Speaker 1: Hello. Everyone and welcome to the Immigration Insights Podcast, hosted by me, Kate Kalmykov, co-chair of the Global Immigration and Compliance Group at Greenberg Traurig. Today, I am once again joined by my partner Jennifer Hermansky, who's based in our Philadelphia office. She's currently chair of the AILA [00:00:30] EB-5 committee, and in that capacity she liaises regularly with the government and stakeholders on EB-5 issues. She's a key member of our GT EB-5 team. Jen, happy to have you back.

Speaker 2: Thank you for having me. Happy to talk today about some key issues that investors are having.

Speaker 1: So you and I recently spoke about the RIA that was passed in 2022, which was the [00:01:00] Reform and Integrity Act, which revamped the EB-5 program for the first time since IMMACT 90 and the introduction of the Regional Center Program in 1992. One of the key features of the RIA is that it contains a grandfathering provision. So if EB-5 investors file by September 30th, 2026 and the program lapses or is changed at a later point, [00:01:30] they are protected from those changes under the grandfathering provision of the RIA. Likewise, we expect that there will be an adjustment for inflation as prescribed by the RIA made after the grandfathering provisions expire. So because of that, many investors are rushing over the course of the next year to file EB-5 petitions for themselves and for their family members [00:02:00] to lock in the $800,000 rate before it's increased. And also because they're living in a world where they know what the law and the requirements of the EB-5 program are and they don't know how it could possibly be changed or even if it's extended at all.

And because of this sort of rush that many people feel to file, they are looking at various funding mechanisms, alternative [00:02:30] funding mechanisms for their EB-5 investment. So we have seen investors making partial and installment funding to file the application and then subsequently investing additional funds to meet the EB-5 requirements. We have seen many individuals financing the investment through loans and many regional centers are advertising loans, which have always sort of been [00:03:00] an accepted method of funding under the EB-5 program, but it depends how they're structured. So can you walk us through how individuals can actually use loans to finance an EB-5 investment?

Speaker 2: Well, EB-5 investors have been using loans as a method to finance their EB-5 for a very long time. I would actually say that obtaining a loan against real property that the investor [00:03:30] owns is probably the most popular and most frequently used source of funds for EB-5 investors. And quite often investors want to unlock capital from their asset without actually selling the asset. So we've had at this point more than a decade worth of guidance from USCIS about what types of loans can be used for the EB-5 investment. [00:04:00] So we previously discussed that we had the EB-5 Reform Act passed in 2022, and in that law, they made a few changes to the source of funds requirements. And this is actually one area where we have some new guidance in the EB-5 Reform Act on when we use loans as a source of investment. So in the RIA it says a few important [00:04:30] things.

Number one, it says where you use a loan from a third party as a source of funds, that loan has to be made in good faith. It can't be used to circumvent any of the other requirements including the lawful source of funds. It also says that where the loan is coming from a licensed bank, that the bank does not have to show its own source of funds [00:05:00] for how it's giving you the money because it's a licensed banking institution. But the RIA does say that where the loan is coming from a third party that is not a licensed banking institution, that third party has to show its source of funds for how it's making the loan to the EB-5 investor. And this is something that I think the USCIS wanted for a very long time, and in fact, they actually practiced when adjudicating [00:05:30] the I-526 petitions and the I-526E petitions, but now it's formally in the statute.

So those are some of the baseline rules that we're working with. So where an investor goes to a bank and maybe takes out a loan against real property that they own, that's very traditional, still allowed. The bank does not need to prove its source of funds, but where you get a loan from a third party, maybe that third party is a relative or maybe that [00:06:00] third party is your business or a relative's business, then we're going to have to show the source of the funds. And importantly, one thing that we still have is that the USCIS got sued actually a few years ago and through some litigation, we call it the Zhang litigation, the ruling from the court was that it's okay [00:06:30] to actually take an unsecured loan so there's no collateral personally owned by the investor, and that unsecured loan can be a proper EB-5 source of funds. So generally we're working under these basic rules anytime someone is going to take out a loan to do their source of funds.

Speaker 1: And as you said, it's a very popular financing mechanism for the EB- [00:07:00] 5 for a variety of reasons, maybe people have their money tied up in investments, so they have to rely on a loan. A lot of our clients that come to us use the loan mechanism because they're banking with institutions that they have a relationship with and the money is available to them and it's low interest and it makes sense. So they're good faith mechanisms to fund the EB-5 investment.

