

Kate Kalmykov ([00:10](#)):

Welcome to the inaugural podcast of Immigration Insights. This is the new Greenberg Traurig immigration Podcast. Greenberg Traurig is one of the largest law firms in the world. My name is Kate Kalmykov. I am the global co-chair of the immigration practice here at GT, and I'm thrilled to be joined today by my partner from Philadelphia, Jennifer Hermansky. Jen and I have been working together for over 15 years, and a large portion of our practice focuses on the EB-5 Immigrant Investor visa. We have represented over 8,000 investors in the EB-5 process. We have structured over \$12 billion in EB-5 financings for regional centers, organizations, real estate developers looking to raise money through this program. So Jen, tell us a little bit, what is EB-5? What is this program that was introduced in 1990?

Jennifer Hermansky ([01:15](#)):

EB-5 is the United States Investment for green card or permanent residence program. So many nations around the world have various programs for citizenship immigration based on investment. An EB-5 is the category of green card that we give out to investors who make substantial investments to the United States into a business that creates jobs for US workers. So it has been around for quite some time. You might hear it referred to as the EB-5 Program or the EB-5 Regional Center Program or Green Card Through Investment. But this is our country's investment immigration program, and it's been very popular and it continues to be very popular.

Kate Kalmykov ([02:05](#)):

It's comparable to the Golden Visa programs that many countries in Europe and the Caribbean and now in the Middle East have. Essentially, it's a really easy route to get permanent residency in the US because you're self-sponsoring for a green card. So you don't need an employer, you don't need a family sponsor, you simply invest money and the US government obviously wants to know that the investment you're making is lawful. And so the investment has to demonstrate where they earn the investment funds as well as the movement of the funds from the time they were earned all the way through until investment. Now, the goal of the program when it was introduced in 1990 was to attract foreign direct investment into the United States. When the program was initially introduced, it was introduced as a job creation program. So investors would start their own business or invest into an existing business that had to create 10 full-time jobs for US workers, citizens, or permanent residents.

[03:08](#)):

But in 1992, the program morphed and Congress introduced the Regional Center Program and it was a pilot program, which means that it had to be periodically renewed. The Regional Center program is really a different program than the direct program. Rather than investing into your own business, it allows for pooled investment into a special purpose vehicle or a fund, and that fund can then loan money or make an equity investment into any sort of job creating project. Most commonly, they're real estate projects, commercial real estate projects. With the Regional Center Program, there was also the concept of indirect employment creation introduced. So what is indirect employment creation? What does that even mean?

Jennifer Hermansky ([03:58](#)):

So, basically it means that instead of counting full-time employees at a business, which was the more traditional method that Kate just discussed, we now get to use economic models in order to determine the employment creation impacts from a whole project. So each of these projects will hire an economist to help them determine the job creation for a project. For example, if the EB-5 project is a hotel, the economist will look at the amount of money that will be spent to develop the hotel, for example, hard

and soft construction costs. And that will be input into a model which will tell us the number of jobs that are going to be created in the economy as a whole as a result of that development. So it greatly expanded how we think about and how we calculate jobs for the EB-5 program.

[\(04:55\)](#):

One of the really good things about it is that instead of counting these heads, we have an expanded method of job creation. More jobs are created in the economy upstream and downstream from the project, and it allows more investors to invest in each project because we create 10 jobs per investor in a project, and many of these larger development projects might create 1000, 2000, 3000 jobs in the economy as a whole result of the development cost. So, it enables the fund that Kate just discussed to raise a larger amount of EB-5 investment capital, and it allows a larger amount of foreign direct investment into the US. So it's really a great program overall.

Kate Kalmykov [\(05:48\)](#):

And I live in New York and I happen to walk around the city all the time, and it's really amazing because the skyline is full of projects that have been funded through EB-5 investment, and it's a win-win because the real estate developers get low interest financing through the EB-5 program, which is incredibly important, especially in a market right now where interest rates are crazy. And it's a win for the investors who get their green card and are able to realize the American dream. Most of our clients, when they come to the US, they're really doing it for their children. They want them to come here to get their education in the United States, they're looking at US schools. Some of them are doing it because they themselves have always wanted to move to the US, start a business in the US. We're attracting through the EB-5 program entrepreneurs, business people, creative people, and people that are really looking forward to making contributions in the US. So, the program was revamped after about 25, 30 years after it was initially introduced in 2022.

