

HOSPITALITYLAWYER.COM PRESENTS

2013 THE **HOSPITALITY LAW**
CONFERENCE
FOCUSING ON LEGAL, SAFETY & SECURITY SOLUTIONS

FEBRUARY 11-13, 2013 • HOUSTON, TEXAS

USE OF EB-5 AS FINANCING OPTION

PRESENTERS



- **San San Lee**
- Principal, Law Offices of San San Lee
- Represents Management Companies and Owners on Management transactions domestically and internationally.
- Former in house counsel, Intercontinental Hotels and Rosewood Hotels & Resorts.



- **Lincoln Stone**
- Stone & Grzegorek LLP in Los Angeles
- Attorney for more than 2,000 successful EB-5 investors
- Represent several Regional Center groups that have raised more than \$1.5 billion in EB-5 capital
- EB-5 hospitality sector projects include hotels in Los Angeles, Seattle, Portland, Atlanta and Milwaukee

INTRODUCTION - THE GROWTH OF USE OF EB-5 ON HOSPITALITY DEALS

- What is EB-5 Financing?
 - “EB-5” refers to the employment-based fifth preference category of immigration. By making an investment in a US business, a foreign national can obtain US permanent residence.
- Examples of Recent EB-5 Financed Projects
 - LA Live – Marriott Courtyard and Residence Inn
 - Pearl District (Portland) – Residence Inn
 - W Hotel Hollywood – Drai’s Restaurant
- Historic EB-5 Visa Usage

	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Total	147	71	126	349	802	793	1,443	4,218	1,885	3,463	7,641*

* 80% - China Mainland born

NATURE OF EB-5 DEALS

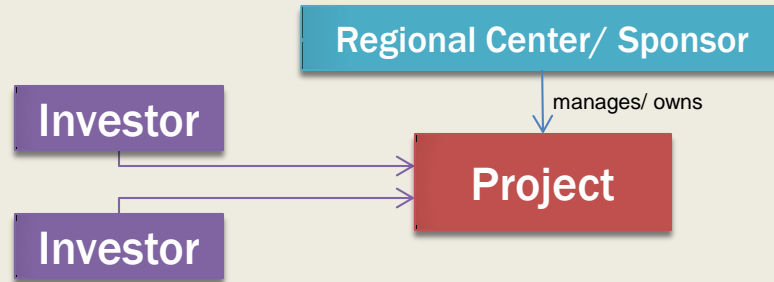
HOW DO THEY DIFFER FROM “TYPICAL HOSPITALITY DEALS”?

- **Why Use of EB-5 Appears to Makes Sense**
- **More Similarities than Differences on Deal Points – but there are Critical Differences**
- **Key Characteristics of EB-5 Process**
 - **Must be Feasible from Employment Generation Perspective**
 - **Practically -- Must be Sponsored by a Regional Center**
 - **Requires a Team of EB-5 Professionals – Immigration Counsel, Economist, Promoters**
 - **Longer Lead Time**
 - **Requires Administrative Oversight**
 - **Absence of Reliable Pre-approval Process**

COMMON EB-5 STRUCTURES

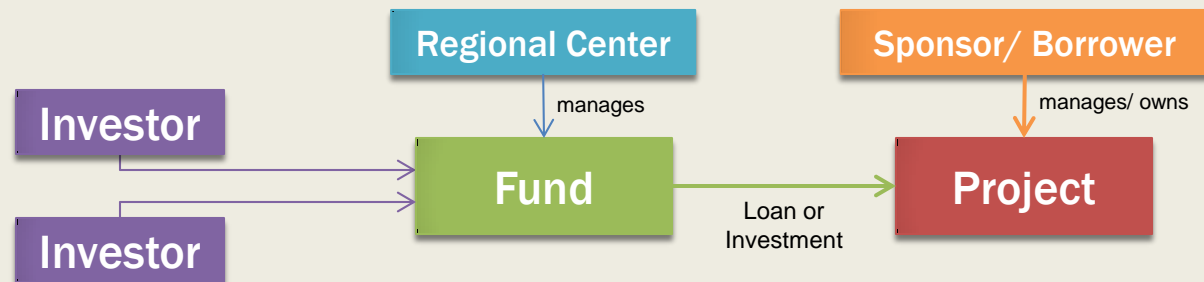
■ SINGLE GROUP MODEL:

- The Regional Center/Job Creating Project involve just one group



■ FUND MODEL:

- The Regional Center raises capital for a Job Creating Project controlled by a separate group



EB-5 ELIGIBILITY REQUIREMENTS

The general EB-5 eligibility requirements are -

- Investment of capital (\$1 million, or \$500,000 if in a “TEA”)
- New commercial enterprise
- Investor capital is from a lawful source
- Commercial enterprise will create jobs (10 per EB-5 investor)
- Investor will participate in management (day-to-day, or policy formulation)

OVERVIEW OF “TARGETED EMPLOYMENT AREA” -- \$500,000 ?

