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“A Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects” DRAFT 12/18/14

By Professor Jeanne Calderon and Gary Friedland, Esq.

Note: This paper is a working draft. For ease of review and collaboration by authorized sources as well as tracking revisions, the authors have posted this paper on the NYU Stern Center for Real Estate Finance website. The authors realize that this paper requires substantial, additional work before completion. They are continuing to revise this paper (including the footnotes) based on their own review and research, as well as the feedback of others. No portion of this paper (including the appendices) shall be disseminated to, discussed with or otherwise disclosed to anyone, without the prior written consent of the authors.

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INTRODUCTION

From an immigrant’s perspective, the EB-5 visa program (“EB-5” or the “Program”) represents merely one of several paths to obtain a visa.² The EB-5 visa is based on the immigrant’s investment of capital in a business that creates new jobs.³ However, from a real estate developer’s perspective, the immigrant’s investment to qualify for the visa creates an alternative capital source for the developer’s project (“EB-5 capital” or “EB-5 financing”).

Despite the Program’s enactment by Congress in 1990, for many years EB-5 was not a common path followed by immigrants to seek a visa.⁴ However, when the traditional capital markets dried up during the Great Recession, developers’ demand for alternate capital sources rejuvenated the Program. Since 2008, the number of EB-5 visas sought, and hence the use of EB-5 capital, has skyrocketed.⁵ EB-5 capital has become a capital source providing extraordinary flexibility and attractive terms, especially to finance commercial real estate projects. Consequently, many developers routinely consider EB-5 capital as a potential source to fill a major space in the capital stack.⁶ As the tool becomes more widely known and understood, this source of capital should become even more popular.

¹ Professor Jeanne Calderon of the NYU Stern School of Business and Gary Friedland, Esq.
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² Immigration and Nationality Act (INA) section 203(b)(5);
<http://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/act.html>. The term “EB-5” refers to the fifth category of the five permanent resident visas available in the employment-based preference system that prioritizes immigrants based on their skills. A visa is also referred to as a “green card”. The Program is sometimes known as the “Immigrant Investors’ Program”. <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor>

³ Technically, rehabilitation projects that preserve jobs are also eligible for EB-5 investment; however, the overwhelming majority of EB-5 projects involve new projects that create new jobs. [Insert citation]

⁴ For example, according to a 2005 report by the Government Accounting Office, only 6,024 visas under the EB-5 category were issued from its inception through 2004, despite the law’s allocation of 10,000 visas per year. “Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors”, GAO-05-256: Published: Apr 1, 2005. This Report includes a history of the Program until 2004. The current annual quota remains at 10,000 EB-5 visas per year, as discussed on page ____.

⁵ For example, 1,258 EB-5 visa applications (I-526 petitions) were filed during fiscal year 2008, compared to 10,928 during fiscal year 2014. This represents an increase of 769% [10,928-1,258/1,258]. Furthermore, the number of applications filed during 2014 represented more than 25% of the applications filed since the Program’s inception in 1990.

http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_performancedata_fy2014_qtr4.pdf;

http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526-I829_performancedata_fy1991-2013_qtr1.pdf

⁶ For example, I-Fei Chang, CEO of the U.S. branch of Greenland Holdings (“Greenland”), a partially state-controlled, Shanghai-based development conglomerate with more than \$50 billion in assets, remarked in a recent interview that EB-5 has “now become almost a conventional way [to raise capital] for large-scale developers in America”. Crain’s New York Business, 11/10/2014 “Chinese development firm puts down roots in Brooklyn”, by Joe Anuta. http://www.crainsnewyork.com/article/20141112/REAL_ESTATE/141119948/chinese-development-firm-plants-roots-in-bklyn In 2013, Greenland acquired a 70% ownership stake in the \$5 billion Atlantic Yards development

The EB-5 investor's motivation for making the investment accounts for the relative flexibility and favorable terms afforded by EB-5 capital compared to conventional capital sources. Unlike the conventional capital providers (such as banks, private equity funds, REITs, life insurance companies and pension funds), the EB-5 investor's reason for making the investment is to secure a visa. Thus, his primary, if not exclusive, objective at the time of making the investment is to satisfy the EB-5 visa requirements. Consequently, so long as the investor believes that the investment will qualify for the visa and result in the safe return of his capital, he is willing to accept a below market, if not minimal, return on the investment.⁷ Furthermore, the investor might not require some of the other protections that more sophisticated, conventional real estate investors typically seek.

Sometimes, critics refer pejoratively to EB-5 as the "visa for sale" or "cash for visa" program.⁸ However, the immigrant's investment is not a purchase of a visa, but instead an investment in a U.S. project that will create jobs with the expectation that the investor's capital will be returned. While the investment must be "at risk", the investor's expectation is that he will recover his investment after it has been outstanding for sufficient time to comply with the EB-5 immigration requirements.

EB-5 can fill any space in the capital stack and take the form of debt or equity; ranging from unsecured loans to senior mortgage loans to equity. EB-5 capital raises for individual projects have ranged in size from \$500,000 to more than \$400 million. In the past five years, EB-5 capital has played a key role in financing several large-scale projects, particularly in major urban areas.⁹

Simply stated, the Program requires that the immigrant make a capital investment of \$500,000 or \$1,000,000 (depending on whether the project is located in a "Targeted Employment Area"¹⁰) in a business located within the United States. The business must directly create 10 new, full-time jobs per investor¹¹. Thus, the number of jobs that a project will create is a key determinant of the amount of the potential EB-5 capital raise.

project (now known as "Pacific Park", but for consistency referred to in this paper as "Atlantic Yards") in Brooklyn that has utilized a substantial amount of EB-5 capital. This is further described on page ____.

⁷ For example, the EB-5 investors who funded one of the largest capital raises in history relating to the renovation of a Las Vegas casino resort (two tranches totaling almost \$400 million) are entitled to interest at the rate of 0.5% per annum. <http://www.sec.gov/Archives/edgar/data/1606965/000119312514317197/d775866d10q.htm>

⁸ "Rules Stretched as Green Cards Go to Investors" by Patrick McGeehan and Kirk Semple, NY Times, December 18, 2011 http://www.nytimes.com/2011/12/19/nyregion/new-york-developers-take-advantage-of-financing-for-visas-program.html?pagewanted=all&_r=0; <http://fortune.com/2014/07/24/immigration-eb-5-visa-for-sale/>

⁹ Examples include several projects that have raised, or are in the process of raising, \$200 million or more of EB-5 capital. The Related Companies ("Related") raised \$600 million for a mixed-use project in the Hudson Yards on the West Side of Manhattan. Forest City Ratner ("Forest City") raised \$477 million for Phases I and 2 of Atlantic Yards and is in the process of raising an additional \$249 million (or \$100 million) for Phase III, which would bring the project total to over \$700 million. Silverstein Properties ("Silverstein") has a pending raise of \$249 million for the mixed use, Four Seasons Hotel and luxury condominium in the Tribeca section of Manhattan. A partnership including Acadia Realty ("Acadia") raised \$200 million for the mixed-use City Point project in downtown Brooklyn. Stockbridge/SBE ("SBE") raised almost \$400 million for the renovation of the SBE's SLS Hotel and Casino Las Vegas (formerly the Sahara Hotel).

¹⁰ INA section 203(b)(5)(C)

¹¹ INA section 203(b)(5)(A)

Most projects create a limited number of direct jobs. However, if the project is affiliated with a government-approved Regional Center, an additional category of jobs may be counted, “indirect jobs”. Typically, a new business generates many more indirect jobs than direct jobs.¹²

Although United States Customs and Immigration Service (“USCIS”) is the Federal agency that governs the immigration process, including the EB-5 Program,¹³ it regulates only aspects of the immigrant’s investment that enables him to qualify for the visa. The Securities and Exchange Commission regulates the process of soliciting investors, but this aspect plays only a small role in the overall capital formation and capital structure process.¹⁴ The EB-5 Program’s limited rules and regulations permits EB-5 capital to be structured in a variety of ways with many different features.

In recent years, the overwhelming majority of investors seeking EB-5 visas have invested in commercial real estate projects through Regional Centers.¹⁵ Although the investors’ funds ultimately can be deployed to the project as a loan or equity, EB-5 investments are most commonly structured as a loan.¹⁶ Thus, this paper will primarily focus on EB-5 capital in the context of loans to commercial real estate projects, and specifically, those sponsored by a Regional Center.¹⁷ (Projects that utilize any EB-5 financing in its capital stack will be referred to as “EB-5 projects”.)

The paper is divided into two sections. The first section provides background on the EB-5 immigration process. A basic knowledge of this topic is necessary to understand the capital stack alternatives and implications presented by EB-5 capital. The second section explains the key features of EB-5 capital and its role in current projects. Below is an overview of the major topics.

I Background Topics

A. Overview of EB-5: The paper’s focus is on EB-5 capital as a financing tool, rather than on the immigration aspects of the Program. However, to understand the mechanics of EB-5 capital, one must have a basic knowledge of the Program because the Program’s requirements, as well as the immigrant investors’ preferences, shape the structure of the investment.

¹² If the immigrant invests directly in the project, rather than through a Regional Center, then only “direct” jobs are counted – jobs where the workers are employed directly by the job creating entity that owns the project.

¹³ Prior to 2003, the now defunct “Immigration and Naturalization Service” (“INS”) performed most of these functions.

¹⁴ See securities law discussion at page ____.

¹⁵ IIUSA, the national trade association for EB-5 regional centers, estimates that 95% of all EB-5 capital is raised and invested through Regional Centers (although not all of the capital is invested in real estate projects).

<https://iiusa.org/en/eb-5-regional-center-investment-program/>. The EB-5 investor does not typically invest directly in the project entity, but instead invests through a New Commercial Enterprise, an EB-5 required investment vehicle described in detail on page ____.

¹⁶ As explained further in the Capital Stack section, many EB-5 investors prefer loans to equity because their prime motive to make the investment is to secure the visa. They believe the features of a secured loan increase the likelihood they will be recover their investment. A fixed maturity date and a default remedy including foreclosure impose pressure on a defaulting borrower.

¹⁷ The relationship between the Regional Center, on the one hand, and the developer and its project, on the other hand, is sometimes referred to as “sponsorship”, “affiliation”, or “association”. This paper refers to these terms interchangeably.

B. The capital raise: a simple overview of the process by which the EB-5 capital may be raised overseas (and within the United States.)

C. Immigration process: The immigration process affects the investment structure, as well as the timing of developer's access to EB-5 funds and the exit strategy for the investor's recovery of his capital. We explain the two-step process for an individual to seek an EB-5 visa (submission of I-526 and I-829 petitions), and the Regional Center designation process (submission of I-924 application).

II Capital Stack Topics

A. The Regional Center and its relationship to the developer and the investor: A developer whose project might be suitable for EB-5 capital has two fundamental options - either to seek project sponsorship by an existing, third party Regional Center or to form its own "in-house" Regional Center. The selected option will influence the terms and structure of the EB-5 investors' investment. Use of a Regional Center generally involves a two-tier structure: the New Commercial Enterprise to which the investors contribute their capital; and the Job Creating Enterprise that owns the project and receives the EB-5 capital from the New Commercial Enterprise. Another option available to developers is to rent an existing Regional Center. This third option has been gaining popularity in recent years.

B. Types of commercial real estate projects most suitable for utilizing EB-5 capital.

C. Capital stack: Even though EB-5 capital can fill any part of the capital stack, gap financing in the form of mezzanine loans or preferred equity is the most common use. After simply explaining the capital stack in conventional projects, as well as in EB-5 projects and conventional gap financing, we describe the method by which one determines the size of the EB-5 capital slice. We then compare: (a) EB-5 mezzanine debt vs. conventional mezzanine debt; (b) investment structures of third party Regional Centers vs. those of developer Regional Centers; (c) EB-5 mezzanine debt vs. EB-5 preferred equity; and (d) EB-5 preferred equity vs. conventional preferred equity, as well as EB-5 mezzanine debt.

D. Escrow of the investors' contribution and the developer's need for bridge financing: Although escrow of the funds is not a legal requirement, the Regional Center, in response to investor concerns, often escrows the funds until the investor's immigration petition reaches a certain stage. Due to the extended duration of the immigration process, developers are increasingly turning towards bridge financing, offered by banks and other lenders, to fund part of their projects until the release of the investors' contributions for use in these projects.

Databases. The paper provides two selective databases: (1) some of the largest real estate projects in urban areas ("large scale projects") that have utilized EB-5 capital; and (2) some of the well-established, successful Regional Centers and their affiliated real estate projects. Each database emphasizes key variables analyzed in this paper.

Related topics outside of the paper's scope

As will become apparent upon reading this paper, properly integrating EB-5 financing into the capital stack requires expertise in immigration law, corporate and securities law, real estate law, tax law, finance, and economics. However, this paper does not address some aspects of EB-5 financing.

Securities laws considerations

The securities law aspects of EB-5 are beyond the scope of this paper. The EB-5 investors' capital contributions to the investment vehicle "New Commercial Enterprise" ("NCE")¹⁸ constitutes a "security" for purposes of the Federal securities laws.¹⁹ An EB-5 project is typically exempt from the registration requirements of the Federal securities laws.²⁰ Most conventional real estate projects are also exempt.

In contrast to the conventional real estate project (without EB-5 capital), an EB-5 project involves a two-step securities analysis.²¹ The first step is to determine whether the immigrants' investment in the NCE is exempt from registration. The second step is similar to the analysis that applies to any conventional real estate project: whether the investment in the project entity (in the EB-5 case, the JCE) is also exempt from registration.

The conventional real estate project developer entity relies upon the registration exemption under the SEC's Rule 506 of Regulation D related to "private offerings".²² The NCE, as issuer, relies upon the same exemption. However, in light of the foreign investors who may be solicited abroad, the NCE also relies on the exemption under Regulation S related to "offerings made outside the United States."²³

Securities offering documents, including a private placement memorandum, are part of the document package provided to the solicited investors. These documents are also included in the submittal to the USCIS in connection with the Regional Center's designation I-924 application; and in the individual investor's I-526 petition to become a conditional permanent resident.

Income tax law considerations

Income tax law issues relating to EB-5 projects are beyond the scope of this paper. United States citizenship status is not required for a person to become subject to U.S. income

¹⁸ As discussed on page ____, the investors contribute equity capital to the NCE, which in turn invests the proceeds in the entity that owns the project, the "Job Creating Enterprise" ("JCE").

¹⁹ See SEC "Investor Alert" Investment Scams Exploit Immigrant Investor Program", Release date 10/1/13 http://www.sec.gov/investor/alerts/ia_immigrant.htm

²⁰ Section 12(g) of the Exchange Act of 1934, as modified by the Jobs Act, permits private placements for up to 2,000 investors of record or 500 investors who are not "accredited investors", subject to the Investment Company Act of 1940.

²¹ This assumes, as discussed on page ____, that the NCE and JCE are separate.

²² <http://www.sec.gov/answers/rule506.htm>. At least four of the EB-5 projects included in the Large-Scale Project database are being developed by a public company or its affiliate. Lennar Corporation, the public homebuilder, is the developer of the Shipyard project in San Francisco. <http://www.bizjournals.com/sanfrancisco/feature/structures/2014/lennar-urban-selling-at-san-francisco-shipyard.html?page=all> Stockbridge/SBE investment Co., LLC filed a registration statement with respect to another EB-5 project, the SLS Las Vegas. <http://www.secinfo.com/d14D5a.n8R3n.htm>. Forest City Ratner is the developer of Atlantic Yards. An affiliate of Acadia Realty Trust, the public REIT, is the developer of City Point in Brooklyn.

²³ <http://www.sec.gov/rules/final/33-7505.htm>. Other securities law issues that arise in the EB-5 context in particular include the potential need for broker-dealer registration of the Regional Center and others who solicit investors. <http://www.uscis.gov/news/alerts/investor-alert-investment-scams-exploit-immigrant-investor-program>.

taxation on worldwide income. Upon becoming a lawful permanent resident of the United States (even if the residency is conditional) the immigrant investor becomes taxable as a U.S. person,²⁴ subject to tax on his worldwide income. The immigrant becomes a conditional permanent resident upon the issuance of the conditional visa, which occurs after the first step of the EB-5 visa process.²⁵ The time between the issuance of the conditional visa and the unconditional visa is at least two years.²⁶ As a U.S. taxpayer, the individual is taxed, not only on payments or distributions relating to the EB-5 project, but also on his unrelated income, subject to treaties and other special provisions.

Lack of transparency by USCIS and Regional Centers

Various sources, including interviews, internet sources and presentations at industry-led conferences, provide the support for information contained in this paper. Two major factors account for the extreme difficulty in obtaining meaningful information about the raising and deployment of EB-5 capital.

First, although Regional Centers and investors file a tremendous volume of financial and legal information with USCIS about particular projects, USCIS is not transparent, and generally makes very little information or data available for public release, even if sought under a FOIA request.²⁷ Second, due to the intensively competitive market for EB-5 capital available from a limited supply of potential foreign investors, many Regional Centers and developers are reluctant to disclose details about the capital raise, structure of the transaction or the cost of capital to the developer-borrower.²⁸ Some operators of Regional Centers and developers were willing to discuss EB-5 capital, but typically only in the most basic terms.²⁹

The Regional Centers' websites generally do not describe the terms of their investments or the capital structure of the project entity. This might be due to intense competition among Regional Centers for EB-5 investors to provide capital, as well as securities law concerns. In contrast, substantially more information is available on the websites of the migration agents or brokers who are soliciting immigrant investors, particularly those of Chinese migration agents.³⁰

²⁴ IRC section 7701(a)(30)(A) defines United States person to include a "resident".

²⁵ If the immigrant's EB-5 petition is ultimately rejected during the second-step of the process, his visa will be revoked, and he will no longer be taxable as a U.S. person. <http://www.irs.gov/publications/p519/ch01.html> (re "Green Card Test"). See also 8 C.F.R. § 216.6 (d) (2) re the termination of lawful permanent residence status as of the date of the I-829 denial.

²⁶ The I-829 petition must be filed during the window between 21 and 24 months from the conditional visa issuance. The processing of the I-829 takes longer than three months.

²⁷ USCIS often cites the "proprietary" exemption as the basis for its refusal to release confidential or financial information about a particular project or Regional Center. 5 U.S.C. § 552(b)(4)

²⁸ Michael Gibson is Managing Director of USAdvisors, an investment advisory firm that provides EB-5 due diligence for potential investors. USAdvisors' related website, www.EB5Projects.com, compiles online data of EB-5 projects. However, the authors of this paper independently located substantially all of the project details referenced in this paper, including the databases, by extensively researching internet sources.

²⁹ Representatives of only a few of the Regional Centers contacted by the authors were very willing to discuss their deal structure, including Lam Group, EB-5 New York State, US New York Immigration Fund ("USIF"), Lightstone, American Life, and CanAm.

³⁰ As discussed in the Immigration Process section on page _____, during fiscal year 2013, approximately 86% of all I-526 approvals (the first step in the visa process) were issued to applicants from Mainland China. <https://iiusa.org/blog/research-analysis/quarterly-retrospective-january-issue-regional-center-business-journal/>

However, this paper does not rely on the Chinese websites because the validity of these sites is even more difficult to authenticate than the websites of the U.S.-based Regional Centers.

We used these Chinese websites merely to confirm the information provided by the Regional Centers. To the limited extent this paper considers these websites as sources, the authors relied upon their Chinese-speaking research assistants to translate.³¹ Obviously, these Chinese websites are a more remote source since at best they are a secondary source, presumably relying upon information provided by Regional Centers, NCEs or developers, directly or indirectly.

I BACKGROUND ON EB-5 PROGRAM AND IMMIGRATION PROCESS

EB-5 Program Overview

Congress added the EB-5 category of visa as part of the Immigration Act of 1990 to stimulate the creation of new jobs by capital invested by immigrants.³² Under the Program, an immigrant must invest \$1,000,000 in a United States business that creates 10 jobs for each EB-5 investor.³³ However, if the project is located in a Targeted Employment Area (“TEA”), the investment threshold is reduced to \$500,000.³⁴ Since the law’s enactment in 1990, the amount of the minimum required investment has remained the same.³⁵

Sources of EB-5 law

The statutory framework for the Program can be found at INA sections 203(b)(5) and 216A, which were modified by inter alia Section 610 of Pub. L. 105-119 and Section 402(a) of Pub. L. 106-396; and Section 4 of Pub. L. 108-156, relating to Regional Center Pilot Program. The regulatory framework can be found at 8 CFR 204.6 and 8 *CFR* 216.6. In addition, USCIS has issued several Policy Memoranda and Policy Manuals that can be found on the USCIS website and are footnoted in this paper. The four precedent decisions of the USCIS’ Administrative Appeals Office (AAO) opinions are: Matter of Izummi, 22 I&N Dec 169 (BIA 1998); Matter of Ho, 22 I&N Dec. 206, (BIA 1998); Matter of Soffici, 22 I&N Dec 158 (BIA 1998); and Matter of Hsiung, 22 I&N Dec 201 (BIA 1998). These decisions, unlike most AAO opinions, create certain standards that apply to EB-5 applications or investments, such as Matter of Ho compliant business plan, and Matter of Izummi decision interpreting some of the at-risk rules applicable to EB-5 investments. No precedent decisions have been issued since 1998.

Targeted Employment Area

³¹ Jasper Yang and Erzhuo Wang, undergraduate students at NYU’s Stern School of Business.

³² INA 203(b)(5)(C)

³³ INA 203(b)(5)(A)(ii)

³⁴ 8 C.F.R. 204.6(f)(2)

³⁵ The statute authorizes the Attorney General to raise the dollar limit by regulation. INA section 203(b)(5)(C)(i). The Attorney General sets the TEA capital investment amount, but it must be no less than ½ of the basic (\$1,000,000) amount. INA section 203(b)(5)(C)(ii).

A geographic area is classified as a TEA if its unemployment rate is at least 150 percent of the national average.³⁶ Most projects seek to qualify as a TEA to attract immigrants whose main purpose in making the investment is to obtain a visa, and therefore, prefer to invest \$500,000, instead of \$1,000,000.

The Program delegates to each State the authority to determine whether a particular property is located in a TEA, and USCIS defers to this determination.³⁷ The State authority issues a TEA designation letter if it determines that the project location meets the requirements. The methodology applied by the various States differs.³⁸ Many states have adopted an expansive view of whether a project is determined to be in a TEA because they often prefer that development occur within their own state rather than in a neighboring state.

One of the first steps that a developer takes to determine the feasibility of an EB-5 project is to request that the State authority issue a TEA designation letter. The processing of the TEA letter request is much shorter than the other aspects of the EB-5 immigration process.³⁹ If the State were to determine that the project is not located in a TEA, many developers would forego EB-5 capital as a capital source because the project would presumably not attract immigrant investors. Again, obviously the immigrant investor prefers to minimize the amount of the investment necessary to obtain the EB-5 visa.

In some states, the TEA “high unemployment standard” is met in locations that one would not expect to qualify, such as the thriving Midtown, Chelsea and Tribeca areas of New York City. A common way developers achieve this is by adding contiguous tracts to the project’s census, thus creating a combined area which achieves the requisite high unemployment rate.⁴⁰

Even the USCIS has questioned whether the State authorities are adhering to the “spirit of the law”.⁴¹ In 2011, then USCIS director Alejandro Mayorkas pointed out that the \$500,000 investment threshold should only be available where the project results in employment of people who live in high unemployment areas.⁴² The liberal interpretation by some states has rendered

³⁶ A location can also qualify as a TEA if it is a “rural” area, as defined in INA section 204.6. Relatively few projects are located in rural areas, as many investors prefer to invest in projects in or near urban areas. See the Project section of this paper for other EB-5 investor preferences, such as established developers and Regional Centers. In the case of an investment through a Regional Center, the location of the JCE rather than the NCE, determines the project’s location for TEA purposes. See USCIS Policy Memorandum, PM-602-0083, dated May 30, 2013 (“2013 Policy Memorandum”) at pages 8 and 9.

³⁷ 8 C.F.R 204.6(i)

³⁸ For example, as of October 2, 2014, the State of California process to request a TEA letter has been automated by a new interactive database tool that allows up to 12 contiguous census tracts to be combined. <http://www.business.ca.gov/International/EB5Program.aspx>. . New York State delegates the determination making authority to the Empire State Development agency. http://www.labor.ny.gov/stats/immigration_act.shtm. Texas delegates this authority to local mayors or county judges.

http://www.impactdatasource.com/Download_Files/Texas%20TEA%20Designations.pdf

³⁹ For example, as of July 2014, the estimated time frame for processing a TEA designation request in New York State was one week. Telephone interview of Ed Kowalewski, the Director of International Investment Programs of Empire State Development, on July 16, 2014.