But what's new [00:07:30] in the EB-5 space that really started popping up after the RIA was passed and the program started filing applications again in 2022, was the offers of loans to be made by affiliates of the regional center or the new commercial enterprise, the actual fund that the EB-5 investors are putting their money into. And this was something that I think was completely new [00:08:00] and it's still in its infancy if we're being honest. So what structures do we see in the market and what is acceptable? And for those following in the EB-5 space, I'm sure that they have seen that there are now fees on this issue being sent out by USCIS. So Jen, give us a little bit more information on this.

Speaker 2: Yeah. So we know that there are [00:08:30] regional centers or new commercial enterprises out there potentially that have a way to fund some of the investment to their EB-5 investors that they're subscribing. This is maybe attractive marketing for investors because they can make their investment and also get some financing from a third party. So we know right off the bat that there are a number [00:09:00] of things

that come into play here. So the first would be whether or not that lender entity who is normally an affiliate of one of the EB-5 entities, let's say, whether that is a licensed banking institution, because we know through the course of seeing some requests for evidence from USCIS that they are looking into whether or not these entities are [00:09:30] properly licensed to make loans of this nature. So where one of these affiliates is going to make many loans to investors, there might be state law requirements or other requirements that need to be put in place by the affiliate in order to make the loans in the first place.

So that's one point of due diligence to potentially ask about with the lender. And we also know that generally these affiliate [00:10:00] entities are not going to be considered by USCIS to be a bank, which means that that party who is acting as the lender is going to have to source the lawful source of funds that they're using to make the loan to the investor. So we know these are some baseline rules. Then we also need to look at how long is the loan outstanding for and [00:10:30] what, if anything, is the collateral for this loan. So we know that you can have an unsecured loan, again, through the Zhang litigation, that's fine. Generally where a loan is unsecured, then we would submit the loan agreement, that would be fine. Where there is some security for the loan, we generally have to show what that is and potentially show the source of that collateral.

So in a more traditional [00:11:00] way, when we're getting a loan from a bank against a house, we would source where and how we purchase the house. Here the collateral is very important. We know that it needs to be structured correctly. One thing that is very clear from precedent case decisions is that a loan that you are taking from a third party cannot be secured by the investor's [00:11:30] ownership interest in the new commercial enterprise. So if I'm an EB-5 investor as an example, and I purchase a unit in an LLC or I become a limited partner in a limited partnership and I have an ownership unit in that new commercial enterprise, I cannot secure the loan using my unit in the NCE. That would run a foul of the at-risk rules. And [00:12:00] it also runs a foul of an important decision Matter of Izummi. So we know that's not allowed.

So I think investors have to look very carefully if there is some security. They need to look when the loan gets repaid, because I think USCIS is very focused on that. We know that there are many cases approved actually with loans of this manner. Generally, [00:12:30] there has been no issue when the investor is able to repay the loan maybe over a shorter period of time, six months, 12 months, 18 months, and they do so out of their own funds. The fact that the loan came from an affiliate of the regional center I think is maybe not so big of a deal in those cases. Where the loan is not going to be repaid for a very long time, four, five, six years, and where the repayment [00:13:00] of the loan might come from the underlying EB-5 loan to the project being repaid, there, I think USCIS is taking a very close look at whether these are good faith loans. And we're certainly going to keep reporting on the decisions that USCIS is making with respect to those loans.

Speaker 1: And that's important for investors, but it's also important for regional centers that have introduced these types of loan programs. [00:13:30] We also represent some of them.

We represent banking institutions and we work very closely with our real estate council and our banking, finance, and regulatory council because these are very complicated issues that don't just have an EB-5 impact, but the impact runs across different sets of federal laws and sometimes state laws. Okay, so let's talk about funding in installments. And this is sort of our hot topic today. So as we [00:14:00] said, sometimes an individual may not have the full $800,000 available to fund at the time of EB-5 investment. The regulations say you can be in the process of investing. At the same time the legal standard for any immigration application is that it has to be approvable when filed. So you can be in the process of investing, but it has to be approvable when filed.

