AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Practice Pointer

NOID in EB-5 Case Reveals USCIS Is Reviewing Data from Other Agencies to Check for Inconsistencies

USCIS has warned that it will look more closely at representations made by EB-5 petitioners on Form I-526, and recent USCIS adjudications suggest that the agency's warnings should be heeded. In his opening remarks during the EB-5 National Stakeholder Engagement on August 13, 2015, Nicholas Colucci, Chief of the Immigrant Investor Program described initiatives to identify and assess fraud risks and expand information collection. Chief Colucci's comments followed the release of the U.S. Government Accountability Office (GAO) report, *Immigrant Investor Program, Additional Actions Needed to Better Assess Fraud Risks and Report Economic Benefits*, published just a day earlier on August 12, 2015. Among other things, the report recommends expanded information collection and fraud risk assessments in conjunction with interagency partnerships. Now, there is evidence that these initiatives are underway.

A recently issued Notice of Intent to Deny (NOID), attached hereto, illustrates how wide of a net USCIS is casting in its efforts to verify the accuracy of information and documents submitted by petitioners to substantiate the lawful source of EB-5 investment funds. Notwithstanding necessary redactions, it is clear, and not surprising, that USCIS examined business and personal financial records, citing 8 CFR §204.6(j)(3). However, USCIS also examined earlier visa applications submitted by the petitioner and her spouse, prior resumes and letters of recommendation, and, it seems, other records dating back to the mid-1990s. In adjudicating the I-526 petition, USCIS found inconsistencies and contradictions when it compared the representations that the petitioner made in support of her I-526 petition with those the petitioner made on DS-160 forms that she and her husband had previously submitted to the Department of State (DOS) in applications for nonimmigrant visas.

But for efforts to examine the immigration history of the petitioner and her spouse, one would not expect these issues to arise during adjudication of the I-526. Though it is possible that questions of this nature could arise during consular processing, DOS would likely return the I-526 petition to USCIS with a request to review its approval. Now it is clear that USCIS is stepping up its efforts to thwart the use of questionable information and documents to obtain EB-5 immigration benefits. Thus, everyone should expect that USCIS will cooperate with other agencies—DOS, the FBI and other law enforcement agencies, the Office of Foreign Assets Control (OFAC), the Department of Commerce (DOC), and others—as it reviews I-526 and I-829 petitions and the backgrounds of the petitioner and derivative beneficiaries.

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USCIS's concerns about misrepresentation are evidenced in the NOID by reference to potential sanctions. Noting the petitioner certification on Form I-526, that evidence submitted is true and correct, USCIS cites 8 USC §287(b) and 8 CFR §103.2(a)(2) as grounds for perjury when evidence submitted is knowingly or willfully false. This statute refers to 28 USC §1746, which extends the penalty of perjury to any unsworn statement said to be true and made under penalty of perjury. Petitioners make this statement upon signing Form I-526 and Form I-829.

The NOID also suggests that information provided to DOS in earlier visa applications may not be true and correct, as only the information in the DS-160 or the I-526, but not both, could be accurate. The prospect of willful misrepresentation or fraud in declarations to DOS raises issues of perjury and may result in permanent refusal of a visa.

Beyond whether perjury has occurred, the NOID states that all representations made by the petitioner may be questioned when the veracity of only some of the information or documents supporting a petition is questioned. Citing *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), USCIS is signaling that an inquiry into a specific issue in a petition may result in a broader inquiry of the "reliability and sufficiency of the remaining evidence." In such a situation, USCIS expects competent, independent, and objective evidence to explain the inconsistencies. The NOID states that explanations supported by lesser evidence will not be acceptable.

