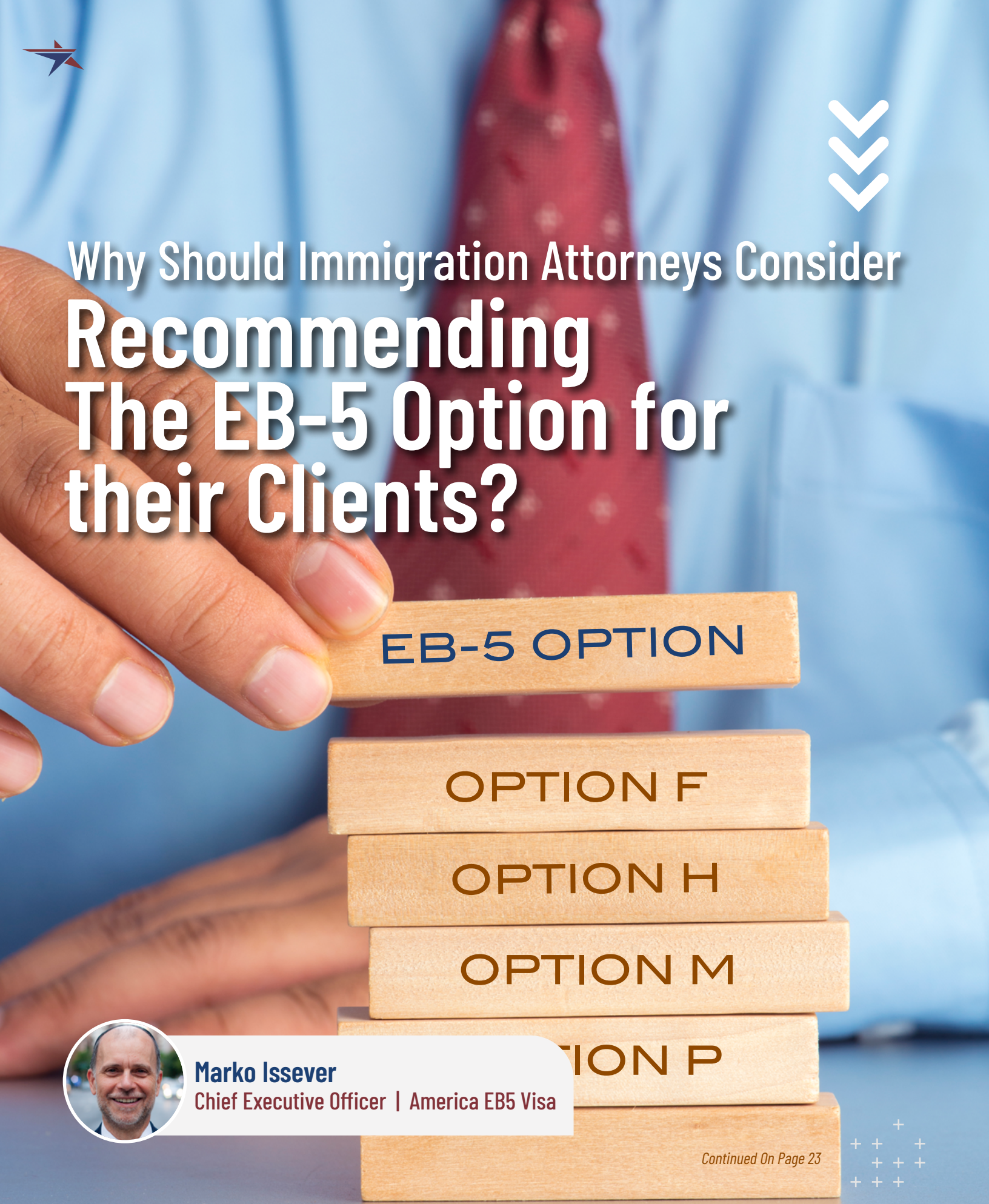
Why Should Immigration Attorneys Consider Recommending The EB-5 Option for their Clients?



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Others have addressed this critical issue before and concluded that immigration attorneys should include the EB-5 option in their menu because it makes sense for many clients. It is not necessarily the solution for every client looking to obtain a green card, but there are quite a few groups for whom EB-5 is the best option, perhaps the only viable option. Therefore, they would not be getting comprehensive immigration advice if their immigration attorneys did not present the EB-5 option to these clients.

Why are some or perhaps most immigration attorneys reluctant to offer EB-5 as an option to their clients seeking permanent resident status in the U.S.?