Typically, to date, or let's say up [00:14:30] until maybe a month ago, we had always been able to submit applications where there was installment funding, provide through an RFE additional information with respect to subsequent installment fundings, as well as the source of funds for subsequent installment fundings to the USCIS. And the cases may take a little bit longer to be adjudicated and reviewed because [00:15:00] they didn't have all of the source of funds documents initially, because there was an RFE or request for evidence issued. But ultimately USCIS would approve these cases and adjudicate them and permit the structure. Sometimes, we also would actively submit documents, inter-file as soon as the person made their second, third, fourth installment funding and ask USCIS to match up our inter-filing to the actual case. [00:15:30] I'd say there was a 50% chance that they would actually do that and sometimes, of course, we still have to wait for the RFE.

Because the USCIS is a huge bureaucracy, there's contractors working in the mail room who are not government, employees who are employees of Department of Homeland Security and US citizenship and Immigration Services. So sometimes it was hard to match up the inter-filing to the actual file without having an RFE that has a barcode that directs [00:16:00] where a submission needs to actually go. So now the USCIS is sort of questioning installment funding, issuing RFEs, which are not asking for proof of subsequent installments being made, but actually questioning the timing of those. And if they are made after the agreement that was reached with the regional center was concluded, what if they were late? And in some [00:16:30] cases issuing denials. So can you walk us a little through the trends that we're seeing in the adjudication of installment funding right now?

Speaker 2: Yes. So they actually seem pretty aggressive. I'm kind of shocked by it because the rules have always said that an investor can be in the process of investing. Actually, the statute when the EB-5 law was passed back in 1990 actually contained the [00:17:00] in the process of investing language. And that was not changed by the RIA. I went back and double checked, did I miss this? But no, that language has always been in there. So it's not just that this in the process of investing language is in the regulations or in the USCIS policy, it's in fact in the statute that this sort of arrangement is allowed. So we have to start from that baseline. From there, the regulations [00:17:30] at USCIS also say that you can be in the process of investing and they give some examples of how you can be in the process of investing in the source of funds rules.

And also there's some really good additional guidance in the Matter of Izummi decision, which talks about what is an at-risk investment. And when I was looking at some of the decisions from USCIS and going back in and looking at the Matter of Izummi decision, there's some really [00:18:00] good language in there. Basically where USCIS, when it was deciding this precedent decision, which is binding on the USCIS still to this day, it says that the USCIS has responsibility to ensure that the requisite amount of money is actually paid by investors. And over the years, the USCIS has seen this and they have a right to look [00:18:30] at a schedule of payments. This is actually in the facts of Izummi. And interestingly enough, the I-829 rules also touch on this because in the I-829 regulations, it says that you should submit evidence that you've substantially met the capital requirements.

So when you look at this language together, it makes it seem that you have well up until the time of the I-829 filing to make the full investment. [00:19:00] And I think that that is clearly the rule and USCIS is still trying to figure out how to administer that practically. So in their recent decisions, they seem to be saying a few really important things that investors really need to take note of. The first is that installment method can be fine. It's not that they're saying you can't do it, but they're saying you have to plan correctly to do it. The first thing is that number one, [00:19:30] what documents are in your I-526E petition that show that you're actually in the process of investing and that you're bound to it? And normally what we would do for investors is make sure that there is a side letter agreement with the EB-5 new commercial enterprise that says, "Okay, you funded part of the investment now and you must fund the remaining installment by a certain date."

So having a agreement with [00:20:00] the NCE about when you must fund the second installment is very important. So it can't just be that the investor unilaterally decides to do it, the NCE has to allow it and there has to be a writing binding the investor to that schedule. So that's number one. Number two, USCIS seems to be saying that the investors have to identify now the source of funds for their second installment. So if the side [00:20:30] letter says that you must make a remaining wire of $400,000 USUSD to complete your investment by 12/31/2025, and we're filing an EB-5 petition today for someone, we should be identifying what is the source of funds for that remaining installment that's going to be made at the end of the year. And this might be hard for investors to do, but this is a very good point for investors [00:21:00] to take note of. You have to understand where your money is going to come from to fund the additional installments.

It can't just be that you're planning on somehow liquidating something or coming into money somehow. They really want to know that you're going to be bound to make that second installment. So I think that's also very important. And then the third and final thing is that USCIS wanted to see evidence of what that was going to be as [00:21:30] a source of funds. So if you say that you're going to sell a house to make that $400,000 second installment, we should be presenting the evidence of that you own the house, that it's lawfully yours, maybe that it's up for sale, that we're also presenting the evidence of when and how the investor purchased the property lawfully. So that way the source of funds is in the record for USCIS, and that puts [00:22:00] the investor in

the best position to show they're in the process of investing. They've identified the capital that they're going to use, they've identified the date that they're going to fund the second installment, and they've identified that they're legally bound to make that second installment.

