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"A Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects" DRAFT 12/26/14

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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 and appendices) 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.

"A Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects"[1] DRAFT 12/26/14

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.

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[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

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 capital 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 investor[11]. Thus, the number of jobs that a project will create is a key determinant of the amount of the potential EB-5 capital raise.

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development 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.

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[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 Entity that owns the project, receives the EB-5 capital from the New Commercial Enterprise and creates the jobs.[18] 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, as well as the interplay between immigration risk and financial risk. We then compare: (a) EB-5 mezzanine debt vs. conventional mezzanine debt, including the developer's cost of capital; (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

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[18] As discussed in the Regional Center vs. NCE vs. JCE section, if the EB-5 capital is deployed to the project as equity capital rather than debt capital (a loan), a one-tier structure generally applies. However, EB-5 capital is more typically deployed as a loan to the project entity.

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 financing are beyond the scope of this paper. The EB-5 investors' capital contributions to the investment vehicle "New Commercial Enterprise" ("NCE")[19] constitutes a "security" for purposes of the Federal securities laws.[20] An EB-5 project is typically exempt from the registration requirements of the Federal securities laws.[21] 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.[22] 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 capital case, the JCE) is also exempt from registration.[23]

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".[24] 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."[25]

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

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[19] 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 Entity" ("JCE"). As discussed on page ___, sometimes the NCE and JCE are the same entity.

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

[21] 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.

[22] This assumes, as discussed on page ___, that the NCE and JCE are separate.

[23] The second step is required only if the NCE and JCE are separate entities. As discussed on page ___, sometimes the NCE and JCE are the same entity.

[24] 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.

[25] 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.

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 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,[26] 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.[27] The time between the issuance of the conditional visa and the unconditional visa is at least two years.[28] 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.[29] 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.[30] Some operators of Regional Centers and developers were willing to discuss EB-5 capital, but typically only in the most basic terms.[31]

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[26] IRC section 7701(a)(30)(A) defines United States person to include a "resident". See Michael Galligan, U.S. Residence: A Tale of Two (or More) Definitions," *New York Law Journal* (August 5, 2013).

[27] If the immigrant's EB-5 petition is ultimately rejected during the second-step of the process, his visa will be revoked subject to his appeal rights, 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.

[28] 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.

[29] 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)

[30] 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.

[31] 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, Silverstein Properties and CanAm.

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.[32] 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.[33] 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.[34] Under the Program, an immigrant must invest $1,000,000 in a United States business that creates 10 jobs for each EB-5 investor.[35] However, if the project is located in a Targeted Employment Area ("TEA"), the investment threshold is reduced to $500,000.[36] Since the law's enactment in 1990, the amount of the minimum required investment has remained the same.[37]

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.[38] 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

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[32] 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/

[33] Jasper Yang and Erzhuo Wang, undergraduate students at NYU's Stern School of Business.

[34] INA 203(b)(5)(C)

[35] INA 203(b)(5)(A)(ii)

[36] 8 C.F.R. 204.6(f)(2)

[37] 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).

[38] http://www.uscis.gov/laws.

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

A geographic area is classified as a TEA if its unemployment rate is at least 150 percent of the national average. [39] 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.[40] 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.[41] 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.[42] The processing of the TEA letter request is much shorter than the other aspects of the EB-5 immigration process.[43] 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.

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[39] 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 ("May 2013 Policy Memorandum") at pages 8 and 9.

[40]8 C.F.R 204.6(i)

[41] 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

[42] The TEA status of the project must be valid generally as of the date the individual investor files his I-526 petition, the first step in the immigration process. If the project's local economy is improving, it is possible that the project will no longer qualify as a TEA when the unemployment statistics are updated. Larger projects are especially at risk where there is a greater time delay between the initial investors who file petitions and the later investors. If later investors cannot qualify with a $500,000 investment because the project is no longer in a TEA as of the date they file, the EB-5 capital raise could be jeopardized with impacts to the project and the first immigrant investors who filed petitions. Based on remarks of Robert C. Divine, Esq. at EB-5 Summit, ILW conference held in New York City on December 19, 2014.

[43] 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.

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 that achieves the requisite high unemployment rate.[44]

Even the USCIS has questioned whether the State authorities are adhering to the "spirit of the law".[45] 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.[46] The liberal interpretation by some states has rendered the TEA concept almost meaningless.[47] Critics have referred to this combination of census tracts as "gerrymandering". [48]

Job creation

Job creation is the centerpiece of the Program.[49] The project must create at least 10 full-time jobs for American workers[50] 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.[51] 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.[52]

If the investor invests in a project that is not sponsored by a Regional Center, only direct jobs count.[53] Direct jobs are generally those full-time jobs filled by W-2 employees of the commercial enterprise.[54] 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

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[44] "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

[45] See also May 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."

[46] "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

[47] http://eb5news.com/system/uploads/newsletter/file/7/Nov_Dec_2011_Newsletter.pdf by Michael Gibson

[48] "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

[49] May 2013 Policy Memorandum at page 17.

[50] For these purposes, workers include U.S. citizens as well as lawful permanent residents. 8 C.F.R. section 204.6(e).

[51] The calculation relating to this requirement is explained in more detail in "The size of the capital slice" section beginning at page ___.

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

[53] 8 C.F.R. 204.6(e)

[54] 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)" dated December 11, 2009 (individually "Neufeld December 2009 Memorandum") and Memorandum from Neufeld entitled "EB-5 Alien Entrepreneurs – Job Creation and Full Time Positions" dated June 17, 2009 (individually "Neufeld June 2009 Memorandum"). The Neufeld December 2009 Memorandum and the Neufeld June 2009 Memorandum are collectively referred to as the "2009 Neufeld Memoranda". Also see the May 2013 Policy Memorandum at page 16 and 17.

associated with construction activity qualify only if they last for at least two years.[55] 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. [56] 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.[57]

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.[58] Instead, they work for those who provide goods or services to the project.[59] 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).[60] 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.[61]

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.

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[55] Neufeld June 2009 Memorandum

[56] 8 C.F.R. 204.6(m)(7)(ii)

[57] See May 2013 at page 19

[58] See May 2013 at page 18

[59] 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

[60] 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.

[61] 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

Most EB-5 projects strive to create more jobs than the minimum required by the EB-5 law 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.[62]

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.[63]

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.[64]
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.[65] This example assumes that (1) the EB-5 investor's proceeds will be loaned by the NCE

[62] See the "Size of the EB-5 capital slice" section beginning at page __

[63] Another alternative is to "rent" the Regional Center. See the discussion of renting in the Regional Center section of this paper.

[64] 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.

[65] See the discussion in the Regional Center section at pages ____.

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;
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).[66]

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 migration agents are often a paid a fee based on the total of the immigrant investment capital raised by the agent for the project. That fee is often paid in installments, with the first payment made by the Regional Center or NCE at the time the investor subscribes to the project

[66] 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, especially if the application includes an exemplar filing as described on page ___. 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

using the administrative fee proceeds described below and the balance paid in periodic installments payable at the same time that the JCE makes loan payments to the NCE.

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 one-time administrative fee charged to the investor by the Center[67]. 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.[68] USCIS "adjudicates" (reviews and ultimately approves or denies) the petition.

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).[69] 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".[70]

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,[71] depending upon whether the investor then resides inside or outside of the U.S. The focus is to obtain background information about the investor.

[67] See the discussion of the administrative fee at page ____. The amount of the administrative fee charged by the Regional Center to the investor varies, but generally ranges from $25,000 to $60,000. See in particular page 11 of this link: http://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-19_Dec13.pdf. Representative administrative fees include CanAm PIDC $48,000; USIF $47,000 to $50,000; American Dream Fund: $45,000; and Lightstone $50,000. Insert Website references. The administrative fee is sometimes referred to as a "syndication fee". See for example American Life http://www.amlife.us/eb-5-visa/faq-investment-topics

[68] 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 be in effect 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.

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

[70] See discussion in Regional Center section at page __ (Regional Center vs. NCE vs. JCE)

[71] Form I-485

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.[72]

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.[73] 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.[74]

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. Even if the project is economically successful, the I-829 petition will be denied if it does not meet the EB-5 requirements, such as the failure to create sufficient jobs or to continuously maintain the capital investment outstanding and at risk.

If the I-829 petition is approved, unconditional permanent resident status is granted and an unconditional (“permanent”) green card is issued. 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.

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[75]	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[76]	8 months
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 the “at-risk” and sustained investment rules, the investor’s recovery of capital cannot occur until after the approval of the I-829 petition. Furthermore, the timing of this “exit” depends on the terms of the

[72] 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.

[73] 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. May 2013 Policy Memorandum at page 22.

[74] See the discussion regarding the calculation of the job cushion in the Capital Stack discussion at page ___.

[75] 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=dfb3cqIcGbR2L_ZoVmePu

[76] 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=dfb3cqIcGbR2L_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

investment, as well as the JCE's liquidity and ability to repay the loan or distribute the equity.[77] 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.[78] Thus, even if the I-829 petition is approved, the investor is not assured that his capital investment will be recovered.

