

U.S. Economic Sanctions and Their Intersection with EB-5 Immigrant Investor Practice

by Jack Hayes and Lincoln Stone

Immigration lawyers whose clients seek benefits in the employment-based fifth preference (EB-5) category should be aware of U.S. economic sanctions that restrict U.S. persons from engaging in activities involving various countries that are subject to U.S. embargo programs. These sanctions are a complex topic that requires specific legal guidance and they frequently change in application and scope. This publication provides a basic overview of how U.S. economic sanctions can impact immigrant investor practice in connection with EB-5-related activities and transactions. Following the basics is a discussion of important legal rules and developments that may assist practitioners.

In brief, lawyers should screen a potential EB-5 investor to determine whether he or she is either residing in, or will need to utilize property located in or from, Cuba, Iran, Sudan, or Syria; or is a person who has been specially designated or “blocked” by the U.S. government. The same approach should apply to any other party—such as the commercial enterprise receiving funds—that is participating in an EB-5-related transaction or business dealing. If the answer is “yes” to either question, then practitioners and other involved parties need to obtain a license or other document from the U.S. government authorizing certain EB-5-related activities to proceed. Unless the transaction is exempt, a violation of U.S. law could occur, which could result in criminal or civil penalties.

Background

The Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury is the primary U.S. government agency¹ administering economic restrictions on the financial support and business activities of persons in certain countries, and on specified individuals and entities engaged in certain activities, or acting as agents of restricted countries.

U.S. sanctions cover “persons,” including individuals and entities.² Generally speaking, OFAC’s sanctions’ restrictions and requirements ap-



Jack Hayes is of counsel in the Washington office of [Steptoe & Johnson LLP](#). He provides economic sanctions, anti-money-laundering, anti-corruption, and export control compliance advice to clients engaged in various industries or business activities that overlap with U.S. immigration obligations and requirements. He also counsels corporate clients on visa strategies and procedures that affect cross-border investments and staffing decisions, usually involving senior managers or executive personnel, with an emphasis on U.S. regulatory compliance considerations.

Lincoln Stone practices law in Los Angeles with [Stone & Grzegorek LLP](#). Mr. Stone serves as vice chair of the AILA EB-5 Investor Visa Committee; he is editor-in-chief of AILA’s [Immigration Options for Investors & Entrepreneurs](#), and he is chair of AILA’s EB-5 Investor Visa Conference. Mr. Stone holds degrees in law, business administration, and the humanities.

¹ The U.S. Department of State frequently provides foreign policy advice to the Office of Foreign Assets Control (OFAC) regarding the application of U.S. economic sanctions, and does implement specific sanctions programs, such as the Iran Sanctions Act and certain proliferation-related sanctions regimes, that are beyond the scope of this article.

² See, e.g., 31 CFR §560.305.



ply to “U.S. persons,”³ meaning any U.S. citizen or lawful permanent resident, wherever located in the world; any entity organized in the United States, as well as its foreign-located branch offices; and any person physically located inside the United States, including non-U.S. citizens or branch offices of foreign entities.⁴ Although most OFAC sanctions programs do not apply directly to foreign persons, if a foreign person conducts business with a restricted country or person using goods, services, or technology of U.S. origin; or conspires or collaborates with a U.S. person; or unlawfully causes a U.S. person to violate such prohibitions, then the foreign person may be subject to OFAC jurisdiction and penalized for violations.⁵

OFAC currently imposes comprehensive economic sanctions on the countries and governments of Cuba, Iran, Sudan, and Syria. These sanctions prohibit U.S. persons from furnishing any services to Cuban nationals,⁶ wherever located in the world, or to Iran,⁷ Syria,⁸ or Sudan,⁹ even though most transactions are permitted with respect to persons located in certain “specified areas” of Sudan.¹⁰ These sanctions present substantial obstacles to assisting potential EB-5 investors who are residing in, or who need to transfer property to fund the required EB-5 investment from, these four countries.

OFAC currently imposes blocking requirements on certain persons and property located in North Korea, and also restricts U.S. persons from providing any financial services to Myanmar (Burma). Moreover, OFAC restricts transactions and services benefiting designated entities, organizations, and individuals, including those that are involved in terrorism, narcotics trafficking, proliferation of nuclear, chemical, and biological weapons, or transnational criminal organizations, or are acting contrary to U.S. foreign policy objectives, such as undermining regional peace, security, stability, or humanitarian interests. These persons and entities, known as specially designated nationals and blocked persons (SDNs),¹¹ are named on the SDN list that OFAC regularly updates via its website and *Federal Register* notices.¹² In addition, OFAC administers a policy that restricts U.S. persons from having any business dealings with any entity owned 50 percent or more by an SDN, even if such entity is not specifically named on the OFAC SDN list.

U.S. persons are prohibited from conducting transactions or dealings with SDNs, and are required to block the property or interests of property of SDNs held by U.S. persons or located in the United States. Property includes any type of tangible or intangible assets, real and personal property, contracts, purchase orders, debts, accounts payable, and financial assets or funds. Interest is defined to mean any interest (not necessarily a legal interest), whether past, present, future, or contingent.

Application of U.S. Economic Sanctions to EB-5 Investor Issues

The general principles discussed below apply to all EB-5 investors; particular attention should be directed to any involved person from, or entity or property located in, Cuba, Iran, Sudan, or Syria. These principles may also apply in certain circumstances to North Korea or Myanmar.

3 OFAC sanctions against Cuba apply to “persons subject to U.S. jurisdiction,” which directly cover foreign entities “owned or controlled” by U.S. persons, such as subsidiaries, affiliates, offices, or other business ventures, and currently is the only sanctions program with this extraterritorial jurisdictional reach.