Speaker 1: So a couple of questions come to mind. What if someone is expecting to have money come through a source, but life happens and now they can't anymore? So perhaps they have to take a loan [00:22:30] or perhaps they have to ask a different relative because they didn't get their Christmas bonus or whatever happens. I wonder whether now into petitions we have to consult with clients and go through different scenarios of where the source of funds can come from because they may say, "Well, you didn't tell us ahead of time, you didn't present it." And that of course is very difficult because paperwork may not be available. You may just be able to write a narrative [00:23:00] and they're applying a standard that they haven't applied before. So we're really sort of winging it in terms of how we're going to present this information.

Speaker 2: I think that's right, and I think this makes a point of investor preparedness. And I think USCIS is trying to weed out maybe serious investors from those who maybe are not so serious. And I think in the past, [00:23:30] USCIS has maybe seen a lot of skeleton filings where people will file a case early to get a priority date established for them and maybe they've only invested $10,000 and there's hardly any source of funds in the file. I think in those cases, USCIS will be more aggressive moving forward that you case was not really approvable when it [00:24:00] was filed. You did not meet burdens to show that you are in the process of investing or identifying what are the lawful source of your funds. And importantly, when the RIA was passed, we had a new form I-526E that was published by the USCIS for everyone to use.

And if you look carefully at the questions on the form, they ask for dates of funding. There's multiple [00:24:30] places where you can put in multiple dates. They ask explicitly what is the source of funds for all of the capital that are being invested? And USCIS is looking at the form carefully and where those additional dates are not identified or sources are not identified, they're being aggressive in sending denials or notices of intent to deny to investors saying, "We don't believe that your case was approvable when it was filed." Or, " [00:25:00] We do not believe that you are meeting the burden of proof." And by the way, they updated their policy manual in the EB-5 section to give themselves discretion, more discretion about how they handle cases. And they're actually saying in some decisions now that, "We have the discretion where you did not identify the source of funds or give us documents [00:25:30] in advance about the source of funds for the second installment. We have the discretion to send your case right to a denial. We are not obligated to send you an RFE."

And we've not seen this sort of aggressiveness in a very long time, but I think investors should take note that this is the USCIS that we are dealing with right now. And you have to be prepared and you have to plan in advance for your EB-5. You can't [00:26:00] just wing how you're going to send $400,000 later to the US. So I think this takes us full circle. How we started there is less than 365 days now before September 30th, 2026. And if investors are going to invest money and file a case before that date, they need to

be thinking now about what they're going to do because they have to plan for the source of the full 800,000, [00:26:30] even if those will be wired in installments.

Speaker 1: Well, this is also certainly an issue for projects and regional centers. They don't want to get a whole bunch of denials and have refund money to investors. And now they have financing that they were relying on in terms of timing missing and they have to go back out into the market. So it's not just even an investor issue, certainly project and an offering issue. And [00:27:00] we may see that many projects start changing their stance on whether they will accept installment funding at all.

Speaker 2: I think that's right. And I think for the regional centers and NCEs that are out there raising funds, they might need to develop their own internal screening policies. When do they allow an investor to do a partial investment? And what documents do the investors have to present to the NCE for them to do their due diligence [00:27:30] on them and the funds and the likelihood that the person will be in a position to send the remaining funds on time? Because of course, if Kate and I are competing EB-5 investors and there's one spot left in a project and then there's two of us trying to get into it, the NCE is going to have to evaluate which one of us might have a better source of funds or which one of us is prepared to fund fully in advance. [00:28:00] So I think the regional centers and NCEs out there need to look closely at their own policies for when they allow it, what documents do they collect up from the investor in advance to show that the person is going to meet the second funding deadline that they impose upon them.