On a quarterly basis, USCIS publishes the average time frames for the agency to process various types of applications under the Program. [79] These average time frames have varied widely over recent years, and even from month to month.[80]

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 members").[81] The annual limit applies to the investor and his derivative family members.[82] 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.[83] During fiscal year 2013, more than 85% of the EB-5 visa applicants were from mainland China.[84]

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

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[77] 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.

[78] 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

[79] 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 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 petition 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.

[80] 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.

[81] 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 additional 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

[82] INA section 203.

[83] INA section 202(a)(2)

[84] https://iiusa.org/blog/research-analysis/quarterly-retrospective-january-issue-regional-center-business-journal/

would be frozen ("retrogress") until the start of the Federal government's ensuing fiscal year on October 1, 2014.[85]

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.[86] 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 petition 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. These delays can impact the timing of the investor's recovery of his capital. If the delay results in the NCE's loan becoming due before the investor's I-829 petition is approved, an issue could arise as to whether the repayment might jeopardize the investor's approval due to the "at risk" rules.[87] This might necessitate the restructuring of the loan to extend its maturity date until the approval of the investors' I-829 petitions. A more detailed analysis of retrogression is beyond the scope of this paper.[88]

Moreover, the growing trend of developers utilizing EB-5 capital for large-scale projects, which in several cases includes several hundred EB-5 investors per project, is likely to have a significant impact upon the annual quota.[89] 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, for example, if only two large-scale projects with a total of 1,000 EB-5 investors 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.[90]

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[85] http://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/China%20Employment%20Fifth%20Preference.pdf

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

[87] 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 LP partnership agreement or LLC operating agreement, the NCE manager controls the timing of the distribution of the funds to the investors, or 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 arguably 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 petition approval or unconditional visa issuance. Any further discussion of this is beyond the scope of this paper.

[88] 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 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/

[89] 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 III each anticipates 498 investors. (Phase III to be verified)

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

Enactment of 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. [91] If this or similar legislation were enacted, the number of visas that could be issued under the Program would be dramatically increased. 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.[92]

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.[93] The inclusion of indirect jobs typically yields a dramatic increase in the potential size of the EB-5 capital raise.[94] 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 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.[95] Congress has extended the life of this program numerous times.[96]

The current three-year extension expires in September 2015.[97] Extension is anticipated despite the fact that it is related to the controversial comprehensive immigration reform

[91] For example, 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).

[92] Assuming the number of investors who could obtain EB-5 visas were increased from 3,000 to 10,000, 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).

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

[94] See the "Size of the capital raise" section beginning at page ___.

[95] Section 610 of Public Law 102-395 (October 6, 1992)

[96] 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)

[97] Footnote __

legislation.[98] 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.[99] Obviously, there is always a risk that pending legislation will not be enacted. If the Regional Center program is not extended, the impact to the Program would be devastating.

Only a few Regional Centers have direct government involvement at the state or local level.[100] 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.[101] Some Regional Centers operate in more than one state. The same Regional Center can sponsor an unlimited number of projects.

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. [102]

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.[103] That number mushroomed to 601 as of December 1, 2014.[104] Many more Regional Center applications are currently pending before USCIS.

However, many Regional Centers have not sponsored even a single project resulting in a successful EB-5 capital raise.[105] 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.[106]

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[98] 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

[99] 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

[100] Examples include Vermont, Hawaii, Michigan, Iowa, and Miami.

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

[102] 8 C.F.R. section 204.6(c)

[103] EB-5 Immigrant Investor Program Stakeholder Engagement, 12/05/2014

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

[105] *According to IIUSA ____________________________ footnote to website*

[106] 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/

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. [107]

Regional Center vs. NCE vs. JCE; loan model vs. equity model

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. Debt capital, such as a loan by the investor to the NCE, does not qualify. [108] In turn, the NCE must invest all of that capital in the JCE.[109]

However, the NCE's capital investment may be deployed as a loan or equity, even though the immigrant investors' investment must be only equity capital. 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 debt fund; the fund deploys its investors' equity proceeds as the source of funds for a loan or other debt investment. [110] This does not cause the individual investors' equity capital to be recharacterized as debt.

Two basic investment approaches are available to invest the immigrant investors' equity capital in the project – the "loan model" and the "equity" model. Most EB-5 investments are structured under the loan model.

Under the loan model, all of the immigrant investors' capital is deployed by the NCE to the JCE as a loan. The Regional Center forms an 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.

Simply stated, 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 JCE, utilizing the investors' capital as the loan proceeds.

At the loan closing, the JCE pays origination fees or points to the NCE or its affiliates. During the loan term, the JCE as borrower typically makes periodic interest payments. The periodic payments are equal to the total of the migration agent and other brokerage fees, a management fee to the NCE's manager and the interest component payable to the immigrant investors. Typically, this total amount is paid to the NCE which distributes the appropriate amount to the various parties. The total amount due from the JCE is typically expressed in the loan agreement (or note) as a single, lump sum amount payable in installments as interest. In addition, the NCE can generate an additional profit on the spread if the interest payment charged to the JCE is greater than the total of the interest rate and fees to be paid by the NCE**.** The entire

[107] See I-924 instructions: http://www.uscis.gov/sites/default/files/files/form/i-924ainstr.pdf
[108] 8 C.F.R. § 204.6(e). May 2013 Policy Memorandum at page 3.
[109] Matter of Izummi at page 179. As described in this section, if the investors' capital is ultimately deployed as equity, rather than a loan, then the NCE and JCE could be the same entity. In that case, the immigrant investors usually invest directly in the entity, in which case the NCE and JCE are collapsed into a single entity.
[110] See for example, https://www.preqin.com/docs/newsletters/re/Preqin_RESL_Nov_2012_Growth_of_Real_Estate_Debt.pdf

principal amount is paid in one installment at loan maturity. A more detailed discussion of this topic is contained in the Capital Stack section of this paper.

Thus, the loan model involves a two-tier structure. 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 be a creditor, and not have an equity interest in the JCE. A one-tier structure is not permitted or appropriate because the immigrant investor would then be contributing prohibited debt capital to the NCE-JCE.

Under the equity model, the EB-5 investors are directly or indirectly equity owners in the entity which owns the property and will create the jobs. The equity model can be a one-tier or two-tier structure. The immigrant investors can contribute equity capital directly to the entity that owns the property and will create the jobs. In that case, the NCE and JCE are one and the same entity. Alternatively, a two-tier structure can be employed. The investors can contribute equity capital to the NCE. The pooled capital would then be contributed as equity capital to the JCE, with the investors owning equity in the JCE through the NCE. Apparently, the one-tier structure is more common for EB-5 investments utilizing the equity model.[111]

In the one-tier structure, the immigrant investors are typically preferred equity owners of the NCE-JCE. In the two-tier structure, the NCE is a preferred equity owner of the JCE. The economics of the equity model investment often time has similarities to the loan model, as will be discussed in the Capital Stack section.

The Regional Center and/or the NCE, on the one hand, and the project developer, on the other, 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.

Legal structure of the various entities

Although the Program does not require any specific type of legal entity, an NCE is typically 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, the LP is the more typical entity structure for an NCE. The main reason for this is due to an USCIS interpretation that specifically approves the LP format.[112] However, some NCEs are formed as LLCs because they are able to meet the same standard as an LP. [113]

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

[111] For example, the one-tier equity model structure is utilized by each of American Life's investments referred to on page ___ ; and the Jay Peak Resort's investment sponsored by the Vermont Regional Center referred to on page ___ of this paper. Presumably, the two-tier structure would make equity model investments more administratively feasible for the developer, especially for large EB-5 capital infusions, because the developer would have investor relations with only one direct investor, the NCE, rather than with multiple individual investors. However, this is beyond the scope of this paper.

[112] 8 CFR 204.6(j)(5)(iii)

[113] See for example SLS Las Vegas, http://www.adreamfund.cn/en-us/lasi.html. Also note that the May 2013 Policy Memorandum implicitly permits an NCE to be an LLC. See the redemption example on page 5 of that Policy Memorandum that refers to an NCE's" limited partnership agreement or operating agreement".

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.[114] 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. [115]

Investor's capital investment must be "at risk"

The EB-5 investor's capital investment in the NCE (i.e., the $500,000 or $1,000,000 equity contribution) must be placed "at risk" for the purpose of generating a return.[116] Thus, the investor can neither be guaranteed a return on any portion of his investment nor guaranteed the return of any portion of his capital investment.[117] Otherwise, that portion of the investment is not deemed to be at risk, and does not constitute equity capital.[118] Thus, it does not qualify as an EB-5 contribution for purposes of the $500,000 or $1,000,000 requirement.

The May 2013 Policy Memorandum states that if the investor has the right, under the LP partnership agreement or LLC operating agreement, to demand that some portion of his capital be redeemed by the NCE, that portion is not at risk.[119] This interpretation is consistent with the precedent decision, Matter of Izummi.

