

Strategies for Documenting Lawful Source of EB-5 Invested Funds

By H. Ronald Klasko*

The EB-5 regulations require the investor to prove that the invested capital was “obtained through lawful means.” Specifically, 8CFR§204.6(j)(3) requires either “foreign business registration records”; corporate, partnership and personal tax returns filed within 5 years; “evidence identifying any other source of capital”; or documentation of court judgments or pending court cases. However, in practice, this is one of many examples in EB-5 practice where USCIS ventures well beyond the regulatory requirements in insisting upon far more substantial documentation to prove lawful source of funds. Although the regulatory list of documents is in the disjunctive, in practice USCIS requests all of the listed categories of documents and, in most cases, significant additional documentation.

“Documents to Prove Lawful Source of Invested Funds” by the same author of this article is an outline of suggested types of documents to meet the lawful source of funds requirements. In reviewing this list, the client or attorney should be aware of the following practice pointers based upon the author’s experience with these types of applications:

1. As indicated above, this is one area of the law where simply following the regulations will not be sufficient. The regulatory requirements (including especially the 5 years of tax returns) should be viewed as a starting point. In some cases (unfortunately not the norm), tax

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- returns will show a sufficient enough income to preclude the necessity of any further documentation.
2. The requirement to document lawful source of funds is the same whether the investment is an individual investment or a regional center investment.
 3. Documenting lawful source of funds requires extreme attention to detail and knowledge of business documentation and sometimes of finance and accounting. Many financial transactions require a multitude of documents to evidence, and USCIS will insist on all of the detailed documentary evidence.
 4. It is only necessary to prove where and how the investor obtained the \$500,000 or \$1,000,000 required to be invested. It is not necessary to prove where the investor obtained every dollar that he now has or ever had.
 5. The difficulty of documenting the lawful source of funds often varies greatly by country. It can be especially difficult in countries where no tax returns are required to be filed or where full disclosure of revenues and profits on tax returns is the exception rather than the rule. Where tax returns are not required to be filed, this should be documented. Where tax returns are required to be filed but the individual's tax returns show very little income, the documentation of the source of funds should provide overwhelming evidence to counter the negative implication that comes from a review of the tax returns.
 6. Documenting lawful source of funds is a different requirement than the requirement to trace the funds from the individual investor to the investment enterprise. This also needs to be done in great detail. For countries with restrictions on the outflow of currency, this can be especially difficult, since the investor may engage in several layers of transactions between the money leaving the investor's account overseas and arriving in the US enterprise.
 7. In documenting lawful source of funds, the ultimate focus is on the person who originally obtained the funds. If the investor obtained all of the funds on her own, this is not an issue. If the funds were the result of a gift, the lawful source of the giftor's funds must be

- documented. If the source of funds was a loan, the lawful source of the lender's funds must be documented, as well as the lawful source of any collateral put up by the investor for the loan. If the source of funds is an inheritance, the decedent's source of funds may be the issue.
8. Very often in documenting lawful source of funds, the attorney or client must make a judgment regarding how far back to go with the documentation. For example, if the source of funds is a real estate transaction that resulted in substantial proceeds from the sale of real estate, the documentation of the real estate sale is certainly required. If the real estate was purchased within the last several years, it is highly recommended to document how the investor obtained the money to purchase the real estate that has now been sold. If the real estate was purchased 30 years ago, it may be impossible to provide such documentation. There is no clear line regarding how far back one must go to obtain documentation, with "reasonableness" being the rule of thumb. The same concepts apply to, for example, securities transactions. For inherited money, if the decedent earned his money 50 years ago, USCIS may agree it is not possible to document the earning of those funds at the present time.
 9. If the investor obtained the invested money through unlawful employment in the US, issues may be raised by USCIS.
 10. Although primary documents should be obtained wherever possible, written statements, affidavits and resumes can help fill some of the holes in the primary documentation and can help to paint a picture that satisfies the USCIS examiner that the invested capital had a lawful source.
 11. It is always a good idea to provide a narrative description of the investor and the invested funds, with citations to the documentary exhibits, rather than relying on the USCIS examiner to understand all of the documentation and to draw the conclusion that the investor wants drawn from the documentation.

12. In many EB-5 cases, documenting the lawful source of funds can be the most arduous and time consuming part of the process. The investor should be forewarned of the need for substantial documentation. Sometimes, the investor may have gone to great lengths to avoid having documentation of the very transactions that now have to be proved for purposes of the EB-5 petition. A good rule of thumb is that if the attorney can understand, through the documentation, where the money came from, the chances of being able to satisfy USCIS should be greatly enhanced.