Speaker 1: And certainly it's also an additional paperwork burden for regional centers and projects because they're tracking when the installment is funding and if there's multiple installments, they have to track those [00:28:30] due dates. So there's definitely an additional monitoring burden on them. So let's move on to worst case scenario. Somebody got denied because of this change in policy and they want to contest it. What are we doing? Are we filing a motion to reopen? Are we doing an appeal? What's our strategy in dealing with these types of issues? Because obviously people have put money in, they wanted [00:29:00] to move them and their families to the US and in some cases we have people that are already in the US that have filed concurrently to take advantage of that change that was introduced under the RIA. And now worst case scenario, they got a denial of their 526E.

Speaker 2: Yes, I think this is a very difficult thing for investors to go through. It might be that the investor wants to try [00:29:30] to file a motion to reopen with additional documents to show that they made the second installment and that their source of funds was generally consistent with what was said when the I-526E petition was filed. If they have a very strong case for that, they might want to file a motion to reopen. But also to me, these things seem sort of ripe for appeal to the AAO. [00:30:00] I think in some of these decisions, the USCIS has tried to say that there was some affirmative burden by the investor to inter-file the documents to show that they made their second installment and what the source of funds was. But that sort of procedure has never been a written policy of USCIS. It was never published anywhere for investors. No investors were put [00:30:30] on notice of this.

So in these types of scenarios where the USCIS has been very aggressive with the denial and maybe just denied a case without even sending an RFE for the investor to provide additional documents, and where there are very good legal arguments that the USCIS has overstepped on its legal authority, it might make sense to go directly to the USCIS AAO [00:31:00] in those cases and just put forth all of those legal arguments. And importantly, the AAO does de novo appeals, which mean that they get to look at all of the evidence anew and you actually have the opportunity to send in additional new evidence to the AAO.

So investors certainly can prepare their source of funds for their second installment and send all of that to the AAO, and say, " [00:31:30] Administrative Appeals Office, please look at our case. We filed our second installment. We are fully invested. Instead of requesting information from us to see if we met our deadline, you just denied our case and we had already met all of the requirements at the time that you denied our case. And you denied our case based on a premise that we had to send documents somewhere when there is no established procedure to do that." So that seems like a pretty fair [00:32:00] argument for the AAO to go in and look at those cases and determine that the investor has been fully funded with lawful sources.

Speaker 1: And by the way, outside of the EB-5 process, there is not a single immigration process that we work on, whether it's family-based or employment-based that has an affirmative interfiling requirement. That just does not exist. But let's say in the worst case, the AAO denies the appeal, the investors can [00:32:30] then go to federal district court and contest it there. And I do think we may see litigation at some point on that because this issue is certainly a hot button issue that is going to impact a lot of people.

Speaker 2: I think that's true. I think under the RIA, it's a good reminder for people that you have to exhaust your administrative remedies. You have to go first through an AAO appeal before there can be any appeals to the district court [00:33:00] level in the federal court system. But also I think federal courts might take more kindly to these sorts of things. That an investor filed their case, they had an agreement to send the rest of the funds, they met that agreement, they sent the rest of their funds, and those funds were documented as lawful. And yet still the Immigration Service denies their case. That seems like an abuse [00:33:30] of discretion. It sounds arbitrary and capricious, which is exactly the standard that the federal court is going to look at in those types of cases.

Speaker 1: And by the way, you mentioned a change to the USCIS policy guidance, but we also have guidance on when the service has to issue requests for evidence and notices of intent to deny. And it if in a petition looks like it has enough information, but they need clarification, they should be issuing an RFE. [00:34:00] They should not be sending a denial because the petitioner didn't affirmatively inter-file something that there's no procedure to do. And we have also heard that there has been a lot of turnover at the USCIS, and that includes the IPO. So it may also be that now we have new adjudicators looking at these cases, changing the standards, looking at them with sort of a different set of eyes. And that human sort of factor is a really real thing [00:34:30] that we see a lot when we have changes in administration, that there may be changes in how adjudications are made based on new people coming in.

Speaker 2: I think that's right. There's new people, they're being trained differently, and we sometimes get cases that are outliers. And again, we still are getting RFEs too, from the [00:35:00] USCIS, asking for the second installment and the source of funds. So we know that there are some adjudicators out there who will go and send an RFE and ask for the documents, and then there are some that won't. And that's an internal consistency issue that USCIS has to work on.

Speaker 1: Well, for our part, we're going to continue to monitor the situation, report things on the podcast, on our blog, eb5insights.com. And Jen, thank you so much [00:35:30] for joining us today to discuss this important issue.