⁴⁰ See footnote 8 “Rules Stretched as Green Cards Go to Investors” by Patrick McGeehan and Kirk Semple, NY Times, December 18, 2011. <http://www.nytimes.com/2011/12/19/nyregion/new-york-developers-take-advantage-of-financing-for-visas-program.html?pagewanted=all& r=0>

⁴¹ See footnote 40. See also 2013 Policy Memorandum at page 7: “Congress expressly provided for a reduced investment amount in ... area of high unemployment in order to spur [investment] in “areas of greatest need.”

⁴² See footnote 40.

the TEA concept almost meaningless.⁴³ Critics have referred to this combination of census tracts as “gerrymandering”.⁴⁴

Job creation

Job creation is the centerpiece of the Program.⁴⁵ The project must create at least 10 full-time jobs for American workers⁴⁶ for each EB-5 investor. In other words, for each \$500,000 of EB-5 capital invested, the project must create at least 10 EB-5 program-qualifying jobs.⁴⁷ Jobs can include those relating to construction activity, as well as to the operations of the project. Below is a simplified explanation of the complex job-creation rules.⁴⁸

If the investor invests in a project that is not sponsored by a Regional Center, only direct jobs count.⁴⁹ Direct jobs are generally those full-time jobs filled by W-2 employees of the commercial enterprise.⁵⁰ The applicant demonstrates direct jobs to USCIS by producing W-2 tax forms and legal working status in the U.S. and other evidence of employment. Direct jobs associated with construction activity qualify only if they last for at least two years.⁵¹ The overwhelming number of jobs associated with construction activity are indirect for immigration purposes.

If the project is sponsored by a Regional Center, then the type of jobs to be counted also includes “indirect” jobs, as well as a subcategory of indirect jobs referred to as “induced jobs”. These jobs are demonstrated to USCIS based on an economic impact report’s economic-job impact model that shows the impacts of the project’s capital investment and/or on actual employment data.⁵² An economist prepares the economic-job impact report based on a business plan developed by the developer – at times with the assistance of the Regional Center. Generally, at the I-526 investor petition phase of the immigration review, the business plan must reasonably demonstrate that the jobs will be created within two and one-half years after USCIS approves the immigrant’s I-526 petition.⁵³

Indirect jobs are those held by persons who are not W-2 employees of the commercial enterprise, but are created as a result of the project.⁵⁴ Instead, they work for those who provide

⁴³ [http://eb5news.com/system/uploads/newsletter/file/7/Nov Dec 2011 Newsletter.pdf](http://eb5news.com/system/uploads/newsletter/file/7/Nov_Dec_2011_Newsletter.pdf) by Michael Gibson

⁴⁴ See footnote 40.

⁴⁵ 2013 Policy Memorandum at page 17.

⁴⁶ For these purposes, workers include U.S. citizens as well as lawful permanent residents. 2013 Policy Manual at page ____.

⁴⁷ The calculation relating to this requirement is explained in more detail in “The size of the capital slice” section beginning at page ____.

⁴⁸ Some of this discussion is based on a telephone conversation with economist Jeff Carr of Economic & Policy Resources, Inc. on September 11, 2014.

⁴⁹ 8 C.F.R. 204.6(e)

⁵⁰ Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations entitled “Adjudication of EB-5 Regional Center Proposals and Affiliated Form I-526 and form I-829 Petitions; Adjudicator’s Field Manual (AFM) Update to Chapters 22.4 and 25.2 (AD09-38)” (December 11, 2009 (the “Neufeld Memorandum”)) Permanent full-time jobs are defined as a minimum of 35 hours per week over the course of the project. Jobs held by independent contractors do not count. Neufeld Memo December 2009 at page 15. Also see the 2013 Policy Memorandum at page ____

⁵¹ Neufeld June 2009 memorandum

⁵² 8 C.F.R. 204.6(m)(7)(ii)

⁵³ See May 2013 at page 19

⁵⁴ See May 2013 at page 18

goods or services to the project.⁵⁵ In contrast to direct construction jobs associated with construction activity, indirect jobs associated with construction activity can qualify for EB-5 program job benefits even if the construction lasts less than two years. The work can be performed anywhere, even in an entirely different geographic location.

For example, indirect jobs include those held by those who work for the steel mill in Ohio that provides metal studs for the construction of a hotel project in California, as well as those who work for the manufacturer in Wisconsin that provides plumbing fixtures to the project. Indirect jobs also include those workers who supply and deliver linens to the hotel after it opens for operation, and those who perform professional services for the hotel, including external accountants and lawyers – ideally there would be a documented third party payment.

Induced jobs are generated when workers – direct as well as indirect – spend part of their increased compensation on consumer goods and services. In practice, these operations-based indirect jobs are limited to the geographic area of the project (i.e., within the sponsoring Regional Center’s territory).⁵⁶ For example, purchases at supermarkets, gas stations, and clothing stores by the project’s construction workers (direct employees), as well as by employees of the steel mill (indirect employees), can count towards job creation.⁵⁷

Construction expenditures are a major determinant of the number of construction activity jobs generated. Revenues from operations are typically a major determinant of the number of operations jobs generated. Other factors include the project’s geographic area and its industry type.

Most EB-5 projects strive to create more jobs than the EB-5 minimum required for the number of potential investors, primarily for investor marketing purposes. The excess jobs create a cushion to provide comfort for subscribing EB-5 investors that a sufficient number of jobs will be created to have their investor petitions approved in case actual development deviates from the planned development or operations, or the USCIS does not ultimately recognize some of the jobs created by the project as being EB-5 program eligible.

Under some models, a multiplier factor is applied to the construction spending or operating revenues to arrive at the number of jobs created. The multiplier factor varies depending on such variables as project location, industry or property type and construction techniques.

Most projects generate substantially more construction activity jobs than operations jobs. In addition, it is relatively easy to demonstrate and expend actual construction expenditures rather than to forecast and meet revenue targets for a project that is at the planning stages or in the early stages of operations. Consequently, many projects rely substantially, if not exclusively, on construction activity jobs to support the capital raise, assuming the number of jobs to be created is sufficient to support the amount of EB-5 capital to be raised.⁵⁸

⁵⁵ Indirect jobs (including induced jobs) may be full or part-time, permanent or temporary because input-output tools do not distinguish between full-time and part-time job holders. The work may be an independent contractor or employee. Neufeld at page 13-15, May 13, 2013 at pages 15-17

⁵⁶ If a project seeks to include indirect jobs associated with the operations component in the area outside of the Regional Center’s approved territory, detailed and verifiable evidence must be provided to USCIS showing that there are in fact significant, quantifiable job impacts from the project’s operations outside of the territory.

⁵⁷ In contrast, indirect jobs generated by tenant or hotel guest spending, are generally not counted as indirect jobs. USCIS Questions and Answers: EB-5 Economic Methodologies (July 3, 2012) Question 1.

<http://www.uscis.gov/news/questions-and-answers/questions-and-answers-eb-5-economic-methodologies>

⁵⁸ See the “Size of the EB-5 capital slice” section beginning at page ___

Capital Raise – Background

As described below, a developer whose project may be suitable for an EB-5 capital component has several options as to how it can access the EB-5 capital through a Regional Center. The most common routes are the developer forms its own Regional Center or seeks to have its project sponsored by an existing, unrelated Regional Center. Most developers choose to associate with an unrelated Regional Center to access EB-5 capital, as discussed in the Regional Center section.⁵⁹

In any case, five participants are instrumental at the capital raise stage:

1. The Regional Center
2. The EB-5 immigrant investor
3. The new commercial enterprise (“NCE”) – the entity formed by the Regional Center that serves as the investment vehicle into which an immigrant contributes his required equity capital.
4. The job creating entity (“JCE”) – the entity that owns the project that will create the jobs, which also ultimately receives the EB-5 proceeds as a debt or equity investment from the NCE.⁶⁰
5. The migration agent located overseas, or the broker located in the United States, who solicits the immigrant investor.

The EB-5 investor’s proceeds can be invested by the NCE in the JCE, either as a loan or equity.⁶¹ This example assumes that (1) the EB-5 investor’s proceeds will be loaned by the NCE to the JCE, and (2) the developer associates with a third-party Regional Center, rather than forms its own “in house” Regional Center.

After the developer and NCE determine that the project is suitable for EB-5 investment and reach an agreement on the loan terms, a variety of documents are needed to proceed with the solicitation of investors, including the:

1. Project’s business plan;
2. Economic impact analysis report based on an economic model that supports the requisite number of jobs to be created;
3. Regional Center designation letter (924 approval) issued by USCIS, including the project preapproval for this particular project, if applicable;
4. TEA letter from the appropriate State agency (assuming the project is located in a TEA, as is almost always the case for an EB-5 project);
5. Offering documents, including private placement memorandum;
6. Subscription agreement whereby the investors commit to the investment in the NCE, as well as the escrow agreement, if any, pursuant to which the investors’ contributions will be held pending the satisfaction of a condition, such as USCIS’ approval of the petition to become a conditional permanent resident;
7. Limited partnership agreement or LLC operating agreement of the NCE and JCE;

⁵⁹ Another alternative is to “rent” the Regional Center. See the discussion of renting in the Regional Center section of this paper.

⁶⁰ As indicated below, sometimes when EB-5 capital is deployed as equity the NCE and the JCE are the same entity. The paper generally refers to the NCE and JCE as two separate entities.

⁶¹ See the discussion in the Regional Center section at pages ____.

8. Loan and security or mortgage documents between the NCE and JCE; depending on whether a mortgage loan, mezzanine loan or unsecured loan is involved;
9. A deed or ground lease to the property and title report (depending on title status of the property owned by the JCE);
10. Commitments from other capital sources to the JCE to fund the balance of the project's costs, including senior mortgage financing and, if applicable, bridge financing;
11. Documents supporting the Regional Center's proven track record;
12. Documents supporting the developer's proven track record – EB-5 projects and otherwise; and
13. Demonstration of developer's source of loan repayment (the "exit" strategy).⁶²

At the time of solicitation, most investors will live in foreign countries rather than in the United States. Migration agents specialize in soliciting investors overseas for EB-5 projects. These agents are usually located in the same country, and speak the same language, as the investors. Some investors may live in the United States under a temporary visa, such as a student visa or a work visa. They are more likely to be solicited by brokers in the United States. The Regional Center will often have a relationship with a network of migration agents in one or more countries.

The Project Factors section of this paper describes the many factors that an immigrant investor considers when selecting the particular project in which he will invest.

The Immigration Process – the Investor's Path to Permanent Residency

The immigration process affects the investment structure, and the timing of developer's access to EB-5 funds, as well as the exit strategy for the investor's recovery of his capital.

After the investor selects a particular project as his investment target, he executes the Subscription Agreement. He wires to the Regional Center the minimum required investment (usually \$500,000) and the administrative fee charged to the investor by the Center⁶³. The wiring of the funds occurs before the investor's visa petition is filed.

The first step of the two-step visa application process begins with the investor filing with USCIS a Form I-526 petition (or application) for conditional permanent residency.⁶⁴ USCIS "adjudicates" (reviews and ultimately approves or denies) the petition.

⁶² Most of these documents are of the type required as part of the Regional Center's initial application to be designated (approved) as such by USCIS. See Initial Evidence Requirements section of Instructions to Form I-924, Application for Regional Center. <http://www.uscis.gov/sites/default/files/files/form/i-924instr.pdf>

⁶³ The amount of the administrative fees charged by the Regional Center to the investor varies, but generally ranges from \$25,000 to \$60,000. See http://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-19_Dec13.pdf see page 11 of the link. Representative administrative fees include: CanAm PIDC \$48,000; USIF \$47,000 to \$50,000; Extell \$60,000; Lighthouse \$50,000. Insert Website references

⁶⁴ A separate USCIS process relates to the application to be designated as a Regional Center, based on Form I-924, further described in the Regional Center section of this paper. The investor's I-526 petition relates to a specific project that is sponsored by a particular Regional Center. Once a Regional Center is designated by USCIS, the designation generally applies to future projects without further Regional Center filings. The Regional Center designation must exist prior to the filing of the I-526 petition. Thus, the timeline for processing the I-924 designation is not factored into the estimated time frame for the individual's visa application process below.

The adjudicator assigned to the application focuses on the project, as well as on the individual investor. At the project level, USCIS' main consideration is whether, based on the business plan and economic model selected by the Regional Center, the project is likely to create the number of jobs required (based on the amount of the EB-5 capital to be raised).⁶⁵ At the individual level, USCIS' focus is (1) whether the investor's funds have been obtained from a lawful source and (2) whether the investor's funds will be placed "at risk".⁶⁶

Ultimately, USCIS approves or denies the I-526 petition. Approval signifies that USCIS has accepted the project's business plan's terms and assumptions, as well as its job creation projections. If the I-526 petition is approved, the investor executes and submits a form to request an interview with USCIS or the Department of State,⁶⁷ depending upon whether the investor then resides inside or outside of the U.S. The focus is to obtain background information about the investor.

If the interview is favorable, the U.S. Department of State issues a conditional visa (also known as a "temporary green card"). This elevates the investor's status to "conditional permanent resident" for a period of two years.⁶⁸

The second step requires that, during the window period between 21 months and 24 months after the issuance of the conditional visa, the applicant file with USCIS a Form I-829 application to remove the visa conditions. At the project level, USCIS' main focus is whether the required number of jobs has been created.⁶⁹ This entails verification that all of the business plan's commitments have been kept, especially the actual expenditure of project funds.

For example, if the amount of the actual construction expenditures is less than the amount set forth in the I-526 business plan, fewer jobs are likely to be validated and thus, some of the I-829 petitions could be at risk of denial, unless the project has a sufficient job cushion.⁷⁰ At the individual level, USCIS' main focus is whether the immigrant investor has sustained his investment in the project and the investment continues to be at risk.

If the I-829 is approved, unconditional permanent resident status is granted and a permanent green card is issued.⁷¹ The immigrant investor may permanently live and work in the U.S. The conditional visa period counts towards the five-year residency requirement for U.S. citizenship.

⁶⁵ The various project level documents, including the organizational, transaction and investor documents, are furnished to the investor by the Regional Center.

⁶⁶ See discussion in Regional Center section at page ___ infra. (Regional Center vs. NCE vs. JCE)

⁶⁷ Form I-485

⁶⁸ The green card remains in effect if the holder files the I-829 petition within 90 days of the visa's expiration. <http://www.uscis.gov/green-card/after-green-card-granted/conditional-permanent-residence>. This is 21 to 24 months after the date of the conditional visa.

⁶⁹ Technically, USCIS requires that the investor demonstrate that the assumptions and estimates presented as inputs to the job creation model have been realized or can be expected to be realized within a reasonable time.

⁷⁰ See the discussion re the calculation of the job cushion in the Capital Stack discussion at page ___.

⁷¹ The I-829 petition may be denied for various reasons including, the failure to create sufficient jobs or the investment not being sustained and at risk. In any case, an immigrant whose I-829 petition is denied is subject to deportation. Thus, even if a project is successful economically, a risk exists that the I-829 petition might be denied. In order for the I-829 to be approved, the investment must continue to be at risk and sustained. This includes that the investment must still be outstanding. Thus, as of the time of the I-829 decision, the investor is not likely to know whether he will recover his investment. As discussed below, the investor's derivative family members will be entitled to apply for a visa based on the investor's EB-5 investment.

From start to finish, this two-step application process with visa issuance typically takes 4 to 5 years. Below is an estimated timeline for each step of the process.

I-526 application – adjudication process ⁷²	12 months
I-485 interview and conditional visa issued	3 to 6 months
Time lapse before eligible to file I-829	21 to 24 months
I-829 application - adjudication process ⁷³	<u>8 months</u>
Total	more than 4 years

This immigration process timeline must be distinguished from the expected time frame for the immigrant to recover his EB-5 capital investment. Generally, under USCIS “at-risk” rules, the investor’s recovery of capital cannot occur before the approval of the I-829 petition. Furthermore, the timing of this “exit” depends on the terms of the investment, as well as the JCE’s liquidity and ability to repay the loan or distribute the equity.⁷⁴ However, in reviewing the investor’s visa petition, USCIS does not consider the likelihood of whether the investor will recover his investment or the extent of his financial return on the investment.⁷⁵

On a quarterly basis, USCIS publishes the average time frames for the agency to process various types of applications under the Program.⁷⁶ These average time frames have varied widely over recent years, and even from month to month.⁷⁷

The immigration law places an annual cap of 10,000 on the number of conditional visas that may be issued under the EB-5 Program. The EB-5 visa is available, not only to the investor, but also to his or her spouse and their unmarried children under the age of 21 (“derivative family

⁷² As of October 31, 2014, the average time frame for the processing of an I-526 petition was 14.7 months. https://egov.uscis.gov/cris/processingTimesDisplay.do;jsessionid=dfb3cqlcGbR2L_ZoVmePu

⁷³ As of October 31, 2014, the average time frame for the processing of an I-829 petition was 8.6 months. https://egov.uscis.gov/cris/processingTimesDisplay.do;jsessionid=dfb3cqlcGbR2L_ZoVmePu

However, average processing times vary from month to month. Expedited processing can be requested. <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-inquiries>

⁷⁴ As discussed in the Capital Stack section of this paper, the investor is likely to recover his capital earlier if the EB-5 capital is deployed as a loan rather than as equity.

⁷⁵ The USCIS website provides that “approval of an EB-5 Regional Center application does not in any way constitute USCIS endorsement of the activities of that Regional Center; guarantee compliance with U.S. securities laws; or minimize or eliminate risk to the investor.” <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers>

⁷⁶ USCIS’ published average processing times are somewhat misleading. For example, the I-924 processing time applies to original I-924 applications, including those based on a hypothetical projects as well as on exemplar filings, and I-924 amendments which includes project preapproval. The level of review for these various applications varies. An original application based on an exemplar will take longer than one based on a hypothetical. Similarly, the amendment review and decision-making process should take a shorter time period because the amendment involves only an isolated issue. The I-526 time frame is also misleading. The time frame depends in part on whether the project was preapproved. If a project preapproval was not issued for the project, then USCIS treats the first I-526 petition filed as an exemplar and determines whether the project meets USCIS approval. If USCIS approves the project, then this project level approval generally applies to other I-526 petitions filed for that project, unless a material change occurs, such as to the business plan.

⁷⁷ For example, as of October 31, 2014, the average time to process an I-829 petition was 8.6 months, while as of May 31, 2014, the average time was 15.1 months.

members”).⁷⁸ The annual limit applies to the investor and his derivative family members.⁷⁹ Thus, if the average number of derivative family members was 1.5 to 2 per investor, only 3,000 to 4,000 visas could be issued per year to investors.

In addition, an annual per country visa limit applies. No more than 7.1% of all EB-5 investor visas can be issued to one single nationality. However, if the 10,000 annual cap has not been reached, the differential can be reallocated.⁸⁰ During fiscal year 2013, more than 85% of the EB-5 visa applicants were from mainland China.⁸¹

For the first 24 years of the Program, these quota limits had never been reached. However, as a consequence of the increase in the number of visas sought, the U.S. State Department announced in August 2014 that the issuance of new EB-5 visas to Chinese applicants would be frozen (“retrogress”) until the start of the Federal government’s ensuing fiscal year on October 1, 2014.⁸²

Based on the current caseload, as well as the increasing demand by Chinese investors, many immigration law experts anticipate that Chinese retrogression will reoccur sometime during the spring or summer of 2015.⁸³ At some point, this may result in a backlog that will extend for more than the current year. Although USCIS will continue to process and approve I-526 petitions submitted by Chinese investors, after obtaining I-526 approval, a Chinese investor would not be able to proceed to the interview stage. Thus, this would likely delay the conditional visa’s issuance, as well as the processing and approval of the I-829 petition and the permanent visa’s issuance. This could result in the expiration of more than five years from the adjudication of the I-526 application. The typical EB-5 loan term is five years. Consequently, the investor’s recovery of his investment might be delayed because the investment must remain at risk until at least the I-829 petition is approved.⁸⁴ A more detailed analysis of retrogression is beyond the scope of this paper.⁸⁵

⁷⁸ The visas of the derivative family members are based on the single \$500,000 investment by the “investor”. They are not required to make any additional investment. Thus, the USCIS data on petitions filed, approved or denied does not reflect the potential visas to be issued to the family members. <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor-process>

⁷⁹ INA section 203.

⁸⁰ INA section 202(a)(2)

⁸¹ <https://iiusa.org/blog/research-analysis/quarterly-retrospective-january-issue-regional-center-business-journal/>

⁸² <http://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/China%20Employment%20Fifth%20Preference.pdf>

⁸³ See for example, <http://blog.klaskolaw.com/2014/11/06/surviving-and-thriving-in-times-of-eb-5-quota-backlogs/>

⁸⁴ USCIS has not issued formal guidance by regulations or otherwise as to whether the repayment of a loan by the JCE to the NCE before the investor becomes an unconditional permanent resident violates the “at risk” or sustained investment rules relating to an immigrant’s capital investment. It may be argued that mere repayment by the JCE to the NCE (as distinguished from a distribution by the NCE to the immigrant investor) should not cause the capital invested by the immigrant investor in the NCE to no longer be at risk or sustained. For example, depending on the NCE’s LLC Operating Agreement (or similar agreement), the NCE manager controls the timing of the distribution of the funds to the investors, and may have to right to reinvest the proceeds. Furthermore, until distributed, the funds are subject to the claims of the NCE’s creditors, and thus at risk. A related issue is whether the loan agreement terms permit the loan to be repaid by the JCE prior to the I-829 approval or unconditional visa issuance. Any further discussion of this is beyond the scope of this paper.

⁸⁵ For example, retrogression would also have a major impact on derivative family members who are approaching age 21. Due to delays in the issuance of the conditional visa, these children may “age out” of the Program and not

Moreover, the growing trend of developers utilizing EB-5 capital for large-scale projects, which in several cases includes 400 to 800 EB-5 investors per project, is likely to have a significant impact upon the annual quota.⁸⁶ If a project with 500 EB-5 investors were to have an average of two family members per investor seeking a visa, then a single project alone might theoretically absorb 1,500 visas, or 15% of the total number of EB-5 visas allotted for a particular year. Thus, if only two large-scale projects had I-526 petitions being processed during the same year, the two projects might absorb approximately 30% of the total EB-5 visa allocation for that particular year.⁸⁷

Pending Federal legislation would alleviate this problem. One proposal counts only the investors, and not their family members, to determine whether the 10,000 annual quota has been reached. If this or similar legislation were enacted, the number of visas that could be issued under the Program would be dramatically increased.⁸⁸ In addition, the legislation would eliminate the per-country quota. This would likely result in a substantial increase in foreign investment capital flowing into the United States and create a substantial number of new full-time jobs for American workers.⁸⁹

II CAPITAL STACK

Regional Center

Background

As previously discussed, if a developer's project is affiliated with a Regional Center, then the EB-5 job creation requirement may be met by counting indirect jobs in addition to direct jobs.⁹⁰ The inclusion of indirect jobs typically yields a dramatic increase in the potential size of the EB-5 capital raise.⁹¹ While the main benefit conferred by Regional Center status is the ability to count indirect jobs, two other important benefits result. First, an economic model can demonstrate job creation. Otherwise, detailed data and records are required to prove actual job creation. Second, the EB-5 investors' pooled proceeds could be deployed as a loan to the project

be eligible for a visa. "The Impact of Chinese Quota Retrogression on EB-5 Investors and EB-5 Investments", IIUSA 2012, by Tamy Fox-Isicoff and Ronald Klasko; <http://blog.klaskolaw.com/2014/01/20/faqs-on-eb-5-quota-backlog/>; <http://blog.klaskolaw.com/2014/11/06/surviving-and-thriving-in-times-of-eb-5-quota-backlogs/>

⁸⁶ Some examples include Related's Hudson Yards – 1,200 investors; SLS Las Vegas - 768 investors; Silverstein's Four Seasons Hotel in Tribeca - 498 investors; Forest City Ratner's Atlantic Yards' Phase I - 400+ investors and Phase II and Phase each anticipates 498 investors.

⁸⁷ Visa number allocation is determined based on the date of issuance of conditional visas, not the date of approval of the I-526 petitions.

⁸⁸ Senator Patrick Leahy (D VT), [S 744](#) "Border Security, Economic Opportunity, and Immigration Mobilization Act"; Rep. Jared Polis (D CO) and co-sponsors Rep. Matt Salmon (R AZ), Rep. Joe Garcia (D FL), and Rep. Mark E. Amodei (R NV), [HR 4178](#), "American Entrepreneurship and Investment Act of 2014"; Rep. Darrell Issa (R CA), [HR 2131](#), "Supplying Knowledge-Based Immigrants and Lifting Levels of STEM Visas Act" (also known as the "Skills Visa Act")

⁸⁹ Assuming the number of investors who could obtain EB-5 visas were increased from 3,000 to 10,000, (the) 7,000 additional investors per year would result in a minimum of \$3,500,000,000 additional EB-5 capital (7,000 x \$500,000) and 70,000 new jobs (7,000 x 10 jobs per investor).