[\(07:00\)](#):

It took Congress some time to revamp it. They first extended it for five years. So anyone who filed an application under the old EB-5 program before 2022 was grandfathered under those rules. But they did change the program, and a lot of those changes were in response to how the program was operating, in response to feedback that they got from stakeholders, and the first major change was that they raised the price. So from 1990 until 2022, there was no adjustment for inflation in the investment amount. So the original investment amount was a million dollars, and if you invested in a high unemployment area, then the investment amount was reduced to 500,000.

[\(07:48\)](#):

Now the investment amount is 1,050,000 thousand, or if you invest into a special set-aside category, which is either a rural area, a high unemployment area, or into a government infrastructure project, then the investment amount is 800,000. So it is a significant increase over what the program was, but again, it wasn't adjusted for inflation for a very long time. The second change that they made in the new law was introducing integrity measures. People and stakeholders really voiced concern that they wanted more oversight over investments, over how funds were used in the EB-5 program, and they wanted to get comfort in the security of the investment that they were making. So Jen, can you walk us through some of the integrity measures that were introduced?

Jennifer Hermansky [\(08:45\)](#):

Yes. This was a major focus of Congress when they passed the EB-5 Reform and Integrity Act. They wanted to do multiple things to make the program safer for investors and just better overall in terms of

other global programs like this. The first is that they introduced background checks for everyone involved in the EB-5 projects. So the owners of these projects, the owners of the Regional Center, the individuals who are managing the EB-5 funds, they all need to go through extensive background checks with the Department of Homeland security in order to participate in the program. A second major change that the law made was to introduce the concept of a fund administrator into these projects. A lot of times the EB-5 projects are structured in a way where we have the fund making a loan or an equity investment to a project, but maybe the manager of the fund and also the project are related entities, they might share some ownership and there could be some conflicts of interest involved there.

[\(09:54\)](#):

So, the concept of the fund administrator is introduced in order to make this process better and more reliable, actually more like what normal banking institutions do when they extend senior loans or mezzanine loans to projects. The fund administrator will be a co-signatory on the bank statements where when funds are being released to the lender entity and then a draw request is being made by a project to the lender to transfer the funds under the loan agreement or the equity documents. The fund administrator will review the draw request, make sure that the project has the required expense backup documentation in place, and then they will review that, review all of the loan agreements and other definitive documents to make sure that the between accounts are appropriate and correct. This is done in response to issues in the past where projects have maybe diverted funds to other projects or to other personal expenditures.

[\(11:05\)](#):

There's been a number of enforcement actions in the EB-5 space unfortunately in the past, but Congress saw that they have accepted a lot of feedback from other government agencies like the Securities and Exchange Commission and also the USCIS internally, and they have introduced this concept of the fund administrator who can be a third party reviewing and making sure that funds are actually being used in the project that it was intended for. That's I think a really good change, a really major change. The other thing, the third thing that I think I'll talk about is that the USCIS really expanded the annual compliance that each of these projects have to do. So, instead of there being large periods of time whereby no one from the government was really checking or visiting the projects, now there's a whole system put in place whereby each EB-5 project and the Regional Center that is sponsoring the project, they need to report back to the government every year in a very detailed manner about the progress of the project and how the funds were spent.

[\(12:17\)](#):

So there's a real accounting put in place each year and that accounting must go to the USCIS each year and describe the use of funds for the project, so that's really a revamp that was not happening before and it gives an extra check. Then finally, the government was really focused on doing more audits and site visits of the projects. They want to go out there, make sure that the project is actually happening. If we're supposed to be building a hotel on 5th Avenue, they're going to go there and make sure that the project is underway.

[\(12:50\)](#):

We are contacted by investors all the time to help them in their applications, and we see a lot in the requests from the US government, the government saying, "Hey, we sent out an agent to the property and we didn't see any work going on site. You need to give us an update of what's actually happening." And so this prompts additional checks to each of the projects. And this has really, I think, cleaned out a lot of the actors from the EB-5 space. There's just a lot of serious people left in this program, which I

think gives investors a lot of comfort in addition to all these other integrity measures that we just discussed.

Kate Kalmykov ([13:28](#)):

Absolutely. And we work, I would say, with 90% of the EB-5 investors we work with are overseas, so they have no ability by themselves to go and see what's happening with the project. But they know that the government now has measures in place to review, to visit, to ask questions, to request data, and they do when you submit one of these annual compliance filings. If they have questions, they will send them and the project has to respond, and they also have to make this data available to the investors now. So, this is something that's a really welcome change that gives investors a lot of comfort. The other really welcome change that I think the new law introduced was this concept of the visa set-aside categories that I mentioned. The goal here was really to direct investment funds to the area in the country that needs them the most.

