the unlawful presence.[79] As AAO decisions frequently presage USCIS policy, admissions in F-1 status after having unknowingly triggered an unlawful presence bar may not save the EB-5 investor.

EB-5 Investors as Possible Public Charges?

A successful EB-5 petitioner has invested $500,000, at least, before being able to obtain an approval notice. It is understood that those investment funds must remain with the EB-5 commercial enterprise, at risk, and should be used as described in the business plan for the commercial enterprise.

The prudent applicant should still be prepared to show access to funds apart from the EB-5 investment on which the applicant and his or her family will be able to support themselves once they have moved to the United States. At some consular processing posts, notably U.S. Embassy London, applicants are told to be prepared to show bank statements with sufficient funds beyond the poverty income guidelines to rule out the possibility that the applicants could be considered a public charge risk.[80] Moreover, applicants with any severe medical conditions or children with special needs should be prepared to present evidence of the ability to pay for medical care or education in the United States. Applicants who have given birth to children in the United States may need to show proof of payment of hospital expenses. Lastly, the proposed regulations to amend the definition of "public charge" may also affect EB-5 investors, as the proposal allows negative inferences based on the use of public benefits that were previously exempt from consideration.[81]

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[76] INA §212(a)(9)(B)(i).

[77] INA §212(a)(9)(B)(v).

[78] *See* Letter, Divine, GC USCIS to Berry (July 14, 2006), AILA Doc. No. 08082930, and Letter, Melmed, GC, USCIS to Horne (Jan. 26, 2009), AILA Doc. No. 09012874.

[79] *Matter of F–V– C–*, ID# 11163 74 (AAO Apr. 19, 2018), *available at* www.uscis.gov/sites/default/files/err/H6%20-%20Waiver%20of%20Inadmissibility%20-%20Unlawful%20Presence%20-%20212%20%28a%29%289%29%28B%29/Decisions_Issued_in_2018/APR192018_02H6212.pdf.

[80] INA §212(a)(4)(a) provides that any person who, "in the opinion of the consular officer at the time of application for a visa, … is likely at any time to become a public charge is inadmissible."

[81] 83 Fed. Reg. 51114 (Oct. 10, 2018). For further discussion, see Michele Franchett & Taiyyeba Skomra, *Public Benefits and "Public Charge" -- What Do They Mean for Immigrants?* (Oct. 25, 2018), www.sggimmigration.com/public-benefits-and-public-charge-what-do-they-mean-for-immigrants/.

Communist Party Affiliation

The EB-5 visa category has been used most, in the past few years, by nationals of the People's Republic of China and Vietnam.[82] Inadmissibility for current or past membership in a Communist or totalitarian party may apply to many EB-5 applicants.[83] Note that the DS-260 application merely asks "Are you a member of or affiliated with the Communist or other totalitarian party?" Yet, the consular officer, remaining more faithful to the language of the statute, will likely ask if the applicant has *ever* been a member of or affiliated with the Communist Party. Fortunately, there are three statutory exceptions to this ground of inadmissibility:

- Involuntary membership;
- Past membership, where the membership ended at least two years before the interview (five years where the party was controlling a dictatorship); and
- Family unity, as the parent, spouse, son, daughter, or sibling of a permanent resident or U.S. citizen

Protracted I-526 processing times and the visa backlog can easily provide an applicant enough time to terminate party ties and qualify for the past membership exception. The client should nonetheless be prepared for administrative processing in response to the disclosure. It may be worth reminding the client about the importance of disclosure and that the same question arises again in a naturalization application. The temporary inconvenience of administrative processing is far preferable to the alternatives -- a future claim of misrepresentation, a finding that the permanent resident status was not properly granted, or a criminal charge for willful material concealment.