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 to migration agents or reimbursement of costs or expenses to the Regional Center.[120]

Although the NCE cannot guaranty either the return of the investor's capital investment or the return of his capital investment, the repayment of the NCE's loan (principal and/or interest) by the JCE can be guaranteed by a third party. This is permitted even though the repayment of the loan in the debt context is essentially equivalent to the mandatory redemption of equity in the equity context. The USCIS "prohibitions" on guarantees and redemptions focus on agreements that run directly to the immigrant investors. The guaranty of the loan runs directly to the NCE.

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[114] However, the manager might own equity in the JCE.

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

[116] 8 C.F.R. section 204.6(j)(2); May 2013 Policy Memorandum at page 5

[117] Matter of Izummi, at page 180-188; May 2013 Policy Memorandum at page 5

[118] May 2013 Policy Memorandum at page 5

[119] The example involves an investor who has the right to demand a redemption, such as a "put" option. It does not address whether a redemption right (mandatory or optional) in favor of the NCE would violate the at-risk rules. Furthermore, the example in the Policy Memorandum involves the investor's right to demand a redemption after obtaining his conditional visa. It does not directly address related issues such as whether a redemption right exercisable after unconditional permanent residency (after adjudication of the I-829 petition) would violate the at-risk rules. By comparison, the requirement that the investor's equity investment be sustained applies only until the I-829 adjudication. Finally, it does not address whether a redemption right in the case of a two-tier equity model structure would violate the at-risk rules, that is, where the JCE might have a redemption right with respect to the NCE.

[120] This is in contrast to the use of the administrative fees paid by the EB-5 investors. Matter of Izzumi; 2013 Policy Memorandum at page 16.

For example, the Lightstone New York Regional Center ("Lightstone Regional Center") 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.[121] In contrast, if instead the NCE (or anyone else) guaranteed repayment of the immigrant investors' contributions or if the agreement provided for the redemption of the investors' equity interest in the NCE, this would violate the EB-5 "at-risk" rules, presumably resulting in the USCIS's denial of the application. [122]

However, unlike the loan model, the opportunity to provide for the guaranty is not generally available in the case of the equity model. First, a "guaranty" of an owner's equity investment is typically antithetical to the concept of risk equity. Secondly, in the case of the more common one-tier structure, the investors directly own the equity interests, with no intervening entity as in the case of the two-tier loan model. Thus, a guaranty or redemption would be in favor of the investor's direct interest in the one-tier equity model. Accordingly, this would violate the at-risk rules. If a two-tiered structure equity model were utilized, then arguably a redemption right in favor of the NCE, or a redemption right or obligation by the JCE, might be permissible because the right would not run directly to the individual investors. However, neither the May 2013 Policy Memorandum nor USCIS regulations addresses this.

In addition to the requirement that the investor's equity capital be invested at risk, the investment in the NCE must be continuously maintained throughout the period until the I-829 petition is approved.[123] This requirement that the investment be "sustained" applies whether the investment is made under the loan model or the equity model.

Despite the at-risk rules and the sustained investment requirement, the NCE can make periodic distributions to the immigrant investor before the I-829 petition is adjudicated, so long as the distribution reflects a return on the investment, such as a profits interest, rather than a return of any portion of the investor's capital, and the distribution is not guaranteed to the investor.[124] However, no distribution of the investor's capital can be made by the NCE to the investors until after the I-829 petition is adjudicated.[125] An earlier distribution would violate the at-risk rules and sustained investment requirement, resulting in the recharacterization of the capital as debt not equity.

Generally, the investment by the investor in the NCE must be paid in full by the investor prior to the filing of the I-526 petition. However, the payment may be deposited into, and held in, an escrow account until the conditional visa is issued.[126]

***Third party Regional Center vs. developer "in-house" Regional Center*:**

[121] See Lightstone's EB-5 website: www.lightsstoneeb5.com (insert pdf). This structure was discussed by telephone with Meir Milgraum of the Lightstone Group on November 20, 2014.

[122] USCIS determinations on individual applications are not binding on third parties and do not serve as precedent.

[123] See 8 C.F.R. section 216.6(a)(iii). May 2013 Policy Memorandum at page 21

[124] May 2013 Policy Memorandum at pages 5 and 6

[125] May 2013 Policy Memorandum at page 6

[126] May 2013 Policy Memorandum at page 6

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 Center[127] 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 points, management fees and interest rate spread. The developer that controls its own Regional Center (and NCE) essentially loans the investors' funds to itself (its related JCE). Typically, the developer JCE's principals 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. [128] 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 – to access 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 (whether third party or "in house"), 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.[129] 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 that 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 "formation" 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.[130] Origination fees or points equal to 1% represent \$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 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. This saving is offset by any staff costs the developer will incur 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 retains the agents directly. However, the amount of these brokerage fees in these alternative arrangements may differ.

Despite these tempting cost savings, most developers ultimately elect to affiliate with an existing Regional Center for several reasons.[131] First, the existing Regional Center saves the developer the time and expense of forming a Regional Center and obtaining its designation from USCIS so that investors can be solicited and their funds utilized by the developer in an

[127] 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.

[128] The interest rate spread is discussed in the Capital Stack section below

[129] http://www.eb5investors.com/qa/how-much-does-it-cost-to-establish-an-eb5-regional-center2

[130] Technically, some or all of the fees may be paid to the NCE or an affiliate of the Regional Center.

[131] See page __ for the list of the many services that a Regional Center may provide to the developer and the investors.

accelerated time frame. Second, the experienced Regional Center should be able to more quickly locate 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 to the investors and their counsel, as they proceed through the USCIS immigration process. [132]

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 this 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 a year or even longer.[133]

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"). [134]

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. [135] When the individual investors submit their 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.[136] 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. [137]

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.

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[132] 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.

[133] 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

[134] May 2013 Policy Memorandum at page 14.

[135] May 2013 Policy Memorandum at page 14.

[136] 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).

[137] May 2013 Policy Memorandum at pages 14 and 15.

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. [138] 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 project[139]. 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 facts (for example changes to the business plan - which are not uncommon in construction projects), fraud or willful misrepresentation, 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.

The Lightstone Regional Center designation application, referred to above, includes an exemplar filing for its initial project. The USCIS designation letter in response to the application includes 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.[140] 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. [141]

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.[142] Alternatively, project approval can be deferred, and sought when the first individual investor 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.[143] There, USCIS issued a letter approving the project but did not include any facts or details about the project, job creation or capital structure.

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[138] 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 application 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 (for example, with respect to the business plan), 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

[139] May 2013 Policy Memorandum at page 24.

[140] 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.

[141] Obviously in the case of a designation letter based on a hypothetical project, virtually no meaningful project information is revealed.

[142] http://www.uscis.gov/sites/default/files/files/form/i-924instr.pdf at page 1, 2B.

[143] 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

Thus, the type of project level information revealed in Lightstone Regional Center's USCIS determination letter does not appear to be common. [144] 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;[145] 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.[146]

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: 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 entity; and monitoring compliance with the construction spending and operating revenues that serve as the basis for the business plan and the economic impact report. [147] Either a third party Regional Center or a developer's in-house Regional Center can provide these services.

Renting a Regional Center

Renting an existing, third party Regional Center is another increasingly common alternative available to a developer.[148] 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. [149]

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million is part of the capital stack for each of Phase 2 and Phase 3. However, these two loans will be funded through a different Regional Center, USIF.

[144] 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

[145] The geographic area must be contiguous. See Instructions to Application of Regional Center at page 1.

[146] 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.

[147] 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/

[148] 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.

[149] See, for example, "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 Mastroianni 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 the USIF Regional Center is sponsoring. In both cases, USIF is providing typical Regional Center services to the projects.

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 required to seek designation as an "in-house" Regional Center, yet obtain comparable benefits by bypassing the middleman.[150] 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 specific 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 sponsored even one project resulting in a successful capital raise.[151] These relatively inactive Regional Centers might be inclined to consider renting their designation to generate revenue. In contrast, a well-established Regional Center that is sponsoring other projects will generally not be interested to entertain 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 financially successful 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 and designation 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.[152] These fees, unlike the investment contribution, are often not paid into escrow,[153] 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 agents and other brokers involved in the transaction. The Regional Center may choose to retain a portion to defray the Regional Center's costs of forming and staffing ("overhead and profit"). In contrast, the entire amount of the EB-5 capital

[150] See page ___ re cost savings of developer "in-house" Regional Center
[151] *IIUSA citation…*
[152] See footnote __ above
[153] See the "Escrow of EB-5 investment funds" section starting at page __

contribution must be invested in the JCE.[154] 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.[155] 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.[156] Furthermore, if the project does not create sufficient jobs to support the visa petitions filed by the individual investors, then obviously the essential purpose for the filing fails.