([14:22](#)):

So 20% of EB-5 visas are now allocated to rural areas. And that's according to the federal Census Bureau's definition of what constitutes a rural area. 10% are reserved for urban TEA projects that are in a high unemployment area, and the government is part of the changes in the new law even change the definition of how they define what constitutes a high unemployment area. It can be a census tract or it can be 12 conjoined census tracts no more, which is different than what it was before. And 2%, as I noted, are reserved for government infrastructure projects. I don't think we've seen one of those yet since the new law was passed in the market, but those would be government administered infrastructure projects. I can think of some that are in sore need, like updates to the train systems and things like that that may take advantage of the new law and the set aside category. But Jen, what does it mean when we say visa set aside category preference category? What does that actually mean in practice?

Jennifer Hermansky ([15:34](#)):

Sure. So every year we have 10,000 EB-5 green cards to give out to investors and their family members. So, each EB-5 investor is eligible to bring their spouse and their unmarried children who are under the age of 21 to the US with them on the basis of just this one investment of either \$800,000 or \$1,050,000. So, out of the 10,000, we are giving those out to the investor and their immediate family members. So under the new law Congress allocated these percentages of 20%, 10% and 2% a year to rural high unemployment and infrastructure projects. It directs that 20% of the 10,000 visas go to investors and their family members that are investing in rural area projects. This was a major lobbying effort by members of Congress who wanted to direct more EB-5 funding into their rural areas, their rural states, because of course the goal of the EB-5 program is to create jobs for US workers.

([16:45](#)):

So, attracting foreign direct investment into these projects, having increased construction jobs or hotel jobs, hospitality healthcare jobs is a priority for these congressional leaders. That is why we ended up with these set asides. The vast majority of EB-5 projects at this point are in one of these set aside categories. I think the simple answer for that is reality speaking, most of these investors want to just spend \$800,000. They don't want to put in 1,050,000 when they could invest in something that they could get for \$800,000 essentially.

Kate Kalmykov ([17:24](#)):

The difference, I guess, Jen is that if it's their own business, they don't always want to tie their immigration to it because you're opening a new business in the United States, you don't know how it's going to work out, and you don't want to hinge any risks with bringing yourself and your family over. So, I would say the Regional Center Program and these set aside categories probably account for 99.5% of all EB-5 applications because people really tend to separate their business investments from the immigration. Now, one of the things about the set aside categories is that they have priority processing, and we've definitely seen that at play. I think when those of us dealing with immigration can honestly say the government is very slow, our US bureaucracy is slow. Particularly since COVID, unfortunately, we have seen immense delays across the board in immigration filings, but particularly in EB-5. And then we had this introduction of the priority processing. I think we were sort of maybe negative and said, "Well, what's going to actually be the difference?" The difference has been astounding, right?

[\(18:40\)](#):

The new process for the program is that a project has to apply for preapproval. This was something that was originally introduced in 2011 in July 2011, this project exemplar preapproval process when Alejandro Mayorkas was still head of the EB-5 unit, but it was optional. And at that time, many people chose to do that. They wanted their projects preapproved because it was easy for them to market their project. They'd say, "Hey, I got an approved project. Don't invest in his project, invest in mine I already have a government approval." And then the processing time slowed down for those exemplars from two to three months to a year to a year and a half, and it became sort of there's no really point in doing this. But with the new program, project preapproval is now mandatory to file. It doesn't have to be approved in order for a project to raise money, but you absolutely have to file the application and it's called an I-956F, and you need to get the receipt notice before investors can begin filing their cases.

[\(19:44\)](#):

Now, for project preapproval applications, I'd say processing times are across the board and there's a reason for that. The reason is that there's a way to expedite it by filing a mandamus action, which we're going to talk about later. It's a federal court action in which you ask the government to give you a decision on a case that you believe is delayed. Many projects are filing for mandamus because under the new law, they're supposed to get a decision in 90 to 180 days. And when they sue under mandamus, they are. Now what happens next? The investor filings are adjudicated faster. So we've seen rural filings where you have an approved I-956F be approved anywhere from 28 to 90 days, which is astounding because applications for the EB-5 petition under the old program can sometimes take three to four years. So that's a drastic improvement for investors.