The answer, for the most part, is historical. Although not meant to be an exhaustive list, the following will give the reader an idea of some potential myths as to why immigration attorneys refrain from pursuing EB-5 for their clients. Each of these reasons must be addressed to minimize potential "phobias" regarding EB-5 held by professionals representing their clients and genuinely wanting to execute the best course of action for them.

1. Complicated process
2. Global tax/residency requirement
3. Long processing times
4. Involves potentially risky investments resulting in capital payback risk
5. Expensive, time value of money, opportunity cost of the EB-5 investment
6. Conflict of interest between lenders of capital and users of capital (i.e., the developers)
7. Redeployment risk
8. Job creation responsibility
9. Not enough supervision of the EB-5 stakeholders, which can lead to fraud risk
10. Investment is a black box and requires a tedious due diligence process

While this list is not necessarily exhaustive, this article will address each of these issues and explain why immigration attorneys should consider recommending EB-5 to their clients as a viable option to obtain permanent residency in the United States.

1. Complicated process

While it is true EB-5 is complicated, there are many stakeholders with varying expertise that can service the investors as solution partners. Investors mitigate the risk of choosing a weak project by carefully selecting a qualifying project by working with a professional such as a licensed broker-dealer.

Source of funds

Although the source of funds is under increased scrutiny when compared with other investment-based visa types (such as E-1/E-2), if the investor can document how they earned the funds they will use for the capital investment, their task is surmountable.

Path of funds

The path of funds (in other words, the funds transfer from the foreign country of origin to the U.S.), is not an issue in most cases. However, in countries like Mainland China, India, Vietnam, and Bangladesh, there are restrictions on the amount of funds an individual is allowed to transfer out of the country. Nevertheless, an investor can overcome this issue by utilizing the services of professionals specializing in money transfers.

Too many requests for evidence (RFEs), Notice of Intent to Deny (NOIDs), Denials

It is also true that we saw an increased number of RFEs and NOIDs before the passage of the Reform and Integrity Act of 2022 (the RIA). Fortunately, the number of denials has significantly decreased since then. Investors are vetting projects better. The immigration attorneys filing EB-5 petitions are also more careful with the source of funds. Even though we still see several RFEs for technical spurious reasons, there are relatively fewer post-RIA because Regional Centers (RCs) must now file the project details with the USCIS through Form I-956F.

Long and tedious application forms

Since the RC's I-956F filing makes the application process more straight forward, immigration attorneys no longer must prepare long and complicated filings with USCIS. The investor EB-5 petition (i.e., the I-526E Petition), is a standard form, much like other forms immigration attorneys are familiar with. The only two sections that are EB-5-specific are the rigorous source of funds analysis and the reference to the I-956F filing. Immigration attorneys do not include detailed project information anymore when preparing investor petitions. They need only reference the I-956F filed by the RC.

Retrogression

Investors born in countries like Mainland China and India continue to experience a backlog concerning visa availability (known as retrogression). However, the RIA dealt with this issue by creating visa set-asides. New applicants can avail themselves of a combined 3,200 visa set-asides if they invest in Rural (2000), urban TEA (1000), or infrastructure (200) projects. In addition, there have been many unused visas in previous years that have rolled over to EB-5. There is no significant retrogression concern for the time being for post-RIA investors who invest in these types of projects instead of straight urban ones (all of which remain current as of the latest State Department Visa Bulletin).

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2. Global tax / double taxation / residency requirement

While this is a legitimate concern, it is not EB-5-specific. Anybody considering obtaining permanent residency status in the U.S. or US citizenship must deal with this requirement. That said, there are certain misconceptions about this requirement as well. If there is a tax treaty between the candidate's original country of citizenship and the U.S., the foreign tax credits would offset a substantial, if not all, of the additional tax liability of non-U.S. income.

3. Long processing times

The processing times have become significantly shorter, and the adjudication process has become more efficient post-RIA. USCIS is currently processing most I-526E applications in less than a year for rural and urban TEA projects, while pre-RIA, an I-526 approval took over four years. The EB-5 investor petition has been reduced to the I-526E Petition. All the project-related information is part of the I-956F application filed by the RC. This is a welcome development that has simplified not only the immigration attorney's work but the adjudicator's work as well. In the new environment, adjudicators who review the cases are already familiar with the project in which the investor has invested. As a result, they can process the cases faster and more efficiently.