Construction activity jobs provide most, if not all, of the jobs that EB-5 projects rely upon to satisfy USCIS requirements. The amount of the project's construction expenditures is the main driver of construction jobs for these purposes. Obviously, larger projects typically involve higher construction costs and thus result in more jobs. Larger projects with construction expected to last at least two years create even more jobs because in those cases direct jobs also count. Moreover, even if the project does not last two years, the indirect jobs count. Consequently, to be conservative, many capital raises for EB-5 projects are sized based on only indirect jobs. In those cases, direct jobs and operation jobs might be counted towards the job cushion.[157] Projects that can demonstrate a larger job cushion (the creation of more jobs than

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[154] Matter of Izummi at page 179

[155] 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 Memoranda that liberalized the guidelines for construction activity jobs that count towards job creation. See footnote ___. Even a ferris wheel project is seeking to tap EB-5 capital. The CanAM Regional Center is seeking to raise $150 million of EB-5 capital to fund The New York Wheel, a 625 foot ferris wheel to be built on the Staten Island waterfront. http://www.silive.com/news/index.ssf/2014/07/newn_york_wheel_gets_financial.html

[156] See the discussion in the Capital Stack section at page ___.

[157] http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED-EB5-QA_022614.pdf See Q&A 6 re economically direct jobs.

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.

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.[158] Nevertheless, some of these projects do not rely on these jobs in sizing the EB-5 capital raise as they expect to create a sufficient number of indirect jobs to support the immigrants' petitions.

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. 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 years and six months from obtaining the I-526 approval.[159] Thus, it is important to time the capital raise so that the filing of the investor's I-526 petition is properly synchronized with the expected time frame within which jobs are likely to be created. This will increase the likelihood that the investor will be be able to demonstrate at the I-829 petition stage that the jobs have been created or will be created within the required time frame.

To the extent the economic analysis is based on total construction expenditures, the investor must show that the actual 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.[160]

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.

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[158] These projects are included in the Large- Scale Projects Database in Appendix A. Creating indirect construction activity jobs is easier than creating operations jobs because construction jobs are based on construction expenditures, which are more controllable by the developer than the less predictable revenues to be generated by a project.

[159] Neufeld Memorandum June 17, 2009. 8 C.F.R. § 216.6(c)(1)(iv). May 2013 Policy Memorandum at page 22. The regulations require that the investor must establish that it is more likely than not that the jobs will be created "within a reasonable time". 8 C.F.R. § 216.6(c)(1)(iv).

[160] In 2011, USCIS proposed regulations that would accelerate the processing time for "shovel-ready" projects that are fully developed with participating investors who are ready to file I-526 petitions. These regulations were never finalized.
http://www.uscis.gov/sites/default/files/USCIS/Outreach/Feedback%20Opportunities/Operartional%20Proposals%20for%20Comment/EB-5-Proposal-18May11.pdf

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 to invest in projects that have either commenced construction or are ready to start construction, for example, with building permits already issued.

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.

However, the USCIS' liberal interpretation of bridge financing expressed in its 2013 Policy Memorandum makes the coordination of timing of the EB-5 capital raise and the filing of the I-526 petitions less critical in relation to when the jobs will be created. Under the new bridge financing guidelines discussed in the Bridge Financing section on page ___, jobs created before the EB-5 capital is invested or even contemplated can be credited to the EB-5 investors, so long as the EB-5 capital replaces short-term temporary financing which would subsequently be replaced.[161]

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". [162]

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 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. [163] 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. [164] 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

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[161] 2013 Policy Memorandum at pages 15 and 16

[162] http://commercialobserver.com/2014/09/eb-5-ambitious-china-city-project-sits-in-limbo/

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

[164] http://www.chinacityofamerica.com/

Until recently, most 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[165]

Increasingly, EB-5 investors tend to prefer the Gateway cities,[166] 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. [167]

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.[168] Second, large projects will create more 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 generate funds from the project available to repay the investors.

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. [169]

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

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

[167] 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.

[168] 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/

[169]For 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 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;

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:

Project Name	Developer[170]	EB-5 capital
Hudson Yards	Related Companies	$600 million
Atlantic Yards (Barclays Center) – Phases I, II & III[171]	Forest City Ratner	$728 million
Four Seasons Tribeca	Silverstein	$250 million
City Point	Acadia Realty	$200 million
W57	Durst Organization	$180 million
101 Tribeca	Witkoff/Fisher Bros.	$175 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.[172]

Most of the large-scale EB-5 projects are income producing, presumably due to an abundance of caution that sale of the project would generate proceeds to be paid to the NCE that may jeopardize whether the investor's capital remained fully "at risk" and continuously sustained until the I-829 petitions were outstanding. However, more recently, "for sale" development projects have utilized EB-5 capital. 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, Silverstein's luxury condominium portion of its Four Seasons project in Manhattan and Fisher Brothers' and the Witkoff Group's luxury condominium 101 Tribeca in Manhattan.[173]

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 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.[174] Given that few Regional

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http://www.hudsonyardsnewyork.com/the-story/building-hudson-yards;
http://www.hudsonyardsnewyork.com/article-detail/construction-begins-on-hudson-yards-eastern-platform-135

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

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

[172] "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.

[173] These projects are included in the Large-Scale Projects Database.

[174] See the explanation in the Immigration Process section on page 13.

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.[175]

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.[176] 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 in 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.[177] The phenomenal increase in the number of approved Regional Centers that have sponsored major transactions over 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.[178] 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

[175] 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.

[176] http://visaeb-5.com/ Also see the Large-Scale Projects Database in Appendix A.

[177] http://www.sfbarc.com/projects/hunters-point-shipyard/ Also see the Large-Scale Projects Database in Appendix A.

[178] See the discussion in the Capital Stack section on page ___ regarding potential conflicts and the lesser alignment of interest that exists between the investors and 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.[179] The City of New Orleans Regional Center sponsored a project with operators (hired by the former mayor) who defrauded the investors. [180] The South Dakota Meat Packers' plant project, sponsored by the South Dakota Regional Center, filed for bankruptcy, despite substantial government financial support.[181]

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.[182] 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. [183] 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. [184] 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.[185]

Location in a TEA

[179] This scandal was featured in Fortune Magazine's recent feature article regarding EB-5. http://fortune.com/2014/07/24/immigration-eb-5-visa-for-sale/

[180] http://www.wwltv.com/story/news/local/nagin-trial/2014/09/03/14573278/

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

[182] http://legis.sd.gov/docs/legsession/2014/Bills/HB1176P.pdf

[183] 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 New York State's Empire State Development Corporation ("ESDC") and former U.S. Ambassador to Trinidad and Tobago. The ESDC is the chief economic development agency that oversees projects such as Atlantic Yards. http://www.marketwired.com/press-release/us-immigration-fund-appoints-ambassador-charles-gargano-as-executive-director-1892735.htm

[184] http://www.hydc.org/html/project/rezoning.shtml

[185] 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 $1,000,000), 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 for use in the project. [186] These EB-5 proceeds can fill any space in the JCE's capital stack.[187]

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% of the total project costs. 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.[188]

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.[189] 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.[190]

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.

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[186] 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.

[187] 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 is required.

[188] The most important EB-5 restrictions are that the investment be "at risk" and be sustained throughout the immigration process. See May 2013 Policy Memorandum at pages 5 and 6.

[189] 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.

[190] 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).

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 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. After completion of the construction and stabilization of the income (in the case of an income-producing property), 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 intends 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.[191]

However, 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.[192]

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

[191] Job creation is obviously not a factor in the case of those metrics.
[192] See page ___ above

of EB-5 capital that can be raised for that project is $5 million.[193] Conversely, if the targeted EB-5 capital raise is $5 million, then the minimum number of jobs required is 100.[194]

All of the new jobs created by an EB-5 project, regardless of the source or amount of invested capital, can be allocated for EB-5 purposes to the EB-5 investors, even if EB-5 capital represents a very small percentage of the total project costs.[195]

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 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.[196] 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.[197] 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.

An alternative, simpler way to view this follows. First, take the total dollar volume of EB-5 capital sought to be raised, multiply the number of millions x 2 to arrive at the number of investors (that is, 2 investors at $500,000 each for each $1,000,000 of investment). Then multiply that by 10 to arrive at the minimum number of jobs required to support the capital. Compare the total jobs estimated to be created by the project and compare that to the minimum number required. If the total number of jobs is greater, the job cushion equals the excess jobs. The job cushion ratio would be the total number of jobs divided by the minimum number.[198]

Although the USCIS does not consider whether a job cushion exists for a particular project, a recent USCIS determination letter in response to an exemplar filing helps illustrate how the job cushion would be determined. The USCIS determination letter regarding the initial project by the Lightstone Regional Center states that the NCE will loan $50 million of EB-5 capital towards the total project cost of $208.915 million. [199] Based on the business plan and

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[193] 100 jobs/10 per investor = 10 investors x $500,000 each

[194] $5 million total EB-5 capital raise/$500,000 per investor = 10 investors. 10 investors x 10 jobs/investor = 100 jobs.

[195] 8 CFR section 204.6(g); http://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-19_Dec13.pdf at page 9

[196] 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.