[\(20:51\)](#):

For the urban TEA cases, we are also seeing EB-V petitions approved in about 90 to 120 days. So Jen, what does that mean in terms of usage? We had retrogression before, and we can explain what that is to everyone, but how are investors choosing to go? I mean, there is a little bit of a faster processing time with the rural, but you also mentioned it has a 20% reserve versus a 10% reserve. So, what are we seeing in the market?

Jennifer Hermansky [\(21:22\)](#):

We're definitely seeing more of a demand for rural projects right now. Although I want to say I think there's so much good coming out of the EB-5 program right now. One of those things is faster processing times like you were just mentioning. But also another really great thing coming out of this program is that we have these set asides. We have people going into these categories, and there are not really long wait times like there was before. A lot of investors might read about how backlogs developed in the old EB-5 program, and many investors have been waiting a very long time, particularly where they are from

a country where there is high demand for EB-5 visas. But that's just not really the case right now in the new program. So we have these set aside visa numbers where we are directing a certain amount of green cards to be given to individuals in each of those categories.

[\(22:28\)](#):

So we have the 20% set aside for at least 2000 visas every year going to the rural projects, and the 10% set aside going to the high unemployment TEA area projects or a thousand set aside for there. We have also a general pool of visas that are being used by investors from all countries. And for the investors that prior to the RIA Pass, they filed their petitions. But what this generally means with the set asides is that individuals are going to get to the green card faster in US, particularly those investors who are born in a country where there's high demand for visas. So, in the US immigration system in general, we start limiting the amount of green cards that we give out every year if there is very high demand for individuals immigrating who are born in a certain country.

[\(23:33\)](#):

So we limit every country to 7% of the total overall number of visas, so that one country doesn't dominate 80% of the green cards we give out every year, for example. So, generally speaking, what this means for investors is that with these set aside categories, they are getting a priority for those numbers of visas. And also a really great thing that Congress did is that they allow the visas each year, visas that go unused in the rural category or in the high unemployment category, they get to roll over to the next year. So for example, if we have 2000 rural green cards that we can give out in this fiscal year of 2024, and we only give out 1000 of them, the extra 1000 that we didn't use this year goes right back into the same category for next year. So next year we'll have 3000 rural green cards that we can give out.

[\(24:37\)](#):

Right now, the USCIS has been ramping up their adjudication of petitions. They are trying to do better with deciding the cases faster, so the EB-5 petitions get approved and people can move to the next stage of the process, which is getting that two year green card. That is when we're counting the numbers for how many green cards we're giving out each year. So, at present, we have not reached any of the limits that Congress has set for us. There's enough visas available for the number of approved cases that USCIS has and for people in any country under the new RIA set-aside categories.

Kate Kalmykov [\(25:17\)](#):

Which actually is a wonderful thing because we have certain countries that under the old program, regress. They used up their quota; China is one, it has a huge population. They had a big economic boom. We saw a lot of investment in 2013, '14, '15, '16 from China, and then they used up their visas to such a degree that there was a 15 year wait line that developed for the EB-5 based green card for a mainland born Chinese national. Same thing with India, another very large population country, A lot of successful entrepreneurs and business people, a lot of them applied for EB-5. They never had such a long backlog, but it was several years. And so now we are current and it is a prime time to invest in EB-5, but is there a possibility of regression? I think that's probably the top question that we get, right?

Jennifer Hermansky [\(26:17\)](#):

Definitely. People want to know, "I'm giving a lot of money to this project. How long is it going to be until I can move my family to the US?" It's a huge priority for the investors. So, we are always getting this question. The answer is yes, there is the possibility that we could experience some backlog development. There has been an incredible amount of people that are actually still applying for the EB-5 program. The USCIS just last month in June, released statistics that in the first quarter of 2024, they

received 1800 EB-5 petitions for adjudication at USCIS. So over just a three-month period, it's an incredible amount of applications that they have received. So, we need to monitor the data that the government gives out. They don't always do the best job they can, I think, at giving the public the data that they should in order to determine whether backlogs are brewing.

[\(27:21\)](#):

Probably yes, there are, but does it look anything like the backlogs of before this 15 year backlog that you just mentioned? No, absolutely not. There's not enough applications pending at this point to do such a huge backlog like that. And also we have these other protections that Congress built in like the rollover of the visa numbers for the set asides, and they are doing that to ensure that we have very limited wasted green cards at the end of the year. They want to give out as many as possible. So, is it possible that in the future we will hear about a backlog in the rural area or the high unemployment area? Will the State Department announce it? Probably, first the USCIS would have to really start approving a lot of petitions at one time in order for a backlog to develop. If it does, it will be based on the investors' country of birth and also their category.