⁹⁰ 2013 Policy Memorandum at page 19; 8 C.F.R. §§204.6(m)(1), (7)

⁹¹ See the "Size of the capital raise" section beginning at page ____.

entity. If the EB-5 investors invest directly in the project, the capital must be deployed as equity.

The Regional Center concept was not part of the original EB-5 legislation enacted in 1990. However, it soon became apparent that few businesses could generate a sufficient number of direct jobs to support a large EB-5 capital raise necessary to make the Program meaningful. In response, Congress expanded the type of jobs that may be counted by adding the Regional Center concept as a pilot program in 1992.⁹² Congress has extended the life of this program numerous times.⁹³

The current three-year extension expires in September 2015.⁹⁴ Extension is anticipated despite the fact that it is related to the controversial comprehensive immigration reform legislation.⁹⁵ The Program is perceived to create jobs. In addition to the obvious support of the real estate lobby, influential public figures, such as Bill Gates, Warren Buffet and Sheldon Adelson strongly support the Program.⁹⁶

The term “Regional Center” sometimes creates the mistaken impression that it is a governmental or quasi-governmental unit. Similarly, names of certain Regional Centers that contain the name of a city or State, such as the New York City Regional Center, the EB-5 New York State Regional Center or the Vermont Regional Center, might suggest that the Regional Center is the exclusive center for a particular geographic area. However, the promoters of the Regional Center select the name, presumably aimed to attract foreign investors. The Regional Center is simply a business entity (public or private) that promotes and coordinates foreign investment in a defined geographic area within the EB-5 legal framework.⁹⁷

Only a few Regional Centers have direct government involvement at the state or local level.⁹⁸ A Regional Center does not hold exclusive jurisdiction over a particular geographic region. Many geographic areas have multiple Regional Centers which can make investments anywhere in that region.⁹⁹ Some Regional Centers operate in more than one state. The same Regional Center can sponsor an unlimited number of projects.

The meteoric growth in the number of Regional Centers from 2007 to 2014 mirrors the growth of the industry. In 2007, only 11 Regional Centers existed.¹⁰⁰ That number mushroomed to 601 as of December 1, 2014.¹⁰¹ Many more Regional Center applications are currently pending before USCIS.

⁹² Section 610 of Public Law 102-395 (October 6, 1992)

⁹³ When Congress extended the program in 2012, it renamed the program the “Regional Center Program” and eliminated the term “Pilot”. Public Law 112-176 (Sept. 28, 2012)

⁹⁴ Footnote 92

⁹⁵ In 2012, the Regional Center Program was reauthorized by unanimous consent in the U.S. Senate and by a vote of 412-3 in the House of Representatives. S. 3245 <https://www.govtrack.us/congress/bills/112/s3245>

⁹⁶ http://www.nytimes.com/2014/07/11/opinion/sheldon-adelson-warren-buffett-and-bill-gates-on-immigration-reform.html?_r=0 “Break the Immigration Impasse” by Sheldon Adelson, Warren Buffett and Bill Gates, NY Times, 7/10/2014

⁹⁷ 8 C.F.R. section 204.6(c)

⁹⁸ Examples include Vermont, Hawaii, Michigan, Iowa, and Miami.

⁹⁹ <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers>

¹⁰⁰ EB-5 Immigrant Investor Program Stakeholder Engagement, 12/05/2014

¹⁰¹ <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers>

However, many Regional Centers have not sponsored a single project resulting in an EB-5 capital.¹⁰² This could be due to advantages well-seasoned Regional Centers possess to attract developers and foreign investors, as well as the complexity and the lengthy immigration process that discourages some Regional Centers and developers.

The EB-5 Program imposes few requirements or standards upon Regional Centers. Neither the Regional Center's owners nor its executives are required to possess any special qualification, educational background or investment experience. No minimum staff size is set. No minimum net worth or capital is required for the Center's ownership or operations. Neither an accounting audit nor other financial oversight is required.¹⁰³

The Regional Center must file a basic annual return, Form 924A, with USCIS, but no independent verification is required. The form requires disclosure of a limited amount of information about the EB-5 capital raised, jobs created and investor petitions. This information is generally not project specific. Thus, the filing presents an opaque view of the Center's operations.¹⁰⁴

Regional Center vs. NCE vs. JCE

The investor does not invest in the Regional Center. Instead, he "associates" with the Regional Center by investing in a project that the Regional Center sponsors or arranges. Technically, the EB-5 investor invests in the NCE. That investment must be equity capital, not debt. In turn, the NCE must invest all of that capital in the JCE.¹⁰⁵ However, the NCE's investment may be a loan or equity.¹⁰⁶

The EB-5 investor's contribution to the NCE must be "at risk". According to USCIS, the investor must actually place his capital at risk "for the purpose of generating a return".¹⁰⁷ Thus, the investor cannot be guaranteed a return *of* his investment or a return *on* his investment. Similarly, the investment cannot be subject to a right of redemption.¹⁰⁸ The NCE must invest all of the EB-5 proceeds in the JCE. The NCE may not use the proceeds for any other purpose, such as the payment of migration agents or reimbursement of costs or expenses to the Regional Center.¹⁰⁹

In the case of a loan to the JCE, the NCE makes the loan, not the investors. It might seem contradictory that the NCE can use the EB-5 investors' capital to make a loan that the investors could not make directly. However, this is analogous to investors in a private equity real estate

¹⁰² According to IIUSA _____ footnote to website

¹⁰³ Note however that at least one Regional Center, the Vermont Regional Center, requires the audit of its projects. <http://vtdigger.org/2014/10/13/patricia-moulton-vtdiggers-eb-5-story-inaccurate/>

¹⁰⁴ See I-924 instructions: <http://www.uscis.gov/sites/default/files/files/form/i-924ainstr.pdf>

¹⁰⁵ 8 C.F.R. § 204.6(e). If the NCE is the job creating enterprise, then a separate JCE is not required. May 2013 PM at page 18.

¹⁰⁶ Technically, if the ultimate investment by the NCE is equity, rather than debt, then the NCE and JCE could be the same entity. In that case, the immigrant investors could invest directly in the entity, which is technically an NCE and JCE. In contrast, if the NCE is making a loan to the JCE, then the NCE and JCE are separate entities. The NCE is the lender and the JCE is the borrower. The investor's equity investment will be in the NCE, which uses the proceeds to invest in the JCE. As a lender, the NCE would not have an equity interest in the JCE, except in the unlikely event where the lender is also an equity investor.

¹⁰⁷ May 2013 PM at page 5

¹⁰⁸ Matter of Izummi, footnote ____; May 2013 PM at page 5.

¹⁰⁹ This is in contrast to the use of the administrative fees paid by the EB-5 investors.

debt fund; the fund deploys its investors' equity proceeds as the source of funds for a loan or other debt investment.¹¹⁰

Although the recovery of the investor's contribution in the NCE cannot be guaranteed, the repayment of the NCE's loan by the JCE or a third party can be guaranteed.¹¹¹ The Program respects the separateness of the two entities (the NCE and the JCE). The EB-5 restrictions that apply at the investor-NCE level do not generally apply at the NCE-JCE level.

For example, the Lightstone New York Regional Center ("Lightstone RC") is a recently designated developer "in-house" Regional Center for the Lightstone Group, a New York City based real estate developer ("Lightstone"). Lightstone Regional Center's first project is a mixed use, primarily residential development in Brooklyn, New York. Lightstone Regional Center structured the EB-5 capital investment in the JCE as a mezzanine loan in the approximate amount of \$60 million. David Lichtenstein, a principal of Lightstone, is personally guaranteeing repayment of the loan by the JCE to the NCE.¹¹² If, instead, the NCE (or anyone else) guaranteed repayment of the immigrant investors' contributions, this would violate the EB-5 "at-risk" rules, presumably resulting in the USCIS's denial of the application.

The Regional Center (which directly or indirectly controls the NCE) and project developer determine whether the investment in the JCE will be structured as a loan or as equity, and negotiate the terms of that investment. The investment terms are reflected in the offering documents that are marketed to potential investors, who obviously weigh these terms in deciding in which project to invest.

Under the more common loan model, the third party Regional Center forms a NCE that makes a loan to the JCE. The loan could be secured by a first or junior mortgage against the property, secured by equity interests (mezzanine financing), or even unsecured. This topic will be discussed in the Capital Stack section of this paper.

Simply stated, the NCE makes a loan to the JCE where the third- party Regional Center (or often its principals, affiliates or other related parties, referred to as "affiliates") acts as a "middleman" between the investors and the developer, utilizing the investors' capital as the loan proceeds. At the loan closing, the JCE pays origination fees or points to the Regional Center or its affiliates. Periodically, during the loan term, the JCE makes interest only payments to the NCE, with the entire principal balance paid at maturity.

The JCE pays an amount equal to the total of the interest payable to the immigrant investors, the migration agent and other brokerage fees, and a management fee to the NCE's manager. This total amount is typically paid to the NCE for distribution to the appropriate parties. Alternatively, the JCE could directly pay the fees. Similarly, the total amount due from the JCE can be embedded in a single interest rate that covers all of these fees and expenses, or the amounts can be separately stated.

In addition, the Regional Center or affiliates can generate a profit on the spread equal to the difference between the interest rate charged to the JCE, and the total of the interest rate and

¹¹⁰ See for example,

https://www.preqin.com/docs/newsletters/re/Preqin_RESL_Nov_2012_Growth_of_Real_Estate_Debt.pdf

¹¹¹ It would seem that the same analysis should apply to a mandatory redemption by the JCE to occur as of a certain date. This should be viewed as the equity equivalent of the obligation of the JCE, as borrower, to repay the NCE's loan.

¹¹² See Lightstone's EB-5 website: www.lightstoneeb5.com (insert pdf). This structure was discussed by telephone with Meir Milgraum of the Lightstone Group on November 20, 2014.

fees referred to above. (The preferred equity structure has some similarities to the loan structure, as will be discussed below.)

Third party Regional Center vs. developer “in-house” Regional Center:

If a developer contemplates the inclusion of EB-5 capital in its capital stack for the first time, it has two basic options: the developer can either enter into an agreement with an existing, unrelated third party Regional Center¹¹³ or form its own “in-house” Regional Center.

Many developers are tempted to form their own Regional Center to access inexpensive EB5 capital, and to bypass the unrelated third party Regional Center as middleman. The developer seeks to avoid many of the fees and costs imposed by the third party Regional Center and its NCE, including the interest rate spread, points and management costs. The developer that controls its own Regional Center (and NCE) essentially loans the investors’ funds to itself (its related JCE). Typically, principals related to the developer JCE will manage the NCE.

The third party Regional Center’s profit sources are limited to the upfront administrative fees paid by the investors, as well as revenues related to the loan, such as points, management fees and any interest rate spread.¹¹⁴ Obviously, the developer has an additional, and much more substantial, profit center available - namely, the project. Thus, the developer that forms its own Regional Center uses this vehicle as the means to achieve an end - accessing cheap capital. In contrast, the third party Regional Center uses its status to operate an ongoing business.

The total costs and fees to form a Regional Center, as well as to prepare and process the I-924 Application to be designated a Regional Center, typically range from \$100,000 to \$200,000.¹¹⁵ Most of these costs are relatively the same, irrespective of the initial project’s size. These costs can be more easily absorbed in the case of larger EB-5 capital raises, or the developer anticipates that it will utilize the Regional Center for multiple projects.

For example, consider an EB-5 capital raise of \$200 million. The \$200,000 total cost represents less than 1/10th of 1% of the capital raise. The fees earned by the Regional Center from a single EB-5 loan transaction can dwarf that cost. The origination fees or points equal to 1% represents \$2 million; annual management fees equal to 2% represent \$4 million; and 100 basis points (1%) of interest rate spread charged by the Regional Center or NCE equals \$2 million per year.

Whether the developer waives the management fee or essentially pays the fee to itself, the developer saves the fee that would be payable to the manager of the third party Regional Center, offset by any staff costs it incurs to perform these services. In addition, the developer incurs fees charged by the migration agents and brokers, whether or not it utilizes a third party Regional Center and the Center’s network of agents, or the developer contracts with the agents directly. However, the amount of these brokerage fees in these alternative arrangements may differ.

¹¹³ The preliminary agreement between the Regional Center and the developer is reflected in a term sheet, Letter of Intent (LOI) or Memorandum of Understanding (MOU) that sets forth the basic terms and conditions of the arrangement. Alternatively, a commitment letter can be issued by the Regional Center.

¹¹⁴ The interest rate spread is discussed in the Capital Stack section below

¹¹⁵ <http://www.eb5investors.com/qa/how-much-does-it-cost-to-establish-an-eb5-regional-center2>

Nevertheless, most developers ultimately elect to affiliate with an existing Regional Center for several reasons.¹¹⁶ First, the existing Regional Center saves the time and expense of forming a Regional Center so that investors can be solicited and their funds utilized in an accelerated time frame. Second, the experienced Regional Center more quickly locates suitable foreign investors through its network of migration agents that have an existing base of potential investors. Third, the Regional Center provides oversight responsibility of the EB-5 immigration process, and assistance of the investors and their counsel, as they proceed through the USCIS process.¹¹⁷

Legal structure of the various entities:

Although the Program does not require any specific type of legal entity, an NCE is formed as either a limited partnership (LP) or a limited liability company (LLC). Despite the LLC being the predominant form of entity ownership for commercial real estate projects in today's real estate market, NCEs are more often formed as LPs. The main reason for this is due to an USCIS interpretation that specifically approves the LP format. However, many NCEs are formed as LLCs because they are able to meet the same standard.¹¹⁸

Thus, the EB-5 investors in the NCE are either limited partners in the LP or members of the LLC. Typically, a general partner (GP) manages the NCE if the NCE is an LP; or a manager manages the NCE if the NCE is an LLC. The GP or manager (referred to as "manager") is typically a principal of, or otherwise related to, the Regional Center (or the developer) and does not contribute any equity to the LP.¹¹⁹ The manager is paid a management fee. The manager's duties include handling the daily affairs of the NCE (which are limited), coordinating between the Regional Center and the JCE, answering the investors' questions, communicating with the escrow, and taking care of other investor relations' responsibilities.¹²⁰

Regional Center application process

To qualify as a Regional Center, the entity must obtain a designation (approval) from USCIS. Filing Form I-924, the Application for Regional Center, initiates the process. Many professionals, including an economist, EB-5 business plan writer, and lawyers (immigration, corporate and securities, as well as real estate), prepare the application and related documentation. The time frame to prepare the application, and have it processed by USCIS, varies. Even though the processing time for some recent applications has taken as little as four months, it is still not unusual for the process to take up to a year.¹²¹

¹¹⁶ See page 33 for the list of the many services that a Regional Center may provide to the developer and the investors.

¹¹⁷ Only a small percentage of the Regional Center members of IIUSA, the trade association for Regional Centers, are developer "in-house" Regional Centers. The IIUSA members include most of the Regional Centers with active projects.

¹¹⁸ 2013 Policy Memorandum at page 12.

¹¹⁹ However, the manager might own equity in the JCE.

¹²⁰ A developer that operates or manages a private equity fund or REIT will have investor relations' experience. Thus, this may be a factor in the developer's willingness to form its own Regional Center.

¹²¹ As of April 30, 2014, the average processing time was 4.4 months, while the average processing time as of October 31, 2014 was 9 months. USCIS insert

The Regional Center application must relate to a particular project. A major variable affecting the time frame for preparing and processing a Form I-924 pivots on whether the Regional Center seeks pre-approval of an actual project (an “exemplar project”) as part of the application or merely describes a project in more general terms (a “hypothetical project”).¹²²

If the I-924 application relates to a hypothetical project, with only general information about the project (and general predictions about job creation, the economic model, the business plan and offering documents), then the USCIS designation and approval attaches solely to the Regional Center designation.¹²³ When the individual investors submit the I-526 petitions, the project portion of the application will be determined.

However, if the I-924 application includes a sample I-526 petition for an individual investor, together with more detailed information about a specific project (including the actual offering documentation, business plan, economic model and other project specific documents), then the application receives a more in-depth review to determine if the package complies with the EB-5 requirements.¹²⁴ This is referred to as an “exemplar filing” or an “exemplar form I-526 petition”. If the exemplar is approved as part of the I-924 process (known as “project preapproval,”) the project level determination will generally be followed (“accorded deference”) by the USCIS adjudicators who will later review the individual investors’ I-526 petitions.¹²⁵

Project preapproval provides a marketing advantage to the Regional Center and developer. The investors gain the comfort of knowing that USCIS has scrutinized the project and issued a favorable determination concerning compliance with the Program’s requirements, especially the job creation methodology and the number of jobs to be created.

However, many Regional Center applicants choose to tie the I-924 application to a hypothetical project. The hypothetical project route saves time at this stage because the USCIS designation approval process is streamlined.¹²⁶ Furthermore, the exemplar filing with the I-924 delays the filing and processing of the individual investors’ I-526 petitions. Also, in some cases, despite the project preapproval, USCIS does not accord deference to the project¹²⁷. For example, if upon the filing of the I-526 petition by the individual investor, USCIS determines that there has been a material change in the business plan (which obviously sometimes happens in new construction) or economic model, it may revoke the project preapproval and require a de novo review of the project based on the new facts. Thus, some developers choose not to devote the time and money to seek project preapproval.

¹²² 2013 Policy Memorandum at page 14.

¹²³ 2013 Policy Memorandum at page 14.

¹²⁴ The exemplar contains the same project level information (including the specific business plan, economic report, transactional and investor documents) that would be included in the individual investor’s I-526 petition (but it does not include information specific to a particular investor, such as the source of funds).

¹²⁵ May 13 2013 PM, pages 14 and 15.

¹²⁶ However, the processing time for the I-924 designation with project preapproval for the Lightstone Regional Center approved on September 18, 2014 took approximately seven months from its application date of February 6, 2014. See Lightstone Regional Center designation letter. <http://lightstoneeb5.com/wp-content/uploads/sites/9/2014/10/Lightstone-NY-Regional-Center-Approval-Letter.pdf> As an alternative to an exemplar or hypothetical project, USCIS allows an I-924 to be accompanied by an actual project but with less information than required for an exemplar. This type of filing could be accorded some deference, but not to the same extent as an exemplar filing.

http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED-EB5-QA_022614.pdf Question and Answer #8

¹²⁷ 2013 Policy Memorandum

The Lightstone RC designation application, referred to above, includes an exemplar filing for a particular project. The USCIS designation letter included the project's preapproval. The letter reveals details about the project, including the capital structure and number of jobs to be created, that would not otherwise be made publicly available by USCIS. Many Regional Centers post a copy of the USCIS designation letter on their websites.¹²⁸ Although a designation letter issued in response to an application, coupled with an exemplar filing, provides information about the Regional Center's initial project, public information is not made readily available with respect to the Regional Center's future projects.¹²⁹

In the case of future projects, the Regional Center can decide, on a project-by-project basis, whether to pursue project preapproval. It can seek a preliminary determination of project preapproval by filing an amendment to the Form 924 with an I-526 exemplar prior to the filing by individuals' I-526 petitions.¹³⁰ Alternatively, project approval can be deferred, and sought when the first individual investors files his I-526 petition for the project.

Furthermore, the amount of information set forth by USCIS in project preapproval letters varies. For example, in 2008, the New York City Regional Center was approved and designated as a Regional Center, without an exemplar filing. However, in 2010, this Regional Center filed an amendment to its designation to seek project preapproval of the Atlantic Yards project in Brooklyn, New York.¹³¹ There, USCIS issued a letter approving the project but did not include any facts or details about the project, job creation or capital structure.

Thus, the type of project level information revealed in Lightstone Regional Center's USCIS determination letter does not appear to be common.¹³² If that level of information were available with respect to all EB-5 projects, a much more reliable database could be developed.

The main factors considered by USCIS in reviewing the Regional Center application include the geographic region covered by the Regional Center;¹³³ how the proposed activity will promote economic growth in that area; specific industry types for the projects to be sponsored; verifiable detail about how jobs will be created; and the specific type of economic model that will be utilized.¹³⁴

¹²⁸ See, for example, the Regional Center designation letter for each of the following Regional Centers: CanAm, Silverstein and EB-5 Capital. Also, IIUSA has obtained a copy of all designation letters as of 2013 pursuant to a FOIA request it filed. **2x with Lee at IIUSA re sharing and also whether it has project preapproval letters**

¹²⁹ Obviously in the case of a designation letter based on a hypothetical project, virtually no project information is revealed.

¹³⁰ <http://www.uscis.gov/sites/default/files/files/form/i-924instr.pdf> at page 1, 2B.

¹³¹ <http://ebfive.files.wordpress.com/2013/05/new-york-city-rc.pdf> This heavily-publicized project received an EB-5 loan of \$228 million for Phase 1 from the New York City Regional Center. An EB-5 loan of approximately \$250 million is part of the capital stack for each of Phase 2 and Phase 3. However, these loans will be funded through a different Regional Center, USIF.

¹³² Another example of a recent approval that provides substantial information about the project, including job creation estimates, relates to the amendment filed for the Golden Gate Global Regional Center. This involves project preapproval of a portion of the first phase of the multi-phased redevelopment of Candlestick Park in San Francisco by the public homebuilder Lennar Corp. This is discussed further in the Project Factors section on page _____. Here is a link to the letter: http://sfbarc.com/wp-content/uploads/2014/01/Amended-Approval_San-Francisco-Bay-Area-Regional-Center_ID1031910162_RCW1126350317.pdf

¹³³ The geographic region must be contiguous. See Instructions to Application of Regional Center at page 1.

¹³⁴ Instructions to I-924 Form <http://www.uscis.gov/sites/default/files/files/form/i-924instr.pdf>. The industry types are referenced by the applicable NAICS industry code.

The USCIS does not delineate the specific services that must be provided by a Regional Center. Many Regional Centers are “full service”. They provide the following services:¹³⁵ overseeing the marketing and solicitation of investors by migration agents and other brokers; obtaining subscription agreements and funds, as well as escrow agreements (if applicable) from the investors; overseeing immigration compliance, including coordination of the investors’ USCIS applications; monitoring direct jobs; tracking capital investment into the job-creating enterprise; and monitoring compliance with the construction spending and operating revenues that serve as the basis for the business plan and the economic impact report. Either a third party Regional Center or a developer’s in-house Regional Center can provide these services.

Renting a Regional Center

Renting a Regional Center is another increasingly common alternative available to a developer.¹³⁶ The rental of an existing Regional Center has been mentioned in news articles, but it is difficult to determine how many rentals exist as this information is not tracked, at least publicly, by USCIS.¹³⁷

When a developer rents a Regional Center, it enters into an agreement to utilize the Center’s designation, typically for a specific project. USCIS does not provide any rules governing the rental agreement between a developer and an existing Regional Center. The rental fee structure might be a fixed fee or based on a percentage (such as a percentage of the total EB-5 capital raised). The agreement provides the scope of services, if any, that the Regional Center will furnish to the developer (such as coordination of overseas marketing of developer’s project).

The developer’s objective in renting a Regional Center is to avoid the time and expense to seek designation as an “in-house” Regional Center, yet obtain comparable benefits by bypassing the middleman.¹³⁸ Presumably, the rental agreement will permit the developer to utilize the Regional Center’s designation and thus, gain the various advantages that apply to a Regional Center, including the right to count indirect jobs, and form a NCE, which can make a loan to the JCE.

Although the third party Regional Center and the rental version are both unrelated to the developer, the potential Regional Center inclined to enter into a rental arrangement is different from a Regional Center that typically sponsors a developer’s project. Many of the existing Regional Centers have never been involved in a successful capital raise.¹³⁹ These relatively inactive Regional Centers might be inclined to consider renting their designation to generate

¹³⁵ See IIUSA Best Practices for EB-5 Regional Centers <http://iiusa.org/blog/wp-content/uploads/2013/11/IIUSA-Best-Practices-for-EB-5-Regional-Centers.pdf>; <https://iiusa.org/en/eb-5-regional-center-investment-program/>; also see <http://visaeb-5.com/for-developers-2/>

¹³⁶ A less popular alternative is the purchase of a Regional Center. http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED-EB5-QA_022614.pdf see Question and Answer #1.

¹³⁷ See, e.g., “More NYC developers tap cheap EB-5 capital”, The Real Deal, by Guelda Voien November 1, 2013. <http://therealdeal.com/blog/2013/11/15/more-nyc-developers-tap-cheap-eb-5-capital/> However, in a telephone conversation on November 25, 2014, in response to our questions, Nick Mastrionni II of the US New York Immigration Fund (USIF) informed us that this article mischaracterizes as rentals the two Durst EB-5 capital projects that his Regional Center is sponsoring. USIF is providing typical services to the JCE for these two projects.