4. Involves potentially risky investments resulting in capital payback risk

Immigration attorneys do not have to refer their clients to RCs, implicitly appearing to be endorsing the project sponsors. No experienced immigration attorney is interested in doing this. Unfortunately, since the investment in a qualified project is part of the EB-5 application process, many ignore EB-5 as a legitimate option for their clients. It does not have to be like this. The RIA mandate of the I-956K filing requirement makes the project introduction and due diligence task assigned to regulated third-party promoters, such as licensed U.S. broker-dealers. In other words, immigration attorneys should not refrain from EB-5 because they do not want to direct their clients to various investment options. Instead, they should direct them to broker-dealers, who represent already-vetted projects with ready-to-study due diligence materials. This access to information can help reduce the capital repayment risk.

5. Expensive, time value of money, opportunity cost of the EB-5 investment

There is no denying that EB-5 is a more costly immigration option than family-based and many other employment-based programs. Of course, immigration attorneys should present their clients with these less expensive options if they are viable. But for those candidates for whom family-based immigration is not an option, or the other employment-based options such as EB-2 and EB-3 that have significant retrogression concerns, EB-5 could be the only viable option. For example, provided they already have access to the required investment capital, for India-born H-1B visa holders, the opportunity cost of the EB-5 investment is the time value of money. Although a significant sum, the cost of potential loss of income is much higher than this opportunity cost with the additional benefit of self-sponsorship without being bound to any employer. They can negotiate a much better compensation package through the green card and employment authorization they get via EB-5. They can work anywhere they want. They can also start their own business, a choice most make towards total financial freedom.

6. Conflict of interest between lenders of capital and users of capital, the developers

There are two different RC models. When the investor invests his capital into an EB-5 project, the funds go into a special-purpose company called the New Commercial Enterprise (the NCE). The RC typically manages this special-purpose company and invests the EB-5 capital as a loan or equity investment into another special-purpose company called the Job Creating Entity (the JCE). There is a potential conflict of interest when the NCE and the JCE are substantially owned and/or controlled by the same principals (often the developer of the project). However, an arms-length relationship exists between the NCE and the JCE in most of the other typical RC-based structures. In these typical structures, while the NCE is controlled and managed by the RC, the JCE is controlled by the developer.

The loan documents between the NCE, as lender, and the JCE as borrower, typically include strong covenants designed to protect the NCE. These provisions help mitigate the potential conflict of interest between the lenders and borrowers of capital. It is important to note that notwithstanding this potential conflict of interest, there is a benefit of the affiliated developer and RC model. Investors have only one responsible party they have to deal with.

7. Redeployment risk

Redeployment risk is the risk that the project sponsors would reinvest investor's capital in other projects due to either the terms set forth in the private placement memorandum (PPM) plus optional extension rights of the sponsor not being met or investor-specific issues such as not having fulfilled the sustainment period, however that is defined. Currently, as far as capital repayment is concerned, as opposed to when an investor is eligible to file for permanent residency status, the definition of sustainment period is contested in the federal courts.

USCIS believes that the RIA allows investors to receive their capital back after two years of capital usage by the project developer-controlled JCE, assuming the creation of a minimum of ten jobs attributable to the specific investor. There are many projects in the EB-5 market where the redeployment risk is minimal, regardless of the outcome of the interpretation of the sustainment period. Moreover, most PPMs restrict the sponsors from redeploying the funds in a riskier project than the original one investor selects for their EB-5 petition. Many redeployed funds become senior obligations of the subsequent borrowers, providing additional capital repayment security.

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8. Job creation responsibility

Investors have direct job creation responsibility when applying for the EB-5 through a direct EB-5 application. However, the job creation responsibility is passive when applying through the RC program. Most of the required jobs in the RC model are indirectly created through the output of statistical models. The most significant variables are capital expenditure and building completion. Developers of most projects end up spending, at the minimum, the stated capital stack in the business plan. The building completion guarantee kicks in if they run out of funds before project completion. If the building completion guarantee provider is a reputable third party, the risk of leaving the project incomplete becomes minimal. As for capital expenditure, unless we experience deflation, neither commodity prices nor labor costs ever come down. As a result, developers spend the same, if not more, funds than projected in the business plan. As such, investors do not have to worry about the job creation responsibility, provided they select a project with a comfortable job "cushion" (i.e., enough jobs to allocate more than 10 per investor).