4 See, e.g., 31 CFR §560.314.

5 See, e.g., 50 USC §1705.

6 See 31 CFR §515.302.

7 See 31 CFR §560.204.

8 See Executive Order No. 13582 §2(b) (Aug. 17, 2011).

9 See 31 CFR §538.205.

10 See 31 CFR §§538.205; 538.320 (including Southern Sudan, Southern Kordofan/Nuba Mountains State, Blue Nile State, Abyei, Darfur, and “marginalized areas” in and around Khartoum). U.S. sanctions generally do not apply to the Republic of South Sudan.

11 These targeted sanctions can apply to SDNs relating to the Balkans, Belarus, Burma (Myanmar), Ivory Coast, Democratic Republic of the Congo, Iraq, Liberia, Libya, Lebanon, North Korea, Somalia, and Zimbabwe, as well as to the more comprehensively embargoed countries of Cuba, Iran, Sudan, and Syria.

12 See [Specially Designated Nationals List](#).



FOR MORE ON EB-5 VISAS, download Peter S. Erly's and Lincoln Stone's monograph, [The Intersection of Securities Law and EB-5 Investor Practice](#), Lincoln Stone's [Financial Statements and Accounting Concepts for EB-5 Visa Purposes](#), and Paul Sommers's and Lincoln Stone's [Regional Economics and Job Creation in EB-5 Immigrant Investor Practice](#).



Here, however, we focus on EB-5 investors who are residing in, or other persons whose investment capital may originate from, Iran. This is because of the volume of EB-5 petitions filed by Iranian investors compared with nationals of the other sanctioned countries. U.S. Citizenship and Immigration Services (USCIS) has denied EB-5 visa petitions on behalf of Iranian citizens, citing OFAC regulations as the basis, because the source of funds was located in Iran; a U.S. person would be offering employment to an Iranian person, located in Iran, seeking to invest in the United States; and/or the applicant's funds, in the normal course of being transferred out of Iran, destined ultimately for the United States, may have involved Iranian banks listed as SDNs by OFAC. In the view of USCIS and its Administrative Appeals Office (AAO), compliance with sanctions laws comes under the heading of the EB-5 investor's obligation to demonstrate a lawful source of funds.¹³ Given the history of such denials, EB-5 investors must provide evidence to USCIS that either OFAC has issued a specific license for the EB-5 investor, or a letter that no such license is required. USCIS provided general public guidance with respect to OFAC and the Iranian Transaction Regulations (ITR) in its stakeholder meeting of December 16, 2010.¹⁴

Failure to comply with U.S. economic sanctions laws against Iran can result in significant penalties. Criminal violations carry fines of up to \$1 million and prison terms of up to 20 years, or both.¹⁵ Civil violations carry fines of twice the value of the transaction, or up to \$250,000, whichever is greater.¹⁶

Licenses for Providing Services to Iran and Related Transactions

Pursuant to the ITR,¹⁷ U.S. persons cannot provide any services to Iran or the government of Iran, wherever located. "Services" is not defined by OFAC, but the term is broadly construed; services may include legal, accounting, financial, brokering, and public relations services, or any other type of activity that confers a benefit. Because the restriction applies to legal services—even though an important exemption for legal and compliance services is available, as discussed below—the ITR directly affect attorneys practicing in any area within the United States, and U.S. persons who are attorneys practicing law abroad.

Also, restricted services may cover financial services, which is particularly important in the EB-5 context. OFAC guidance indicates that such services may include the transfer of funds to or from Iran, as well as the undertaking of any investment, brokerage, banking, or money remittance services, or loans, guarantees, letters of credit, or other extensions of credit, or insurance and reinsurance, involving Iran.

The restrictions on providing services to Iran, and on engaging in trade-related transactions or dealings involving Iran,¹⁸ are very broad. Unless a general license or license exemption is available under

13 8 CFR §204.6(j); see, e.g., *Matter of [redacted]*, WAC 09 007 51516 (AAO Sept. 21, 2010), published on AILA InfoNet at Doc. No. 10092180 (posted Sept. 21, 2010).

14 See USCIS EB-5 Immigrant Investor Program Stakeholder Meeting (Dec. 16, 2010), PowerPoint slides 29 through 34, published on AILA InfoNet at Doc. No. 11010732 (posted Jan. 7, 2011).

15 See 50 USC §1705(c).

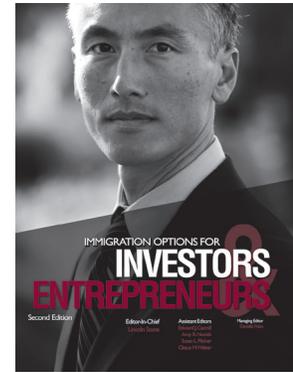
16 See 50 USC §1705(b).

17 31 CFR Part 560.

18 31 CFR §560.206.

the ITR, U.S. persons must apply for and obtain a specific license from OFAC prior to providing such services to, or engaging in trade transactions with, Iran.

For an Iranian (or person located in another comprehensively embargoed country) to obtain a U.S. visa, it is necessary that one or more U.S. persons undertake certain activities to support the petition or application for the U.S. visa. For example, many visa petitions (including EB-5) require the following types of activities, which arguably could include a U.S. person furnishing unauthorized services to, and related transactions or dealings with, Iran or Iranians located in Iran: (1) a U.S. person's employment sponsorship of, contracting with, or involvement with an intending Iranian investor; (2) a U.S. person's assistance to the Iranian in transferring funds and personal information into the United States from Iran; and (3) U.S. persons who are legal and other professionals (such as human resource professionals, or employment placement services) providing assistance or advice regarding the visa petition. If persons in Iran (or Cuba, Syria, and nonspecified areas of Sudan) are the recipients or beneficiaries of such U.S. visa-related undertakings, directly or indirectly, then a specific license from OFAC could be required.