[\(28:20\)](#):

But the State Department has been very clear and they have recently gone out and talked to the public at different events about the EB-5 program. One important thing that they did recently, they spoke to IIUSA, which is a trade organization involved in EB-5. They have told the public at that event that they have an incredible amount of EB-5 visas available over this year and the next year. So for example, we have over 8,000 reserved visas for this year, and they anticipate that next year we'll still have over 6,000 reserved visas to give out based on all of the rollover visas that we've had so far. So, there's an incredible amount of green cards available. So any backlogs that do come up, it's hard to predict exactly what they will be, but certainly it will not be of the magnitude that it was in the past.

Kate Kalmykov [\(29:21\)](#):

Again, this is really not a concern unless you're from mainland China and possibly India. But even that, we're not seeing as many filings as we see from China. So what if I am a Chinese national and I want to try to take all proactive steps that I can to avoid a possible backlog despite this visa availability. So, one of the other great changes that the RIA introduced was that it took the concept of something called concurrent filing, which we as immigration lawyers use in other categories because it's always been available and introduced it for EB-5. What concurrent filing means is if you are in the United States in a valid visa status, whether a student, whether an H-1B worker, whether a tourist, you can file your EB-5 petition and your green card application at the same time. What this does is it allows you to also apply for work authorization through the green card filing and travel authorization.

[\(30:33\)](#):

So you basically will have all of the benefits of being allowed to remain in the United States, travel in and out of the United States once that travel authorization is granted or on your visa, depending on which one you have. Because certain visas like the H-1B allow for what we call dual intent. So you can have the green card pending and also work and travel on an H-1B or an L-1 intra-company manager or executive visa, and it allows you to remain here. So this is actually wonderful because many students do not get selected in the H-1B lottery. We have this system that needs to be revamped, which is a topic for another podcast of the H-1B visa. There's only 65,000 spots available. We usually as a country get five times that amount and sometimes students don't get selected. They have a job offer, they want to remain in the United States, they want to use their degree, and so they can concurrently file. They'll have the ability to stay here past the expiration of their F-1 status and they'll be able to work.

[\(31:38\)](#):

So that is fantastic, the concurrent filing, and we've had many clients take advantage of that. So if you're in a retrogress category and you're in the US before it retrogresses right now, if you file for concurrent filing, you'll be able to extend that work and travel authorization and it's going to be given to you for five years. And the retrogression, if it does occur, will not be that long based on the data we currently have. Jen, there's another way to sort of mitigate this potential exposure through the NBC filing. So, if I'm not in the us, I'm processing overseas, I filed my I-526 petition, it's been approved, and now my case has been forwarded to the National Visa Center, which is the agency that acts as the clearinghouse for collecting all of my biographic documents before they're sent to my home country consulate. What option do I have here to mitigate a potential backlog situation?

Jennifer Hermansky [\(32:36\)](#):

So, the State Department is really trying to work with stakeholders and the EB-5 applicants to make as many green cards available as they possibly can each year. They have developed a process where they allow the applicants to elect how they want their green card to be charged to a category, meaning if they have invested into a rural project, they can select that they would like a visa number from the rural set aside, or you can actually elect to get a green card number out of the general visa pool. So we have approximately 7,000 unreserved visas. So those are the ones that are not rural, not high unemployment, and the small amount of infrastructure that we have each year, those are the unreserved visas. For example, if we have a high number of individuals in the rural area category coming up or the high unemployment urban TEA area, maybe if you are not an investor who was born in mainland China, you might want to elect to go into the unreserved pool where there's absolutely no backlog at all for you.

[\(33:53\)](#):

You could avoid a backlog that way. So, individuals who are from those other countries other than China, India, the high users of visas every year in green cards. So that's one strategy, and that's actually really great because if people choose that category that allows more reserved visas to go to the other individuals who are backlogged. So that will clear up more quickly backlogs for those other categories. The State Department is really trying to be as flexible as they can here, and this is a great area for the investors to just work with their immigration attorney when it's time to go onto this next stage of the process and we're working with the State Department to get a green card issued to you, we'll figure out what category is best for you to elect at that time.