¹³⁸ See page ___ re cost savings of developer “in-house” Regional Center

¹³⁹ IIUSA citation...

revenue. In contrast, a well-established Regional Center that is sponsoring other projects will generally not be interested in entertaining a rental arrangement. The developer's acts or omissions could expose this Center to liability (securities laws and otherwise) and could damage its reputation, which would pose a greater deterrent to a thriving Regional Center.

Thus, the rental of a Regional Center could be viewed as a hybrid type of Regional Center combining aspects of a developer's own Regional Center and a third party Center. Like the developer's own Center, the developer that rents a third party Regional Center handles all aspects of the process, except those to be furnished by the Center pursuant to the rental arrangement. Most importantly, the developer establishes the investment terms between the NCE and JCE because it controls both entities. Like the unrelated Regional Center, which sponsors a developer's project, the developer's rental of a Regional Center, permits the developer to avoid the lengthy and costly Regional Center formation process.

Administrative fees:

In addition to the minimum required investment, typically \$500,000, the EB-5 investor also pays a one-time, upfront administrative fee to the Regional Center. The amount of the fee ranges, but reportedly, fees in the range of \$40,000 to \$60,000 are common.¹⁴⁰ These fees, unlike the investment contribution, are often not paid into escrow,¹⁴¹ but instead are paid and released directly, to the Regional Center.

The Regional Center can use this administrative fee to pay a variety of expenses, including fees of the migration agent in the investor's home country, and fees of other brokers involved in the transaction. The Center retains the balance. Presumably, this will defray the Center's costs of forming and staffing ("overhead and profit"). In contrast, the entire amount of the EB-5 capital contribution must be invested in the JCE.¹⁴² Furthermore, the investor's capital account is limited to his capital contribution of \$500,000. Thus, upon a successful exit from the NCE, the investor will recover his \$500,000 investment, but no part of the administrative fee. Similarly, his return on the investment is based only on the \$500,000 investment.

Factors that Make Certain Projects More Suitable for EB-5 Capital Investment ("Project Factors")

EB-5 capital is available to fund virtually any commercial real estate asset or property class; including hotels, casinos, assisted living facilities, hospitals, educational institutions, industrial, office, retail, residential (primarily multifamily), and mixed use.¹⁴³

¹⁴⁰ See footnote ___ above

¹⁴¹ See the discussion escrow of EB-5 funds below starting at page ___

¹⁴² Cite USCIS May 2013

¹⁴³ NES Financial is a private company that provides escrow and fund administration for more than 200 EB-5 projects. NES collected data on the product distribution for these projects from 2010 through 2013. 45% of the total EB-5 capital raised for these projects were in the resort, casino or hotel category, and 20% were for mixed use/office. NES Financial, EB-5 Market Data and Industry Trends. April 2014. However, the Large-Scale Project Database attached to this paper illustrates the wider array of large-scale projects that are utilizing EB-5 capital. This could be attributed, in part, to the 2009 Neufeld Memorandum that liberalized the type of construction jobs that count towards job creation. See footnote ____. Even a ferris wheel project is seeking to tap EB-5 capital. The New York Wheel, a 625 foot ferris wheel to be built on the Staten Island waterfront, is seeking to raise \$150 million of EB-5 capital. http://www.silive.com/news/index.ssf/2014/07/newn_york_wheel_gets_financial.html

Nevertheless, certain projects are more suitable for EB-5 capital because they are more readily able to satisfy the job-creation and other EB-5 requirements, as well as to meet the market preferences of foreign investors. The EB-5 investor's goal to obtain the visa and to receive the safe return of his capital investment drives these factors.

Job creation

As previously discussed in the EB-5 Program Overview, job creation is the most important factor. The total number of jobs that the project will create determines the maximum amount of EB-5 capital potentially available to fund a project, as explained further in the Capital Stack section below.

The two main categories of jobs counted for EB-5 purposes are construction activity jobs and operations jobs. All projects can count indirect jobs associated with construction activity. However, only those projects that will take longer than two years to complete are eligible to count both economically direct and indirect jobs associated with construction activity. Obviously, larger projects are likely to require a longer construction period; thus, larger projects are more likely to have more direct jobs associated with construction activity.¹⁴⁴ Projects that can demonstrate a larger job cushion (the creation of more jobs than necessary to support the EB-5 capital raise, as described in the EB-5 Capital Size section of this paper) tend to be more attractive to investors – particularly if project developers have placed a significant amount of their own equity capital “at risk” in the project as well.¹⁴⁵

Only certain types of projects are likely to create many direct operations jobs due to the requirement that the jobs be directly employed by the JCE or that the project's operating agreements meet EB-5 program requirements. Hotels, casinos and resorts can create many direct jobs. These projects have accounted for a sizeable number of large EB-5 projects. Examples of very large recent EB-5 capital raises for hotel construction include the SLS Las Vegas resort, the Four Seasons hotel and luxury condominium in New York City, the Hudson Yards project, and the Los Angeles Marriot project.¹⁴⁶

However, the diverse array of large projects that have tapped EB-5 capital in recent years demonstrates the expansive nature of projects for which EB-5 capital is suitable. For example, in the past few years, “for sale” development projects (as distinct from income producing rental projects) utilized EB-5 capital. This might be attributed to the concern that the sale of the project would generate proceeds that may jeopardize whether the investors' capital remained fully “at risk” for the time period required by the EB-5 law. Apparently, developers have successfully overcome this hurdle. Some recent examples of large projects that include a substantial, if not exclusive, for sale component, include Lennar Corporation's master planned development project in San Francisco with more than 12,000 homes to be built and Silverstein's luxury condominium portion of its Four Seasons project in Manhattan.¹⁴⁷

¹⁴⁴ As explained in the Program Overview section, even if a project is eligible to count direct jobs, it might not be practical due to the EB-5 standards for demonstrating the creation of these jobs.

¹⁴⁵ See the example at page ___ in the Capital Stack section of this paper.

¹⁴⁶ These projects are included in the Large- Scale Projects Database in Appendix A. Actually creating indirect construction activity jobs is easier than creating operations jobs because construction jobs are based on construction expenditures, which are easier for the developer to control than the less predictable revenues to be generated by a project.

¹⁴⁷ These two projects are discussed later in this paper.

Status of property – “shovel ready”

The goal of the EB-5 investor is to obtain a visa as quickly as possible with the least amount of financial risk. Under the Program requirements, to obtain his I-829 approval and unconditional visa, the investor must demonstrate that the required number of jobs has been created, generally within two years¹⁴⁸ of obtaining the conditional visa. To the extent the economic analysis is based on total construction expenditures, the investor must show that the expenditures have been made in accordance with the plan. If project commencement is delayed, the project expenditures will likewise be delayed, thereby jeopardizing the visa approval. Accordingly, the quicker that the project starts and the funds are spent to complete the project, the more likely the I-829 application requirements will be met for removal of the visa conditions and issuance of the immigrant investor’s permanent visa.

Furthermore, the EB-5 investor’s investment motive makes him more risk adverse than the typical US real estate investor who will be seeking a higher rate of return. The foreign investor also tends to be less familiar with the US market generally, as well as with the particular property and its local market. The immigrant investor has virtually no upside potential in the typical EB-5 structure. Thus, the investor negatively views any contingencies or uncertainties that may cause the construction’s commencement to be delayed because that may jeopardize his visa issuance.

Given that many investment opportunities are currently available to an EB-5 investor, the investor tends to be inclined to pursue those projects that are less likely to face delays. Thus, investors disfavor projects that are exposed to entitlement risk, title- closing risk, financing risk or environmental risk. Accordingly, EB-5 investors prefer projects that have either commenced construction or are ready to start construction.

The number of projects available to EB-5 investors is expanding as more developers seek to take advantage of this valuable financing tool. Thus, these investors have more opportunities to invest in projects where the land is already owned by the developer, fully entitled and requires no environmental remediation. Additionally, depending on the circumstances, even if the developer controls the property – by a purchase and sale contract or an option – but does not own fee title to the property, this might be viewed negatively due to the closing date’s uncertainty that may result in a construction delay.

Thus, it is preferable that the developer takes title to the property, obtains all entitlements and resolves environmental matters before the EB-5 investment must be funded. Even if resolution of these issues is a condition precedent to the EB-5 investment, the project presumably will incur less investor resistance if these matters are resolved before marketing commences, to avoid the risk that these issues might cause investors to shift their focus to another investment opportunity that does not pose the same risks.

An example of a project obviously not ripe for marketing to EB-5 investors involves China City of America, a proposed project in the Catskills region of New York. It has been described as “Disney-like but with gambling”.¹⁴⁹

A Chinese émigré, who lives on Long Island, is developing China City. The original plan, filed in 2012, called for a \$6 billion project to be constructed on 2,200 acres. In 2014, after

¹⁴⁸ Two years and 6 months from obtaining the I-526 approval per USCIS. 2013 Policy Memorandum or Neufeld June memo

¹⁴⁹ <http://commercialobserver.com/2014/09/eb-5-ambitious-china-city-project-sits-in-limbo/>

years of local zoning and environmental opposition, the developer divided the project into three phases, with the first phase to consist of a college, as well as student and faculty housing on 575 acres of development.¹⁵⁰ Reportedly, the project aims to raise \$60 million of EB-5 capital, with the balance of the funding to come from a loan and private equity. The Regional Center application has been pending with USCIS since 2011.¹⁵¹ Apparently, the developer has not yet solicited investors, due to either the lack of a USCIS designation or the lack of entitlements to build any portion of the project.

Location of property and type of developers

Until recently, many projects were developed in less urbanized areas by smaller developers. Few large real estate developers utilized EB-5 capital. However, since the Great Recession, more of the larger real estate developers based in major cities are participating in the Program. This trend represents a marked change from the early years of the Program and is likely to continue.¹⁵²

EB-5 investors tend to prefer the Gateway cities,¹⁵³ rather than rural areas, or urban areas in secondary or tertiary markets. They also tend to prefer developers with a successful track record in developing real estate of the same type that is the subject of the potential investment. Arguably, the immigrant investors' general lack of familiarity with the US real estate market and their awareness of the recent scandals involving small developers who obtained EB-5 capital can account for this preference. Major developers likely will have greater experience, staff and capital sources to perform thorough due diligence and market analysis of the project, to obtain commitments from senior lenders and preferred equity sources, as well as the ability to complete the project on budget and on time. A track record of previous EB-5 projects might be helpful as a marketing tool to EB-5 investors. However, a developer's financial strength and demonstrated ability to build large projects is presumably more important to attract many investors, even if the previous projects did not include an EB-5 capital component.¹⁵⁴

Several reasons could support this preference. First, many immigrant investors are not familiar with any geographic areas in the US. However, if they are familiar with any areas, those are likely to include the areas that receive the most publicity and news attention, such as New York City, Los Angeles, Las Vegas and Washington D.C.¹⁵⁵ Second, large projects are more likely to take at least two years to construct and therefore create indirect jobs that count for EB-5 purposes. Third, major developers with successful track records are more likely to complete the projects and thus, not only generate the jobs necessary to support the visa, but also to have funds available to repay the investors.

¹⁵⁰ http://www.washingtonpost.com/business/skepticism-surrounds-china-city-plan-for-upstate-new-york/2014/01/19/dac079de-816e-11e3-8099-9181471f7aaf_story.html

¹⁵¹ <http://www.chinacityofamerica.com/>

¹⁵² By contrast, as of June 2004, no investors in an EB-5 project located in New York had obtained a permanent visa. GAO Report, Table 4, at page 22.

¹⁵³ Gateway cities include New York City, Boston, Washington, D.C., Miami, Los Angeles, San Francisco and Chicago.

¹⁵⁴ If the Regional Center is a developer in-house Regional Center, the developer's track record in raising EB-5 or other capital may be a relevant factor.

¹⁵⁵ For example, the website of the Chinese migration agent for the successful USIF NY Regional Center features videos of landmark NYC sights and famous American songs about New York City, including Frank Sinatra's version of the song "New York, New York". <http://www.qiaowai.net/zhuanti/bulaien/>

Although, as stated above, the long construction period of large-scale projects helps create qualifying EB-5 jobs, these projects also require many capital sources, particularly due to the astronomically high capital costs and the delay in income production. Thus, the developers of these projects seek EB-5 capital as a patient funding source.¹⁵⁶

A few examples of the approximate amount of pending or completed EB-5 capital raises for New York City projects of major developers commenced after the Great Recession include:

<u>Project Name</u>	<u>Developer</u> ¹⁵⁷	<u>EB-5 capital</u>
Hudson Yards	Related Companies	\$600 million
Atlantic Yards (Barclays Center) – Phases I, II & III ¹⁵⁸	Forest City Ratner	\$728 million
Four Seasons Tribeca	Silverstein	\$250 million
City Point	Acadia Realty	\$200 million
W57	Durst Organization	\$180 million
International Gem Tower	Extell	\$ 75 million

The Database set forth in attached Appendix A contains additional information about some of these projects and other large EB-5 projects in New York City, as well as projects in some other major cities.¹⁵⁹

Track record of Regional Center

Regional Centers with a successful track record of raising substantial amounts of EB-5 capital and completing projects are more likely than new Regional Centers to attract investors' capital. Ideally, the Regional Center will have a track record of multiple successful projects with I-526 approvals, I-829 approvals and repayment of the investors' capital.

However, not many EB-5 projects have reached the stage where the investors have obtained I-829 approval. A combination of factors accounts for this. The time frame from the

¹⁵⁶For example, Jeff Blau, chief executive of the Related Companies ("Related") is quoted in a recent Wall Street Journal article about Related's EB-5 capital raise of at least \$600 million to date to fund part of the \$20 billion Hudson Yards project in New York City. The funds will be used towards building a platform over the working rail yard on which the foundation for the 17 million square feet of buildings will sit. Mr. Blau stated that the capital served as "a very critical part of the puzzle" to fund the project. Further, he pointed out that "[r]aising the money through traditional means would have been difficult because of the years long gap between when the platform over the 13-acre train yard is started and when the buildings are completed and income starts rolling in."

http://www.wsj.com/articles/hot-source-of-real-estate-financing-green-card-seekers-1418146394?mod=residential_real_estate "Hot Source of Property Financing: Visa Seekers Developers Raise Millions for U.S. Projects Through EB-5 Visa Program" by Eliot Brown, 12/9/2014;
<http://www.hudsonyardsnewyork.com/the-story/building-hudson-yards>;
<http://www.hudsonyardsnewyork.com/article-detail/construction-begins-on-hudson-yards-eastern-platform-135>

¹⁵⁷ This list names the major developer involved. Some of the projects have more than one developer partner.

¹⁵⁸ As mentioned in footnote 6, Greenland has acquired a 70% ownership stake in the Atlantic Yards project in Brooklyn. The EB-5 investors that are from China may favor this project due to the involvement of a Chinese development conglomerate as majority owner.

¹⁵⁹ "Brand name" operators or tenants might also be an inducement. Thus, several recent and pending projects, such as the Four Seasons in Tribeca, and the LA Live in downtown Los Angeles, provide support for this.

solicitation of EB-5 investors through the immigration process resulting in the I-829 approval and issuance of the permanent visa usually takes at least four years.¹⁶⁰ Given that few Regional Centers existed prior to 2009, insufficient time has passed for many projects to reach the approval stage for an I-829 petition. Even fewer projects have resulted in the investors' successful exit from the project resulting in recovery of their investment and return because the investors' investment must be sustained in the project through the I-829 approval.¹⁶¹

Two notable exceptions to the investors' preference for projects affiliated with more seasoned Regional Centers indicate that while an experienced Regional Center is a factor, this has been overcome by less established Regional Centers.

First, USIF was not designated as a Regional Center until 2010. However, this third party Regional Center has quickly emerged as one of the most favored by major developers to sponsor their large-scale projects, especially in NYC. USIF has sponsored numerous projects with an EB-5 capital component exceeding \$100 million, including nearly \$500 million for Phases 2 and 3 of Atlantic Yards, the joint venture between Forest City Ratner and Greenland.¹⁶² In addition, the Golden Gate Global Regional Center (GGG) based in San Francisco, is a third party Regional Center designated in 2009 that did not even include real estate as a covered industry code in its original designation and does not have a substantial track record. Yet GGG has become the sponsor of a multi-phased redevelopment project San Francisco by one of this country's largest public homebuilders, the Lennar Corporation ("Lennar"). GGG has raised over \$200 million of EB-5 capital for this project that includes more than 12,000 homes to be built on the former site of the NFL's San Francisco 49ers stadium and the Naval Shipyard.¹⁶³ The phenomenal increase in the number of approved Regional Centers in the past five years suggests that a lack of a track record is not a major deterrent for the many entrepreneurs who view the establishment of a Regional Center as an innovative business opportunity.

Second, many investors are willing to invest in projects sponsored by a developer's in-house Regional Center, particularly where the developer is a major developer. Since 2008, several major developers have formed "in-house" Regional Centers that have successfully accessed inexpensive EB5 capital and bypassed an existing Regional Center as middleman. The developers are able to convince those investors to focus on their record of developing and completing large projects.¹⁶⁴ They must also demonstrate their ability to raise capital overseas through a brokerage network or other arrangement.

Attached as Appendix B is a database of some of the well-established, successful Regional Centers, all but one of which is a third party Regional Center. Key data is included, such as the Project's EB-5 capital size, immigration petition approvals, and investors' successful exit, if any.

Government involvement

¹⁶⁰ See the explanation in the Immigration Process section on page 13.

¹⁶¹ See Appendix B, the database of established Regional Centers, some of which have projects that have resulted in the investors' successful exit. In September 2014, the Can Am Regional Center repaid \$122 million to investors, representing the largest EB-5 return of capital in history. Insert citation.

¹⁶² <http://visaeb-5.com/> Also see the Large-Scale Projects Database in Appendix A.

¹⁶³ <http://www.sfbarc.com/projects/hunters-point-shipyard/> Also see the Large-Scale Projects Database in Appendix A.

¹⁶⁴ See the discussion in the Regional Center or Capital Stack session re potential conflicts and the greater alignment of interest that between the investors and the Regional Center, in the case of a third party Regional Center compared to a developer in-house Regional Center.

Foreign investors tend to prefer projects that have government funding and support. This can take various forms including political endorsement, financial support, subsidies, or tax incentives. Many foreign investors respect the government's judgment, and believe that government support increases the likelihood that the project will be successful.

However, it is ironic that some of the most noteworthy recent EB-5 failures have involved projects supported by government officials. The "Chicago Convention Center", involved a project with nearly 300 EB-5 investors. Political leaders strongly endorsed the project, and even made selling trips to China.¹⁶⁵ The City of New Orleans Regional Center sponsored a project with operators (hired by the former mayor) who defrauded the investors. The South Dakota Meat Packers' plant project, sponsored by the South Dakota Regional Center, filed for bankruptcy, despite substantial government financial support.¹⁶⁶

In response to these incidents, at least one state – South Dakota - has proposed legislation to prohibit any State or local government involvement in the EB-5 program.¹⁶⁷ Thus, one might conclude that government support will play a lesser role in an immigrant's decision to invest in a particular EB-5 project.

However, recent projects suggest the contrary. For example, the previously described redevelopment of Candlestick Park involves a public-private partnership between the City of San Francisco and Lennar. This project finally started in 2013 after years of planning and development, dating back to 1999 when the City designated Lennar as the master developer. Willie Brown, the former Mayor of San Francisco, is one of the principals of GGG, the third party Regional Center sponsoring the project.¹⁶⁸ Also, Related's Hudson Yards exemplifies a very strong public-private partnership for one of the largest mixed-use projects in the United States, if not the world.¹⁶⁹ When completed, it will have more than 17 million square feet of commercial and residential space, as well as 14 acres of public open space. The New York City Industrial Development Agency's grant of approximately \$510 million in property tax relief reflects the City's support of the project.¹⁷⁰

Location in a TEA

¹⁶⁵ This scandal was featured in Fortune Magazine's recent feature article re EB-5

<http://fortune.com/2014/07/24/immigration-eb-5-visa-for-sale/>

See fn ___ in the Escrow section of this paper about this scandal.

¹⁶⁶ This beef packer's scandal played a major role in the 2014 U.S. Senate campaign of former Governor Mike Rounds after his former cabinet secretary's obtained related employment shortly after state aid was granted to the plant. <http://www.washingtonpost.com/blogs/post-politics/wp/2014/10/22/new-development-in-in-scandal-dogging-mike-rounds-could-spell-more-trouble/>

¹⁶⁷ <http://legis.sd.gov/docs/legsession/2014/Bills/HB1176P.pdf>

¹⁶⁸ <http://www.sfbarc.com/projects/hunters-point-shipyard/>

The President of the third party Regional Center is a real estate lawyer who represents Lennar.

<http://www.sfbarc.com/our-company/our-team/>. Similarly, Charles Gargano, the Executive Director of USIF, is the former Chairman of the Empire State Development Corporation ("ESDC") and U.S. Ambassador to Trinidad and Tobago. <http://www.marketwired.com/press-release/us-immigration-fund-appoints-ambassador-charles-gargano-as-executive-director-1892735.htm> The ESDC is the agency that oversees projects such as Atlantic Yards.

¹⁶⁹ <http://www.hydc.org/html/project/rezoning.shtml>

¹⁷⁰ <http://urbanland.uli.org/planning-design/hudson-yards-rises-rails> ; <http://fall.uli.org/session/hudson-yards/> ; <http://www.bloomberg.com/news/2014-03-19/new-york-s-hudson-yards-starts-next-phase-as-deck-begins.html>

To attract immigrant investors, a project must be located in a TEA; otherwise, it will not be competitive with the vast majority of projects that are so located. Of course, investors favor projects within a TEA because this limits their financial risk to \$500,000, (not \$1 million), since they are investing to meet a visa requirement rather than to make a meaningful financial return on their investment. As stated in the Overview section above, meeting the TEA standard is not difficult for most projects. Accordingly, virtually any EB-5 project will be located in a TEA. Thus, this factor does not serve to distinguish one project from another in the eyes of the investor.

Capital Stack Details

EB-5 capital does not constitute a particular type of capital. It refers to the investors' equity contributions to the NCE that in turn is invested by the NCE in the JCE.¹⁷¹ These EB-5 proceeds can fill any space in the JCE's capital stack.¹⁷²

EB-5 capital is remarkably flexible as a capital source. The amount can represent as little as 1% of the total project costs to as much as 100%. The nature of the capital can be debt or equity. It can be any specific type of debt or equity. It can be secured by collateral or unsecured. It can contain virtually any features, with few limitations or restrictions imposed by the EB-5 Program.¹⁷³

The capital structure for an EB-5 project varies from deal to deal. However, a review of large development projects involving substantial capital raises unveils common aspects in EB-5 capital stacks.¹⁷⁴ Relevant examples are included in this discussion.

The capital stack incorporated into recent EB-5 projects contains similarities and differences with the stack typically encountered in conventional real estate projects. Keep in mind that the capital stack for conventional projects also differs from deal to deal, based on a variety of factors. These factors include the developer's financial strength, the type of project and location, prevailing interest rates, and competition.¹⁷⁵

The typical EB-5 project involves new construction because this is the most common way to satisfy the job creation requirement. The total project costs of a real estate development, whether or not it involves EB-5 capital, include the land acquisition costs, the hard costs and soft costs related to construction and development. Lenders are generally reluctant to finance the acquisition costs of vacant land due to the risks associated with the market, entitlement and construction.

In a conventional real estate project (without EB-5 capital), the development entity that owns and operates the property obtains a construction loan to finance all, or a substantial part, of

¹⁷¹ In some cases where EB-5 capital is deployed as an equity investment instead of a loan, the NCE may also be the JCE, in which case the investors invest directly in the JCE. However, this paper generally refers to the NCE as separate from the JCE.

¹⁷² By contrast, the capital stack of the NCE is very simple: 100% of the capital is the equity provided by the EB-5 investors, which is \$500,000 per investor if the project is located in a TEA; otherwise, \$1,000,000 per investor.

¹⁷³ The most important EB-5 restrictions are that the investment be "at risk" and be sustained throughout the immigration process. See May 30, 2013 Policy Memorandum at pages ____.

¹⁷⁴ The paper will refer to these structures and characteristics as typical but this is arguably an overgeneralization and likely to change with the times and the market. For example, before 20____, it was common for EB-5 capital to represent more than 50%, and in some cases, 100% of the capital stack.

¹⁷⁵ For a discussion of the capital stack in traditional real estate projects, see *An Introduction to Real Estate Finance*, Edward A. Glickman (Academic Press 2014).

the construction costs. In the case of an income-producing property, the construction loan term is typically the anticipated construction period plus the estimated period for the project to achieve a stabilized cash flow. Thus, the term varies depending on various factors that affect the construction and stabilization periods. The monthly payments under a construction loan are typically interest only (with no principal amortization) at a per annum rate equal to a spread over a key benchmark interest rate, such as Libor. The development entity typically obtains a replacement permanent loan to refinance and pay off the construction loan. The permanent loan is often a fixed-interest rate loan with principal amortization. The term of the permanent loan is generally 5 to 10 years. The construction loan, and the permanent loan that refinances it, are typically senior mortgage loans with the borrower granting to the senior lender a first mortgage lien against the property.