FOR MORE ON EB-5s
check out AILA's
[Immigration Options for
Investors & Entrepreneurs,
2d Ed.](#) (AILA 2010).

Specific OFAC License Applications Involving Persons in Iran

As noted, the ITR prohibit the export of services from the United States to Iran, as well as the import of Iranian-origin services into the United States. Recognizing that Iranians can qualify for visas to come to the United States, the ITR include a general license allowing the importation into the United States of Iranian-origin services and activities related to numerous visa categories.¹⁹ However, OFAC has determined that this general license does not allow U.S. persons to provide the types of services necessary to assist an Iranian to pursue an EB-5 petition and visa. Moreover, it appears that because an Iranian pursuing an EB-5 visa must “invest” funds in the United States, OFAC must specifically authorize U.S. persons (*e.g.*, a bank, an immigration attorney, a U.S.-based company, etc.) to receive this investment from Iran prior to any such funds being transferred into the United States. Thus, OFAC has implemented a specific licensing process for U.S. persons assisting Iranians who are resident in Iran and/or whose investment funds originate from Iran in connection with EB-5 visa petitions.

To our knowledge, OFAC has not issued any publicly available written guidance regarding specific information that should or should not be included in a license request for EB-5 purposes. Nevertheless, to obtain a specific OFAC license to pursue an EB-5 visa involving an Iranian resident or funds located in Iran, a U.S. person applicant should send a letter by overnight mail and fax to the Licensing Division of OFAC.²⁰ The letter should request specific authority to undertake all necessary transactions, services, or activities related to obtaining an EB-5 visa for the intended Iranian beneficiary. The letter typically includes information about the immigrant and the intended investment to support the EB-5 petition requirements. Because of recent developments in U.S. sanctions laws, if investment funds, property, or assets have to be transferred from Iran using Iranian financial institutions, it may be advisable to identify which Iranian financial institutions will be used (if known), or to include representations that designated Iranian financial institutions will not be used. Furthermore, it is prudent for the license application to identify, specifically or generally, all U.S. persons who may be involved in the EB-5-related activity, such as the relevant USCIS regional center, the commercial enterprise, the financial institution(s) involved in receiving or handling the funds being transferred to the United States, and/or any escrow accounts. An applicant also can include in the letter arguments why OFAC should grant

¹⁹ 31 CFR §560.505(c). “Persons otherwise qualified for a visa under categories E-2 (treaty investor) and all immigrant visa categories are authorized to carry out in the United States those activities for which such a visa has been granted by the U.S. State Department...” [emphasis added].

²⁰ The mailing address is Office of Foreign Assets Control, U.S. Department of the Treasury, Treasury Annex, 1500 Pennsylvania Avenue, NW, Washington, DC 20220; the OFAC fax-on-demand document service number is (202) 622-0077.

a specific license or issue a letter that no license is required. Any such license or letter received from OFAC eventually will be included in the EB-5 petition materials submitted to USCIS.

OFAC has informally indicated that it is advisable to consolidate as many would-be immigrants as possible into one license application submitted to OFAC. This may expedite the issuance of OFAC's authorization and thus the adjudication by USCIS of the EB-5 petitions relating to the intending Iranian investors. However, there could be instances when it would be prudent to file separate OFAC license applications for different cases. For example, it may be that the robustness of information available to support one intending Iranian EB-5 investor is less than that of another intending investor. Therefore, OFAC could request additional information for one investor, which would delay OFAC's decision and affect other intending Iranian investors. Another situation warranting a separate application may occur when an intending Iranian investor may be temporarily or permanently residing outside Iran and funds or property used to fund the EB-5 investment do not originate from Iran (*i.e.*, are located in another country). In this instance, it may be reasonable to argue in the application letter that no specific OFAC license should be required for the subject person and property.

To avoid delays in processing, information about the EB-5 investor should include full name, place of birth, date of birth, Iranian national identification number, passport number, address, telephone number, background about the source of the assets used for the investment, how funds will be (or have been) transferred out of Iran to the United States, and/or information about prior petitions to USCIS or approval by USCIS of petitions. Copies of identity cards, passports, and résumés also may be submitted. If OFAC requires more information, an official may contact the license applicant by phone, fax, or e-mail to request specific data. For example, it is our understanding that OFAC has requested specific personal data for all close family members who intend to immigrate with the Iranian EB-5 investor, *e.g.*, a spouse and minor children, such as name, Iranian identification number, date of birth, place of birth, and passport number.

OFAC Consideration of Specific License Request

Typically, OFAC will send a letter to the applicant acknowledging receipt of the license request and assigning a case number to the request. The acknowledgment letter does not name the OFAC licensing case officer who has been assigned to the application. To check on the status of pending license requests, applicants can call the OFAC Licensing Division telephone number and ask for the case officer who has been assigned.²¹ It can be difficult to make contact with individual licensing case officers to discuss an application, as OFAC typically does not publish any direct phone numbers or e-mail addresses for its staff.

OFAC has approved specific licenses related to Iranians seeking immigrant visas under the EB-5 program. These licenses authorize one or more U.S. persons to engage in transactions, dealings, or activities, or otherwise provide assistance, in support of the EB-5 visa petition. They also can include, if needed, an explicit authorization to return funds to be invested to the Iranian investor if the EB-5 petition is denied.