- The lower minimum capital threshold applies if the investment is made in a business with a “TEA” – a rural area, or a high unemployment area (95% of all EB-5 petitions)
- A “rural area” is an area not within either a metropolitan statistical area or the outer boundary of any city or town with population exceeding 20,000
- “High unemployment” is at least 150 percent of the national average:
 - The MSA or the county in which the new commercial enterprise is conducting business has an average unemployment rate exceeding 150% of the national average rate, OR
 - State letter certifies that geographic or political subdivision has been designated a high unemployment area
- Whether the investment is made in a TEA is based on statistical information relating to the time of investment (or at the time the petition is filed), and is based on the location where the commercial enterprise is principally doing business.

OVERVIEW OF EB-5 JOB CREATION

- Must create 10 full-time positions per EB-5 investor
- In “stand alone” commercial enterprise (i.e., not regional center affiliated), these must be W2 employees and typically no construction phase jobs could be claimed
- “Troubled business” investment allows for “saving” jobs
- A regional center affiliated commercial enterprise allows for “reasonable methodologies” to estimate job creation, including construction phase and operations phase jobs, as well as indirect and induced jobs

REGIONAL CENTER JOB CREATION

- Regional centers are designated by USCIS, and are listed at www.uscis.gov
- “Reasonable methodology” typically consists of:
 - (i) “Initial change” data, and
 - (ii) a widely used Input-Output model (such as RIMS II or IMPLAN)
- “Initial change” data (output, earnings, employment)
 - increase in revenues
 - Increase in “direct” jobs
 - Construction expenditures (for construction phase jobs)
- Estimating for phases
 - operations related jobs
 - construction related jobs

ILLUSTRATION OF USE OF INPUT- OUTPUT MODEL

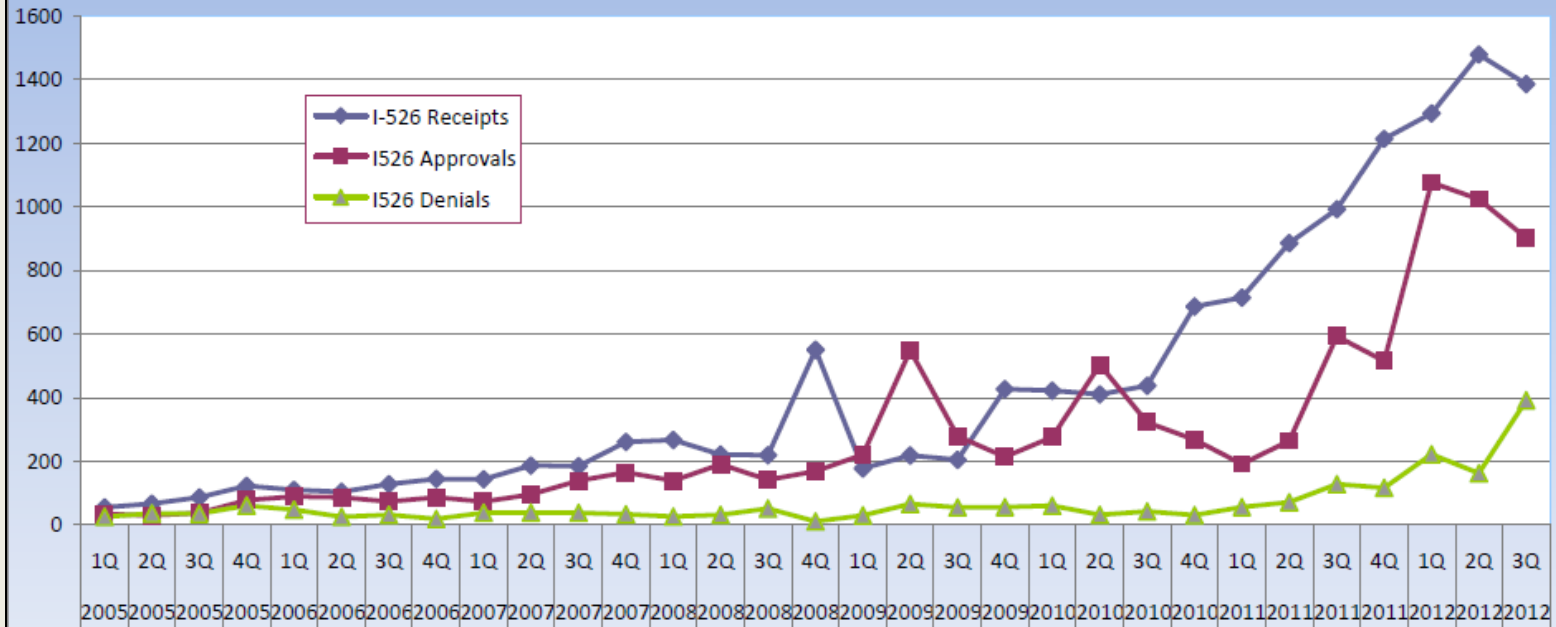
- Select region
 - Los Angeles
- Define initial change in economy
 - Electric auto manufacturing plant, 115 workers
- Identify industry
 - Automobile manufacturing NAICS 336111; IMPLAN 276
- Input data, view results:
 - Direct: 115.0
 - Indirect: 187.7
 - Induced: 143.3
 - Total operations phase jobs: 446.0
- Construction phase job creation involves the same process, and typically is a multiple of the expenditures on hard construction costs