Size of the EB-5 capital slice

The amount of an EB-5 project's capital raise is a critical determinant of where in the capital stack EB-5 capital fits in relation to the other capital sources that will fund the total project costs. After the potential EB-5 capital amount is calculated, the developer will determine the extent to which it wishes to incorporate EB-5 capital into the stack and its placement. For example, if only \$5 million of EB-5 capital can be supported by a project with total project costs of \$100 million, then obviously an insufficient amount of EB-5 capital would be available to fund a senior mortgage loan.

The number of jobs to be created by a project poses the primary and most basic constraint on the maximum size of an EB-5 capital raise. This limitation applies whether the EB-5 capital takes the form of debt or equity.

In contrast, job creation is irrelevant to the size of capital raises for conventional real estate projects. Outside of the EB-5 arena, in sizing a commercial real estate mortgage loan (and sometimes mezzanine debt), two of the most common metrics a lender typically considers in underwriting a mortgage loan are the loan to value ratio (or loan to cost, in the case of construction loans), and the debt service coverage ratio.¹⁷⁶

In EB-5 projects, developers and Regional Centers also focus on developing a business plan that at a minimum demonstrates that the requisite number of jobs will be created to satisfy the EB-5 program requirements. Most developers strive to build in a job cushion to create more jobs than the minimum required, as explained in the EB-5 Program Overview section above.¹⁷⁷

Again, for each EB-5 investor, the project must create 10 new jobs. Assuming that the project is located within a TEA, 10 jobs must be created for every \$500,000 of EB-5 capital raised. For example, if a project is expected to create 100 new jobs, then the maximum amount of EB-5 capital that can be raised for that project is \$5 million.¹⁷⁸ Conversely, if the targeted EB-5 capital raise is \$5 million, then the minimum number of jobs required is 100.¹⁷⁹ Any marketing-inspired surplus jobs cushion should be excluded.

The total number of jobs expected to be generated by the project (including the job cushion), based on the business plan and economic model, must be compared with the minimum

¹⁷⁶ Job creation is obviously not a factor in the case of those metrics.

¹⁷⁷ See page ___ above

¹⁷⁸ 100 jobs/10 per investor = 10 investors x \$500,000 each

¹⁷⁹ \$5 million total EB-5 capital raise/\$500,000 per investor = 10 investors. 10 investors x 10 jobs/investor = 100 jobs.

number of jobs necessary for all of the EB-5 investors to qualify. The total number of jobs divided by the minimum number of required jobs can be considered the “job coverage ratio” for EB-5 projects.¹⁸⁰ If the project lacks a job cushion (that is, the number of jobs projected is equal to the EB-5 minimum requirement), the job coverage ratio would be 1.0. In the above example involving a \$5 million EB-5 capital raise, if the project is expected to create 150 jobs (50 more than the 100 minimum required), then the actual job coverage ratio would be 150/100 or 1.5, representing a cushion of 50%.

The job coverage ratio reflects the job-creation requirement imposed by the EB-5 law. In contrast, the loan to value and debt service coverage ratios are underwriting criteria imposed by lenders that vary by lender and by project type. Of course, the senior lender also utilizes standard typical underwriting criteria in evaluating whether to make the loan, whether or not an EB-5 capital component is included.

Lightstone Regional Center’s application for Regional Center designation status included an exemplar filing.¹⁸¹ The USCIS determination letter states that the NCE will loan \$50 million of EB-5 capital towards the total project cost of \$208,915 million.¹⁸² Based on the business plan and economic analysis submitted by Lightstone, USCIS determined that the project will generate 1,423 jobs. At least 1,222 of the 1,423 jobs will be construction jobs, or 86% of the total.¹⁸³ The 1,423 jobs number would support a capital raise in excess of \$70 million.¹⁸⁴ However, the \$50 million raise would require the creation of only 1,000 new jobs (\$50 million/\$500 thousand per investor). Thus, a substantial job cushion exists. The job coverage ratio is 1.423 (1,423 total projected/1,000 minimum jobs required).

The number of estimated jobs created by the JCE are not allocated among all investors based upon the relative investment percentage of each capital source. Instead, all of the new jobs created by an EB-5 project regardless of the source of invested capital can be allocated for EB-5 purposes to the EB-5 investors, even if EB-5 capital represents less than 1% of the total project costs.¹⁸⁵ Thus, in the Lightstone example above, even though \$50 million represents less than 25% of the total project costs, all 1,423 jobs for all project capital sources can be allocated to the EB-5 investors, rather than merely the proportionate share represented by the EB-5 capital.

Although construction activity jobs are based on qualifying construction expenditures, not all construction expenditures are deemed by USCIS to create jobs. For example, USCIS does not treat certain land acquisition costs, contingency budgets or items like interest, developer fees and other soft construction costs as “job creating expenditures”. However, EB-5 investment funds may be used to acquire the land and pay these disallowed soft costs¹⁸⁶ but the expenditure of these funds must be excluded from the economic-job impact study because the USCIS routinely does not allow EB-5 projects to count any of the jobs created by such activity towards EB-5 program eligible job creation counts.

¹⁸⁰ This could be viewed as somewhat analogous to the debt service coverage ratio (DSCR) in traditional real estate lending which compares the property’s annual net operating income to the annual debt service.

¹⁸¹ See discussion on page ___ above.

¹⁸² Note that the Lightstone Regional Center’s website projects an EB-5 capital raise of \$60 million. The same principles should apply to this larger raise. <http://lightstoneeb5.com/eb-5/capital-structure/>

¹⁸³ It is likely that a higher percentage of jobs were construction activity jobs. The designation letter detailed four different industry types in the letter.

¹⁸⁴ $1,423/10 = 142$ investors x \$500,000 investment per investor = \$71M

¹⁸⁵ 8 CFR section 204.6(g); http://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-19_Dec13.pdf at page 9

¹⁸⁶ USCIS Q and A: Economic Methodologies, July 3, 2012, question 2. <http://www.uscis.gov/news/questions-and-answers/questions-and-answers-eb-5-economic-methodologies>

Background of mezzanine financing and preferred equity in conventional real estate projects

Until the 200_, many senior mortgage lenders were willing to lend as much as 90% of a property's total market value, especially for a property that already was developed. However, in today's market, senior lenders are generally only willing to lend in a range from 50% to 70% of the total project costs. Lenders demand that the developer invest some equity to evidence a financial stake in the project ("skin in the game"). The amount of developer equity required varies by lender, but generally ranges from 1% to 10%. This leaves a gap ranging from 20% to 45% of the capital stack. The obvious choice to bridge the gap would be a second mortgage loan from another lender. Although second mortgages were sometimes utilized in the past, today most senior lenders prohibit them.¹⁸⁷ Thus, capital sources have developed to satisfy the demand for more leverage by the developer without being characterized as mortgage debt. In conventional commercial real estate deals, mezzanine (mezz) debt or preferred equity fills this gap.¹⁸⁸

Conventional mezz debt

In a senior mortgage loan, the property owner is the mortgage borrower. The collateral for the loan is the mortgage borrower's direct ownership of the property. Mezz debt is a loan secured by the mezz borrower's equity in another entity, and not secured by the property.

If the property owner (mortgage borrower) desires mezz financing, the senior mortgage lender typically requires that a special purpose entity (SPE) be created to serve as the mezz borrower that will own the equity interests in the property owner. The mezz loan is funded to the mezz borrower SPE. The collateral is the mezz borrower's equity interest in the property owner.¹⁸⁹

The mezz borrower does not directly own any real property and does not operate a business. Thus, the value of the mezz lender's collateral is derived solely from the indirect ownership of the underlying property.¹⁹⁰

If the mezz borrower defaults, the mezz lender may foreclose under the state's commercial law,¹⁹¹ rather than under the state's real property law that is applicable to

¹⁸⁷ The national credit rating agencies require that any mortgage included in a commercial securitized loan offering prohibit the mortgage borrower from incurring any additional (or junior) mortgage debt. Rubin, Paul. 2009. "Strategic Thinking for the Mezzanine Lender" *American Bankruptcy Institute Journal* 28:8, 422-43, 88. Mezz debt is not considered mortgage debt.

¹⁸⁸ For a discussion of mezz financing and preferred equity see "Ch. 9: Mezzanine Debt and Preferred Equity in Real Estate" by Andrew Berman, *Alternative Investments: Instruments, Performance, Benchmarks, and Strategies 163* (H. Kent Baker & Greg Filbeck eds., John Wiley & Sons 2013). For a discussion of mezz lending compared to preferred equity, see http://www.paulweiss.com/media/109627/nylj_30nov11.pdf; Also see "Commercial real estate mezzanine finance: market opportunities" *Real Estate Issues* - September 22, 2003 by David Watkins) http://pages.stern.nyu.edu/~igiddy/articles/CRE_mezzanine.html

¹⁸⁹ For example, if the property owner is a limited liability company, the membership interests in that LLC owned by the mezz borrower serve as the collateral for the mezz loan. The collateral constitutes personal property and is governed by the state's commercial law rather than its real property law.

¹⁹⁰ See the Diagram of a Sample EB-5 Mezz Loan Structure attached as Appendix C that is discussed in the EB-5 Mezzanine section below at page ____.

mortgages.¹⁹² Upon the completion of the foreclosure process, the mezz lender replaces the mortgage borrower as the owner of the entity that owns the property (the senior mortgage borrower). However, the mezz lender's interest is subject to all of the liens and encumbrances of the property, including the senior mortgage.¹⁹³

The mezz loan provides for a fixed maturity date and creates a firm obligation to comply with the loan terms. The periodic loan payments are interest only. Sometimes, the mezz loan provides for a portion of the interest to be paid currently, with the balance to be accrued and not due until loan maturity. In addition, sometimes mezz loans provide for a profit participation to the mezz lender, also known as an "equity kicker". The entire principal balance "balloons" at maturity. Conventional mezz loan providers ("mezz lenders") include private equity debt funds, mortgage REITs and insurance companies.¹⁹⁴

Conventional preferred equity

In contrast, the capital provided by the preferred equity investor does not constitute a loan. Preferred equity provides a direct ownership interest in the project owning entity. The investor makes a capital contribution to the property owner in exchange for an equity share of the ownership entity.

As one of the owners of the project entity, preferred equity investors do not possess collateral or foreclosure rights. Instead, the preferred equity investors have contractual rights and remedies under the organizational documents of the project owning entity (such as an LLC Operating Agreement) that governs the relationship of the project entity's owners, including the developer. In certain prescribed events,¹⁹⁵ the preferred equity investors can remove and replace the developer. However, if the investors were to seek to assert these rights, it is likely that the developer would challenge the claim in court.

The preferred equity investors will often have a direct ownership interest in the project owning entity. However, similar to the requirement imposed in the case of a mezz loan, some senior mortgage lenders will require that the preferred equity be invested in a SPE that in turn owns an equity interest in the project entity.¹⁹⁶

The term "preferred" refers to the preferred investor's right of payment with priority over the common equity owner (typically the developer). In a conventional real estate project, a cash flow distribution waterfall provides that the project's cash flow be allocated first to operating expenses, reserves and debt service payments. Any available remaining cash flow is then distributed to the equity owners.

Under a typical structure, the preferred equity investors are entitled to a preferential return on their investment (typically ranging from 6% to 10% per annum) until the preferred equity investors receive that return and recover their capital investment (sometimes referred to as

¹⁹¹ States' commercial laws are based on the Uniform Commercial Code (UCC).

¹⁹² The state's commercial law foreclosure process that applies to a mezz loan default is much quicker than the foreclosure process under the state's real property law that applies to a mortgage default. See Berman fn ____.

¹⁹³ In contrast, in the case of the typical senior mortgage foreclosure, either the lender becomes the owner of the property with all junior liens wiped out, or the lender's lien is paid off.

¹⁹⁴ The mezz lender and senior lender typically enter into a separate agreement, commonly known as an "Intercreditor Agreement", concerning such matters as the rights and responsibilities of the mezz lender, especially in the case of a default of the mezz loan or the senior mortgage loan.

¹⁹⁵ Such events include a default as defined in the Operating Agreement.

¹⁹⁶ Berman at page 175 (Ch. 9)

a “preferred return” or a “pref”). After the pref is recovered, the residual or excess cash flow available for distribution is split with the developer, often disproportionately to the relative capital contributions in favor of the developer (sometimes referred to as the “profit split”).¹⁹⁷

Preferred equity typically does not provide a fixed or mandatory redemption date on which the capital must be repaid to the preferred equity investors. Instead, the occurrence of a “capital event”, such as a sale or refinancing of the project, is typically the trigger that generates sufficient cash flow for the investors to achieve the pref and a profit split.¹⁹⁸

If the developer contributes equity to the venture, as is typically the case, then it is common for the pref to be paid to the preferred equity investors and the developer (the common equity) pari passu, rather than being distributed first to the preferred investors.

The preferred equity possesses some debt characteristics. The preferential return on the investment is similar to the interest component on a loan. The recovery of the capital is similar to the repayment of principal under a loan.

The payment preference over common equity is similar to the priority that debt has over equity. Private equity funds, sovereign wealth funds, pension funds, life insurance companies and wealthy individuals often provide this type of equity capital. A more detailed explanation of preferred equity is beyond the scope of this paper.

Below is a diagram that shows a generic depiction of the capital stack, with relative risk, and the portion of the total project costs (TPC) funding applicable to each layer in a conventional real estate project.

High	Capital Source	First	% TPC
Risk Level and Expected Return ----->	Common Equity (Developer)	Absorb Losses <-----	1-10%
	Preferred Equity		Gap 10-40%
	Mezz Debt (Subordinated)		50-70%
	Senior Debt (Mortgage Lender)		
Low		Last	

EB-5 Capital – Slice of the Total Capital Stack

Until recently, it was common for EB-5 capital to comprise more than 50% of the capital stack. In some cases, it comprised the entire stack.¹⁹⁹ However, as immigrant investors and their

¹⁹⁷ For an article about real estate preferred equity see “Internal Rates of Return and Preferred Returns: What Is the Difference?” Real Estate Law & Industry Report, 6 REAL 200, 04/02/2013 by Steven Carey http://www.pircher.com/media/publication/8_PDFArticSAC.pdf

¹⁹⁸ The occurrence of a capital event does not necessarily generate sufficient cash flow to pay the pref or to result in a profit split.

¹⁹⁹ Even today, EB-5 capital funds the entire costs of some real estate projects, but generally not major projects. For example, EB-5 capital is funding 100% of the \$9.5 million to develop a condominium office building in Miami. <http://www.bizjournals.com/southflorida/news/2014/12/03/eb-5-funded-office-building-to-break-ground->

migration agents have become more sophisticated, as well as aware of a few well publicized EB-5 project failures and financial abuses by Regional Centers and developers, EB-5 investors are increasingly unwilling to take such a large stake in the capital stack. Instead, the top and bottom levels of the stack in the EB-5 project market consist of a senior mortgage and developer equity, similar to the conventional real estate project's capital stack.²⁰⁰

Despite this similarity, the rationale for the EB-5 capital stack differs in some respects. The institutional investor's decision to make a senior mortgage loan signifies to the EB-5 investor that an experienced third party has confidence in the project. The EB-5 investor views this as an added layer of protection because the institution, possessing more experience and sophistication in U.S. real estate deals than the EB-5 investor, undoubtedly has performed due diligence which validates the diligence performed by the investors' professionals.

As is true for the senior lender and other investors (mezzanine and preferred equity) in a conventional real estate project, the EB-5 investors demand that the developer have skin in the game. Thus, even though EB-5 capital can fit anywhere in the capital stack, gap financing as mezzanine debt or preferred equity is the most common use.²⁰¹

Why many immigrant investors prefer mezz over preferred equity

As discussed above, even though the EB-5 investors' contribution to the NCE must be equity capital rather than debt, the NCE's deployment of those proceeds into the JCE can be debt or equity.²⁰² EB-5 investors who provide gap financing to a project generally prefer that their investment be structured as mezz debt rather than preferred equity. The investors' main concern is that the capital will enable completion of the project. The investors hope that this will create the necessary jobs for them to obtain their visas and the subsequent return of their capital investment in the shortest time possible.

The investors prefer the loan structure, which has a fixed maturity date, periodic interest payments²⁰³ and a foreclosure remedy available in the event of a default by the developer's JCE. This will impose a legal obligation upon the JCE, and additional pressure for the developer to complete the project on a timely basis.²⁰⁴

In the case of a mezz loan or preferred equity, as a practical matter, a sale or refinance is necessary to provide sufficient proceeds to result in the recovery of the NCE's capital investment. However, a loan's fixed maturity date, coupled with the right to foreclose upon the other equity (including the developer's) is likely to give the investor more comfort than the features of preferred equity, especially if it does not provide for a mandatory redemption within a similar time frame as the mezz loan alternative. An LLC Operating Agreement governing the equity that merely provides for a cash flow distribution waterfall, with a sale or refinance as a

[after.html](#). On the other hand, EB-5 capital funded 100% for the development America Life's \$168 million LA Hotel project, albeit in an unusual arrangement discussed below, beginning at page ____.

²⁰⁰ SEE the Large-Scale Projects Database in Appendix A.

²⁰¹ See the Large-Scale Projects Database in Appendix A.

²⁰² USCIS cite for loan model – In re Izummi footnote __. These alternative investment types are referred to as the "loan" model and "equity" model.

²⁰³ However, often times, payments of mezz interest are split between a portion that is payable currently (monthly, quarterly or annually) and a portion is accrued until a future date, such as loan maturity.

²⁰⁴ The investors are likely to be reluctant to pursue the foreclosure remedy for two reasons: the foreclosure process will delay project completion; and they lack the wherewithal to complete the project without selecting a replacement developer, a process in which they have no experience.

capital event, does not ensure that the sale or refinance will occur by a certain date. Nor does it impose any time pressure on the developer. Nevertheless, as discussed below, some EB-5 capital is structured as preferred equity, although sometimes differently than in conventional real estate projects.

A diagram illustrating a sample capital structure for a project utilizing EB-5 capital as a mezzanine loan is set forth in attached Appendix C.

EB-5 mezz interest rate/cost of capital compared to conventional mezz

As explained earlier, EB-5 mezz loans bear a lower interest rate than conventional mezz loans because the EB-5 investor is motivated by the visa rather than maximization of financial returns. Obtaining the permanent visa is the main compensation for the investor. However, a true comparison of the developer's cost of capital in EB-5 mezz and conventional mezz loans requires more than merely focusing on the EB-5 capital's interest rate.

In conventional real estate projects, mezz is available in at least three different scenarios: core projects with stabilized cash flow; value-added projects where the existing project is re-positioned to change its use²⁰⁵; and opportunistic projects involving new construction and development.

The interest rate charged by the mezz lender varies to reflect the risk associated with the loan. The lowest rate applies to core projects and the highest rate applies to new construction (opportunistic projects).

Until 2007, mezzanine interest rates in conventional real estate deals often ranged from 15% to 20% per year. Lenders were reluctant to fund mezzanine loans during 2008 and 2009. However, as the market has rebounded and benchmark interest rates have remained low, competition for mezz lending has resulted in reduced interest rates. In today's market, mezz rates for stabilized, cash flowing properties are in the 8 to 9% range per year; and for new construction properties are in the 11 to 14% range per year.²⁰⁶

The typical EB-5 capital loan funded by immigrant investors has many cost components borne by the developer JCE to be taken into account in determining its true cost of capital for this capital source. As discussed in the Regional Center section, these various costs are reflected in alternative ways.²⁰⁷

A common method is to embed all the costs in the loan agreement as one rate; for example, 6% per year, to be paid by the JCE. Upon receipt of the periodic interest payment, the NCE then pays the relevant amount to the various participants in the transaction, such as: (1) a management fee to the general partner or manager of the NCE; (2) a fee (commission) to the migration agent or broker; and (3) a minimal interest payment to the investors. Sample annual fees could be 2% to the general partner or manager; and 2% to the agents and brokers,²⁰⁸ with

²⁰⁵ Many value-add projects involve some construction or rehabilitation.

²⁰⁶ Email dated 11/21/14 from Tal Bar-Or, Managing Director of Meridian Capital Group. This is consistent with the rates in effect in 2013 "Money in the Middle" by Beth Mattson-Teig, National Real Estate Investors Journal June/July 2013 at page 54 <http://www.dukerealty.com/wp-content/uploads/2013/07/NREI-July-2013-Issue-List-of-Top-Owners-etc-.pdf>

Also see Michael Stoler, The Return of Mezzanine Financing, Mortgage Observer 6/25/13.

<http://commercialobserver.com/2013/06/the-return-of-mezzanine-financing/>

²⁰⁷ At page ____

²⁰⁸ Investors sometimes pay a fee to the migration agent, but may be unaware that the Regional Center is also compensating them unless this is disclosed in the offering documents.

2% annual interest to the investors. The portion allocated to the investors is often less than 2% per year.²⁰⁹ The Regional Center or its affiliate may also add an interest rate spread on top of the management fee (that would increase the effective rate of the loan to the JCE.)

Alternatively, in lieu of a single interest payment to the NCE, a more transparent approach provides for the JCE to pay separate amounts to the immigrant investor, the migration agent and the NCE's manager. The total cost of capital to the JCE could theoretically be the same under either method.

Lightstone's Bond Street multifamily project is an example of an EB-5 project where the interest paid to the investors is separately stated, and thus, transparent. There, the interest paid to the investors is 1% per year.²¹⁰

The calculation of the developer-borrower's cost of capital for an EB-5 mezz loan is more complex and much less transparent than in a conventional loan. In a conventional loan, the borrower's cost of capital is based on the debt service payments, typically interest only in the case of a mezz loan.²¹¹ However, the interest rate paid to the immigrant investors is not the only cost that must be considered in calculating the cost of capital²¹² for an EB-5 loan. The cost of capital must reflect all of the additional costs and fees that a developer-borrower must pay in order to obtain the loan, many of which are unique to EB-5 transactions. As explained above, this includes the fees paid to the migration agent and other brokerage fees, as well as the management fees and any interest rate spread paid to the NCE.²¹³

Typically, EB-5 projects involve new construction (because construction is a major job creator). Thus, the highest mezz interest rate, the rate applicable to new construction, would serve as the best comparable rate for an EB-5 project. This comparison is more relevant to the developer because it benefits from this savings due to the spread between the conventional mezz rate for new construction and the EB-5 cost of capital. In contrast, the interest rate paid to the EB-5 investors will be low in any event.

Often, commentators writing about EB-5 mezz rates do not distinguish among the various rates applicable to conventional mezz.²¹⁴ Other times the wrong benchmark rate is cited as the basis for comparison. Conventional mezz rates for a stabilized project are sometimes compared to EB-5 rates, rather than to the higher construction mezz rate.

It is often reported that the spread between the EB-5 mezz rates and conventional mezz rates is in the range of two basis points (bps) per year.²¹⁵ However, this appears to be a gross understatement. As indicated above, the mezz rate for a stabilized project is much less risky than EB-5 mezz, which is typically construction mezz with all the risks inherent in construction loans.

Assuming the appropriate conventional mezz rate is 11 to 14% per annum and typical cost of capital for EB-5 mezz is in the 6 to 7% range, the difference between the two overall costs is at least 5% per annum. On a \$100 million EB-5 mezz loan, the savings to the developer would be \$5 million per year. For a 5-year term, obviously the total savings would be \$25

²⁰⁹ For example, the EB-5 loan made to SLS Las Vegas, involving one of the largest EB-5 capital raises to date, the investors are entitled to interest payments based on ½ of 1% (0.5%) per year.

²¹⁰ See the Lighthouse website Q3 on FAQ tab. <http://lightstoneeb5.com/faq-2/>

²¹¹ This discussion ignores the cost of capital attributable to the closing costs, including points or origination fees.

²¹² This can also be considered the effective or equivalent interest rate.

²¹³ In addition, the costs should include any fees paid to the Regional Center for loan origination. Note that some of these fees would be paid to a lender in a conventional loan.

²¹⁴ Insert

²¹⁵ See footnote:

million. The SLS Las Vegas EB-5 mezz-type loan described below illustrates the substantial savings that accrue to developers utilizing EB-5 mezz loans.²¹⁶

In addition to interest charges, many conventional mezz lenders charge points in the 1% range upon origination of the loan and an additional point 1% upon exit (the repayment). The lender in an EB-5 mezz loan often charges points as part of the loan origination, but an exit fee is not as common.²¹⁷

As discussed above, conventional mezz financing sometimes includes an equity kicker. Under the kicker, the developer shares in a percentage of the appreciation or increased value of the project, particularly upon a sale or refinancing of the property.²¹⁸ Equity kickers are extremely rare in EB-5 mezz loans because neither the Regional Center nor the developer needs to offer this feature to investors who do not focus on maximizing their financial returns.

