

## Business Law

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### A Path to U.S. Citizenship May Lead Straight into a Minefield

For over a generation, the United States government has been encouraging high net worth investors and entrepreneurs to earn conditional permanent residency status (which may lead to eventual U.S. citizenship) through the EB-5 Investor Visa Program (the “EB-5 Program”) by investing at risk capital in the United States that leads to the creation of jobs. To further enhance the EB-5 Program, Congress established a pilot project allowing immigrant investors to link their investment capital with a regional center (each a “Regional Center”) which has been approved by the U.S. Citizenship and Immigration Services (“USCIS”) for the promotion of economic growth in a targeted area. Despite the establishment of the Regional Center project, few foreign investors took advantage of the EB-5 Program during the program’s first 15 years. For example, in 2005 only 332 visas were issued under the EB-5 Program, even though up to 10,000 visas are reserved for issuance each year under the program. The U.S. government took steps to streamline this process in 2008 as a response to the financial collapse, and their results were successful. The number of visas issued under the EB-5 Program rose by over 30 times in less than 10 years. As a result, on August 23, 2014, the number of visas granted under the EB-5 Program in a single fiscal year reached the 10,000 visa limit. For the first time in the history of the EB-5 Program, USCIS had to turn away prospective foreign investors (all of the affected applicants resided in China where a disproportionate number of EB-5 Program applicants are located); these individuals were not allowed to apply for a visa under the EB-5 Program until the start of the U.S. federal government’s next fiscal year.

The number of regional centers established under the EB-5 Program also exploded. In 2009, there were 90 regional centers operating in 34 states. As of March 2, 2015, USCIS has approved nearly 641 regional centers that, collectively, are located in every state in the U.S. (except for Wyoming) as well as in Guam, Puerto Rico, the Marianas Islands, the District of Columbia and the U.S. Virgin Islands.

Unfortunately, certain individuals and enterprises have taken advantage of the remarkable pace of growth of the EB-5 Program in general (and of the Regional Center pilot project in particular) to defraud both foreign investors looking to obtain conditional permanent residence status in the U.S. and the regional economies that are relying upon the investment capital provided by these foreign investors. This nefarious activity has caught the attention of the Enforcement Division of the United States Securities and Exchange Commission (the “SEC”) which has filed three civil actions in U.S. federal court and initiated two administrative proceedings against promoters looking to take advantage of innocent foreign investors who were willing to risk their hard earned savings in the hopes of attaining a path to U.S. citizenship. This article will briefly discuss the developments associated with two of these enforcement actions.

#### **A Chicago Convention Centre, LLC**

On February 6, 2013, the SEC commenced an action in Illinois federal court alleging that from November 2011 through February 2013, Anshoo Sethi, a managing member of Intercontinental Regional Center Trust of Chicago, LLC (“IRCTC”), used IRCTC’s status as a regional center approved by USCIS to convince over 250 Chinese nationals to invest at least US \$500,000 (plus pay an “administrative fee” equal to US \$41,500) in an IRCTC project to build the “World’s First Zero Carbon Emission Platinum LEED certified” hotel and conference center. However, in soliciting investors, the SEC alleged that Mr. Sethi made false claims such as: (i) Starwood, Intercontinental and Hyatt have executed franchise agreements to manage the property, (ii) IRCTC will contribute land valued at over US \$177 million, and (iii) the hotel project is likely to generate over 8,000 jobs, meaning that up to 800 foreign investors would qualify for conditional permanent residence status under the EB-5 Program. According to the SEC, the money invested by the foreign nationals (totaling US \$145 million) was not used to build a hotel; rather it remained in escrow despite

Mr. Sethi's attempts to have all or a portion of this amount released to him and/or entities he controls. The SEC asserted that Mr. Sethi and/or entities he controls misappropriated nearly \$10 million in administrative fees from foreign investors as a result of this scheme. On March 17, 2014, the defendants in the case settled this matter without admitting or denying the SEC's allegations. As a result of this settlement, the defendants will have to pay over US \$11.5 million in disgorgement of ill-gotten proceeds and a civil penalty of nearly US \$4 million, as well as be barred for a period of 20 years from undertaking certain securities related activity. On August 27, 2014, a federal grand jury in Chicago charged Anshoo Sethi with 8 counts of wire fraud and 2 counts of making false statements as a result of his participation in this scheme. This criminal matter is currently subject to pre-trial motions. If convicted of all charges, Mr. Sethi could face a maximum of 170 years in prison and a total fine of US \$2.5 million or more.

### ***Justin Moongyu Lee et. al.***

On September 3, 2014, in a coordinated action, the U.S. Federal Bureau of Investigation obtained an indictment and the SEC filed a complaint against Justin Moongyu Lee, a former lawyer who practiced in the Los Angeles area. The indictment charges Mr. Lee with 9 counts of wire fraud and alleges that he unlawfully took US \$47 million from 94 foreign investors. The SEC's complaint accuses Mr. Lee, his wife, Thomas Edward Kent (another former lawyer who practiced in California) and five companies controlled by Mr. Lee of misappropriating nearly US \$11.5 million from 24 foreign investors. Each federal action claimed that investors were told that their money would be used to construct an ethanol plant in Western Kansas which would generate a sufficient number of jobs to allow them to qualify for conditional permanent residency status in the United States. In fact, no ethanol plant was ever built, no jobs were ever created and most of the money raised was used to finance an unrelated project in the Philippines to extract iron ore from sand and to repay investors in other, unrelated investments offered by Mr. Lee. At the time the federal

actions were filed, Mr. Lee was held in detention in Korea on charges related to the alleged EB-5 visa scheme. Currently, with respect to the SEC action, a default judgment has been effected against the five companies controlled by Mr. Lee and an administrative proceeding was commenced against Mr. Kent. The criminal action is still pending; if convicted of all charges, Mr. Lee could face a maximum of 180 years in prison.