Kate Kalmykov [\(34:45\)](#):

The other thing a lot of people don't realize is that the backlog categories are based not on citizenship but on country of birth. But if your spouse is born in a non-backlogged country, and we see this a lot with mainland Chinese applicants, perhaps their spouse is even born in Hong Kong, they can cross-charge to their spouse. We call it cross-chargeability, and then they're not subject to the retrogression because when you're a part of a married couple, you can choose your spouse's country of birth as your category, and you're sort of out of that. That's another strategy that we as immigration lawyers love to utilize. Now, let's switch tracks a little bit. We talked a lot about the changes under the RIA, and we're going to see more changes coming up because the RIA was passed over two years ago and the government still has not introduced regulations.

[\(35:44\)](#):

They're supposed to take the statute and they're supposed to promulgate regulations which are subject to notice and comment from the public. Instead, they've sort of been doing this ad hoc interpretation issuing guidance on how long the money needs to be invested based on their interpretation of the

statute, which is currently being litigated in federal court, which they could have just promulgated regulations and sort of avoided this hassle. But we're going to watch the agency and we're going to see what they're going to do and what guidance they keep issuing, and we're going to keep reporting on that on our blog, EB-5Insights.com, on our podcast. But I want to talk a little bit about the changes that we're seeing sort of through other types of action. USCIS, as we mentioned, has been very slow in adjudicating applications, particularly with respect to the older program. What we've been doing a lot is utilizing the mandamus process, which I previously mentioned, which is a filing and federal court where we actually sue the government and we can sue the government at any three stages of the EB-5 process.

[\(36:58\)](#):

So with the I-829 petition, they're supposed to, according to the regulations, give us a decision in 90 days on the I-829. I-829 applications now are taking about four years. That's a huge departure from 90 days. So we actually have been going into federal court on these cases and getting our client's approvals and not a single court, not a single US attorney has fought us anywhere in the country in these actions. This is a great way for clients to appealing I-829s under the old program to get decisions. And it really is important to them because yes, while the 829 is pending, their status in the United States is extended. They're allowed to work and travel, but they need to get a receipt notice to do it, they need to extend that receipt notice because of the USCIS delays, and it's not fair. Many times they want to apply for naturalization, and the naturalization application can't be approved before the I-829 application to get the permanent green card is approved and so the mandamus has been super effective.

[\(38:07\)](#):

But we've also utilized Mandamuses on delayed I-526 applications. That's the actual EB-5 petition where there is an egregious delay. We've also been able to work with the government and settle these actions. Many times they don't even go to court. The US attorney will settle with us. It'll be a sealed settlement, but they'll work with USCIS to get us an adjudication of the case. Sometimes we've even filed and the client hasn't heard in three, four years, and it turns out the file has been lost and nobody told us. It takes filing a court action, which is ridiculous, but to find out what's happening with the case. The other thing where we're utilizing Mandamuses quite frequently on EB-5 applications and not just EB-5 applications, but across the board immigration applications is delay in consular visa issuance. So sometimes the client goes into what's called administrative processing.

[\(39:09\)](#):

They get into a security check, and they're not allowed to tell you why there is a security check. Perhaps there genuinely is a past criminal issue. Perhaps there's a past status violation and overstay work without authorization, but many times it's just lost somewhere in the ether. Perhaps they have a name that somebody else with the security issue has, and there's sort of no timeframe given for a decision, there's no clarity given on what they're reviewing, who's reviewing what's going on. And for many clients, it's a source of frustration. They go to the consular interview, they're making plans to relocate themselves and their family, and that's it. They're stuck in the security check. So we have also been filing mandamus actions against the US Department of State in these cases and been able to resolve these delays. One of the sort of administrative areas where people don't even think about mandamus, but we filed them is sometimes the government doesn't issue a receipt notice.

[\(40:15\)](#):

We just had a case where it was a petition to remove conditions. They need the receipt notice in order to be able to travel, and the check is cashed. We know the case has been accepted for processing. Five, six months go by, the clients still don't have it, and they're getting married in Brazil. The wedding is set, the guests are invited, and so we filed a mandamus action and we were able to get that receipt notice. It

seems so silly that we have to go to federal court on these issues, but right now, it is the only way for us to open up a dialogue with the agency and to get what we want.