[197] Like the conventional senior lender that requires the debt service coverage ratio (represented by the project's net operating income divided by the debt service) to reflect a cushion above 1.0 so that if adverse changes or unforeseen circumstances occur the lender is protected, the immigrant investors seek a job cushion for similar protection.

[198] For example, assume the EB-5 capital sought = $15 million. 15 x 2 = number of investors, or 30. 30 x 10 = the minimum number of jobs required, or 300. If 340 jobs are estimated to be created, the cushion = 340-300 = 40.

[199] See discussion on page __ above. Also, 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/. In fact, the 1,423 estimated jobs would support more than $70 million of EB-5 capital. 1,423/10 = 142 investors x $500,000 investment per investor = $71 million.

economic analysis submitted by Lightstone, USCIS determined that the project is likely to generate 1,423 jobs. However, the $50 million raise would require the creation of only 1,000 new jobs ($50 million/$500 thousand per investor). Thus, a job cushion of 423 jobs exists. The job coverage ratio is 1.423 (1,423 total projected/1,000 minimum jobs required). Furthermore, 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.

Even though 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 costs[200] but the expenditure of these funds must be excluded from the economic-job impact study because the USCIS does not allow EB-5 projects to count this towards job creation.

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. The lender obtains a first lien against the property. 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 5% to 10%. This leaves a gap somewhere in the range of 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.[201] 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.[202]

Conventional mezz debt

[200] 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

[201] 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.

[202] 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

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.[203]

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. [204]

If the mezz borrower defaults, the mezz lender may foreclose under the state's commercial law,[205] rather than under the state's real property law that is applicable to mortgages.[206] 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.[207]

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 is payable in one installment at maturity. Conventional mezz loan providers ("mezz lenders") include private equity debt funds, mortgage REITs and insurance companies.[208]

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

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[203] 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.

[204] 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 ___.

[205] States' commercial laws are based on the Uniform Commercial Code (UCC).

[206] 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 ___.

[207] 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.

[208] 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.

Operating Agreement) that governs the relationship of the project entity's owners, including the developer. Theoretically, these rights should be automatic and self-exercising, but in reality, enforcement is typically more complicated and uncertain than mezz foreclosure.[209] For example, typically in the case of certain defaults as defined in the LLC Operating Agreement or LP partnership agreement, 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.[210]

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 "true" equity 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 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").[211]

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.[212]

If the developer contributes equity to the venture, as is typically the case, then often times the pref is structured for payment to the preferred equity investors and the developer (the common equity). In that case, the pref distributions can be pari passu to the investors and the developer, or 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.

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[209] http://www.paulweiss.com/media/109627/nylj_30nov11.pdf

[210] Berman at page 175 (Ch. 9)

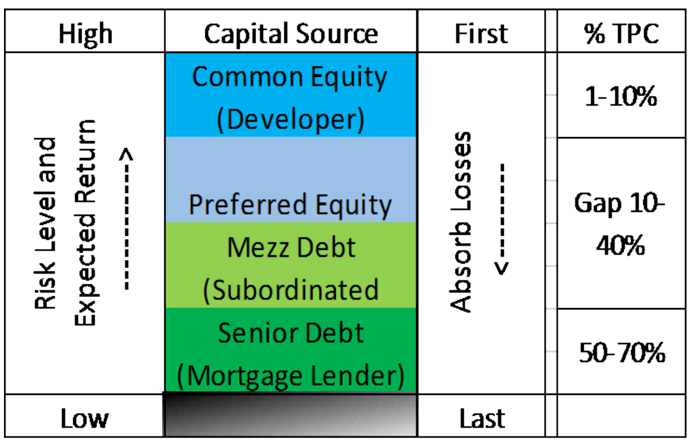
[211] For an article about real estate preferred equity see "Internal Rates of Return and Preferred Returns: What Is the Difference?" Real Estate Law & Industry Report, 6 REAL 200, 04/02/2013 by Steven Carey http://www.pircher.com/media/publication/8_PDFArticSAC.pdf

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

Relative cash flow priority and loss exposure

A basic understanding of the relative cash flow priority and loss exposure of the various capital sources is fundamental to understanding the capital structure. After the payment of project expenses and the retention of any reserves for anticipated expenses, the project's available cash flow is allocated first to pay debt service to the senior lender. The remaining cash flow is then allocated to pay any mezz debt, then preferred equity and common equity. Any project losses are absorbed in the reverse order. For example, if the senior lender were to foreclose on the property due to a mortgage default and the foreclosure sale proceeds were equal only to the senior mortgage loan balance, the senior lender would be made whole and the other capital source providers would suffer the economic loss. (A more in-depth discussion of lien priority is beyond the scope of this paper.) Thus, the senior mortgage loan is the most secure and the common equity is the least secure. Accordingly, the rates of return demanded by these various conventional capital sources reflect these relative risks.

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



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.[213] However, as immigrant investors and their 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.[214]

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

[214] See the Large-Scale Projects Database in Appendix A.

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 investor's 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.[215]

Interplay of immigration risk vs financial risk and economic reward

In the conventional project without an EB-5 capital component, the rate of return applicable to each capital source is adjusted based on financial risk. The capital source provider chooses to make the investment based purely on economic factors. For example, the senior mortgage loan bears a much lower rate of interest than the mezz loan.

The EB-5 project introduces a new consideration – immigration risk. The EB-5 investor accepts below market rates because his focus is securing a visa, which constitutes an essential part of the implied consideration received in exchange for the investment. He realizes he has better investment alternatives if he were to focus strictly on the economics.

Thus, the project's ability to satisfy the EB-5 job creation requirement becomes a paramount concern for the immigrant investor. Even if the investment is successful in economic terms – for example, it in fact generates a 20% annual rate of return – this is irrelevant to whether or not the investor will ultimately obtain a permanent visa. Instead, the key is whether the project will generate enough jobs to meet the EB-5 requirement of 10 jobs per investor.

Since all of the jobs created by the project are allocated to the EB-5 investors, the lower the amount of EB-5 capital sought for a project, the greater the likelihood that the project will meet the EB-5 job requirement, and result in the visa issuance to the investor. Thus, EB-5 capital as a smaller slice of the capital stack, as is typically the case with gap financing, reduces the immigration risk and increases the investor's chance of attaining his goal.

Gap financing in the range of 15% to 30% of the total capital stack accomplishes this reduction in immigration risk. However, the investor is not protected against the greater financial risk he assumes by becoming a mezz lender rather than a senior lender. Yet, the net interest rate payable on an EB-5 mezz loan is typically similar, if not the same as, the interest rate payable to an EB-5 senior lender.

One Regional Center's approach to EB-5 loans protects immigrant investors against both the immigration risk and the financial risk. CanAm, one of the most well established third party Regional Centers, does not make mezz loans, but instead requires that its EB-5 mortgage loan be in a first lien position. It participates alongside the senior lender that also holds a first lien. As a result, the amount of the EB-5 loan represents approximately the same amount as would gap financing.[216]

Developers seek to utilize EB-5 capital to reduce their project's weighted average cost of capital. As the real estate market continues to recover from the Great Recession, senior

[215] See the Large-Scale Projects Database in Appendix A.

[216] **VERIFY THIS**

mortgage loans representing between 50% and 70% of the total project costs are becoming readily available, depending on the property type and location. The rates are often lower than the rates available for EB-5 capital when the entire cost of capital is taken into account. Given that EB-5 investors accept substantially the same interest rate for mezz loans and senior mortgage loans, the spread in interest rates between conventional mezz and EB-5 mezz is much greater than the spread between conventional senior and EB-5 senior loans. Accordingly, developers generally prefer to maximize the amount of loan proceeds from the conventional senior lender at low senior loan rates, and utilize EB-5 capital as a mezz loan source to fund as much of the gap as the mezz lender and senior lender will permit. EB-5 capital as a senior loan source will be advantageous primarily in those situations where the developer is unable to obtain a conventional senior loan.

Another consideration points a developer to seek a conventional senior loan coupled with an EB-5 mezz loan. As explained in the Escrow of EB-5 investment funds section below, EB-5 loan proceeds are often held in escrow and not released to the project until the immigration process advances to a certain stage, usually approval of at least one investor's I-526 petition and in some cases each investor's petition. As the average time line for this approval exceeds 12 months, substantial delays could result until the immigrant investor's contribution can be utilized by the project. The conventional senior loan proceeds would be available much more quickly to fund the bulk of the project. As explained in the Bridge Financing section of this paper, if the EB-5 funds are escrowed, sometimes the developer will seek bridge financing to provide funds until the escrow proceeds are released.

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. 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 payments[217] 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.[218]

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

[217] 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.

[218] 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.

similar time frame as the mezz loan alternative.[219] An LLC Operating Agreement or LP partnership agreement governing the equity that merely provides for a cash flow distribution waterfall, with a sale or refinance as a 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 EB-5 Mezzanine Debt Structure for a project utilizing EB-5 capital as a mezzanine loan is set forth in attached Appendix C.