When Chief Colucci's comments are considered alongside the issues and warnings in the NOID, the lesson is clear. When considering the EB-5 program, investors and derivative beneficiaries must be prepared for a comprehensive and complete inquiry. There must be full disclosure, and evidence must be closely examined before petitions or applications are filed. To the extent possible, attorneys should review the family's immigration history and the history of relations with law enforcement agencies, other administrative agencies, and businesses and financial institutions, so that there is a complete understanding of issues that may arise in the EB-5 adjudication process and which may foreclose petition or visa approval. Counsel should be particularly careful in educating clients about the potential for apparent inconsistencies and the need to be thorough and complete when describing past statements made on nonimmigrant visa applications.

There are two other considerations: First, although this example reflects one specific scenario—USCIS examining information from DOS in the context of an I-526 petition—counsel should assume that once data pipes are put in place, cross-agency communication and information sharing will become the norm in all cases, not just EB-5 cases. Second, when faced with allegations of inconsistencies, counsel should not simply assume that the other agency's information is correct or complete. Sometimes, what appears to be an inconsistency is merely a difference resulting from contextual interpretations of two different questions. For instance, a person might not include all companies for whom they have worked on a resume if they have, for example, worked for more than one company

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at the same time. Practitioners should examine clients' backgrounds as closely as possible before filing a petition or application, but should also diligently investigate if USCIS or another agency alleges inconsistencies in RFEs, NOIDs, or denials. Many times there are legitimate reasons for differences in information.

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petitioner and it is based on information of which the petitioner is unaware, USCIS must notify the petitioner and allow a period of time for rebuttal.

II. Analysis of the Evidence

1. Capital Obtained Through Lawful Means

The petitioner must show that the invested capital was obtained through lawful means:

8 C.F.R. § 204.6(e) defines *Capital* as:

> Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act.

8 C.F.R. § 204.6(j)(3) requires:

> To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:
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> (i) Foreign business registration records;
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> (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
>
> (iii) Evidence identifying any other source(s) of capital; or
>
> (iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

The existing record contains the following evidence:

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Petitioner signed the Form I-526 petition on 2014, certifying that the petition and the submitted evidence are all true and correct.[2] Petitioner and Husband's previous declarations[3] on multiple visa applications calls into question the credibility of the evidence and whether all of the submitted evidence is true and correct.

Consequently, USCIS is requesting clarification on the petitioner's and Husband's complete employment history since 1996. Please include the names of the companies and the owner(s), Business License and/or Business Entity Registration (with registration number), as well as the current address of each company (include prior address(es) of each company if petitioner worked for company at a previous location), length of employment, and salary for each company. This includes any companies where petitioner or Husband had a shareholder or ownership interest.

Petitioner declared the following employment on h 2014 anc 013 visa applications:

- Present Employer:
- 1995 – 2009,

[2] *See* section 287(b) of the Act, 8 U.S.C. § 1357(b); *see also* 8 C.F.R. § 103.2(a)(2).
[3] Per Department of State's website, all declarations in a DS-160 (visa application) are made under penalty of perjury:

> Your electronic signature certifies that you have read and understood the questions in the application and that your answers are true and correct to the best of your knowledge and belief. The submission of an application containing any false or misleading statements may result in the permanent refusal of a visa or denial of entry into the United States. All declarations made in the application are unsworn declarations made under penalty of perjury.

http://travel.state.gov/content/visas/english/forms/ds-160--online-nonimmigrant-visa-application/frequently-asked-questions.html (last visited 7/8/15).

Petitioner declared the following employment on her 2015 visa application:

On all three of her nonimmigrant visa applications the petitioner answered, "NO" to the question, "Did anyone assist you in filling out this application?"

Petitioner submitted a signed resume dated and claimed the following work experience:

There are multiple inconsistencies and contradictions between the petitioner's resume and visa applications.

All the above inconsistencies with petitioner and Husband's resumes, Letters of Recommendation, and declarations on visa applications call into question the legal source of petitioner's investment capital and whether all the submitted evidence with the petition is true and correct As a result, the evidence presented lacks credibility and is insufficient to establish that petitioner's capital investment derived from a lawful source. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*