PROCEDURE FOR INITIAL PERMANENT RESIDENCE

- Procedure for initial permanent residence – two parts:
 - (1) The EB-5 process is commenced when the investor files a petition, Form I-526, with the USCIS. The petition includes both investor-specific and project-specific documents.
 - (2) Following USCIS approval, investor must appear at the US Consulate for the immigrant visa interview.
- Standard processing times range from 10 to 18 months, counting from the time the initial investor petition is filed with USCIS to the time the immigrant visa is issued. Actual processing times in a particular case can vary widely.
- Admission to the United States commence a two-year period of conditional permanent residence.

STATISTICS RE I-526 ADJUDICATION

I-526 Receipts, Approvals, and Denials FY2005-2012 3rd Quarter

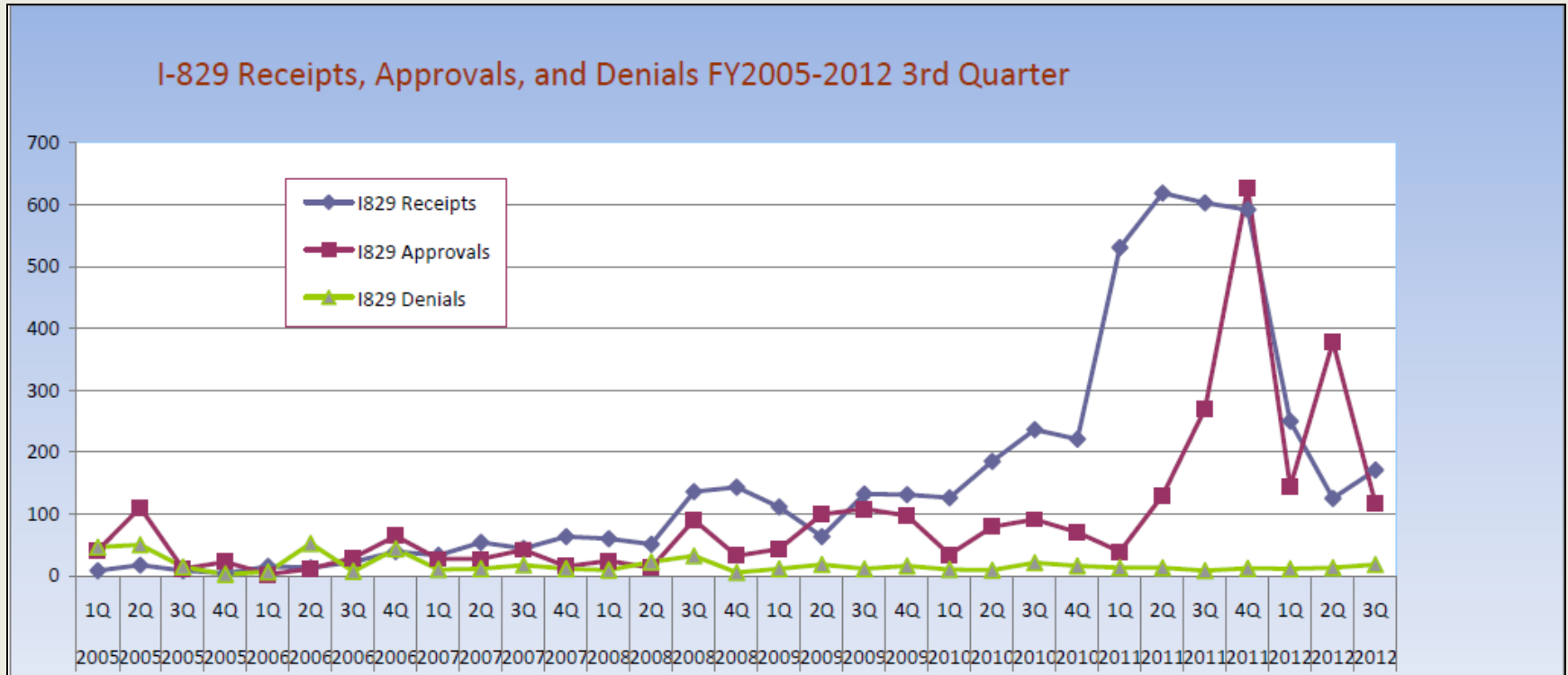


PROCEDURE FOR REMOVAL OF CONDITIONS

- Within the 90 days immediately preceding the 2nd anniversary of obtaining residence status, investor files petition to remove the conditions (I-829)
- The petition adjudication conditions set the requirements for the USCIS decision on the I-829 petition. They are:
 - The required capital was invested
 - The investment was sustained
 - The 10 jobs were created, or are expected to be created within a reasonable period of time

STATISTICS RE I-829 ADJUDICATION

I-829 Receipts, Approvals, and Denials FY2005-2012 3rd Quarter



HOT TOPIC IN EB-5 CASES – JOB CREATION AND “TENANT OCCUPANCY”

- A standard practice for real estate-development based EB-5 projects had been to claim credit for operations phase job creation in terms of the employees in the businesses that would occupy space constructed with EB-5 capital.
- In 2012, citing concern of “merely relocating” jobs, USCIS sought to roll back this practice where there is insufficient nexus between the EB-5 capital and tenant operations.