Although our experience in 2009 and 2010 was that OFAC issued licenses within just a few months of submission, it currently takes OFAC closer to eight months to adjudicate an Iranian EB-5 license application, *i.e.*, to approve or deny the case. Given multilateral sanctions against Iran, Syria, and Libya, U.S. government policy priorities, and OFAC staff resources and budgets, we anticipate that the time required to adjudicate these applications will remain quite lengthy. It can be difficult to expedite particular EB-5-related license applications through the adjudication process, even when critical deadlines may be approaching, such as age-out dates for minors intending to immigrate with the investor. As a result, it is critical that these timing issues be taken into account when considering whether to pursue an EB-5 visa petition.

²¹ The OFAC Licensing Division phone number is (202) 622-2480.

If granted, licenses usually are valid for a one- or two-year period, or until 30 days after a visa is granted, denied, or withdrawn, whichever occurs first. These licenses may require the licensee to file quarterly reports with OFAC regarding the EB-5 immigration status of the Iranians. There is no reporting format, so the OFAC licensee should submit a brief letter to OFAC explaining when and where the EB-5 petition was filed, whether any additional request for information has been received, the date additional information was provided to USCIS, and any indication of when the petition was or will be approved or denied. As a general matter, any transactions, services, or activities undertaken pursuant to an OFAC license to a restricted country, person, or entity are subject to recordkeeping requirements for a five-year period. Copies of any reports filed with OFAC also should be maintained.

OFAC Concerns About Iranians Who Become U.S. Persons

A separate question arises when an Iranian who is a conditional resident in the United States conducts business from the United States with Iran. As long as such persons are not located in the United States at the time of their dealings with Iran, there is a reasonable position that such business may continue unabated without contravening the ITR. However, once an Iranian investor is physically located in the United States, or becomes a U.S. permanent resident, wherever located in the world, any such continued business with Iran, absent first obtaining a specific license from OFAC, appears to constitute a violation of the ITR.

In some instances, OFAC has included warnings in its EB-5 license approvals about continued transactions and dealings with Iran.²² For example, OFAC may be aware that an EB-5 investor is a director, officer, or manager of an Iranian company. Once the Iranian investor relocates to the United States under the EB-5 visa, however, he or she will be considered a U.S. person. Thus, OFAC has advised in cover letters for some of its licenses that a U.S. person who is involved in actively managing an Iranian company, or who engages in activities that are typically associated with owning equity in a company (such as exercising voting rights, receiving dividends, investing more capital, or selling shares), would likely need an OFAC license to engage in such activities. However, if a U.S. person is a nonmajority, passive shareholder in an Iranian company, does not hold a management or board position, and made the investment prior to becoming a U.S. person, then such activities will not necessarily be regarded by OFAC as violating the ITR. OFAC also has warned that a U.S. person requires a specific license prior to selling real estate or liquidating other assets in Iran. This is a highly nuanced area of the law, and any Iranian located in the United States or U.S. person assisting an Iranian in the United States should seek appropriate legal or regulatory advice.

Problem of Limiting Language in OFAC Licenses

OFAC licenses frequently contain, in the “Warning” section of the license, this caution: “This License does not authorize any transactions that occurred prior to the date of its issuance.” Without more, USCIS has stated in some cases, and in its public guidance, that a license obtained after the investment transaction has occurred is not a valid license for EB-5 purposes. In other cases, USCIS has refused to recognize the license where money transfers precedent to the actual EB-5 investment have involved prohibited financial institutions. This outcome presents a predicament, even where the Iranian investor has indicated a willingness to start over with another investment, if the later investment would require transferring funds back to the investor’s control—which also might violate the ITR. In at least one case, though, USCIS approved the later [Form I-526](#), Immigrant Petition by Alien Entrepreneur, petition of the investor who followed the start-over path based on a second investment transaction executed after the OFAC license was issued.

Revisiting OFAC Compliance on the Petition for Removal of Conditions

In a few cases, USCIS has sought further OFAC confirmation of compliance with the ITR in the course of adjudicating the [Form I-829](#), Petition by Entrepreneur to Remove Conditions. USCIS has observed that at the time of investment the petitioner was residing in Iran, the source of money for

²² In support of these warnings, OFAC typically cites 31 CFR §§560, 201, 204, 206, and 207.

investment was Iran, and/or an SDN bank was involved in transferring funds. In these cases, the client already was a U.S. permanent resident (with conditions) and the subject investment transactions had occurred some four to seven years earlier. Given that USCIS vigilance toward OFAC and ITR issues did not commence until 2008, it is likely that no OFAC license would have been issued before the investment activities of such clients. We have proceeded, nonetheless, by submitting in support of the Form I-829 petitions a later-issued OFAC letter indicating that no license was required in the circumstances.²³ In the face of USCIS insistence on more, we have provided a blended argument based on ITR and EB-5 legal standards.

As to the former (ITR), we have argued that OFAC has already determined that no license is required in the circumstances; that in a stakeholder's meeting conducted at the California Service Center (where EB-5 petitions are adjudicated), the assistant director who oversees EB-5 adjudications remarked publicly that USCIS does not seek to substitute its judgments concerning the requirements of the ITR and related executive orders for the positions taken by OFAC, which is the agency with direct subject matter expertise and jurisdiction; that the investment preceded the date on which USCIS commenced its scrutiny of EB-5 petitions for ITR and executive order compliance (in 2008); the investment also preceded the date on which the particular SDN bank was designated by OFAC as SDN; and OFAC has expressed the view that the involvement of the SDN bank terminates when the funds come to rest in a non-SDN bank prior to their being transferred to the United States. Therefore, the SDN bank no longer had an interest in the funds at the time that the funds came to rest in the account of the U.S. bank.