EB-5 mezz loan term

The term of the EB-5 mezz loan is typically five years.²¹⁹ This reflects the EB-5 requirement that the immigrant's investment be sustained and at risk through the date that the I-829 petition (the petition which results in the issuance of the unconditional visa) is approved by USCIS. In some cases, the loan grants the developer the right to extend the loan, such as for two one-year periods.

It may be argued that the at-risk requirement prohibits investment repayment by the JCE to the NCE until the I-829 application is approved. However, the USCIS rules seem to focus on the ultimate repayment by the NCE to the investor, rather than by the JCE to the NCE. Reportedly, some lenders provide that the loan does not mature until the later of five years from the commencement of the loan or the approval of the investor's I-829 petition (which entitles the investor to a permanent green card).²²⁰

Similarly, in accordance with the requirement that the investment be sustained and at risk, generally interest only payments are permitted until maturity, with no principal amortization. This is consistent with the typical arrangement in a conventional mezz loan.²²¹ However, interest only payments are a legal requirement in EB-5 loans because to the extent that principal were repaid, the investment would violate the at-risk rules.²²² Similarly, the NCE may seek to prohibit prepayments by the JCE until the I-829 approvals are obtained.²²³

Other EB-5 mezz loan terms

In addition to more favorable interest rates, EB-5 mezz loans are likely to have terms more favorable to the developer than conventional mezz loans. Conventional mezz loans are provided by debt funds, mortgage REITS and other sophisticated institutional capital providers.

²¹⁶ Beginning at page ____

²¹⁷ Footnote re points

²¹⁸ As the mezzanine financing market has become more competitive among lenders, equity kickers have become less common.

²¹⁹ See, for example, CanA website: <http://www.canamenterprises.com/how-to-apply.html>

²²⁰ See, for example, the EB-5 loan to the Kushner project in Hoboken, New Jersey. Inset link

²²¹ See, for example, CanAm website: <http://www.canamenterprises.com/how-to-apply.html>

²²² In contrast, in a traditional mezz loan, the parties by agreement can provide for principal reduction payments, although interest only is the more common structure. However, as stated above, typically mezz loans provide for interest only.

²²³ See, for example, the EB-5 loan to the Kushner project in Hoboken, New Jersey. Also see CanAm

These sophisticated lenders are in the business of funding numerous large deals. They will tend to be more sophisticated in these matters and more familiar with the nuances of the transaction than a Regional Center, especially one that has not funded many deals. Thus, the developer may be able to negotiate more favorable terms in the case of an EB-5 mezz loan.

In addition, the EB-5 investors are less likely to insist upon some protections that a conventional mezz lender might pursue. For example, the EB-5 lender or investor might accept a longer cure period and a less exhaustive list of events that trigger a loan default. Moreover, as a practical matter, the EB-5 investors are presumably less inclined to declare a default than a conventional mezz lender. Conventional lenders are more likely to aggressively commence a foreclosure action or pursue other remedies. An EB-5 mezz lender is less likely to include terms requiring that one of the mezz borrower's principals provide a guaranty, whether a full payment guaranty or a nonrecourse carve-out guaranty.

The loan made to the developer of a recent project in Brooklyn, New York illustrates the favorable loan terms that would not be found in a real estate loan made by a conventional lender.²²⁴ The New York City Regional Center's NCE loaned \$200 million to a consortium of developers, including Acadia Realty, for the development of Phase 2 of the City Point project. \$100 million took the form of an unsecured loan and the other \$100 million was secured.²²⁵ Consequently, this enabled the developer/borrower to avoid mortgage tax of nearly \$3M and provided the lender with weaker rights and remedies in the case of a borrower default. That loan was made during the recent downturn when conventional lenders were generally unwilling to make even a secured mortgage loan at competitive rates. Furthermore, the risk to the lender was magnified because the borrower merely held a ground lease interest in the land that was owned by New York City.²²⁶

Comparing EB-5 loan terms offered through a third party Regional Center vs. those offered through a developer Regional Center

The developer in-house Regional Center presents an even greater opportunity for more favorable terms for the developer (in addition to lower interest rates or more favorable financial terms).²²⁷ Obvious conflicts of interest arise between the developer's JCE and the NCE lender controlled by that developer or its related parties.

When a third party Regional Center sponsors the project and the related NCE makes a loan to the unrelated JCE, the Regional Center negotiates the loan terms on behalf of the investors. The interests of the EB-5 investors and Regional Center are aligned to the extent that the Regional Center's affiliates only receive their periodic management fees and potential spread

²²⁴ Based on comments by Robert Master, Esq., former general counsel to Acadia...REIT during a panel discussion at ICM Real Estate General Counsel annual meeting on September 30, 2014 at the Marriot Downtown Hotel. Also see <http://www.nycedc.com/project/city-point>; <http://www.washsquare.com/portfolio/city-point.html>; <http://goodjobsny.org/economic-development/albee-square-city-point>; <http://bfcnyc.com/city-point-2/>; <http://nycrc.com/project.html?id=7>

²²⁵ It is unclear whether that loan was secured by the property or by other collateral.

²²⁶ The authors were unable to obtain information about the interest rate on the two loans. However, the interest rate on a mortgage loan secured by the ground lessee's interest in a property commands a higher rate than a mortgage loan secured by a fee interest. Of course, an unsecured loan bears a higher rate than a secured loan due to the greater risk involved.

²²⁷ As indicated in the ___ section above re the cost of capital charged by the developer's in-house Regional Center.

if the JCE continues to make payments pursuant to the loan. However, in the case of a project sponsored by the developer Regional Center, the interests of the EB-5 investors and the JCE are not aligned, or at least not as aligned compared to the third party Regional Center loan scenario. Thus, the EB-5 investors do not have an experienced Regional Center to protect their interests vis a vis the developer JCE's interest. The EB-5 investors presumably are not as focused and experienced as third party Regional Center lenders. The investors, who generally do not have experience in real estate matters in the U.S. (if anywhere), are not as likely to retain counsel as sophisticated as those retained by the developers or the private equity funds and other lenders that make these loans in the conventional real estate world. Thus, it would not be surprising if all of the terms of the loan are not as favorable in the case of a loan by a developer "in-house" Regional Center.

Some of the largest developers in the country have formed developer in-house Regional Centers.²²⁸ These Regional Centers are increasingly attracting more EB-5 capital. The EB-5 investors (and their advisors) tend to be more focused on the developer's track record than the technical details of the loan transaction, such as default remedies and guarantees.

SLS Las Vegas: a transparent EB-5 capital raise approaching \$400,000,000

More information is publicly available about the EB-5 capital component of one of the largest EB-5 capital raises in history²²⁹ because the sale of the securities by the JCE was registered with the SEC.²³⁰ As discussed previously, the NCE and JCE are typically able to avoid registration by relying on SEC exemptions.²³¹

SBE/Stockbridge Investment Company, LLC is the joint venture ("JV") that indirectly owns the recently opened, Las Vegas hotel casino, SLS Las Vegas.²³² The JV is presumably the JCE. The property, formerly the Sahara Hotel and Casino, was acquired in 2007.

The JV's SEC Form 10-Q filing for the quarter ended June 30, 2014 reveals a considerable amount of information about the details of the EB-5 loan made to the JV.²³³ This disclosure is presumably more reliable than the details provided about other EB-5 projects through secondary sources, such as news articles and websites.²³⁴ Among other things, the disclosure illustrates the sharp difference in rates between the conventional financing obtained by the borrower and the EB-5 capital that was utilized to replace it.

²²⁸ Mega-developers such as Silverstein, Extell, and Related have formed their own Regional Centers.

²²⁹ As described below, the EB-5 capital raise was funded in two tranches of up to \$200,000 each. Larger capital raises in a single tranche to date include Forest City Ratner's/Greenland's Atlantic Yards Phase I, Phase II and Phase III, \$228 million and approximately \$250 million each, respectively, and Silverstein's Four Seasons Hotel in New York City, approximately \$250 million. It is unclear whether the capital raise for either Silverstein's project or Atlantic Yards Phase III has been completed.

²³⁰ 10-Q of Stockbridge/SBE Investment Company, LLC for the quarter ended 6/30/2014 ("SBE 10Q") <http://www.sec.gov/Archives/edgar/data/1606965/000119312514317197/d775866d10q.htm>; Registration 10-12G <http://www.secinfo.com/d14D5a.n8R3n.htm>

²³¹ See page __

²³² Technically, the joint venture owns the equity of the entity that owns the property. Note 1 of SBE 10Q

²³³ Note the registration and disclosures relate to the JCE that owns the property and is the borrower of the EB-5 loan by the NCE. The NCE is presumably exempt from registration based on Regulation D and Regulation S.

²³⁴ Note __ to SBE 10Q

In 2012, the JV received a \$300 million senior construction loan at a minimum interest rate of 13%, with a “closing fee” or points of 5% of the principal amount.²³⁵ In 2013, the JV raised two tranches of EB-5 capital in association with the American Dream Fund, the owner of the Las Vegas Regional Center, to provide the proceeds to fund construction of the renovation of the hotel. The amount of the first tranche was \$200M and the second tranche was \$184M, involving 768 investors.

In this case, the EB-5 loans are structured as “subordinated mortgage” interests.²³⁶ The interest rate on each of the EB-5 loans is 0.5% per annum, which represents only the portion payable to the investors.

In addition to the interest on the EB-5 loans, the JV is obligated to pay various fees. The JV pays a periodic fee to the Regional Center and affiliates (including presumably the manager of the EB-5 investment vehicle, or NCE) for management of the EB-5 loans;²³⁷ as well as a one-time success fee based on the aggregate amount of the EB-5 capital raised.²³⁸ In addition, the JV pays a periodic fee to the migration agents, an annual percentage fee based on the outstanding EB-5 loan balance.²³⁹ The aggregate cost of capital is apparently much lower than the cost to borrow from the senior lender. In January 2014, to take advantage of the low cost of EB-5 capital, the JV elected to prepay \$100 million of the senior loan, even though this triggered a 15% prepayment premium, or \$15 million.²⁴⁰

The developer elected to retain a third party Regional Center, rather than form its own, despite the tremendous dollar amount of the loan amount. This structure seems to reduce the developer’s cost of capital by not giving the Regional Center the benefit of any spread between the total fees charged to the developer and the fees paid to the EB-5 investors, the migration agent and Regional Center.

Presumably, the Regional Center offered a flexible and financially attractive arrangement to the developer.²⁴¹ For example, instead of charging the developer an interest rate that includes a spread above the amounts payable to the investor, the migration agent and the Regional Center, the Regional Center charged the interest rate for the immigrant investor’s component, and separate fees for the balance. Presumably, since the EB-5 capital raise was among the largest, if not the largest, of any in history, the developer had leverage to negotiate more favorable loan terms and fee structure with the Regional Center than the typical developer.

EB-5 preferred equity

²³⁵ The senior construction loan served primarily as a bridge loan, pending the funding of the EB-5 loan. See the bridge loan discussion in the Escrow and Bridge Financing section below.

²³⁶ Footnote 5 to SBE 10Q. Technically, Nevada uses a deed of trust rather than a mortgage to secure real property. The footnote does not reveal the priority of the EB-5 lien.

²³⁷ The SBE 10Q does not disclose whether the manager is related or affiliated with the Regional Center or developer.

²³⁸ The SBE 10Q does not disclose whether the Regional Center is serving as a full service Regional Center or to what extent the developer is performing any of the services normally performed by a Regional Center.

²³⁹ The SBE 10-Q does not indicate whether any points were payable on the origination or will be payable at loan maturity. However, the success fee based on the capital raise can be viewed as equivalent to an origination fee.

²⁴⁰ The SBE 10Q

²⁴¹ This is arguably somewhat similar to a rental of a Regional Center.

Even though many EB-5 investors prefer the loan model, some Regional Centers and EB-5 developers offer preferred equity to the immigrant investors, rather than mezz debt.²⁴² The preferred equity structure's relative flexibility attracts these Regional Centers and developers.

This structure lacks a fixed obligation to distribute a fixed amount to the preferred equity investors. This is particularly advantageous to the developer during the project start-up period when insufficient cash flow exists. Preferred equity also does not typically have a mandatory redemption feature (a set date by which the equity capital must be distributed in full to the investors). A guaranty by a principal or affiliate of the JCE, even a carve-out guaranty, is generally not required or appropriate. Thus, the structure imposes less financial pressure upon the project to make payments during the investment's term and no deadline to fund the investors' financial exit from the project by a particular date.²⁴³

However, for similar reasons that the preferred equity structure is attractive to the developer, it is unattractive to the investor. Thus, preferred equity might present a marketing disadvantage to those Regional Centers and developers.

Nevertheless, some Regional Centers and developers are able to attract the immigrant investors based on their perceived potential to achieve greater returns than under the debt model, especially if the preferred equity is the waterfall type that includes a profit split, rather than the fixed dividend type.²⁴⁴ The Regional Center and developer also may be able to convince the investors that the preferred equity structure provides more flexibility and thus, increases the likelihood that the project will succeed and their visas will be issued. Moreover, some of the Regional Centers offering the equity structure are the most established and thus, are able to cite to their past successes in which preferred equity was employed, instead of mezz debt.²⁴⁵

Two fundamentally different formats can serve as the preferred equity structure in the EB-5 context. The conventional cash flow waterfall distribution type is one format, as described above. However, a fixed rate dividend format is another approach that better reflects the immigrant investor's primary motive for investing in the project.²⁴⁶

Since the EB-5 investors do not demand high returns and instead seek low risk, it may be unnecessary for the developer to offer a profit split or "upside" appreciation in the value of the project (which is an integral feature of preferred equity in a conventional structure).²⁴⁷ Instead, the preferred equity in an EB-5 deal can be structured as fixed-rate preferred (and

²⁴² In some cases, preferred equity is offered because the developer's senior lender will not permit additional debt, such as mezz debt, as a capital source for the project. However, senior lenders infrequently prohibit mezz debt in the current market.

²⁴³ Under the typical arrangement, as long as the immigrant investor's capital is outstanding, the manager of the NCE (related to the Regional Center) is entitled to a fee. Thus, arguably the interests of the Regional Center and the investors might not be aligned.

²⁴⁴ The fixed dividend alternative is described in the next paragraph.

²⁴⁵ See for example the American Life Regional Center and the EB5 Capital Regional Center. As discussed below, American Life does not limit its use of preferred equity to gap financing. Instead, it relies on preferred equity to fund substantially all, if not all, of the total project costs. In addition, the EB-5 capital component of one of the signature projects of the EB-5 Program, the Jay Peak Resort, sponsored by the State of Vermont Regional Center, is structured as preferred equity.

²⁴⁶ Due to the lack of transparency in the marketplace, the authors have not reviewed a sufficient sample of EB-5 preferred equity structures to reach a conclusion as to which basic format is more frequently utilized by developers and Regional Centers.

²⁴⁷ Arguably, if the developer were to offer a profit split to the EB-5 investors, it would not be surprising if the investors were to interpret this as evidence of more speculative risk of this particular investment.

cumulative), with many features similar to debt. The NCE is entitled to a dividend equal to a fixed percentage of its investment, which is payable only to the extent of the JCE's available cash flow. The investors are not entitled to any profit split or participation. This preferred equity structure is sometimes utilized in the conventional real estate world, but not nearly as frequently as the cash flow waterfall type of preferred equity.

Fixed rate preferred in conventional real estate projects often includes a mandatory redemption feature where upon the occurrence of a certain date, the developer must return the investors' capital investment. However, this feature does not appear to be common in the EB-5 context.²⁴⁸ Instead, the distribution is deferred until a capital event (such as a sale or refinancing) occurs,²⁴⁹ and then only to the extent of available cash flow. Since the preferred equity structure is not as popular with investors and does not provide them with the same level of security and certainty as a mezz loan, the JCE may need to pay a higher dividend rate to the NCE to reflect a greater return to the investors than the equivalent interest rate offered in the loan structure. However, presumably this return is relatively nominal in any event.

Some EB-5 projects offering preferred equity to the EB-5 investors might elect to offer preferred equity based on a cash flow distribution waterfall more similar to conventional preferred equity. The investors would be entitled to a preferred rate of return on their investment and a profit split on the residual cash flow after the pref is achieved. The preferred rate of return might be set at a rate similar to the interest rate under the mezz loan. The profit split would serve as an incentive for the investors to accept this structure.

The cash flow waterfall type of preferred equity typically lacks a mandatory redemption feature. Also, a guaranty by a principal is even less likely to be appropriate in this alternative given that the preferred equity investors are assuming the risk in exchange for the profit potential. Similar to the more favorable terms available to an EB-5 mezz loan borrower than to a conventional mezz loan borrower, the terms of an EB-5 preferred equity investment to an EB-5 project developer are often more favorable to the project developer than encountered in conventional preferred equity structures.

Jay Peak Resorts is one of the signature projects of the EB-5 program, sponsored by the state operated Vermont Regional Center. However, a recent dispute between Jay Peak's developer and the EB-5 investors illustrates the more favorable preferred equity terms available to the developer in an EB-5 project. This partnership involves a single-tier structure where the EB-5 investors invested directly in the partnership that owns the Tram Haus Lodge, a luxury hotel that is part of the multi-phase expansion of the ski resort.

During 2014, the general partners of the limited partnership were able to dissolve the partnership without obtaining the consent of the limited partners, the EB-5 investors. As a result, the general partners were able to convert unilaterally the limited partners' interest to unsecured claims (characterized by the investors as "IOUs") rather than ownership interests. It is extremely unusual for a limited partnership agreement in a non-EB5 context to permit a dissolution by the

²⁴⁸ Some developers argue that a mandatory redemption is contrary to the USCIS requirement that repayment of the investor's investment must not be guaranteed. However, given that the USCIS rules permit the JCE to repay a loan with a fixed maturity date, by analogy, a mandatory redemption paid by the JCE based on a fixed date, should likewise be permitted. By its terms, the prohibition on guarantees applies to the payment to the EB-5 investor, not to the payment to the NCE.²⁴⁸ Presumably, the USCIS respects the separateness of the entities in applying its rules. Another example is the rules that permit the NCE to make a loan or equity investment in the JCE using the investors' funds, even though the investors are not permitted to make a loan to the NCE.

²⁴⁹ As noted above, the capital event is also the typical event that triggers the payment of the pref and the split in a conventional structure.

vote of the general partners, without also requiring the consent of limited partners.²⁵⁰ After significant adverse publicity in the local media outlets, the general partners agreed to make an additional partial distribution to the investors.²⁵¹

A different approach – American Life

Although the trend, especially in large real estate projects, is for EB-5 capital to serve as gap financing, some projects still rely upon EB-5 capital to provide a more significant share of the capital stack. One radically different type of capital structure for an EB-5 project involves the American Life Enterprise Regional Center (“American Life), one of the first Regional Centers to be formed and one of the most successful. American Life is a developer Regional Center. It manages 10 Regional Centers in various geographic areas throughout the US.

The Frequently Asked Question Section of the Regional Center’s website describes its investment structure.²⁵² Simply stated, the investors invest all of the capital.²⁵³ No developer equity and typically no debt, or a limited amount of debt, is involved. American Life, as managing general partner, is allocated 30% of the net cash flow without making any capital contribution.

Each of the investors, as individuals, invests directly in the entity that owns the property. This is a one-tiered structure, rather than the two-tiered JCE-NCE structure that is required for EB-5 loan transactions and sometimes utilized for EB-5 equity transactions. The entity is typically a limited partnership, where the investors are the individual limited partners and American Life is the managing general partner.

Using this structure, American Life recently raised \$168 million to provide all of the capital for the acquisition and construction of LA Live, a Marriot hotel in downtown Los Angeles that opened in 2014.²⁵⁴ American Life is currently seeking to raise over \$300 million from EB-5 investors, presumably using the same structure, for a new hotel project in Seattle.²⁵⁵

It appears that American Life attracts immigrant investors who are willing to commit to this structure based on the Regional Center’s successful track record, as well as the potential financial return that the investors believe could far exceed the financial return of alternate EB-5 investments. On the other hand, these investors must accept that the exit strategy is solely within the discretion of the developer whose interest might be to prolong the financial arrangement.

Escrow:

²⁵⁰ <http://vtdigger.org/2014/08/10/jay-peak-pay-35-tram-haus-investors-10000-dividends/>

²⁵¹ <http://vtdigger.org/2014/08/10/jay-peak-pay-35-tram-haus-investors-10000-dividends/>

²⁵² American Life Inc. website FAQ Investment Terms: <http://amlife.us/eb-5-visa/faq-investment-topics>

²⁵³ The projects include some non-EB investors. American Life Regional Center website.

²⁵⁴ The Private Placement Memorandum (PPM) for the third stage of the capital raise appears on the Baidu website. Although the authors did not verify with American Life the accuracy of the PPM it appears to be consistent with the structure described in the American Life website.

²⁵⁵ <http://www.bizjournals.com/seattle/blog/2014/07/for-local-firm-la-live-deal-was-warm-up-to-300m.html?s=print>

The immigrant investor's funds paid pursuant to the Subscription Agreement are often not paid directly to the Regional Center or NCE. Instead, the funds are typically remitted to an independent third party that holds the funds in escrow prior to its release to the NCE.²⁵⁶

USCIS does not require the escrow of these funds.²⁵⁷ The escrow is market driven in response to the investors' concern that the USCIS might deny the I-526 petition. Virtually all Regional Centers and NCEs agree to refund the investors' entire investment if their I-526 petitions are denied, whether or not the funds are held in escrow.²⁵⁸

Generally, the developer seeks to gain access to the inexpensive EB-5 capital as soon as possible, especially where the funds are necessary to commence or continue construction. On the other hand, many investors strongly prefer not to allow their investment to be released to the NCE until their I-526 petitions are approved, due to the unpredictable nature of the USCIS approval process and the risk of petition denial. If the funds are held in escrow pending the USCIS approval of the application, then if the petition is denied, the investors can (theoretically) simply furnish evidence of the denial to the escrow holder and recover their investment. If, instead, the funds are released immediately to the NCE, then the investors might have difficulty in recovering the funds and would merely have a legal claim against an entity that might lack readily available assets to pay this claim.

The tension has become exacerbated as the processing time for I-526 petitions continues to increase and developers seek to tap the inexpensive EB-5 capital as soon as possible. The condition that triggers the release of the funds to the NCE varies from EB-5 project to project. The most protective trigger to the investor is the USCIS approval of the individual investor's specific I-526 petition.

The escrow agreement can provide that the escrow be released at an earlier stage. Depending on the project, the triggering event might include one of the following: USCIS approval of a certain number of I-526 petitions for investors in the same project; USCIS approval of the project portion of the I-526 petition (based primarily on job creation);²⁵⁹ the funding of the senior construction loan; and a filing of the I-526 petition.

Holding the immigrant's investment in escrow pending I-526 petition approval does not violate the USCIS requirements that the investor's funds remain at risk and be sustained.²⁶⁰ However, after the I-526 is approved, the funds must be released to the NCE, which in turn must deploy the investment funds – debt or equity – in the JCE. Otherwise, the investment will violate the “at risk” requirement.

Although escrow of the investment provides a marketing advantage, some Regional Centers, especially those with a successful track record of EB-5 projects, do not offer an escrow, and instead provide for funds to be immediately released to the NCE for use by the JCE in the project. Some developers and Regional Centers take the position that escrow is unnecessary.

²⁵⁶ See the NES website for a description of the escrow process in EB-5 investments.

<http://nesfinancial.com/solutions/escrow-administration/>

²⁵⁷ However, USCIS permits, but does not require, an escrow of the funds until the investor has obtained conditional visa status. USCIS 2013 Policy Memorandum at page 6. This is an exception to the “at-risk” rule.

²⁵⁸ Per NES Financial. Insert link.

²⁵⁹ Once the USCIS approves the project portion of the I-526 petition, the main remaining issue is whether the particular investor can demonstrate that his funds originated from lawful sources. This trigger recognizes that the investor is in a better position to know than the Regional Center as to whether the funds originate from a lawful source.

²⁶⁰ The 2013 Policy Memorandum at page 6 permits the funds to be held in escrow until the investor becomes a conditional permanent resident.

They seek to convince the investors that it is in their mutual best interest to start construction of the project as soon as possible in order to catch a strong market, reduce carry costs, and create jobs within strict USCIS time limits.

These Centers rely upon their history of successfully completed projects in which an extremely high percentage of investor petitions have been approved by USCIS. Examples of Regional Centers that do not offer an escrow include American Life and EB5 Capital.²⁶¹ Another large fund that does not hold investors' funds in escrow is USIF, which apparently has funded the largest volume of EB-5 capital transactions since its inception in 2010. These Regional Centers commit to promptly return each investor's contribution if his I-526 petition is denied.²⁶²

The Chicago Convention Center scandal illustrates the importance of an escrow.²⁶³ There, each of the investors promptly recovered his full \$500,000 investment - because the funds were still held in escrow.