9. Not enough supervision of the EB-5 stakeholders, fraud risk

Lack of supervision and resulting noncompliance was a significant issue, pre-RIA. However, RIA changed the EB-5 landscape for all its stakeholders, most notably by introducing various integrity measures described below:

- **Regional Center Program Audits:** All RCs will undergo a USCIS audit at least once every five years.
- **EB-5 Integrity Fund (Integrity Fund):** Created to detect and investigate fraud or other crimes; to determine whether RCs, NCEs, JCEs, and alien investors (and their alien spouses and children) comply with the immigration laws; to conduct audits and site visits, among others. Each RC must contribute $10,000-$20,000 annually (depending on the size of the RC) for the Integrity Fund starting October 1, 2022. These new measures should prevent fraud and abuse and assist the Department of Homeland Security (DHS) in preventing national security breaches. They will allow USCIS to investigate and monitor all parties within the EB-5 industry to ensure compliance.
- **Direct and third-party promoters (including migration agents):** These promoters must be registered with USCIS. Each investor's EB-5 petition must include a disclosure signed by the investor, that reflects all fees, ongoing interest, and other compensation paid to any person, agents, finder or broker-dealer that the RC or NCE knows has received, or will receive, compensation in connection with the offering.
- **Fund Administrator:** Unless the NCE will be audited, NCEs are required to engage fund administrators to monitor and track any transfer of amounts from the separate account. Fund administrators also serve as a co-signatory on all separate accounts and verify that the transfer complies with all governing documents, including organizational, operational, and investment documents.

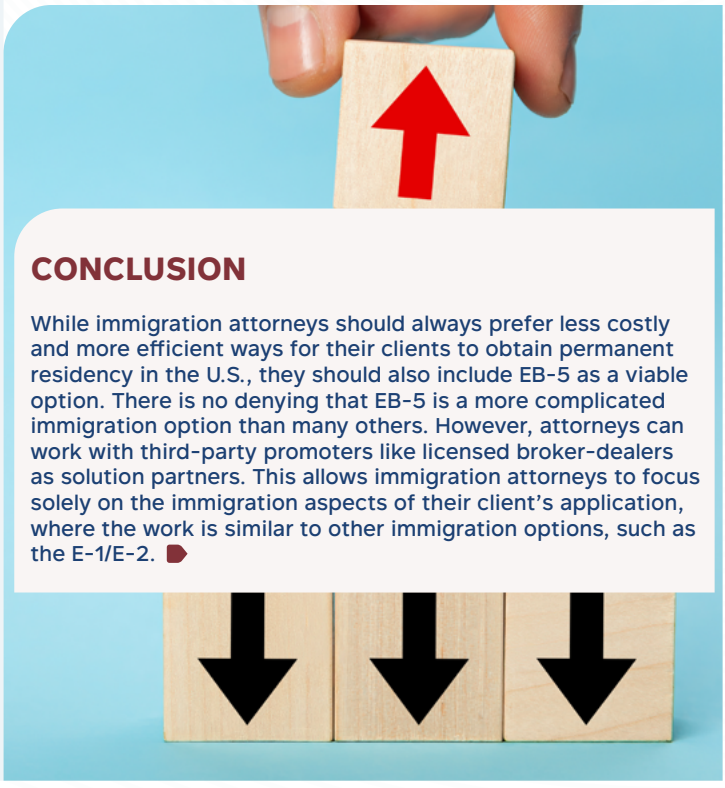
Thanks to these measures, EB-5 investments are now as secure as any other private placement security that sophisticated and accredited investors typically engage with. In addition to the oversight provided by FINRA and the SEC for similar investments, EB-5 projects also benefit from USCIS supervision, as required by the RIA.

10. Investment is a "black box," and the due diligence process is tedious

We often hear this criticism about EB-5. Here are some of those common complaints:

- **"I am not qualified to go through the project deck."**
- **"The relevant information regarding the transaction is all over the place."**
- **"The private placement memorandum (PPM), the appraisal report, the loan agreement, and the escrow agreement are unclear."**

Many immigration attorneys, either having never filed an EB-5 petition or having had a negative experience with it, opt to exclude EB-5 from the immigration options they offer to their clients. Third-party promoters, such as licensed broker-dealers, exist precisely to help address this issue. They present fully vetted projects to the investors from multiple sources with varying features. While it is the job of the immigration attorney to guide the investor through the immigration process and the source of funds, it is the job of third-party promotors to guide investors in project selection and due diligence, which can help demystify that process.



CONCLUSION

While immigration attorneys should always prefer less costly and more efficient ways for their clients to obtain permanent residency in the U.S., they should also include EB-5 as a viable option. There is no denying that EB-5 is a more complicated immigration option than many others. However, attorneys can work with third-party promoters like licensed broker-dealers as solution partners. This allows immigration attorneys to focus solely on the immigration aspects of their client's application, where the work is similar to other immigration options, such as the E-1/E-2.