As to the latter (EB-5), we pointed out that the investor is not required to demonstrate again that he had a lawful source of capital. The commentary of legacy Immigration and Naturalization Service (legacy INS) to the removal of conditions regulations provides that questions of lawful source of funds are better suited to the adjudication of the Form I-526 petition, not the adjudication of the Form I-829 petition.²⁴ Although generally it is true that the lawful source of funds question should not be a factor in the adjudication of the Form I-829 petition for removal of conditions, the regulations provide that if "it becomes known to the government that the entrepreneur obtained his or her investment funds through other than legal means (such as through the sale of illegal drugs)," then the source of funds becomes germane to adjudication of the Form I-829 petition.²⁵ If the USCIS request does not demonstrate that USCIS "knows" that the petitioner has "obtained his investment funds" through "[il]legal means," then this line of inquiry should not be pursued by USCIS.

Insofar as an approval notice from USCIS does not indicate which arguments were or were not effective in persuading the adjudicator to reach a positive outcome, which of these arguments might be compelling in a given case remains a mystery.

Cases Where OFAC License May Not Be Needed for Iranian EB-5 Investors

In our experience, OFAC has determined that if an Iranian national is ordinarily resident outside Iran, and the property necessary to fund the EB-5 immigrant investment will not originate from Iran or is already in the United States, then a specific OFAC license is not required in advance of pursuing an EB-5 petition. OFAC has issued letters confirming this same to U.S. applicants, which can be presented to USCIS to support the EB-5 petition. To illustrate, OFAC has stated in a letter: "We understand from information provided in your correspondence that Mr. _____ is not ordinarily resident in Iran and that the funds are located at a bank account in the United States. Accordingly, no license is required from OFAC under the ITR for [regional center] to provide service to Mr. _____ related to his EB-5 visa application as described in your correspondence."

OFAC typically will issue such a letter only if a U.S. person applies for a license as set forth above.

²³ Our OFAC letters, in these cases, actually read: "[N]o authorization is required from OFAC under ITR for any activities related to the final approval by the USCIS of the EB-5 visa application of Mr. _____, as described in your letter."

²⁴ See Commentary to Final Rule, 59 Fed. Reg. 26587, 26589 (May 23, 1994).

²⁵ 8 CFR §216.6(c)(2).

Unfortunately, even if an investor appears to fit squarely within both conditions discussed, it is our experience that OFAC will not expedite consideration of such a request. Therefore, if a U.S. person seeks guidance from OFAC in this situation, it may be prudent to include in such a letter the information typically required for a license and to request a license in the alternative as part of the submission.

Exemptions and General Authorizations

Certain transactions, dealings, and activities undertaken by U.S. persons involving persons or property in Iran may be generally authorized or exempt under the ITR. The most important provisions applicable to processing EB-5 petitions for Iranians are discussed below.

Legal Services Authorization

The ITR generally authorize (*i.e.*, there is no need to obtain a specific license from OFAC in advance) a U.S. person to provide “legal advice and counseling on the requirements of and compliance with the laws of any jurisdiction within the United States, provided that such advice and counseling is not provided to facilitate transactions that would violate any of the prohibitions contained in [the ITR].”²⁶ This general authorization also allows a U.S. person to receive payment for such legal services, subject to one important caveat identified below. Although we have not received formal guidance from OFAC on the exact scope of this general authorization, it would appear to permit an attorney, duly licensed within the United States with a valid bar membership, to provide legal services in connection with an EB-5 petition to any person, including an Iranian, in Iran, who is pursuing the EB-5 category visa.²⁷

Thus, receiving funds from a person in Iran to pay for legal fees in connection with advice about EB-5 requirements, preparation of the EB-5 visa petition, submission of a license request to OFAC, and/or transfer of property from Iran in a manner compliant with U.S. law, may be covered under this authorization as legal advice regarding compliance with U.S. law. By comparison, if a U.S. person provides legal advice regarding how a U.S. or Iranian person should structure a business to make it more profitable, or facilitates transactions for commercial reasons that may involve Iran or property located in Iran, then such advice could be considered outside the scope of this authorization.

In terms of receiving funds for legal services that are authorized, one needs to be careful that such funds do not come from or through a financial institution or other entity that is identified on OFAC’s SDN list or otherwise considered blocked. As of February 6, 2012, all Iranian financial institutions, even if not specifically named on the SDN list, are blocked. Because property (including funds) in which an SDN has an “interest” must be blocked by U.S. persons, a U.S. bank that receives such funds—where the source of funds indicates an SDN bank, an Iranian financial institution, or the government of Iran—will block these funds.

Informational Materials and Publication Services

The “informational materials” exemption²⁸ permits U.S. persons to import and export informational material,²⁹ even in a commercial transaction, with Iran or the government of Iran. Generally speaking, the information must be preexisting, *i.e.*, “off the shelf,” at the time of the proposed transaction. This exemption is limited,³⁰ and U.S. persons must be careful not to engage in an export of unauthorized services when furnishing information to or receiving information from Iran.

In publicly available interpretive rulings, OFAC has published guidance about this exemption. The rulings indicate that publications or information originating in (or relating to) business in the sanctioned country fall within the exemption. The ITR accordingly will allow U.S. persons to make that

²⁶ 31 CFR §560.525(a)(1).

²⁷ See 31 CFR §560.525(a)(4).

²⁸ 31 CFR §560.210(c)(1).

²⁹ Such information could include publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD-ROMs, artworks, and news wire feeds. 31 CFR §560.315(a)(1).

³⁰ 31 CFR §560.210(c)(2).

information accessible both in print and on the Internet. Allowing persons in sanctioned countries to perform electronic search functions for public data is also permitted, as well as incidental communications with sanctioned country persons that are necessary to effectuate publication or dissemination of exempt informational materials. As a result, the exemption could be used to authorize the provision of information about a USCIS-designated regional center (or affiliated commercial enterprise) to persons in Iran. This exemption also could be used to cover transactions related to the receipt of personal information from a person in Iran regarding the EB-5 petition or to supply as part of an OFAC license application.