### **Alert to Foreign Investors**

As a result of these cases and other recent, documented fraudulent activity targeting foreign investors, the SEC and the USCIS took the unprecedented step of jointly issuing an alert warning foreign investors not to be the victim of unscrupulous promoters looking to solicit investments in fake or fraudulent projects that are purportedly sanctioned under the EB-5 Program. The two U.S. federal agencies urged prospective foreign investors to take these steps prior to making any investment that they believe would qualify under the EB-5 Program.

- Confirm that the Purported Regional Center has been Designated by USCIS** – A list of all designated Regional Centers may be found at [www.uscis.gov](http://www.uscis.gov). Foreign investors should be aware that USCIS does not endorse the Regional Centers listed on its website or any of the investments offered by any such Regional Center.
- Ask the Purported Regional Center to Provide Copies of Documents that it Filed with the USCIS** – Regional Centers should be able to provide foreign investors with copies of the initial application it filed to obtain Regional Center status on Form I-924 and of the supplements it must file annually on Form I-924A as well as all supporting documentation.
- Request the Purported Regional Center to Provide Information about the Proposed Investment in Writing** – The regional center should be able to produce a copy of the offering memorandum from the issuer of the securities and be able to answer any reasonable questions that foreign investors may have.

- **Ask about the Compensation Structure for all those Promoting the Investment** – Foreign investors should ask how much money or what type of benefits those people who appear to be independent but are related to the purported regional center, such as consultants, lawyers or agencies, expect to receive in connection with recommending the investment.
- **Seek Independent Verification about the Proposed Investment** – Legitimate investment opportunities should generate verifiable corroboration. If the investment is in commercial real estate development, there should be construction permits and property tax assessments available at the municipal or county records office. If the proposed investment involves a transaction with one or more arms' length third parties, foreign investors should approach these companies for confirmation.
- **Examine Structural Risk** - If the funds from the proposed investment is to be used to loan funds to develop projects, foreign investors should carefully examine the loan documents and offering statements to determine if the loan is secured by any collateral pledged to investors.
- **Consider the Purported Regional Center's Incentives** – The financial incentives of the principals of the purported regional center, and of the developers of the project that will receive the investment proceeds, should be the same as the incentives for the foreign investors. In short, each of them should have "skin in the game". If they don't, then the foreign investors should stop considering the prospective investment.
- **Look for Warning Signs of Fraud** – Foreign investors are cautioned not to invest in a prospective investment managed or sponsored by a purported regional center if they spot one or more of the following:
  - *Guarantees or promises of obtaining permanent residency status through the proposed investment* – Investing through a regional center makes you

eligible to apply for permanent residence status after a two-year period of maintaining conditional permanent residence status, there are no guarantees that any immigration status will be obtained as a result of any investment under the EB-5 Program;

- *Guarantees of minimum investment returns or no investment risk* – Money invested with a regional center is required by law to be "at risk". There are no guarantees with at risk investments;
- *Overly consistent high returns on investment* – At risk investments tend to fluctuate. Foreign investors should avoid any investment that provides overly consistent above market returns, it may be a warning sign that the investment is really a fraudulent scheme;
- *Unregistered Investments* – Those that issue and/or promote securities that are registered in the U.S. have to provide prospective investors with a significant amount of information about the investment and the company that is spearheading the investment. However, if the securities offered are not registered, the amount of information that is available to investors declines significantly;
- *Unlicensed Sellers* – Principals of regional centers and any of their affiliated agents most often need to have a license to sell securities, even if those securities are not registered. Foreign investors should stay away from any securities offered or sold by unlicensed sales personnel; and
- *Layers of Companies Run by the Same Individuals* – Investments using complex corporate structures may hide real or potential conflicts of interest. Foreign investors should demand that the purported regional center fully disclose and minimize any such conflicts.

Foreign investors who wish to participate in the EB-5 Program are strongly advised to consult with legal counsel who are familiar with U.S. immigration and securities laws before they invest in any project whether through a regional center or otherwise. They should not

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let the prospect of permanent residency status in the U.S., and the subsequent hope of journeying down the path to U.S. citizenship, lead themselves down a dead-end road to financial heartache.

If you would like to know about the EB-5 Program or about other important issues in U.S. securities law, please contact Bill Kitay at (905) 273-3022, ext. 291 or at [bkitay@pallettvalo.com](mailto:bkitay@pallettvalo.com).

*Bill Kitay, Senior Counsel at the law firm of Pallett Valo LLP, is one of the few lawyers located in Southern Ontario who is qualified to provide legal advice and counsel in both Canadian and U.S. law. Specializing in securities and corporate law, Bill's goal is to make Canada more accessible to U.S. businesses and make the U.S. more accessible to Canadian businesses.*

Bill Kitay is a member of the Business Law Practice.



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