EB-5 mezz cost of capital compared to conventional mezz

As explained earlier, EB-5 mezz loans bear a lower overall 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. Thus, he accepts a below market rate. However, from a developer's perspective, 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 interest rate charged to the developer JCE. A developer that is contemplating adding EB-5 capital into a project's capital stack must consider a variety of factors to evaluate the true cost of capital and the potential savings compared to conventional mezz.[220]

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 use[221]; 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. [222]

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 to the EB-5 mezz rate's cost of capital to the developer. This

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[219] If the EB-5 investors invest their equity directly in the entity that owns the property, the NCE and JCE are the same. In that case, the redemption right might violate the "at risk" rules.

[220] The discussion in this section is overly simplistic and does not consider such factors as the term of the loan, closing costs as well as whether the interest is paid currently or accrued.

[221] Many value-add projects involve some construction or rehabilitation.

[222] Email dated November 21, 2014 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/

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.

The developer's EB-5 mezz loan cost of capital is not always apparent. The typical EB-5 capital loan has many cost components that are borne by the developer JCE beyond merely the interest payable to the immigrant investors. All of these costs must be taken into account in determining the true cost of capital for this capital source as some of these costs would not be incurred by the developer in a conventional project. As discussed in the Regional Center section, these various costs are reflected in alternative ways. [223]

A common method is to embed ("bake in") 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,[224] with 2% annual interest to the investors. The portion allocated to the investors is often less than 2% per year.[225] Any residual remaining after the payment of the various participants may be retained for the NCE or related parties.

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. This approach was employed in the case of the EB-5 capital loans for the SLS Las Vegas project described in detail below.[226] The total cost of capital to the developer JCE could theoretically be the same under either method, but is likely to differ.

The calculation of the developer-borrower's cost of capital for an EB-5 mezz loan could be more complex and much less transparent than in a conventional loan**,** unless all of the costs are embedded in a single rate or separately disclosed. 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. [227] However, the interest rate paid to the immigrant investors is not the only cost that must be considered in calculating the cost of capital [228]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 capital 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.[229]

In the case of a developer in-house Regional Center, the cost of capital requires a slightly different analysis to reflect its cost structure. The developer JCE pays the related NCE an amount equal to the interest to which the investors are entitled. For example, Lightstone's Bond Street multifamily project provides for interest payments to the investors equal to 1% per

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[223] At page ___

[224] 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.

[225] For example, in the case of 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.

[226] See page __

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

[228] This can also be considered the effective or equivalent interest rate.

[229] 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.

year. [230] The the developer or a related entity will maintain a staff and possibly outside professionals to perform the immigration, investor relations and administrative services that a third party Regional Center would otherwise provide.[231] If the staff performs services for other projects, whether EB-5 projects or not, the staff costs would be allocated among the various projects. The developer will enter into an arrangement with one or more migration agents or brokers to raise capital from immigrant investors. The fee agreement with those agents and brokers must be taken into account. This total cost is likely to differ from the percentage that the JCE would be charged by the third party Regional Center. If any of the immigrant investors invest without the involvement of a broker, presumably the developer JCE will save fees. All of these costs – the interest to the immigrant investors, the staff costs and the brokerage fees – must be taken into account. The one-time administrative fee paid by the investors to the NCE or Regional Center offsets these costs. The total costs can be converted into an interest rate charged for the loan to the JCE by taking into account the outstanding loan balance, adjusted to reflect the term of the loan.[232]

Often, commentators writing about EB-5 mezz rates do not distinguish among the various rates applicable to conventional mezz. [233] 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 mezz rates, rather than using the higher conventional 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.[234] 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 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.[235]

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. [236]

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.[237] Equity kickers are

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[230] See the Lightstone website Q3 on FAQ tab. http://lightstoneeb5.com/faq-2/

[231] Presumably, the developer JCE would not charge itself a management fee for these services. If the developer performing the services has unrelated investor partners for the project it might desire to charge a fee to the JCE so that the fee is allocated solely to the developer rather than shared with the other investor partners.

[232] A similar analysis would apply in the case of a developer which rents a Regional Center and performs some of the services on its own.

[233] Insert

[234] See the section entitled SLS Las Vegas: a transparent EB-5 capital raise approaching $400,000,000

[235] Beginning at page ___

[236] Footnote re points

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

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.[238] 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 that results in the issuance of the unconditional visa) is adjudicated by USCIS. The 5 year period typically provides sufficient time for the immigration process to be completed. In some cases, the loan grants the developer the right to extend the loan, such as for two one-year periods.

USCIS has not issued definitive guidance as to whether the at-risk and sustained investment requirements prohibit loan repayment by the JCE to the NCE until the I-829 application is approved. However, the USCIS requirements 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).[239] Similarly, the NCE may seek to prohibit prepayments by the JCE until the I-829 approvals are obtained. [240]

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. 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.[241] The New York City Regional Center's NCE loaned $200 million to a consortium of

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[238] See, for example, CanA website: http://www.canamenterprises.com/how-to-apply.html

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

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

[241] 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;

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.[242] Consequently, this enabled the developer/borrower to avoid mortgage tax of nearly $3 million, 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. [243]

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).[244] Obvious conflicts of interest arise between the developer's JCE and the investors who are represented by the NCE lender controlled by that developer or its related parties.

When a third party Regional Center sponsors the project and its 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 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. 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 many 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.[245] These Regional Centers are increasingly attracting more EB-5 capital. The EB-5 investors (and their advisors) might choose to invest in these projects because the investors are more focused on the project developer's successful track record than the technical details of the loan transaction, such as default remedies and guarantees.

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http://goodjobsny.org/economic-development/albee-square-city-point; http://bfcnyc.com/city-point-2/; http://nycrc.com/project.html?id=7

[242] It is unclear whether that loan was secured by the property or by other collateral.

[243] 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.

[244] As indicated in the ___ section above regarding the cost of capital charged by the developer's in- house Regional Center.

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

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 history[246] because the sale of the securities by the JCE was registered with the SEC.[247] As discussed previously, the NCE and JCE are typically able to avoid registration by relying on SEC exemptions.[248]

SBE/Stockbridge Investment Company, LLC is the joint venture ("JV") that indirectly owns the recently opened, Las Vegas hotel casino, SLS Las Vegas.[249] 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.[250] This disclosure is presumably more reliable than the details provided about other EB-5 projects through secondary sources, such as news articles and websites. [251] 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.

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.[252] 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 $200 million and the second tranche was at least $184 million, involving 768 investors.

In this case, the EB-5 loans are structured as "subordinated mortgage" interests.[253] 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;[254] as well as a one-

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[246] 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.

[247] 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

[248] See page __

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

[250] 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.

[251] Note __ to SBE 10Q

[252] 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.

[253] 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.

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

time success fee based on the aggregate amount of the EB-5 capital raised.[255] In addition, the JV pays a periodic fee to the migration agents, an annual percentage fee based on the outstanding EB-5 loan balance. [256] 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.[257]

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 the Regional Center.

Presumably, the Regional Center offered a flexible and financially attractive arrangement to the developer.[258] 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

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.[259] The preferred equity structure's relative flexibility attracts these Regional Centers and developers. In some cases, preferred equity might be offered because the senior lender prohibits any subordinated debt, including mezz debt.

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.[260]

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[255] 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.

[256] The SBE 10-Q does not indicate whether any points were payable on the origination or will be payable at loan maturity.

[257] The SBE 10Q

[258] This might be similar to a rental of a Regional Center.

[259] 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.

[260] 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.

However, for similar reasons that the preferred equity structure is attractive to the developer, it is generally unattractive to the EB-5 investor. Thus, preferred equity might present a marketing disadvantage to those Regional Centers and developers exclusively offering preferred equity as EB-5 capital.

Nevertheless, some Regional Centers and developers have been able to attract the immigrant investors based on their perceived potential to achieve greater returns than under the loan model, especially if the preferred equity is the waterfall type that includes a profit split, rather than the fixed dividend type.[261] 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 among the most established and thus, are able to cite their past successes in which preferred equity was employed, instead of mezz debt.[262]

Two fundamentally different formats can serve as the preferred equity structure in the EB-5 financing context. The conventional cash flow waterfall distribution type is one format, as described in the ____ section above. However, a fixed-rate preferred format is another approach that better reflects the immigrant investor's primary motive for investing in the project.[263]

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).[264] Instead, the preferred equity in an EB-5 deal can be structured as fixed-rate preferred, 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. Typically, the fixed-rate preferred would be cumulative so if a dividend is missed it would be paid in a subsequent period. 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 capital context.[265] Instead, the distribution is deferred until a capital event (such as a sale or refinancing) occurs,[266] 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

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[261] The fixed dividend alternative is described in the next paragraph.

262 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.

[263] 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.

[264] 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.

[265] See footnote __ in the Investor capital must be "at risk" section of this paper.

[266] 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.

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 vote of the general partners, without also requiring the consent of limited partners.[267] After significant adverse publicity in the local media outlets, the general partners agreed to make an additional partial distribution to the investors**.**[268]

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.[269] Simply stated, the investors invest all of the capital required for the project.[270] No developer equity and typically no debt, or a limited amount of debt, is involved.