In contrast, the Regional Center's upfront administrative fee is typically not held in escrow, and instead is released immediately to the Regional Center. It is typically nonrefundable. In the Chicago Convention fraud case, the EB-5 investors still have not recovered the administrative fees (exceeding \$11 million) because such fees were immediately released to the Regional Center, rather than held in escrow.²⁶⁴

Bridge Financing

To relieve the tension between investors (who desire escrow protection of their funds) and developers (who wish to proceed with the project without waiting for release of the EB-5 capital), some developers have turned to bridge financing. Bridge financing in the EB-5 context is interim financing or temporary financing – in the form of debt or equity – prior to the developer's receipt of EB-5 capital.²⁶⁵

Bridge financing describes the use of the funds – that is, to bridge the financing of a portion of a project until the ultimate intended source of financing is available. Bridge financing does not refer to the type of financing. Similar to EB-5 capital, bridge financing could be structured as senior debt, subordinated debt, unsecured debt or equity. However, bridge financing typically takes the form of a loan.

The USCIS had long been concerned that bridge loans might be an after-the-fact pretext by an EB-5 developer for lowering its cost of capital by replacing financing, with minimal impact on new job creation. It has been argued that EB-5 bridge financing simply increases the profit margin of developers. Until recently, the bridge loan market for EB-5 capital was not

²⁶¹ EB-5 Capital Question 5 Investor FAQ – funds released when I-526 petition filed.

<http://www.eb5capital.com/faqs/>. American Life website FAQ - Investment Topics: Question: "How do I invest?" <http://www.amlife.us/eb-5-visa/faq-investment-topics>. Only a few Regional Centers have sponsored projects that have reached the stage where unconditional visas have been issued to the investors. Few Regional Centers existed prior to 2009, and the timeline from the solicitation of the investors through the approval of the I-829 is approximately 5 years. Even fewer Regional Centers have projects that have resulted in the investors recovering their investment. This generally cannot occur until after the unconditional visa is issued because the investor must sustain his investment in the project.

²⁶² See

²⁶³ This case was the focus of the July 2014 Fortune Magazine article on EB-5.

<http://fortune.com/2014/07/24/immigration-eb-5-visa-for-sale/>

²⁶⁴ <http://fortune.com/2014/07/24/immigration-eb-5-visa-for-sale/>

²⁶⁵ 2013 Policy Memorandum at page 15

robust due to uncertainty about whether the USCIS would allow the bridge financing proceeds to be taken into account in determining job creation.

However, the USCIS changed its position on this issue in the 2013 Policy Memorandum. This has brought a measure of certainty to the area and has resulted in an increase in demand for bridge financing for EB-5 projects.²⁶⁶

The Policy Memorandum states in part: “It is acceptable for the developer or the principal of the new commercial enterprise, either directly or through a separate job-creating entity, to utilize...bridge financing... If the project commences based on the bridge financing prior to the receipt of the EB-5 capital and subsequently replaces it with EB-5 capital, the EB-5 capital still gets credit for the job creation... Developers should not be precluded from using EB-5 capital as an alternative source to replace temporary financing simply because it was not contemplated prior to obtaining the bridge or temporary financing.”

Thus, even if the EB-5 financing was not contemplated prior to placement of the bridge financing, so long as the financing to be replaced was viewed as temporary financing (which would ultimately be replaced) the developer could later use EB-5 capital as the source of replacement capital and still obtain credit for the job creation. This interpretation supports a larger EB-5 capital raise than if the EB-5 capital were not credited with job creation generated by the temporary bridge loan funds.

Based on this interpretation and the increased popularity of EB-5 as a financing tool, more banks and other institutions are willing to make bridge loans to fill the financing gap until the EB-5 funds are released from escrow. Some banks, such as Citibank, have formed a special division to provide these loans. These banks still underwrite the loan based on the project without EB-5 capital, in recognition that the USCIS approval of the I-526 petitions is uncertain. Thus, the bridge lender must be prepared to have an exit strategy that does not rely upon the EB-5 capital as the takeout source. Similarly, the EB-5 escrowed funds are not available as a source of collateral. According to Citibank²⁶⁷, the principal amount of the bridge loan is a percentage, from 50% to at most 80%, of the project’s total EB-5 capital component.²⁶⁸

Where a bridge loan is required, obviously the costs to the project will be higher than where the EB-5 capital could be immediately funded when needed. The bridge loan proceeds are typically used to fund project construction costs. The bridge lender typically secures the loan with a senior mortgage loan, even if the ultimate loan to the JCE by the NCE will be a mezz loan.²⁶⁹

The mortgage tax rate varies by jurisdiction. For example, in New York City the rate approaches 3% of the loan’s principal amount, which is significant given the short duration of the bridge loan.²⁷⁰ Additional closing costs will apply. Furthermore, the interest rate on the bridge loan might be higher than on the EB-5 capital loan.

Thus, the bridge loan adds a layer of costs and complexity to the financing transaction. Accordingly, in evaluating whether to use EB-5 capital in its capital stack, a developer must take

²⁶⁶ September 10, 2014 telephone call with Gina Nisbeth of Citibank’s Structured Lending Group, responsible for EB-5 bridge loans.

²⁶⁷ https://www.citibank.com/mss/issuer_svcs/agency/escrow/pdf/eb5_bridge_financing.pdf

²⁶⁸ Citibank’s bridge program is limited to projects that are located in “low income” communities qualifying for Community Reinvestment Act credit. Even though virtually all EB-5 projects are located in a TEA, few are located in qualifying census tracts.

²⁶⁹ If another senior lender is involved, the bridge lender might obtain a participation in the senior mortgage loan.

²⁷⁰ <http://www.tax.ny.gov/pit/mortgage/mtgidx.htm> The mezz loan is not subject to the mortgage tax.

into account whether a bridge loan will be necessary and, if so, must estimate the additional capital costs associated with that bridge loan.

The bridge loan also creates an opportunity for the developer to reduce the risk that the immigrant investor assumes by funding capital during the risky construction phase of a project. The bridge lender initially funds some of the costs that otherwise would presumably be funded by the EB-5 capital. Although the developer presumably desires that the immigrant fund these costs as early as possible, and preferably without the necessity of a bridge loan and its additional costs, bridge financing arguably might be viewed favorably by the immigrant investor, particularly since the jobs created as a result of the bridge loan proceeds are allocated to the EB-5 investor. Subsequent to the Policy Memorandum, USCIS has indicated that there are limits on its liberal interpretation of job creation funded by bridge financing. For example, if EB-5 funds are used to refinance debt initially contemplated as longer-term debt, then the EB-5 funds would not be credited with job creation.²⁷¹ Nevertheless, the broad terms of the Policy Memorandum open many avenues for EB-5 capital to be credited with job creation even where the jobs are created by the bridge financing.

Technically, in most cases, the bridge lender makes the loan to the NCE as that is the entity that will be the recipient of the EB-5 capital upon release from escrow. The NCE then transfers the bridge loan proceeds to the JCE. As the EB-5 capital is released from escrow, the funds are applied to reduce the bridge loan balance.²⁷²

Other sources of bridge financing are also available. Affiliates or other related parties to the developer sometimes fund the bridge. For example, the Lightstone REIT, an affiliate of the developer, is providing bridge financing for the Lightstone's EB-5 project. There the bridge financing of \$45 Million represents 75% of the EB-5 capital raise.²⁷³ Obviously, this alternative is not available to many developers.

EB-5 capital may be combined with tax credit programs

Some developers choose to combine EB-5 capital with Federal tax credit programs to close a funding gap or reduce the need for other capital. These tax credit programs include New Market Tax Credits (NMTC)²⁷⁴, Low Income Housing Tax Credits (LIHTC),²⁷⁵ Historic Tax Credits (HTC)²⁷⁶ and/or Brownfield Tax Credits.²⁷⁷

A discussion of how these programs can be combined with EB-5 funds in the capital stack is beyond the scope of this paper. However, it is noted that the availability of EB-5 capital has much broader application than capital provided through those tax credit programs.

²⁷¹ http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED-EB5-QA_022614.pdf Question and Answer #11.

²⁷² See, for example, the junior construction loan facility that replaced the senior in SLS Las Vegas, referred to above.

²⁷³ <http://lightstoneeb5.com/eb-5/capital-structure/>

²⁷⁴ http://www.newmarkets.org/section/aboutus/tax_credits

²⁷⁵

http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/training/web/lihtc/basics

²⁷⁶ <http://ntcicfunds.com/tax-credit-basics/historic-tax-credit-guide/>

²⁷⁷ <http://www.epa.gov/brownfields/tax/>

NMTC is restricted to “low-income communities” based on an individual census tract in a “low income” area (a much narrower category than EB-5 TEAs). LIHTC is restricted to an asset class and has an income limitation - below market rate, residential projects. HTC is not limited to an asset class, but it has very limited application since it applies generally only to landmark or other historic buildings, and the units must be rented for at least 5 years. Brownfield credits typically involve industrial sites and are limited to properties that require extensive environmental remediation. Each of these programs provides for the issuance of tax credits that can be sold by the owner to generate equity for the project.

In contrast, EB-5 capital does not involve tax credits or any governmental subsidies. Unlike the tax credit programs that are available to limited asset classes or existing properties of a particular condition, EB-5 capital is available to a far broader array of properties, with fewer limitations. However, the project’s job creation capacity serves as a limit on EB-5 capital, but is not a limit on the tax credit programs.

Conclusion

The recent use of EB-5 capital to provide gap financing for large-scale real estate projects in major urban areas represents a dramatic shift from the historic use of EB-5 funds. Increasingly, that capital constitutes a smaller slice of the capital stack, but for projects of immensely greater size.

EB-5 capital provides an extremely inexpensive - perhaps the least expensive - capital source available to developers. Although forming its own Regional Center enables the developer to minimize the cost of EB-5 capital, thus far few developers have pursued this avenue. Most major developers that have utilized the program for their initial and even subsequent projects have relied upon sponsorship by a third party Regional Center. Increasingly, the recent launching of EB-5 capital raises by major developers include those which possess the corporate infrastructure and expertise to coordinate international sales and investor relations, such as Related, Silverstein and Lightstone. These developers have opted to form their own Regional Centers, despite the setup and processing costs, because they perceive the savings and benefits to significantly outweigh the costs. These developers might contemplate using the Regional Center for future projects.

As the dollar volume of typical EB-5 capital raises increases and the number of projects utilizing EB-5 capital multiplies, it should be anticipated that more developers will opt to form their own Regional Centers. However, one cannot quantify the savings that a developer may derive from using its own Regional Center without knowing the terms of the offering and the market rate charged by third party Regional Centers for comparable deals.

However, irrespective of the route they pursue, one point is clear: a greater number of developers are utilizing the Program to access relatively inexpensive and flexible capital. If and when USCIS, the Regional Centers or the developers make publicly available detailed information about the investment terms, a more accurate evaluation of the savings could be conducted. Similarly, one would then be able to make a more accurate comparison of EB-5 terms with terms available from conventional sources. In the meantime, it is undeniable that EB-5 capital is firmly established as a financing tool that any developer considers in creating the optimal mix for a real estate development project’s capital stack.

The large-scale projects funded by EB-5 capital will contribute to a shortage of available visas as the number of applicants dramatically escalates. We assume that during 2015 legislation

will be enacted to extend the Regional Center Program. However, if the Program is to reach its full potential, the annual quota limit would have to be amended to permit more investors and their family members to pursue EB-5 as their path to a visa. It appears that such legislation will be enacted, and consequently, the Program's popularity will expand.

EB-5 capital in the current market presents many interesting questions for future research including the following:

Will more developers opt to form their own Regional Center rather than affiliate with third party Regional Centers?

How are relatively new third party Regional Centers able to attract major developers of large-scale project, compared to well-established Regional Centers?

Will a higher percentage of major developers with large-scale projects opt to form developer in-house Regional Centers?

How do the terms of the investment differ between an in-house and third party Regional Center, including but not limited to the return on the investment to the investor?

How will new Regional Centers attract immigrant investors?

Which factors influence whether a Regional Center deploys EB-5 capital as a loan or equity?

Will gap financing continue to be the most common use of EB-5 capital?

Will more multi-phased, large-scale projects (such as Related's Hudson Yards and Lennar's Shipyard projects) utilize EB-5 capital?

How does the Regional Center or the developer decide the appropriate size of each tranche or series of EB-5 capital for a particular project?

Will real estate projects continue to be the main type of business funded by EB-5 capital?

Are there typical terms for bridge financing used in EB-5 capital financing?

Which type of lenders will dominate the space?

Is it likely that investor demand for EB-5 opportunities will expand or contract and what impact, if any, will this have upon the investment terms and structure?

How will rising interest rates impact the EB-5 capital investment terms and structure?

How will the demand for EB-5 visas and the number of projects seeking EB-5 capital affect future pricing?

Under what circumstances do developers rent a Regional Center and what are the terms?

Will legislation be enacted to remedy the likely retrogression issues?

If retrogression reoccurs and continues for an extended period, what impact might this have upon investment terms and structures?

Which EB-5 capital issues require clarification by USCIS by regulation or otherwise?

Finally, case studies can be prepared focusing on the largest projects (including those covered in this paper), tracing their history to date and their future build out and market absorption. This could include studying all aspects of the project, including visa issuance, project completion, job creation, investor exit, refinancing of capital and the overall success of the project for the developer, the investors and the local community.

Appendix:

A. Database: Certain Large-Scale Real Estate Projects

- B. Database: Certain Successful Regional Centers
- C. Sample of an EB-5 Mezz Debt structure

Appendix A - Certain Large-Scale Real Estate Projects (“Large-Scale Projects Database”)

Attached as Appendix A is a database of some of the largest real estate development projects in which EB-5 capital has been utilized as a component of the capital stack. The database is compiled from information provided by the Regional Centers’ websites, developers’ websites, as well as other sources on the internet, including migration selling agents’ websites and news media articles. Some Regional Centers publicly release more data than others do. Representatives of only a few Regional Centers were willing to reveal or confirm information about their EB-5 investment structure.

The authors emphasize that neither of them has independently verified the information and data. We also acknowledge that the list is subjective and does not purport to list all of the large-scale projects that have utilized EB-5 capital.

The first tab “Summary” summarizes some of the key EB-5 data and applicable to these projects. A separate sheet for each project has been prepared which lists these and other variables in more detail (the “Data Sheet”). Each Data Sheet is divided into four sections: project description, capital structure, EB-5 details and information sources. The Summary and Data Sheet will continue to be updated as information becomes available.

The database generally defines large-scale projects as commercial real estate projects in urban areas where the EB-5 capital component is at least \$100 million or the total project costs is at least \$250 million. We are seeking to verify whether the amount of the EB-5 capital raised for Extell’s Gem Tower project was \$75 million or \$150 million. In any event it is noteworthy because at the time (circa 2011), Gem Tower represented one of the largest projects sponsored by a developer in-house Regional Center.

Some of the projects (such as Related’s Hudson Yards in Manhattan and Lennar’s Shipyard in San Francisco) are enormous, multi-phased projects. Thus, they will take several years to develop and construct. It would not be surprising if these projects seek to raise additional EB-5 capital as the projects progress, similar to the way that Forest City Ratner has raised capital in phases for its multi-phased Atlantic Yards’ project .

As indicated in the Database, the capital raises for some of the projects are still ongoing and not fully subscribed (such as Silverstein’s Four Seasons and Atlantic Yards Phase 3).

Some of the projects utilize separate tranches or series of offerings to raise EB-5 capital (such as SBE’s SLS Las Vegas and Lennar’s Shipyard). Generally, the data for all of the tranches have been consolidated for a single project because the tranches relate to the same phase of construction. However, in the case of Atlantic Yards, tranches have been listed separately because each relates to a different phase of construction. For purposes of the notes and observations below, the Atlantic Yard phases have been consolidated and treated as one project.

The authors recognize that this limited sample of projects is subjective and not suitable for drawing general conclusions about the use of EB-5 capital. However, here are some notes and observations about these projects.

1. The total dollar volume of these 12 projects exceeds \$3 billion.

2. Most of these projects have utilized EB-5 capital as a loan, typically mezzanine (or other subordinated) debt.
3. The EB-5 capital for these projects typically represents 15% to 30% of the total project costs.
4. The number of large-scale EB-5 projects has risen dramatically in the past two years. The projects with the largest capital raises in the Program's history – Hudson Yards (\$600 million), the Atlantic Yards Phase II (\$249 million), SLS Las Vegas (\$384 million), Four Seasons Tribeca (\$249 million) and the Shipyard (\$272 million) – did not start fundraising until 2013 or later.
5. These projects also represents the largest EB-5 projects in history based on total project cost. As explained in the paper, it was more common in the past for the EB-5 capital component to represent a larger share of the capital stack. Several of the projects listed in the Database have total project costs approaching or exceeding \$1 billion. That size project was virtually nonexistent in the EB-5 context prior to 2010.
6. Eight of the projects were sponsored by third party Regional Centers and four by developer's in-house Regional Centers.
7. The types of large-scale projects funded by EB-5 capital vary widely. The project type category in the Database lists the product type of the project to be constructed, even if the EB-5 capital is intended to fund infrastructure for the project.
8. None of these projects has resulted in the investors' recovery of their capital investment. The EB-5 capital funding for these projects generally occurred after 2009, so insufficient time has passed to permit distribution of capital to the investors.

See Appendix B Certain Successful Regional Centers

Attached as Appendix B is a database of some of the most successful Regional Centers with their associated real estate projects. The database is compiled from information provided by the Regional Center's websites as well as other sources on the internet. Some Regional Centers publicly release more data than others.

Unlike the Large-Scale Project Database, this database focused on variables more specific to the Regional Center. The variables were the project; the size of the EB-5 capital component; the total project cost where available; I-526 approvals; I-829 approvals; and investors' recovery of their capital investment.

Most of these Regional Centers have one or more of the following attributes in common:

1. A successful track record in EB-5 projects with a demonstrated ability to raise substantial amounts of EB-5 capital;
2. At least one project where at least \$20 million of EB-5 capital has been raised;
3. Projects where a significant number of I-526 petitions have been approved;
4. Projects where a significant number of I-829 petitions have been approved; and
5. Projects where some investors have recovered their EB-5 capital investment and return on the investment (few Regional Centers have met this hurdle as explained in the paper).

USIF and New York City Regional Center are included because they have at least one project where the EB-5 capital component exceeds \$200 million.

Notes and observations from database:

Some of these Regional Centers operate and manage projects in different parts of the country. Except for USIF, the Regional Centers listed in the Database were established before the market downturn in 2008.

1. This list does not include the “in-house” Regional Centers formed by major real estate developers, such as Silverstein, Extell and Related, that have a successful real estate development track record outside of the EB-5 area.
2. The list includes only one in-house Regional Center, the American Life Regional Center, that is one of the first Centers and which has expanded to managing 10 centers as of this date. Most, if not all of its projects, are developed as EB-5 projects and not as conventional real estate projects without an EB-5 capital component. See the “A Different Approach” section of the paper beginning on page ___.
3. These Regional Centers team up with developers who have the financial strength to line up financial commitments from other capital sources necessary to implement the project.
4. The trend is towards larger projects with larger EB-5 capital raises.
5. The only Regional Centers in this Database to sponsored a project with an EB-5 capital component in excess of \$200 million are the New York City Regional Center and USIF. Ironically, the same project – Atlantic Yard – was the recipient of the capital. Thus, developer seem to be relying less on third party Regional Centers, especially for large-scale projects. Also, newly-formed third party Regional Centers, such as USIF and the American Dream Fund, have been successful in attracting major developers and immigrant investors.
6. All of the Regional Centers, except for EB-5 Capital Regional Center, has raised more than \$1 billion of EB-5 capital.
7. The September 2014 repayment to the investors of the \$122 Million EB-5 loan relating to the Pennsylvania Convention Center project associated with the Can-Am PIDC Regional Center represents the largest recovery in the EB-5 Program to date.
8. Most of these Regional Centers utilize the loan model structure. However, two of these, ALI and EB5 Capital, utilize the preferred equity structure.

Note: The paper’s authors have not independently verified the data compiled from the internet sources. The number of investors assumes that each of the projects is located in a TEA. A Regional Centers’ track record, including the amount of EB-5 capital raised for a particular project or returned to investors, is not audited generally by independent accountants or other professionals. In conventional real estate deals it is not unusual for the developer to have the same investment partners for future projects. In EB-5 projects, typically the investor invests in one project.

Appendix C – Sample structure of EB-5 Mezzanine

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Large-Scale Project Database

THIS IS A CONFIDENTIAL DRAFT, WORK IN PROGRESS AND NOT TO BE CIRCULATED

Professor Jeanne Calderon and Gary Friedland Esq.

Summary

12.15.2014

NOT SIZED FOR PRINTING YET

See Notes at end of paper re Large-Scale Project Database. These might be incorporated into a tab to this workbook.

See separate project sheets for project details for each project and data sources (to be provided). See Durst sample.

#	Project Name	Project Locale	City	Project Developer (Lead developer)	Regional Center	Project Type/ Predominant Type	EB-5 Loan or Equity?	Number of EB-5 Investors	EB Capital Investment	Total Project Cost (TPC)	EB-5 Investment as % of TPC	Type of EB-5 Loan or Equity
1	Hudson Yards [Fn _]	West Side of Manhattan	New York City	Related	In house (Related)	Mixed use/office, retail & residential	?	1,200	600M	TBD		
2	Atlantic Yards Ph 1 [Fn]	Brooklyn	New York City	Forest City Ratner	NYC Regional Center	Mixed use/	Loan	456	228M	1235M	18%	
3	Atlantic Yards Ph 2	Brooklyn	New York City	Forest City Ratner	USIF	Mixed use/	Loan	498	249M	1235M	20%	Mezz
4	Atlantic Yards Ph 3	Brooklyn	New York City	Forest City Ratner	USIF	Mixed use/	Loan	498	249M	TBD		Mezz
5	855 6th Ave	Midtown Manhattan	New York City	Durst	USIF	Mixed use/multi-family rental	Loan	160	80M	423M	19%	Mezz
6	W57	Midtown Manhattan	New York City	Durst	USIF	Mixed use/multi-family rental	Loan	360	180M	685M	26%	Mezz
7	Bryant Park	Midtown Manhattan	New York City	HFZ	USIF	Hotel/Luxury Condominium	Loan	105	53M	253M	21%	Mezz
8	101 Tribeca	Tribeca section of Manhattan	New York City	Witkoff/Fisher Bros.	USIF	Luxury condominium	Loan	350	175M	735M	24%	Mezz
9	Four Seasons	Tribeca section of Manhattan	New York City	Silverstein	In house (Silverstein)	Hotel/Luxury Condominium	Loan	498	249M	950M	26%	Mezz
10	Gem Tower [Fn _]	Midtown Manhattan	New York City	Extell	In house (Extell)	Jewelry Condominium	Loan	150	75M	750M	10%	Mezz

11	City Point	Brooklyn	New York City	Acadia [Fn]	NYC Regional Center	Mixed use/Retail	Loan	400	200M			Mezz or 2nd Mortgage (\$100M)/Unsecured (\$100M)
12	SLS Las Vegas		Las Vegas	SBE	American Dream Fund	Hotel/Casino	Loan	768	384M	534M	72%	2nd Mortgage
13	LA Marriot	Downtown	Los Angeles	American Life	In house (American Life)	Hotel	Equity	336	168M	168M		Equity (LP)
14	Shipyard [Fn_]	Candlestick Park, Naval Shipyard	San Francisco	Lennar	Golden Gate Global	Mixed use/Housing for sale	Loan	544	272M	TBD		

6,323 3162M
over \$3 Billion

Large-scale pending projects

	New York Wheel	Staten Island	New York City		CanAm	Ferris wheel	Loan	300	150M	400M	38%	
	Stadium Place		Seattle	American Life	American Life	Mixed use/Hotel	Equity	600	300M	300M	100%	
	Brooklyn Navy Yard	Brooklyn	New York City		NYC Regional Center			494	247M			
	Nassau Coliseum		NYC suburbs	Forest City Ratner	USIF		Equity	90	45M	135M	33%	
	Atlantic Yard Ph 3											
			New York City	Lam Group								

Project Detail:			
Developer	Durst Organization		
Other major investors	Fetner Organization		
Project Name	855 Avenue of the Americas		
Project Address	855 Avenue of the Americas	NY, NY 10001	Block 806, Lot 34
Regional Center	US Immigration Fund, LLC		
Property Owner	855 MRU, LLC		
Land Acquired	2010 (2013 deed transfer from related entity)		
Property Type	Mixed use: Rental apartments, office and retail		
Project Size			Floors
	Res Rental	350,000 gsf 302 market rate, 77 affordable	8 to 41
	Office	127,000 gsf	2 to 7
	Retail	57,000 gsf below grade, street and 2nd floor	cellar, 1&2
Estimated Construction Start	Started	Foundation in process as of April 2014 Started October 2013	

Capital Structure:	Amount	% TPC	Lender/Investor (or notes)
Senior Loan	260.M	61%	NYS HFA <i>per ACRIS</i> 12/3/2013
EB-5	80M	19%	
Developer & Other	84.M	20%	<i>Presumably incl land acq (purchase: \$101M)</i>
Total Project Cost (Estd)	424.3 M	100%	

EB-5 Capital Details:		Notes
Loan or Equity	Loan	
# Investors	160	Per EB5-visa.com website
Investment per investor	500,000	Presumed
Fully subscribed?	Yes	As of July 2013
Subscription made available		As of April 2013
Jobs created (approx.)	2,009	Actual Job coverage ratio 1.26
Min reqd jobs to be created	1,600	
Job cushion	409	
Funding		Initial advance of \$35M in Dec 2013 presumably to JCE
Timing of release of EB-5		
Structure:		
Particular type of loan or equity	Mezz loan	Assumed based on senior loan and RC website refers to "loan and security documents" before first advance
I-526 application status		

Information sources:

http://visaeb-5.com/wp-content/uploads/2014/02/USIF_855_AoA_Newsletter_Feb_2014_ENGLISH1.pdf

<http://newyorkyimby.com/wp-content/uploads/2013/06/855-Ave.-of-Americas-book-ENGLISH-email.pdf>

<http://www.855avenueoftheamericas.com/> website re office and retail components

<http://www.durst.org/properties/855-avenue-of-the-americas/availabilities/lower-level>

<http://www.eb5-usavisa.com/our-projects/855-avenue> selling agent for the US IF Regional Center
(see project description)

<http://www.eb5-usavisa.com/portfolio/new-york-city-855-avenue-of-the-americas>

<http://online.wsj.com/news/articles/SB10001424127887324125504578509382446057460>

http://therealdeal.com/issues_articles/eb-5-in-overdrive/

The Real Deal article indicates Durst "rented" the regional center for the 855 Ave of Americas EB-5 raise but does not explain how this differs from entering into an arrangement with a third party center. "Rent" here might be a misnomer or merely indicates that the Regional Center is providing less than "full services" to Durst..