[\(40:50\)](#):

So for receipt notices, for approval notices that go missing, and even sometimes there is an issue with the case once it's approved with the USCIS being actually transferred to the National Visa Center so that the consular process can begin. It gets sometimes lost, misplaced, who knows? And that transfer, that handoff sort of isn't made, and it really has a significant impact in terms of timing on clients. And so again, here, mandamus has been a very successful tactic that we have used to help our investors.

[\(41:27\)](#):

Now, Jen, we're running out of time, but I want to briefly just touch on some of the other things we're seeing in the practice, and that is requests for evidence. So, the government, as we know when we file an immigration application, they always have the right to ask us additional questions, and that's fine. Right now, they go through different cycles of what they focus on and right now the focus is on countries with currency restrictions and how are people able to get the money out of the country that has currency restrictions? Are they using a service? What are they doing and how do they get it to the US? I think that's really what we're seeing. We're seeing less project requests for evidence unless the project isn't able to complete the business plan for whatever reason, and it's really an investor focus. So do you want to discuss that a little bit?

Jennifer Hermansky [\(42:21\)](#):

Sure. So we are seeing still a very large focus by the USCIS on what we call the lawful source and path of funds. So, this is actually not a change from the prior program. In the prior program before 2022, investors always had to show where they lawfully earned their \$500,000 investment. The same holds true under the RIA. So if you're investing 800,000 US dollars into a project in the US, the US government has an interest in making sure that the applicants are not laundering money here and that the funds are coming from a lawful source. So there are a few you precedent decisions that we have that are still applicable in the context of the EB-5 Reform and Integrity Act. They tell us that we must pinpoint the investors' funds that were used for the \$800,000 investment, and then we must also show the full path of those funds to the United States. So, however the investor earned that money abroad and then how they transferred it to the US.

[\(43:32\)](#):

I liken this a little bit to a forensic accounting. We don't have to show the investor's full net worth and how all of their money came into existence, but we do really have to be focused on this 800,000 and then we have to be focused on the transfer. So, the USCIS is aware that there are countries out there that have currency restrictions. Not everyone could just walk into a bank and exchange local currency into US dollars. A lot of these foreign countries like China, Vietnam, places in Africa, even some countries in Latin America, they don't have strong local currency, and they have an interest in making sure that individuals use their own currency and hold onto their currency and are not just hoarding US dollars in their foreign bank accounts.

[\(44:29\)](#):

So, it presents a challenge for investors in these countries in order to transfer exchange and then transfer the required amount of US dollars. A lot of times they have to use third party currency exchange agents in other countries to help them exchange their local currency into US dollars. This is a major focus right now of the USCIS and the Immigrant Investor Program Office that administers the EB-5 program. They're really looking at how investors earn those funds and then transferred those funds

lawfully to the US. So, it's really an area where the investors need to be mindful. They need to work with experienced lawyers to make sure that the documentation that they're submitting and the processes that they're going through are going to be acceptable to the USCIS.

[\(45:24\)](#):

Through a number of outreach that stakeholders have been doing and filing Freedom of Information Act requests with the USCIS and filing lawsuits on that, we know that the government is tracking actually these companies or individuals that might help or be involved in the transfer of funds to the United States. They look at global exchange services and how they work. I mean, we can think of places like Western Union and their equivalents working around the world to exchange funds in this manner. So those are non-bank institutions, but they still could be licensed currency institutions in other countries. So a lot of investors utilize those methods, and we're seeing a lot of questions from the immigration service. The good part is with explanation and showing how the funds were moved and who owns the funds at what point in time, we're still able to overcome a lot of those questions and get these cases approved. It's just a matter of presenting the correct evidence to the USCIS in order to meet that investor's burden of proof.

Kate Kalmykov [\(46:39\)](#):

And it's interesting. I mean, they've been working with FinCEN and really looking at individual exchangers and that sort of agency cooperation, we've seen it in the past in different aspects of immigration law, but also in EB-5 with the SEC. Obviously they share data and now they're sort of expanding the breadth of their review.

Jennifer Hermansky [\(47:02\)](#):

Interestingly enough, we also know that a prior head of the IPO was actually the former head of FinCEN. So during that period of time a few years ago where that individual was in charge of the EB-5 office, I think he brought a lot of knowledge and information on these types of issues to the USCIS and now they're really cognizant of these issues and they look out for them and ask about them.