However, OFAC has indicated that any “substantive enhancement” of materials related to a sanctioned country—potentially including seemingly ministerial acts, such as the editing or translating of sanctioned-country articles or assistance to a sanctioned-country person in doing so—do not fall within the exemption. The line between a prohibited service or substantive enhancement of information, on the one hand, and a permitted incidental transaction to a lawful export or import of informational materials, on the other, will not always be obvious.

As a practical matter, it would appear that the informational material exception benefits those involved in the EB-5 visa petition process in two ways. U.S. persons, such as regional centers or lawyers, can make publicly available information about the EB-5 visa process and their services available to Iranians who are considering this visa option. Likewise, Iranians interested in pursuing this visa can provide those in the United States with basic information about themselves, their funds and property, and their interest in the EB-5 visa. But once a U.S. person begins to advise or assist an Iranian with his or her specific interests or situation, then the U.S. person will need a specific or general authorization from OFAC, unless the activity is otherwise exempt. Caution is in order.

Travel

Currently, the ITR do not restrict transactions ordinarily incident to travel to or from any country.³¹ This exemption allows U.S. persons to travel to Iran and spend money ordinarily incident to travel, including expenses for living, the acquisition of goods or services for personal use, and payment for any mode of transport. OFAC has confirmed that under the current regulations, credit cards may lawfully be used for these transactions, even though in practice they may be difficult to use because of increasing sanctions and anti-money-laundering controls imposed against the Iranian financial sector, discussed below.

“Currently, the ITR do not restrict transactions ordinarily incident to travel to or from any country.”

This exemption also permits Iranian persons to travel to the United States and conduct similar transactions incident to travel. Therefore, if normally undertaken in the ordinary course of business, it may be permissible to invite potential Iranian EB-5 visa petitioners to the United States to visit and tour potential investment opportunities of a USCIS-designated regional center, provided that no unauthorized service or related benefit would be furnished during such a trip, and the Iranian otherwise enters the country lawfully.

Personal Communications

The ITR do not restrict U.S. persons from engaging in any postal, telegraphic, telephonic, or other personal communications with persons in Iran, provided that the communications do not involve the transfer of anything of value.³² However, if the communications involve the provision of an unauthorized service or other benefit, such discussions could constitute a violation of the ITR, unless a license is in place or an exemption is available.

31 31 CFR §560.210(d). However, persons subject to U.S. jurisdiction are not authorized to engage in travel-related transactions involving Cuba or Cuban persons, even though some limited general licenses may apply.

32 31 CFR §560.210(a).

SDN Screening

Even if Cuba, Iran, Sudan, or Syria, or certain property or persons in North Korea are not involved, it is advisable for U.S. persons, including lawyers, to screen all transaction parties against the OFAC SDN list, particularly before engaging in any international business with those persons or entities. The SDN list contains thousands of individuals, entities, organizations, and vessels in or affiliated with restricted countries or sanctioned activities (*e.g.*, terrorism) noted above. Many SDNs are not located or resident in the sanctioned countries. Some SDNs may be resident in or nationals of countries having extensive commercial ties to the United States, or even be located inside the United States.

OFAC Restrictions Related to SDNs

U.S. persons are restricted from furnishing any funds, goods, or services to, or for the benefit of, an SDN. Therefore, an important compliance step for lawyers and other U.S. persons is to verify the identity of their clients and other parties with whom they are dealing. Once confirmed, practitioners should check their names against the OFAC SDN list before entering into any engagement, rendering any services, or accepting any funds, money, assets, or property. If a positive match to the SDN list is identified, then a U.S. person is broadly restricted from engaging in business with, receiving funds from, or providing a service to that person or entity. Furthermore, if dealing with an entity, it also is prudent to confirm that the entity is not owned 50 percent or more by an SDN. Should such an ownership stake be identified, the entity would be blocked and restricted, even if not specifically named on the SDN list.

To engage in any dealings with such an SDN, a U.S. person must first receive a specific license from OFAC. Stated differently, unless OFAC grants a specific license or promulgates a general authorization in its regulations, a U.S. person's business dealings, directly or indirectly, with an SDN are prohibited. Such licenses may be quite difficult, if not impossible, to obtain. Consequently, identification of an SDN in the transaction typically will result in a U.S. person being unable to undertake any work that involves such an SDN.

Particular SDN Considerations Involving Iran

Numerous SDNs are affiliated with Iran and its government. Pursuant to Executive Order (EO) 13599 of February 5, 2012, the property or interests of property of persons identified under OFAC's SDN list with the notation "[IRAN]" are now blocked and U.S. persons are restricted from dealings with, or providing a benefit to, or receiving a benefit from, such persons. These restrictions cover the government of Iran, including its agencies, subdivisions, and instrumentalities, such as the Central Bank of Iran, other persons acting on behalf of the government of Iran, or any "Iranian financial institution."³³ However, to the extent OFAC has granted, or will grant, specific EB-5-related licenses under the ITR, it appears that General License A and General License B under EO 13599 would authorize necessary transactions and activities, as long as the specific license is still valid, and certain SDNs engaged in proliferation or terrorism activities are not involved in or will not benefit from the transaction.³⁴

In this regard, a significant number of other SDNs, including those affiliated with the Iranian Revolutionary Guard Corps and other persons allegedly engaging in proliferation of weapons of mass destruction (NPWMD), supporting terrorism (SDGT), or threatening human rights inside or outside Iran, are also blocked and thus off limits to U.S. persons.