In response to disclosures of involuntary or past membership, consular officers at the U.S. consulate in Guangzhou have requested the following items in several cases: (1) a detailed resume; (2) plan for employment in the United States; (3) travel history; and (4) an affidavit detailing the reasons for joining the party, dates of membership, any offices held, any benefits gained by membership, the degree to which one accepted the structure, goals, methods, and practices of the party, and the reasons for terminating membership. If the client is a current and voluntary member, one may consider having the spouse be the investor so the party member can seek a family unity waiver available to current members.

The issue should be considered from the outset by having the prospective applicant complete a detailed questionnaire. Furthermore, in the course of compiling the source of funds discussion, the attorney should review the client's employment history for any indications that Communist Party membership could have been required. Having this information in advance will enable one to supply to the NVC what the consulate will require to minimize delay in adjudication.

However, even where a client completes your questionnaire and denies Communist Party membership then, as well as in the DS-260 application, he or she may confess to it at the interview. After one client's interview, the consulate in Guangzhou requested a more detailed resume and a statement in Chinese and English regarding the dependent husband's previous Communist Party membership, which was first disclosed at the interview. The visa was ultimately issued more than three months after the interview. In a different case, the client admitted to Communist Party membership only at the interview. His case languished in administrative processing status for more than four months and required a second interview before the visa was granted.

CLIENT-INDUCED COMPLICATIONS AND DELAY

Often, clients are in the midst of life events that require additional time in their home countries before they can immigrate. Some are heavily immersed in their businesses or employment that yielded the investment capital. One unfortunate client was locked into his employment contract in China. The employer retained the visa and refused to permit his departure. After the first visa validity period lapsed, the client obtained a

[82] Department of State, Bureau of Consular Affairs, Report of the Visa Office 2017, statistical table V. pt. 3, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport%20-TableV-PartIII.pdf.

[83] INA §212(a)(3)(D).

replacement visa from the U.S. consulate in Guangzhou, which also lapsed while he waited for the employer's permission to leave. But the consulate denied his application for the third visa, and the client did not immigrate. Clients should be reminded that visa reissuance is discretionary, and also could be impacted by visa retrogression.

We frequently encounter families where one child is studying abroad and the entire family postpones the interview until the child returns. This choice adds months to the consular processing phase. In other cases, petitioners who are pregnant at the time of the visa interview are unable to travel during the validity of the issued visa and must apply for replacement visas. Some countries, including China, do not permit newborns to travel without an immigrant visa, despite the regulations and FAM note to the contrary.[84] This leads to new mothers waiting several months or longer for their infants to receive official birth records, passports, and then immigrant visas.

Cultural practices can complicate a family's expectations to immigrate together. The authors have encountered several cases of social adoption among Japanese and Korean clients, where a grandparent adopts his or her grandchild or a father adopts his son-in-law for inheritance purposes. In such cases, we have provided legal opinions from attorneys and professors with expertise in the adoption law of the foreign country to help prove that the adoption has no effect for immigration purposes and does not affect the natural parent-child relationship.[85]

CONSEQUENCES AND CONCLUSIONS

Both practitioner and applicant must recognize that USCIS approval at the I-526 petition stage is but partial success on the path toward attaining lawful permanent resident status, and that all parties should be prepared for any issues that may arise at the consular processing stage. Although the approved petition should be viewed by a consular officer as prima facie evidence of the applicant's eligibility, the officer may feel justified in going to great lengths to confirm the petition validity by investigating inconsistencies between the petition and applicant statements. The applicant must also establish that he or she is otherwise admissible and convince the officer of the bona fides of the investment.

While most cases will sail through consular processing, some can get hung up, to the dismay of the investor, the NCE, and practitioners alike. It is important to advise clients at the outset of the possible delays that could affect their cases. Anticipating and addressing potential problems by way of a detailed questionnaire covering potential consular processing issues serves the interests of all parties.

[84] 8 CFR §211.1(b)(1) waives the requirement for a visa for a child born subsequent to the issuance of an immigrant visa to his or her accompanying parent who applies for admission during the validity of the visa. *See also* 9 FAM 201.2-3(3)(a).

[85] *Matter of B–*, 9 I&N Dec. 46 (BIA 1960).