Kate Kalmykov [\(47:30\)](#):

Other, of course, area where we've seen IPO and the EB-5 unit really focus on is sanctioned countries, right? So they definitely look at those cases closely. They want to make sure that nobody's getting through that sanction, that there's no money passing through a sanctioned institution. So we work with investors all over the world, and we know a lot of these rules, but they should be aware if you're, for example from Iran, and you're looking to do EB-V, and maybe you're living in Dubai or Germany or wherever, you really have to think about where is the money coming from because there's a general license that gives an exemption for EB-5 available for Iranians from OFAC. But again, there's limitations on that. Money cannot pass through a sanctioned financial institution and sanctions differ. If we look at the Russia sanctions, again, no nationality is barred from utilizing the EB-5 program, but you cannot be a sanctioned individual.

[\(48:30\)](#):

Here, where the Russia sanctions differs, they're very targeted. They're individual sanctions and they're sanctions on financial institutions. So it's very important to review whether you're able to invest in EB-5, if you're a practitioner. It's very important to work with lawyers that are experts in OFAC and the requirements. Sometimes our attorneys and our import export group have worked with OFAC to get licenses where clients have needed it, and sometimes OFAC has even responded to us and said, "Thanks for inquiring. Thanks for reaching out, but in this case you do not need it," which is always very

interesting as well. Now, another area where we're seeing our fees on the individual is inconsistencies between the five to six and green card application and previous applications for mostly B-1, B-2 tourist visas.

[\(49:26\)](#):

I would say the inconsistency most common that we see is that the work history is not the same, and there's a million different reasons that this happens. But many times we know that clients don't speak English, they're not fluent, and they hire a service to help them apply for a tourist visa. The service takes a fee and they either omit data, they don't transmit it correctly, they put the wrong date. And then we get to the green card stage and we get this massive request for evidence saying, "Look, you applied for a tourist visa in 2015 and you said you worked for XYZ Corp, and now you filed an EB-5 based green card, and you never worked for XYZ Corp according to the CE you just submitted with your EB-5 petition." So Jen, what do we do in these cases?

Jennifer Hermansky [\(50:18\)](#):

It's really difficult because actually on the visitor visa applications, the non-immigrant visa applications, it asks for information about your employment and your salary. And as we just discussed in the context of the EP-Five petition, we have to show where your source of funds came from. So we are submitting extensive work history information about salary and savings of the individual, and they really take a lot of time. They go into the State Department database and they compare the information on the employment history and also the salary from the EP-5 versus the non-immigrant visa applications that were used in the past. So, when there is any element of discrepancy, we have to really explain why did that happen? A lot of times, maybe an individual thought that they only have to list their main employer, or maybe they're an investor in another company, but they don't actually work there. Now we're in the EP-5 context describing where there are investors in other companies, but maybe not working there.

[\(51:29\)](#):

So, there could be explanations for why these discrepancies exist, but we really have to be very detailed as to why those discrepancies happen. In the context of the EP-5, we might have to go back and do a lot of documenting based on government records that exist of the person's employment history. So in a lot of different countries, not so much here in the US but in other countries, particularly in Asian countries, also in Russia, they have these concepts of labor books or social insurance records kind of similar to our social security records here. Where have you worked? Have you paid into social insurance in the country where you are living? Those things can help to demonstrate maybe where you are in employee versus where you are an investor only.

[\(52:21\)](#):

We have to do a lot of work, which is why it's really important to plan upfront to try and save those other old Visa applications. Don't throw things away, that's a bad habit. Save them for this process so that we can compare and then prepare an application in a consistent and correct manner for people. But to go back and try to explain it later is sometimes hard, so that's why it's good to disclose everything to the lawyer in advance too, so we can help work that out.

Kate Kalmykov [\(52:53\)](#):

And you bringing up the social security and social insurance books, also reminds me that one of the most common RFEs that we get, and one of the changes that the new law made was that they want to see seven years of tax returns. That's always a challenge because not all countries are as stringent in

their tax filings as we are er. It's sometimes challenging to explain why there is no tax filing or why the tax filing perhaps does not list, for example, the sale of real estate, the sale of stock, why it doesn't require it to be reported, and that is something else that we see a lot of RFEs focus on. All right. Well, thank you Jen for sharing your insight. As I mentioned, Jen is a partner in our Philadelphia office. She's also chair of the AILA EB-5 committee, and you will be seeing her a lot on this podcast commenting on EB-5 issues, immigration issues, and what's happening, what the latest news is from the government on EB-5. I am Kate Kalmykov. Thank you again for joining us on our inaugural Immigration Insights Podcast.