This includes several dozen Iranian financial institutions, as well as their foreign branches. Notably, OFAC has imposed limitations that specific EB-5 licenses approved by the agency do *not* authorize transactions including property received from or through certain Iranian banks that are blocked under U.S. law. Such licenses caution that U.S. persons are generally prohibited from engaging in transactions, directly or indirectly, with Iranian banks designated as NPWMD or SDGT, including, but not limited to, Ansar Bank, Bank of Industry and Mine, Bank Mellat, Bank Melli, Bank Refah, Bank Saderat,

³³ 77 Fed. Reg. 6659–62 (Feb. 8, 2012).

³⁴ 77 Fed. Reg. 7660–62 (Feb. 13, 2012). *See also* "Questions Regarding Executive Order 13599 ([Blocking Property of the Government of Iran and Iranian Financial Institutions](#))."

Bank Sepah, Bank Tajerat, Europaisch-Iranische Handelsbank, Export Development Bank of Iran, Future Bank B.S.C., Kargoshaee Bank, Mehr Bank, or Post Bank of Iran; and that the licenses do not authorize funds transferred from or through these blocked banks, even if the transactions may be otherwise permitted under the ITR. Consequently, lawyers should take these restrictions into account when considering how to pursue property transfers lawfully for EB-5 investors from Iran, as well as in a manner that will comply with requirements for petitions to USCIS.

USCIS has stated in its stakeholder guidance that where EB-5 funds have passed through prohibited banks there is a violation of ITR; it therefore has denied EB-5 petitions because an immigrant investor previously held money used for the EB-5 investment in an SDN bank, or transferred funds to make the qualifying investment through a financial institution identified on the SDN list. If such an event occurs, an attorney should verify whether the identified bank actually was included on the SDN list at the time the transaction occurred, or was considered blocked as the government of Iran, the Central Bank of Iran, or any Iranian financial institution under EO 13599, effective February 6, 2012. If the bank was not blocked on the date of the funds transfer, or was not owned 50 percent or more by a bank on the SDN list or other blocked person at the time, no violation of U.S. economic sanctions law should have occurred. In a few instances, our responses to USCIS have pointed out that an earlier transaction preceded the SDN listing of the particular bank, and we have succeeded with that approach.

Moreover, advocates have argued to OFAC that the limited involvement of certain SDN banks or Iranian financial institutions in transferring assets or holding assets prior to transfer from Iran should not preclude the investment of such funds in the United States under the EB-5 program. If OFAC approves an EB-5 license based on a reasonably transparent license application, under General Licenses A and B, the fact that banks are located in Iran should not preclude the investment of funds from these banks in the United States or the funds' being held by U.S. financial institutions or U.S. persons, if the transaction relating to such funds is not conducted through or by an SDN-listed bank.³⁵ Second, should certain Iranian banks designated as SDN, NPWMD, or SDGT have an indirect, limited, or fleeting involvement with the transfer of funds, a private Iranian individual intending to immigrate to the United States should not be blocked in the U.S. banking system because there arguably is no SDN bank "property" or "interest" in the funds. Absent a foreign person engaging in evasive activity or facilitating deceptive financial transactions involving designated banks, license applicants and immigrant investors should have reasonable arguments that such transfers do not contravene U.S. law.³⁶ We are aware that OFAC has taken a position that the involvement of an SDN bank terminates when funds are received in a non-SDN-listed bank prior to transfer to a financial institution in the United States; thus, the SDN bank no longer has a continuing interest in the funds and OFAC has determined that no license to allow the funds transfer into the United States would be required under these circumstances.

Even so, USCIS has opposed this outcome, and through further requests to the EB-5 investor, has maintained that the blocking provisions have not been satisfied. This issue is currently in litigation, with the plaintiffs contending that USCIS is usurping OFAC's exclusive role.³⁷ Although, on the one hand, the AAO has been confident in proclaiming that the EB-5 statute does not authorize transactions by Iranians that otherwise would be prohibited by executive orders and the ITR, it is also true that at least in some cases USCIS is "going behind" the license to object that the precedent transfers of funds that involved SDN banks violate the ITR.

Special Compliance Considerations for Lawyers and Identified SDNs

Lawyers may provide specified but circumscribed legal services to SDNs, as described above.³⁸

³⁵ See 31 CFR §560.516 (authorizing U.S. depository institutions to receive and handle funds originating from Iran).

³⁶ See, e.g., Executive Order 13608, "Prohibiting Certain Transactions with and Suspending Entry into the United States of Foreign Sanctions Evaders with Respect to Iran and Syria" (May 1, 2012).

³⁷ *Elgin Assisted Living EB-5 Fund, LLC et al. v. Mayorkas et al.*, 12 CV 2941 (N.D. Ill. filed Apr. 20, 2012).

³⁸ See 31 CFR §§536.506 (application to specially designated narcotics traffickers), 594.506 (specially designated global terrorists), 595.506 (specially designated terrorists), 597.505 (foreign terrorist organizations), 598.507 (specially designated foreign narcotics traffickers).

However, in most instances, the types of legal services authorized by OFAC are limited to sanctions compliance advice and assistance with the OFAC regulations, litigation, or services considered to be *pro bono*. Commercial legal services or support for SDNs, such as receiving personal funds into escrow, helping with the visa processing paper work, and overseeing the foreign national's compliance with a visa program, are not generally authorized.

OFAC is unlikely to issue a specific authorization or license for SDN-related legal services that are not generally authorized in the legal services exemption, as a general policy of denial typically applies to SDNs. Moreover, even if legal services may be authorized by the appropriate regulatory provision, OFAC requires the attorney to obtain a specific license (via an application to OFAC) in order to receive payment for such services.