[267] http://vtdigger.org/2014/08/10/jay-peak-pay-35-tram-haus-investors-10000-dividends/
[268] http://vtdigger.org/2014/08/10/jay-peak-pay-35-tram-haus-investors-10000-dividends/
[269] American Life Inc. website FAQ Investment Terms: http://amlife.us/eb-5-visa/faq-investment-topics
[270] The projects include some non-EB investors. American Life Regional Center website.

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 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 the LA Marriot (also known as "LA Live"), a Marriot hotel in downtown Los Angeles that opened in 2014. [271] 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.[272]

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 of EB-5 investment funds

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.[273]

USCIS does not require the escrow of these funds. 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. [274]

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, at least 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.

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[271] 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.

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

[273] See the NES website for a description of the escrow process in EB-5 investments. http://nesfinancial.com/solutions/escrow-administration/

[274] Per NES Financial. Insert link.

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 funds 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);[275] 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.[276] 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. 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.[277] 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.[278]

The Chicago Convention Center scandal illustrates the importance of an escrow. [279] There, each of the investors promptly recovered his full $500,000 investment - because the funds were still held in escrow.

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[275] 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.

[276] The May 2013 Policy Memorandum at page 6 permits the funds to be held in escrow until the investor becomes a conditional permanent resident, without violating the "at-risk" rules.

[277] 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 petition 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.

[278] Link to websites

[279] 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/

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) that were immediately released to the Regional Center**,** rather than held in escrow. [280]

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.[281]

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 had 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 weak due to uncertainty about whether USCIS would count, for EB-5 purposes, jobs created before the EB-5 capital was released into the project.

However, the USCIS took a very favorable view on this issue in the May 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.[282]

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 may still receive credit for the job creation… Even if the EB-5 financing was not contemplated prior to acquiring the temporary financing, as long as the financing to be replaced was contemplated as short-term temporary financing which would be subsequently replaced, the infusion of EB-5 financing could still result in the creation of, and credit for, new jobs. 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 potentially far greater EB-5 capital raise than if the EB-5 capital were not credited with job creation generated for the period prior to the release of the EB-5 capital to the project.

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[280] http://fortune.com/2014/07/24/immigration-eb-5-visa-for-sale/

[281] May 2013 Policy Memorandum at page 15

[282] September 10, 2014 telephone call with Gina Nisbeth of Citibank's Structured Lending Group. She is responsible for EB-5 bridge loans.

Based on this interpretation and the increased popularity of EB-5 capital 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 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 Citibank[283], 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. [284]

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.[285]

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.[286] 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 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 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 during the period the bridge financing is in place 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.[287] 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 before the EB-5 capital is released to the project.

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 its release from escrow. The NCE then

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

284 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.

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

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

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

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. [288]

Other sources of bridge financing are also available. Affiliates or other related parties to the developer sometimes fund the bridge loan. 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.[289] 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)[290], Low Income Housing Tax Credits (LIHTC),[291] Historic Tax Credits (HTC)[292] and/or Brownfield Tax Credits.[293]

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.

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. On the other hand, 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

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

[289] http://lightstoneeb5.com/eb-5/capital-structure/

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

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

292 http://ntcicfunds.com/tax-credit-basics/historic-tax-credit-guide/

293 http://www.epa.gov/brownfields/tax/

immensely greater size. This smaller slice increases the likelihood that the necessary jobs will be created to satisfy the visa requirements.

EB-5 capital provides an extremely inexpensive - perhaps the least expensive (other than tax credits) - 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 that possess the corporate infrastructure and expertise to coordinate international sales and investor relations, such as Related, Silverstein and Extell. 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 these costs. These developers contemplate, or are in the process of, utilizing their respective 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 or seek to rent an existing Regional Center . 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 capital terms with terms available from conventional sources, as well as comparison of one EB-5 capital deal to another. In the meantime, it is undeniable that EB-5 capital is firmly established as a financing tool that any developer is likely to consider 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.

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?

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

How are relatively new third party Regional Centers able to attract major developers of large-scale projects, 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 raises 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 financing 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?

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 financing 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 financing 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 with total project costs of at least $200 million and an EB-5 capital component.

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 each project progresses, 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 has 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), SLS Las Vegas ($384 million), Four Seasons Tribeca ($249 million) and the Shipyard ($272 million) – did not start fundraising until 2013 or later, except for the initial phase of Atlantic Yards.
5. These projects also represent the largest EB-5 projects in history based on total project costs. 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. As noted in the paper, the smaller slice of the capital stack increases the likelihood that the EB-5 job creation requirements will be met.
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. In many cases, EB-5

capital is utilized to fund long-term infrastructure projects where significant cash flow is not generated until many years in the future.

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 Centers' 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 petition approvals; I-829 petition 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 sponsored 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 2008-2009.

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, but the EB-5 capital comprises a smaller percentage of the total project costs.

5. The only Regional Centers in this Database to sponsor 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 EB-5 capital. Thus, developers seem to be relying less on well-established, older 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.
9. CanAm utilizes the loan model structure. However, its EB-5 loan are mortgage loans, not mezzanine loans.

   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 immigrant investor invests in one project.

Appendix C – Sample of EB-5 Mezzanine Debt Structure

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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 **12.26.2014** ***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	Tranches	Minimum # Jobs Required	Total Jobs Estimated to be Created	Escrow tied to I-526 petitions	Bridge Loan?	EB-5 Debt Terms (Interest rate, amortization, unsecured/secured by mortgage or equity)	EB-5 Equity Terms (preferred interest, profit split, vs. mezz debt, etc.)	Third Party Senior Lender (Non-EB5) Debt Amount (if any)	Fully subscribed (Yes/No)	Investors' Country of Origin
1	Hudson Yards [Fn _]	West Side of Manhattan	New York City	Related	In house (Related)	Mixed use/office, retail & residential	?	1,200	600M	TBD				12,000								
2	Atlantic Yards Ph 1 [Fn]	Brooklyn	New York City	Forest City Ratner	NYC Regional Center	Mixed use/	Loan	456	228M	1235M	18%			4,560							Yes	
3	Atlantic Yards Ph 2	Brooklyn	New York City	Forest City Ratner	USIF	Mixed use/	Loan	498	249M	1235M	20%	Mezz		4,980		No	No escrow				Yes	
4	Atlantic Yards Ph 3	Brooklyn	New York City	Forest City Ratner	USIF	Mixed use/	Loan	498	249M	TBD		Mezz		4,980		No	No escrow					
5	855 Ave of Americas (6th Ave)	Midtown Manhattan	New York City	Durst	USIF	Mixed use/multi-family rental	Loan	160	80M	423M	19%	Mezz		1,600	2,009	No	No escrow			260M	Yes	
6	W57	Midtown Manhattan	New York City	Durst	USIF	Mixed use/multi-family rental	Loan	360	180M	685M	26%	Mezz		3,600	4,896	No	No escrow			407M		
7	Bryant Park	Midtown Manhattan	New York City	HFZ	USIF	Hotel/Luxury Condominium	Loan	105	53M	253M	21%	Mezz		1,050	1,385	No	No escrow					
8	101 Tribeca	Tribeca section of Manhattan	New York City	Fisher Bros./Witkoff Group	USIF	Luxury condominium	Loan	350	175M	735M	24%	Mezz		3,500		No	No escrow					
9	701 TSQ	Times Square	New York City		USIF	Marriot Hotel	Loan										No escrow					
10	Four Seasons	Tribeca section of Manhattan	New York City	Silverstein	In house (Silverstein)	Hotel/Luxury Condominium	Loan	498	249M	950M	26%	Mezz		4,980	5,543	Yes	Yes			650M	No	
11	Gem Tower [Fn _]	Midtown Manhattan	New York City	Extell	In house (Extell)	Jewelry Condominium	Loan	150	75M	750M	10%	Mezz		1,500								
12	City Point	Brooklyn	New York City	Acadia [Fn]	NYC Regional Center	Mixed use/Retail	Loan	400	200M			Mezz or 2nd Mortgage ($100M)/Unsecured ($100M)	2	4,000		Yes	Yes				Yes	
13	SLS Las Vegas		Las Vegas	SBE	American Dream Fund	Hotel/Casino	Loan	768	384M	534M	72%	2nd Mortgage		7,680	8,719	Yes	Yes				Yes	
14	LA Marriot	Downtown	Los Angeles	American Life	In house (American Life)	Hotel	Equity	336	168M	168M	100%	Equity (LP)	1	3,360		No	No					
15	Shipyard [Fn _]	Candlestick Park, Naval Shipyard	San Francisco	Lennar	Golden Gate Global	Mixed use/Housing for sale	Loan	544	272M	TBD			5	5,440								
								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	Brooklyn Navy Yard Development Corp (nonprofit)	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							

*Large EB-5 loan but nonprofit developer

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	*per ACRIS*	*12/3/2013*
EB-5	80M	19%			
Developer & Other	84.M	20%	*Presumably incl land acq (purchase: $101M)*		
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 misnome or merely indicates that the Regional Center is providing less than "full services" to Durst..