Appendix B
Successful Regional Centers
Summary

THIS IS A CONFIDENTIAL DRAFT, WORK IN PROGRESS AND NOT TO BE CIRCULATED
Professor Jeanne Calderon and Gary Friedland Esq.
Summary 12.15.2014 NOT SIZED FOR PRINTING YET

See Notes at end of paper re Successful Regional Center Database.

See attached worksheet.

Consider adding summary here - narrative and data.

Can AM Regional Center
 First Regional Center approved: 2001
 Number of Regional Centers 6
 Model: Loan
 Third party Regional Center

Source: <https://www.canamenterprises.com/about-us/track-record.html>

Also see closed projects: <https://www.canamenterprises.com/pidc-projects-list.html>

Can Am related Regional Center track record:

PIDC Regional Center Track Record (as of December 2014)						
Project	Loan Amount	# Investors	Maturity Date	I-526 Approvals	I-829 Approvals	Principal Repaid
1 Philadelphia Navy Yard Starr Restaurants -	\$2,500,000	5	12/16/2009	100%	100%	100%
2 Continental Midtown	\$3,000,000	6	1/28/2010	100%	100%	100%
3 Lannett Company, Inc.	\$4,500,000	9	12/13/2010	100%	100%	100%
4 Duane Morris, LLP	\$6,000,000	12	10/19/2010	100%	100%	100%
5 Philadelphia Navy Yard Starr Restaurants -	\$2,500,000	5	9/9/2010	100%	100%	100%
6 Butcher+Singer	\$2,500,000	5	9/16/2010	100%	100%	100%
7 Advanced Sports, Inc. The Day & Zimmermann	\$1,500,000	3	8/4/2011	100%	100%	100%
8 Group, Inc. Temple University Health	\$2,500,000	5	10/27/2013	100%	100%	100%
9 System, Inc. Wordsworth - List	\$13,000,000	26	4/22/2011	100%	100%	100%
10 Associates	\$9,000,000	18	8/25/2011	100%	100%	100%
11 Rhoads Industries, Inc. 121 Point Breeze Terminal,	\$7,000,000	14	8/3/2011	100%	100%	100%
12 LLC	\$2,000,000	4	11/28/2011	100%	100%	100%
13 K.P. Grant Enterprises Agusta Aerospace	\$2,500,000	5	5/16/2012	100%	100%	100%
14 Corporation Aker Philadelphia Shipyard,	\$15,000,000	30	12/16/2011	100%	100%	100%
15 Inc.	\$20,000,000	40	3/27/2012	100%	100%	100%

16	Comcast Corporation	\$26,000,000	52	9/20/2012	100%	98%*	100%
	University City Science						
17	Center	\$20,000,000	40	11/29/2012	100%	100%	100%
18	Philadelphia Navy Yard	\$13,500,000	27	2/5/2013	100%	100%	100%
	Philadelphia Post - Acute						
19	Partners, LLC	\$9,000,000	18	4/17/2013	100%	100%	100%
20	Cintas Corporation	\$7,500,000	15	11/26/2013	100%	100%	100%
	Kimpton Hotel - Palomar						
21	Philadelphia	\$6,000,000	12	11/30/2013	100%	83%*	100% early
	Agusta Aerospace						
22	Corporation	\$14,500,000	29	6/27/2014	100%	90%*	n/a
23	Pennsylvania Convention Center**	\$122,000,000	244	9/3/2014	100%	94%*	100%
	Kimpton Hotel - Monaco						
24	Philadelphia	\$45,000,000	90	10/27/2016	100%	n/a	n/a
	Southeastern Pennsylvania						
	Transportation	\$35,000,000	70	5/30/2017	100%	n/a	n/a
25	Authority (Tranche I)						
	Southeastern Pennsylvania						
	Transportation Authority	\$75,000,000	150	7/1/2019	100%	n/a	n/a
26	(Tranche II)						
	Southeastern Pennsylvania						
	Transportation Authority	\$65,000,000	130	n/a	98%*	n/a	n/a
27	(Tranche III)						
	Courtyard by Marriott -						
28	Navy Yard	\$16,500,000	33	2/28/2019	60%*	n/a	n/a
	Aker Philadelphia Shipyard,						
29	Inc.	\$60,000,000	120	n/a	n/a	n/a	n/a
29	TOTAL*	\$608,500,000	1,217				

Pennsylvania DCED Regional Center Track Record (as of December 2014)						
Project	Loan Amount	# Investors	Maturity Date	I-526 Approvals	I-829 Approvals	Principal Repaid
1 Lionsgate Entertainment, Inc.	\$65,500,000	131	4/10/2013	100%	99%*	100%
2 Bakery Square	\$30,500,000	61	6/5/2014	100%	100%	100%
3 AE Polysilicon Corporation	\$18,000,000	36	11/4/2014	100%	97%*	n/a
4 University of Pittsburgh Medical Center	\$71,000,000	142	7/6/2015	100%	53%*	n/a
5 Valley Forge Convention Center	\$40,000,000	80	5/26/2016	100%	13%*	n/a
6 Cambridge-Lee Industries, LLC	\$35,000,000	70	10/31/2018	94%*	n/a	n/a
7 Allentown City Center	\$35,000,000	70	n/a	n/a	n/a	n/a
7 TOTAL	\$295,000,000	590				

Los Angeles County Regional Center Track Record (as of December 2014)						
Project	Loan Amount	# Investors	Maturity Date	I-526 Approvals	I-829 Approvals	Principal Repaid
1 Time Warner, Inc.	\$47,500,000	95	10/29/2014	100%	100%*	100%
2 Time Warner, Inc.	\$100,000,000	200	6/3/2015	100%	77%*	n/a
3 Sony Pictures Entertainment	\$125,000,000	250	12/15/2016	99%*	0.4%*	n/a
4 Time Warner, Inc.	\$125,000,000	250	9/30/2018	94%*	n/a	n/a
5 Molina Healthcare	\$35,000,000	70	n/a	n/a	n/a	n/a
5 TOTAL	\$432,500,000	865				

Hawaii Regional Center Track Record (as of December 2014)						
Project	Loan Amount	# Investors	Maturity Date	I-526 Approvals	I-829 Approvals	Principal Repaid
1 Hawaii Airport - Consolidated Rental Car Facility (CONRAC)	\$50,000,000	100	n/a	70%*	n/a	n/a

2	Kalaeloa Solar One, LLC (SOPOGY, Inc.)	\$15,000,000	30	n/a	100%	n/a	n/a
3	University of Hawaii - West O'ahu	\$18,000,000	36	4/22/2018	100%	n/a	
3	TOTAL	\$83,000,000	166				

New York Metropolitan Regional Center Track Record (as of December 2014) (designated 2013)							
	Project	Loan Amount	# Investors	Maturity Date	I-526 Approvals	I-829 Approvals	Principal Repaid
1	Gulfport Marine Terminal	\$40,000,000	80	12/24/2018	n/a	n/a	n/a
1	TOTAL	\$40,000,000	80				

45	TOTAL ALL	\$ 1,459,000,000	2,918
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\$ 500,000 per investor ?

* Remaining percentage of applications are pending approval at USCIS

Pending, not included in above schedules:

NY Wheel - Staten Island, NY	\$ 150,000,000	300	TBD	n/a	n/a	n/a
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<http://www.canamenterprises.com/about-us/news-updates/280-ny-wheel-reels-in-chinese-eb-5-investors.html>

* Loan are all first mortgage loans, with 5 year term, no prepayment right.

** The recent repayment of this loan represents the largest project repayment in the history of the EB-5 Program.

\$122 Million to 244 investors in full and on time.

http://www.fortmilltimes.com/2014/10/22/3807665_canam-announces-the-largest-eb.html?rh=1

CanAm PIDC completed projects: <http://www.canamenterprises.com/pidc-closed-projects.html>

EB5 Capital

Number of Regional Centers: 2

First Regional Center designation 2008

Location: Washington, D.C. Metropolitan Area
California

Third Party Regional Center

Model: Equity

<http://www.eb5capital.com/projects/>

Project	EB-5 capital	# Investors	Equity	I-526	I-829	Capital
				Approvals**	Approvals**	Recovered?
1 Sugar Bush, VT* City Market at O Street -	\$20,000,000	40		100%	100%	
2 Group 1	\$5,000,000	10		100%	100%	100%
3 Mariott Marquis City Market at O Street -	\$5,000,000	10		100%	0%	0%
4 Group 2	\$12,500,000	25		100%	0%	0%
5 DC Hilton Hotels	\$39,000,000	78		100%	0%	0%
6 San Jose Mariotte Hotels Kensington Place of	\$35,000,000	70		0%	0%	0%
7 Redwood City	\$6,500,000	13		0%	0%	0%
8 Riverfront at Navy Yard	\$17,000,000	34		0%	0%	0%
9 1000 F Street	\$9,000,000	18		0%	0%	0%
	<u>\$149,000,000</u>	<u>298</u>				

Angel Brunner, principal of EB5 Capital, arranged this project through the Vermont Regional Center in 2007.
Assumed pending applications to mean 0%, potentially some may already be approved

New York City Regional Center (NYCRC)

Number of Regional Centers: 1

First Regional Center designation 2008

Location: New York City

Third party Regional Center

Model: Loan model

<http://nycrc.com/about.html#prettyPhoto>

<http://nycrc.com/previous-projects.html>

Project	Loan		Loan vs. Equity?	Maturity Date	I-526 Approvals	I-829 Approvals	Principal Repaid
	Amount	# Investors					
1 Brooklyn Navy Yard Redevelopment Project (Phase I)	60,000,000	120	Loan				http://www.nycrc.com/article.html?id=10
2 Steiner Studios Expansion Project	65,000,000	130	Loan				http://nycrc.com/project.html?id=12
3 Battery Maritime Building East River Waterfront Project	77,000,000	154	Loan				http://nycrc.com/project.html?id=11
4 Brooklyn Arena and Transportation Infrastructure Project (Atlantic Yards)	228,000,000	456	Loan				http://www.nycrc.com/article.html?id=6
5 George Washington Bridge Bus Station Redevelopment Project(Phase I)	72,000,000	144	Loan				http://nycrc.com/project.html?id=10
6 Pier A Redevelopment Project	16,500,000	33	Loan				http://nycrc.com/project.html?id=9
7 Brooklyn City Point Redevelopment Project	200,000,000	400	Loan				http://nycrc.com/project.html?id=7
8 Bronx Hutchinson Metro Center Project	80,000,000	160	Loan				http://nycrc.com/project.html?id=6
9 Brooklyn Navy Yard Redevelopment Project (Phase II)	42,000,000	84	Loan				http://nycrc.com/project.html?id=5
10 Washington Heights Mixed-Use Development Project	17,500,000	35	Loan				http://nycrc.com/project.html?id=4
11 New York City Subway Wireless Infrastructure Project	75,000,000	150	Loan				http://nycrc.com/project.html?id=3
12 Chrystie Street Mixed-Use Development Project	80,000,000	160	Loan				http://nycrc.com/project.html?id=2
13 Steiner Studios Expansion Project(Phase II)	80,000,000	160	Loan				http://nycrc.com/project.html?id=1
14 George Washington Bridge Bus Station Redevelopment Project(Phase II)	19,000,000	38	Loan				http://nycrc.com/project.html?id=14

14 Total	1,112,000,000	2,224
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Large-scale projects not included in above schedule

Brooklyn Navy Yard	247,000,000	494
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<http://www.nycrc.com/article.html?id=61>

To date, 100% of NYCRC project offerings have been approved by USCIS. NYCRC investor approval statistics are as follows:

				Family members per investor	Investors and family members permanent residency
Total Investors	I-526 approvals	I-829 approvals	Family members with CPR		
2,224	1674	391	4,495	1.7	1,144

Over 2,200 individuals from 20 different countries have invested in NYCRC project offerings to date. These countries include:
 Brazil, Canada, China, Egypt, Germany, Great Britain, India, Indonesia, Italy, Japan, Macau, Mexico, Nepal, Netherlands, Nigeria, Russia, S. Korea, Taiwan, Turkey, and Venezuela.

US Immigration Fund Regional Center

[See Large-Scale Project Database](#)

First Regional Center approved:

Number of Regional Centers: 3

Locations: Florida, NY, NJ

Projects 15

Third Party Regional Center

Model (typical): Loan

American Life
 First Regional Center formed: 1996
 Number of Regional Centers: 10
 Model (typical): Equity
 Developer in house Regional Center
 Administrative fee 39,000 <http://www.eb5-visa.net/decisionprocess.html>

37 projects
<http://www.amlife.us/real-estate-portfolio>
<http://www.amlife.us/about>

Since 1996, over 450 domestic investors and approximately 1,700 EB-5 green card investors have trusted **American Life, Inc.** with their real estate investments. For these immigrant investors, we have delivered over 600 U.S. permanent green cards (via I-829 petition approval) and approximately 1,300 U.S. conditional green cards (via I-526 petition approval). Our knowledge and experience in working with U.S. Citizenship and Immigration Services (USCIS)

In 2006, **American Life, Inc.** began to replicate the Seattle Regional Center model in other cities. Currently, we manage 10 federally approved EB-5 regional centers across the country, including in Southern California (3 locations), Atlanta, Miami, up-state New York and western Washington regions—Seattle, Everett, Lakewood and Tacoma.

Seek list of projects, EB5 capital amount,

#s per website	Project	Equity Amount	# Investors [fn 1]	EB-5 Amount	I-526 Approvals	I-829 Approvals	Investment Repaid	Project Type
2	Town Place Suite by Marriot	18.0 M	36					Hotel
4	Homewood Suites by Hilton	17.6 M	35					Hotel
5	Urban Self Storage LA Courtyard							Storage
6	Marriot/Residence Inn	168.0 M	336					Hotel
7	14575 Industrial	11.5 M	23					Office and Warehouse
8	2413 Pacific Ave, LP	13.0 M	26					Office and Retail

9	1501 First Avenue South, LP	155.0 M	310	Office and Retail
10	1531 Utah Avenue South, LP	59.8 M	120	Industrial
11	618 Second Avenue, LP (Courtyard Marriot)	86.5 M	173	Hotel
12	Canal Boiler, LP	3.2 M	6	Office and Retail
13	Pacific Industrial Center, LP 4746 Ohio Avenue South, LP	35.6 M	71	Industrial and Retail
14	1000 1st Avenue South, LP (Palmer Court)	27.4 M	55	Industrial and Office
15		21.1 M	42	Office and Retail
16	1016 1st Avenue South, LP Olympic Repographics)	12.4 M	25	Office and Showroom
17	3100 Airport Way South, LP (Rainier Storage)	29.2 M	58	Office and Storage
18	3601 W. Marginal Way S.W., LP (Fraser Marine Building)	5.3 M	11	Industrial and Showroom
19	2931 1st Avenue South, LP (Ederer Building)	22.3 M	45	Retail
20	2959 Utah Avenue South, LP (Hill Building)	3.0 M	6	Industrial and Showroom
21	66 South Hanford, LP (Hanford Building)	11.6 M	23	Flex
22	2944 1st Avenue South, LP (Gorlick Building)	9.2 M	18	Flex
23	624 South Lander, LP	3.0 M	6	Warehouse
24	2700 4th Avenue South, LP (Esquin Building)	12.5 M	25	Retail and Warehouse

25	Owl Transfer Building, LP 3317 Third Avenue South,	6.0 M	12	Industrial and Warehouse
26	LP	6.0 M	12	Warehouse
27	2962 1st Avenue South, LP	2.0 M	4	Industrial and Retail
28	Lonestar Investors, LP 2nd and Hinds Street	4.9 M	10	Warehouse
29	(Mendelson Land)	.5 M	1	Yard
30	2418 20th Avenue, LP	1.0 M	2	Flex
31	2440 1st Avenue South, LP	1.0 M	2	Flex
32	3223 3rd Avenue South, LP	3.0 M	6	Flex
33	2444 1st Avenue South, LP	6.8 M	14	Flex
34	2764 1st Avenue South, LP	1.5 M	3	Bank and Office
35	2724 6th Avenue South, LP	2.4 M	5	Office and Warehouse
36	2960 4th Avenue South, LP	10.4 M	21	Flex
37	Hullin Transfer Building, LP	8.7 M	17	Industrial and Office
		<u>743.7 M</u>	<u>1,559</u>	

Footnotes:

FN 1 Assumes that each project is in a TEA.
To be "reconciled" with ALL spreadsheet re historical records. Exclude non-EB5 investors.

Current EB5 projects:

<http://www.eb5-visa.net/currentregionalcenterprojects.html>

Loan	I-526	I-829	Capital
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Project	Amount	# Investors	Approvals	Approvals	Recovered?	Notes
255 South King Street LP 1 (Embassy Suites by Hilton)	244,000,000	488	n/a	n/a	n/a	Offer documents available now.
2 Riverside One LP	18,000,000	36	n/a	n/a	n/a	This project is awaiting the outcome of a court case against the USCIS and is not available for EB-5 investment.
3 Lancaster Lodging LP	31,000,000	62	n/a	n/a	n/a	This project is now complete and opened its doors in June 2014. This project is now built and open for business. The ribbon was cut Oct. 1 2014 at the new Homewood Suites by Hilton near the Atlanta airport.
4 3405 BB Parkway LP	15,100,000	30	n/a	n/a	n/a	This project is now built and opened its doors on 1 July 2014. Courtyard Marriott opened its doors on June 9, 2010
5 901 West Olympic Boulevard	168,000,000	336	n/a	n/a	n/a	
6 618 Second Avenue LP	88,600,000 564,700,000	177 1,129.4	n/a	n/a	n/a	

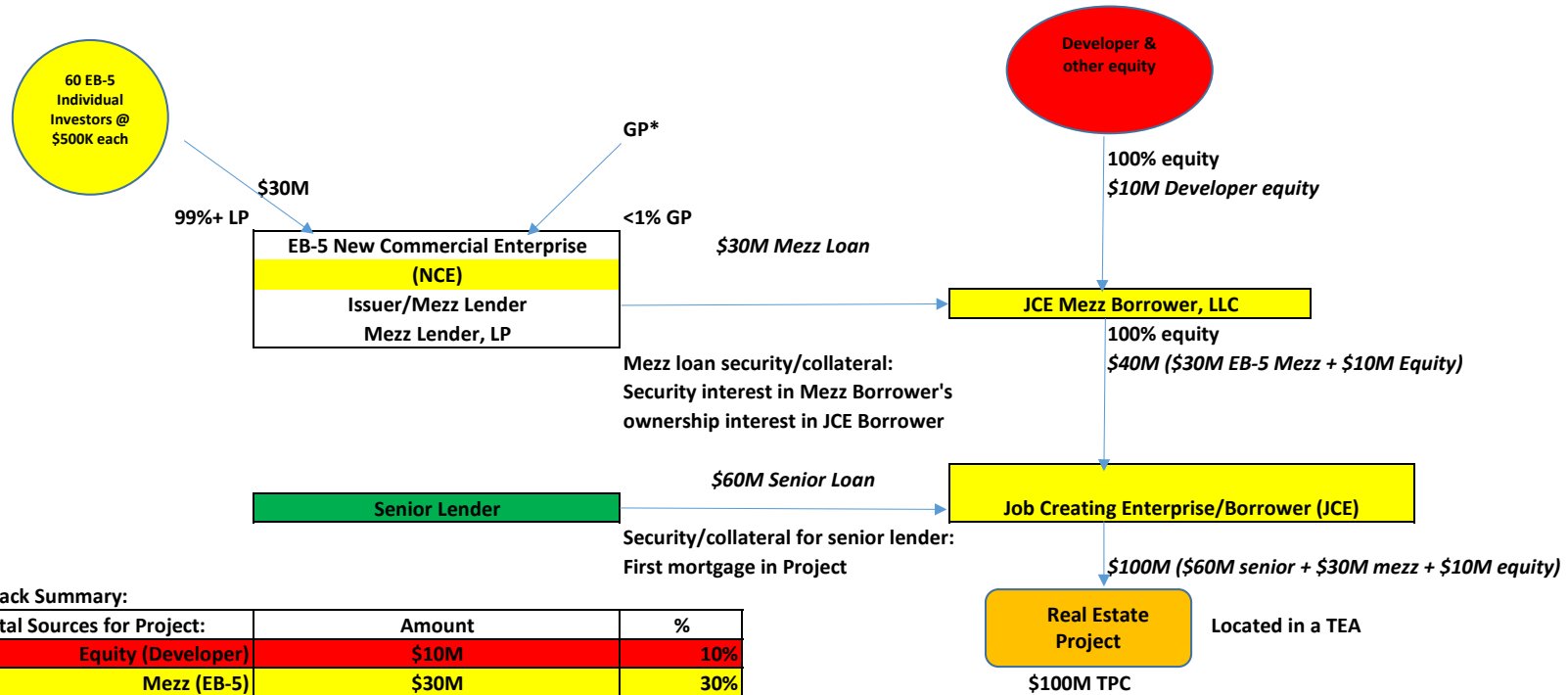
Appendix C

THIS IS A CONFIDENTIAL DRAFT, WORK IN PROGRESS AND NOT TO BE CIRCULATED

EB-5 Mezzane Debt Structure Via Third Party Regional Center

12.15.2014

Professor Jeanne Calderon and Gary Friedland Esq.



Capital Stack Summary:

Capital Sources for Project:	Amount	%
Equity (Developer)	\$10M	10%
Mezz (EB-5)	\$30M	30%
Senior Loan	\$60M	60%
Total Project Cost (TPC)	\$100M	100%

Job Creation:
600 Jobs required (minimum based on EB-5 capital)
750 Total jobs planned to be created
150 Job cushion (excess jobs)
1.25 Job coverage ratio

*GP is general partner of the Limited Partnership in which the EB-5 invest their equity. Typically, GPs are principals of or otherwise related to the third party regional center. GP could be individuals or an entity.

Sample Mezz Loan Terms:	
Loan term	5 years + 2, 1 year optional extensions; after I-829 removal of conditions approved
Interest rate	1-2%/yr to Investors (current pay and/or accrual)
GP management fee	1-2%/yr
Migration agent/broker's fee	1-2%/yr (this and GP fee may be embedded in interest rate for loan)
Points/origination fee	1% of loan amount (paid to GP or Regional Center)
Equity kicker	None (EB-5 investor's prime goal is obtaining a visa)
Collateral	Pledge of 100% of the equity ownership interests of the JCE
Guaranty	Completion guaranty; personal guaranty or nonrecourse carveout guaranty