Absent a specific OFAC license, any property received from an SDN by a U.S. person (*e.g.*, a financial institution or a lawyer) would be considered blocked property, which the U.S. financial institution or attorney would need to place into a special blocked account. Upon receiving such property, the financial institution or lawyer is obligated to file a report to OFAC within 10 days.³⁹ Failure to do so constitutes an independent violation of the OFAC regulations.

Increased U.S. Anti-Money-Laundering Controls and Sanctions Against the Iranian Financial System

To manage potential economic sanctions and potential anti-money-laundering risks, in addition to SDN screening, it also is advisable for U.S. attorneys to establish sufficient client identification in connection with EB-5 practice. This could include reasonable due diligence, such as collecting residence and personal background information, as well as verifying (to the best of the attorney's ability) the source of any funds, assets, or property to be used in an EB-5 investment supporting the petition and any financial institutions that may be involved in the transaction.⁴⁰

Against this backdrop, the U.S. government has increased pressure on foreign financial institutions to cease conducting business with the Iranian financial sector. This has been undertaken through the following measures: (1) OFAC has issued and amended the Iranian Financial Sanctions Regulations, which authorize OFAC to impose sanctions on foreign financial institutions engaged in certain transactions with Iran;⁴¹ (2) on November 28, 2011, the U.S. Department of the Treasury's Financial Crimes Enforcement Network identified Iran and the entire Iranian financial sector as a jurisdiction of "primary money laundering concern" pursuant to §311 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act;⁴² and (3) on December 31, 2011, President Obama signed into law the National Defense Authorization Act for 2012,⁴³ §1245 of which provides authority for expanded sanctions against foreign banks in third countries that conduct "significant transactions" with the Central Bank of Iran.

These legal developments, although different, have a common theme: they aim to prohibit or impose conditions on the opening or maintaining in the United States of accounts for a foreign financial institution that does certain business with Iran. The U.S. government can determine that the foreign financial institution is involved with facilitating significant transactions with Iranian financial institutions or significant financial services sponsored by the Iranian regime and its agents.⁴⁴ If that occurs, the U.S.

39 See 31 CFR §501.603.

40 E. Krauland and J. Hayes, "Anti-Money Laundering and OFAC Sanctions Concerns for Immigration Practitioners Assisting Foreign Investors," *Immigration Options for Investors & Entrepreneurs* 309 (AILA 2d Ed. 2010).

41 75 Fed. Reg. 49836-43 (Aug. 16, 2010) and 31 CFR Part 561.

42 76 Fed. Reg. 72878-85 (Nov. 28, 2011).

43 Pub. L. No. 112-81 (H.R. 1450).

44 This includes facilitating the designated Iranian person's efforts to acquire or develop nuclear energy technology or WMDs, provide support to foreign terrorist organizations, violate United Nations Security Council resolutions, launder money associated with such activities, or finance such activities through the Central Bank of Iran or other Iranian financial institutions, whether or not SDNs.

government may direct U.S. financial institutions to prohibit the opening or maintaining of, or impose strict conditions on, accounts for such a foreign financial institution.⁴⁵

The policy goal of these laws is to persuade foreign financial institutions to decide that the U.S. market is more important than the Iranian market, and force foreign financial institutions to abandon their financial transactions with the Iranian financial sector and the Iranian regime. Consequently, banks in foreign countries with accounts in the United States may decide to stop providing trade financing or other financial services related to any business involving Iran. It is yet to be seen how these financial institution controls may have an impact on EB-5 cases involving Iranians. However, these controls may make it more difficult for Iranians to transfer property from Iran through third-country banks to the United States, even where such transactions are specifically or generally licensed by OFAC.

Conclusion

Immigration lawyers engaged in EB-5 investor practice should be aware of at least the basics of U.S. economic sanctions laws and regulations. A lawyer who focuses solely on immigration services must be sensitive to economic sanctions considerations that are relevant to EB-5 investor practice, as well as possibly other visa services for Iranians (*e.g.*, treaty investor, H-1B, or L visas). The lawyer who is not aware of economic sanctions runs the risk of incurring significant liability and jeopardizing the immigration status of an immigrant investor. Simple compliance steps can be undertaken to mitigate these risks, but when issues are identified, it may be prudent to consult with experienced sanctions counsel before initiating any transaction, business, or other dealing. 

inside IMMIGRATION

Managing Editor

Danielle Polen

Staff Editors Mary E. Cadette
Sheeba Raj

Executive Editor Tatia L. Gordon-Troy

Editor-in-Chief Crystal Williams

Graphic Designer Bradley Amburn

INSIDE IMMIGRATION, published several times annually, is an official publication of the American Immigration Lawyers Association, Suite 300, 1331 G Street, NW, Washington, DC 20005

Copyright © 2012 AMERICAN IMMIGRATION LAWYERS ASSOCIATION. All rights reserved.

No part of this publication may be reprinted or otherwise reproduced without the express permission of the publisher.

For reprint permission requests, editorial comments, and letters to the editor, e-mail pubs@aila.org.

To order AILA publications, visit agora.aila.org. For general AILA publications-related questions, e-mail pubs@aila.org.

Legal Disclaimer

AILA's *Inside Immigration* articles do not necessarily represent the views of AILA, nor should they be regarded as legal advice from the association or the authors. AILA does not endorse any of the third-party products or services mentioned in any articles published herein, nor does it verify claims.

Content Disclaimer

All Internet links contained within this article were current as of the date of publication. When referring to any citations, remember, the law can change quickly, so always review the most current statutes, regulations, and case law.

⁴⁵ Such foreign financial institutions will not be able to open correspondent or "payable through" accounts at U.S. financial institutions from that point forward.