- USCIS has stated it would require documentation such as a market study showing market constraint on supply or “excess demand” for the particular type of developed space before it would EB-5 credit for the tenant job creation. The USCIS “guidance” on the topic is ongoing and the situation remains fluid (i.e., risky).

HOSPITALITY SECTOR EB-5 CONTROVERSY

RE TIMING OF JOB CREATION

- The I-526 petition is supported by a Comprehensive Business Plan with detailed documentation concerning the construction, hotel opening, ramp up and stabilization phases, market analysis, and financial pro forma.
- The job creation report uses developer project data to estimate construction phase and operations phase job creation.
- USCIS imposing “2.5 year rule” for job creation which is a snapshot of job creation that undervalues the permanent job creation in operations after stabilization.

HOSPITALITY SECTOR EB-5 CONTROVERSY RE GUEST EXPENDITURE MODEL

- Operations phase job creation typically is based on forecasted revenues in completed hotel operations (lodging and on-site facilities such as restaurants).
- Economists have advanced the case for additional job creation based on expenditures by hotel guests in the local economy (off-site restaurants, theaters, other entertainment, etc.)
- USCIS objects to job creation model based on guest expenditures without documenting that the addition of the hotel facility to the local market is creating additional demand – it is requiring market studies of “unaccommodated demand”.

POINTS TO CONSIDER IN NEGOTIATING DEALS

- Identification of “Product” is Critical
- Termination Provisions
- Transfer Provisions
- Operational Shortfalls
- Capital Expenditures
- Use of Trademarks
- Confidentiality and Disclosure Issues
- Financial Incentives from Manager
- Protracted Development and Construction Process
- AOP Considerations

RISK FACTORS

- Failure of EB-5 Petition or Visa Process.
- Failure of Approval of Project.
- Change in Circumstances.
- Change in Requirements.
- Timing Issues.