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 investo

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, inclu

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							Storage
6	LA Courtyard 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	35.6 M	71					Industrial and Retail
14	4746 Ohio Avenue South, LP	27.4 M	55					Industrial and Office
15	1000 1st Avenue South, LP (Palmer Court)	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	6.0 M	12					Industrial and Warehouse
26	3317 Third Avenue South, LP	6.0 M	12					Warehouse
27	2962 1st Avenue South, LP	2.0 M	4					Industrial and Retail
28	Lonestar Investors, LP	4.9 M	10					Warehouse

29	2nd and Hinds Street (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
		743.7 M	1,559	

Footnotes:

FN 1 Assumes that each project is in a TEA.

To be "reconciled" with ALI spreadsheet re historical records. Exclude non-EB5 investors.

Current EB5 projects: http://www.eb5-visa.net/currentregionalcenterprojects.html

	Project	Loan Amount	# Investors	I-526 Approvals	I-829 Approvals	Capital Recovered?	Notes
1	255 South King Street LP (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 it doors in June 2014.
4	3405 BB Parkway LP	15,100,000	30	n/a	n/a	n/a	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.
5	901 West Olympic Boulevar	168,000,000	336	n/a	n/a	n/a	This project is now built and opened its doors on 1 July 2014.
6	618 Second Avenue LP	88,600,000	177	n/a	n/a	n/a	Courtyard Marriott opened its doors on June 9, 2010
		564,700,000	1,129.4				

Appendix B	**THIS IS A CONFIDENTIAL DRAFT, WORK IN PROGRESS AND NOT TO BE CIRCULATED**		
Successful Regional Centers	**Professor Jeanne Calderon and Gary Friedland Esq.**		
Summary	**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	$2,500,000	5	12/16/2009	100%	100%	100%
2	Starr Restaurants - 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	$2,500,000	5	9/9/2010	100%	100%	100%
6	Starr Restaurants - Butcher+Singer	$2,500,000	5	9/16/2010	100%	100%	100%
7	Advanced Sports, Inc.	$1,500,000	3	8/4/2011	100%	100%	100%
8	The Day & Zimmermann Group, Inc.	$2,500,000	5	10/27/2013	100%	100%	100%
9	Temple University Health System, Inc.	$13,000,000	26	4/22/2011	100%	100%	100%
10	Wordsworth - List Associates	$9,000,000	18	8/25/2011	100%	100%	100%
11	Rhoads Industries, Inc.	$7,000,000	14	8/3/2011	100%	100%	100%
12	121 Point Breeze Terminal, LLC	$2,000,000	4	11/28/2011	100%	100%	100%
13	K.P. Grant Enterprises	$2,500,000	5	5/16/2012	100%	100%	100%
14	Agusta Aerospace Corporation	$15,000,000	30	12/16/2011	100%	100%	100%
15	Aker Philadelphia Shipyard, Inc.	$20,000,000	40	3/27/2012	100%	100%	100%
16	Comcast Corporation	$26,000,000	52	9/20/2012	100%	98%*	100%
17	University City Science 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%
19	Philadelphia Post - Acute 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%
21	Kimpton Hotel - Palomar Philadelphia	$6,000,000	12	11/30/2013	100%	83%*	100% early
22	Agusta Aerospace 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%**
24	Kimpton Hotel - Monaco Philadelphia	$45,000,000	90	10/27/2016	100%	n/a	n/a
25	Southeastern Pennsylvania Transportation Authority (Tranche I)	$35,000,000	70	5/30/2017	100%	n/a	n/a
26	Southeastern Pennsylvania Transportation Authority (Tranche II)	$75,000,000	150	7/1/2019	100%	n/a	n/a
27	Southeastern Pennsylvania Transportation Authority (Tranche III)	$65,000,000	130	n/a	98%*	n/a	n/a
28	Courtyard by Marriott - Navy Yard	$16,500,000	33	2/28/2019	60%*	n/a	n/a
29	Aker Philadelphia Shipyard, 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**				

	Project	Loan Amount	# Investors	Maturity Date	I-526 Approvals	I-829 Approvals	Principal Repaid
	Hawaii Regional Center Track Record (as of December 2014)						
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**				

	Project	Loan Amount	# Investors	Maturity Date	I-526 Approvals	I-829 Approvals	Principal Repaid
	New York Metropolitan Regional Center Track Record (as of December 2014)				(designated 2013)		
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**
		$ 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

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 Approvals**	I-829 Approvals**	Capital Recovered?
1	Sugar Bush, VT*	$20,000,000	40		100%	100%	
2	City Market at O Street - Group 1	$5,000,000	10		100%	100%	100%
3	Mariott Marquis	$5,000,000	10		100%	0%	0%
4	City Market at O Street - 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	$35,000,000	70		0%	0%	0%
7	Kensington Place of 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%
		$149,000,000	298				

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 Amount	# Investors	Loan vs. Equity?	Maturity Date	I-526 Approvals	I-829 Approvals	Principal Repaid	
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						
	Large-scale projects not inclued in above schedule								
	Brooklyn Navy Yard	247,000,000	494						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:

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

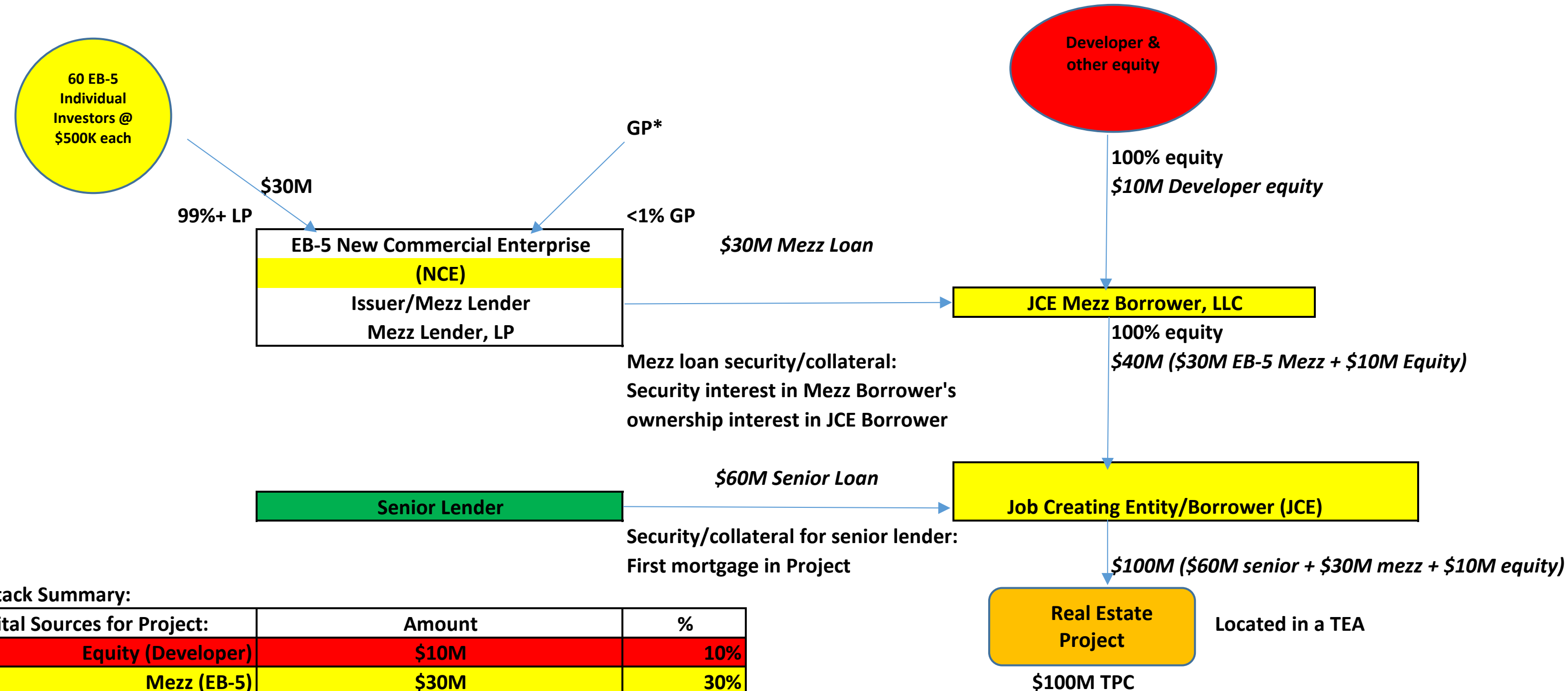
Over 2,200 individuals from 20 different countries have invested in NYCRC project offerings to date.
These countries include:
Brazil, Canada, China, Egypt, Germany, Great Britain, India, Indonesia, Italy, Japan, Macau, Mexico, Nepal, Netherlands, Nigeria, Russia, S. Korea, Taiwan, Turkey, and Venezuela.

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	

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

Sample EB-5 Mezzane Debt Structure 12.26.2014

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