

Successfully Petitioning for an EB-5 Visa (Part Six)

Due diligence and common sense with an EB-5 investment

by Jeffrey C.P. Wang and John Frederick ("Rick") Karch

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Due diligence is obviously required for any substantial investment, but when it comes to making an EB-5 investment, extraordinary precautions should be taken. This is because an EB-5 investment not only puts a significant amount of capital at risk, like any other big investment, it must also satisfy all of the strict requirements of the EB-5 Program. In other words, if an EB-5 investment turns out to be fraudulent, investors risk losing both their money *and* their path to permanent residency.

An excellent illustration of what can happen to unwary EB-5 investors is the recent case involving the Intercontinental Regional Center Trust of Chicago (IRCTC). The Securities and Exchange Commission (SEC) alleges that Anshoo R. Sethi fraudulently sold more than \$145 million in securities in the IRCTC, and that he collected \$11 million in administrative fees from more than 250 investors that were primarily from China. Each investor put up a \$500,000 investment, plus \$41,500 in "administrative fees." Sethi allegedly duped investors into believing that by purchasing interests in a company known as "a Chicago Convention Center" (ACCC), they would be financing construction of a major hotel and conference center near Chicago's O'Hare Airport.

Sethi claimed that the project had the backing of major hotel chains, including Hyatt. However, Hyatt informed the SEC that a letter on its letterhead had been forged. Sethi is also alleged to have claimed that he had obtained all of the necessary building permits, but a search of the Chicago Building Permits database shows that the only permits that had been granted for the project were for demolition, a fence, a tent, and some minor electrical wiring. And although Sethi is just 29 years old, he allegedly told investors that he had "over fifteen years of experience in real estate development and management."

Unfortunately, the SEC claims that Sethi has already spent 90% of the administrative fees he collected from the investors. And the future of the project, as well as the investment funds, remains uncertain. These unfortunate investors could have avoided a great deal of hardship by following a basic “due diligence” checklist, such as this:

Analyze the Business Plan

The Business Plan must be sufficiently detailed to satisfy the requirements of the U.S. Citizenship and Immigration Services (i.e. it must be *Matter of Ho*-compliant). And if the investment is in a Regional Center, the investor must verify that the enterprise has been officially designated as such. A listing of the existing Regional Centers can be found at www.uscis.gov/eb-5centers.

Calculate the Costs

In order to make an informed decision, the investor must first determine the total costs of the EB-5 project. If the enterprise is in an officially designated targeted employment area (TEA) the investor must make a minimum investment of \$500,000, but if the enterprise is not in a TEA, the investor must invest at least \$1,000,000. There may also be additional administrative and other fees involved.

Review the Track Record

Claims of past returns must be carefully analyzed. Documentation that demonstrates a positive track record is generally a good thing, but a record of *overly* consistent high rates of return may actually be a cause for concern (think Bernard Madoff). The backgrounds of the principals that are associated with the project must also be thoroughly researched as part of this step. This includes checking court records for any past lawsuits or criminal convictions. The investor should also verify the business experience of the principals by obtaining resumes, bank references, and Dun and Bradstreet reports.

Verify the Satisfaction of the Job-Creation Requirement

The USCIS requires that an EB-5 project demonstrate that the requisite number of jobs be created within 2½ years of the approval of the I-526. One of the benefits of investing in a Regional Center is that this job-creation requirement can be satisfied through the creation of *indirect* jobs, which are jobs created collaterally or as a result of capital invested in a commercial enterprise affiliated with a Regional Center.

Evaluate the Projected Returns

The investor must determine the projected amounts of the returns, and when the returns are to be paid out; e.g., monthly, annually, or at the completion of project. Similarly, the investor must be clear on how and when the investment funds and administrative fees (or what portion thereof) will be returned if the petitioner's I-526 is denied. Investors would be wise to verify that the Regional Center either has sufficient assets to make such a reimbursement if the I-526 is denied, or that the funds are securely in escrow pending the I-526 approval.

Examine the Exit Strategy

While there can be a proposed exit strategy if the I-526 is approved and the project is successful, EB-5 investors must understand that there can be no guarantee for the return, or rate of return, of the investment. If any portion of the investment is guaranteed, then that portion will not qualify under the rules of the EB-5 Program. The entire EB-5 investment must be *at risk* in order to qualify for the program.

Consider the Tax Consequences

The only thing that can be guaranteed in the EB-5 Program is that once an EB-5 investor obtains conditional permanent residency, he or she becomes subject to the same tax laws that apply to all U.S. citizens. This includes federal income taxes on worldwide income, state taxes, gift taxes and generation-skipping transfer taxes. And at death, the investor's estate is subject to U.S. estate taxes as well. However, with proper prior planning, generally only property that is held in the U.S. will be subject to such estate taxes, particularly permanently sited real estate. And even including real estate holdings, there is ample estate planning latitude permitting fixed assets, liquid assets and investments to be addressed with trust transfers, family investment

entities, gifting and other such distributions to avoid much prospective estate tax. It may be prudent for the investor to get all foreign holdings, particularly the liquid/investment income generating assets abroad, placed in an offshore protective entity or institution to preclude U.S. tax law applications. It is therefore vital that investors engage in tax planning with a tax attorney *prior* to filing an EB-5 petition.

Exercise Common Sense

Last, but not least, the investor must exercise common sense. Any claims that have been made by the promoters or principals must be independently verified. For example, if the project involves construction of commercial real estate, the investor should check county records to see if the issuer has obtained the proper permits. State and local property tax assessments can also be compared with the values the Regional Center attributes to the property. The investor should also verify how many other investors have invested to date. Follow the journalist rule of always looking for at least two sources to verify crucial information.

If the investors in the IRCTC case had followed a checklist such as this, with the assistance of a qualified attorney, they might never have been taken in by Mr. Sethi and the alleged ACCC scam. The building permits that had purportedly been obtained for the hotel/conference center could have been checked online in minutes, and a simple phone call could have confirmed whether Hyatt was really backing the ACCC project. Common sense should also have told the investors that there is no way that the 29-year-old Sethi began managing EB-5 projects when he was only 14 years old. Do your homework and don't be fooled. Unfortunately, as Voltaire once noted, "Common sense is not so common."

About the Author

Jeffrey Wang



Jeffrey C.P. Wang is the managing partner and founder of WHGC, P.L.C. Mr. Wang's practice focuses on handling the legal concerns of international and domestic corporations. In addition to his J.D., Mr. Wang has two advanced Masters of Law Degrees from the University of Washington and the Southern Methodist University School of Law. JeffreyWang@WHGCLaw.com

About the Author

John Frederick (Rick) Karch



John Frederick (Rick) Karch is a partner at WHGC, P.L.C. and a member of the International Corporate Transaction Group. His practice focuses on financial and tax concerns for individual and corporate clients. In addition to his J.D., Mr. Karch is a California CPA, holds an M.B.A. in Finance from Harvard Business School and Masters of Law in Taxation from the University of San Diego. RickKarch@WHGCLaw.com