Myth vs. Fact: Responses to Arguments Against the EB-5 Pilot Program

By Laura Foote Reiff on March 13th, 2015

Myth 1: *Buy a Green Card* – The EB-5 program was established to help high-net-worth individuals buy a green card.

Fact: The EB-5 program is a highly regulated employment-based permanent residence application that takes years to complete. The initial application requires detailed proof of investment in a qualified project. It also requires evidence of an investment of either 1 million USD or 500,000 USD and the creation of 10 jobs for U.S. workers. The investor's application is screened and, if approved, only a "conditional green card" is granted. The same in-depth review of the project and the investor's background are conducted two years after conditional status is granted to ensure the individual's continued eligibility for the EB-5 immigrant investor category.

Myth 2: *Loophole for Criminals/Terrorists* – The EB-5 program provides an easier way for potential immigrants to go through background clearances, providing a loophole for potential criminals and terrorists.

Fact: As described above, the EB-5 program requires an investor's record to be reviewed two times – once for a conditional green card and then again when obtaining a permanent green card. In addition to the normal screening process for other employment based permanent residence applicants, which is conducted twice for EB-5 applicants, the EB-5 applicant must have the project reviewed for compliance with regulatory requirements, including proving the requisite amount of investment and the requisite number of jobs to be created. Moreover, EB-5 applicants go through a rigorous vetting process to demonstrate that their source(s) of funds is(are) lawful and that those funds can legally be invested into qualified projects.

Myth 3: *Simple Background Checks* – Background screening for EB-5 applicants is inadequate.

Fact: All employment-based immigrant applicants undergo detailed and extensive background checks. This is done through the U.S. Department of Homeland Security (DHS)/U.S. Citizenship and Immigration Services (USCIS) or the U.S. Department of State (DOS), or both. DHS and DOS have access to extensive international networks to review and screen potential applicants. Indeed, EB-5 applicants go through this process twice – at the conditional stage and again during the application to remove conditions. In addition, the DHS reviews extensive information about the source(s) of the EB-5 finances used to make an investment in a lawful project in the U.S.

Moreover, the U.S. Department of Treasury's Office of Foreign Assets Control (OFAC), which issues specific and general licenses permitting certain types of activities that would otherwise be prohibited under trade sanctions with particular nations, limits the ability of some prospective investors to source their investment funds through nations that appear on OFAC's "specially designated (SDN) list." Such individuals may also be barred from investment if they or the entity from which they acquired their investment funds appear on this list. While the issuance of a "general" license helps to reduce the lengthy wait time required to obtain the "specific" license authorizing an individualized exemption, it does not exempt investors from the limitations of the SDN list. Furthermore, the Administrative Appeals Office (AAO) has upheld USCIS denials of Form I-526 petitions submitted without the required OFAC license.

In addition, banking institutions perform compliance checks on received wires of funds through applicable "Know Your Customer" rules and return suspicious transactions. Likewise, many banks and institutions such as NES Financial conduct their own OFAC reviews and include a letter confirming the outcome of a compliance check with the confirmation of having received the funds in escrow.

Furthermore, all permanent resident applicants, including those participating in the EB-5 program, are subject to a wide variety of background checks prior to the issuance of a green card, including name, fingerprint, and diverse security clearances to detect possible crimes, fraud schemes, the improper use of "sensitive technology," and other illegal activities.

Finally, Regional Centers are themselves subject to significant scrutiny prior to approval. First Regional Centers must submit voluminous documentation of expected job creation, assets, business projections, and other key markers prior to receiving a USCIS Regional Center designation. Notably, both USCIS and the Securities and Exchange Commission (SEC) review initial Form I-924 Regional Center applications. Moreover, Regional Centers must submit documentation, namely the Form I-924A supplement, to USCIS on an annual basis to demonstrate their continued eligibility for the Regional Center designation. If a Regional Center is found to be non-compliant with the terms of the Regional Center program, USCIS may terminate the entity's Regional Center designation for fraud or inactivity. Finally, USCIS has recently begun carrying out site visits and Form I-924 Regional Center interviews to determine eligibility and compliance with all applicable rules and regulations.

Myth 4: *Jump to the Head of the Line* – EB-5 applicants jump to the start of the green card line, ahead of those who have been waiting for a longer period of time.

Fact: The employment-based immigrant categories have a set aside a number of immigrant visas that are allotted to each category. EB-5 applicants must wait for their visa number like any other employment-based category applicant.

Myth 5: *Not a Security Offering* – EB-5 securities offerings differ from traditional securities offerings. The type of disclosure generally included in Private Placement Memoranda (PPMs) for non-EB-5 offerings are not used in connection with EB-5 securities offerings.

Fact: There are no EB-5 program-specific exemptions to U.S. or State securities laws. Whether you are selling a limited liability company or limited partnership interests to raise money for a hotel, assisted living facility, manufacturer, restaurant or other endeavor, securities laws apply and the persons responsible for preparing the PPM should take reasonable steps to confirm that the information included in the PPM does not misstate or omit facts that would be considered material to an investor's investment decision. You don't get a "free pass" to avoid complying with applicable securities laws just because some or all of your investors are seeking a visa under the EB-5 program. PPMs are not template-based boilerplate documents and should be approached with care and diligence.

Federal and State securities laws require the issuer of securities to provide prospective investors with full, fair, and complete disclosure of all "material" facts about the offering, the issuer of the securities, and the issuer's management personnel, business, operations, and finances. Depending on the deal structure, the applicable securities laws may include any or all of the following: (i) the Securities Act of 1933, as amended, and State "blue sky" laws regarding the offer and sale of securities; (ii) the Investment Company Act of 1940, as amended; and (iii) the Investment Advisers Act of 1940, as amended, and state equivalents.

Myth 6: B*roker Dealer Rules are Not Applicable* – The use of unlicensed finders and other introducers of capital is not regulated in the EB-5 program. Everyone does it and the same rules don't apply with securities offerings under the EB-5 program as in traditional non-EB-5 offerings.

Fact: Entities raising capital from investors seeking a visa under the EB-5 program should consult with legal counsel to ensure that they are complying with all applicable securities laws. These entities must also comply with relevant foreign securities laws and should evaluate whether introducers of capital (commonly referred to as "finders" or "broker-dealers") must comply with the broker-dealer registration requirements of the Securities Exchange Act of 1934.

Myth 7: *Government Limitations* – The government is limited in its ability to prevent fraud or national security threats that could harm the U.S.

Fact: The U.S. government has many tools to help prevent or handle fraud and/or national security threats. Both the DHS and the DOS have a variety of resources, the delegated authority, and the regulations in place to monitor, review, and investigate any potential criminal or fraudulent activity that might be perpetrated by an EB-5 investor. Likewise, the SEC along with the Federal Bureau of Investigation (FBI) and the DHS, have existing tools to deal with fraud, criminal activities, and security threats that may be perpetrated by investors, entities that offer investments, and Regional Centers.
