

Strategies for Documenting Lawful Source of EB-5 Invested Funds

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USCIS's definition of "capital" for EB-5 purposes excludes "assets acquired, directly or indirectly, by unlawful means (such as criminal activities)" 8 C.F.R. §204.6 (e). Although this definition seems fairly innocuous, USCIS has applied this definition to place an extremely rigorous burden on the EB-5 investor to prove that the capital was "obtained through lawful means." 8 C.F.R. § 204.6 (j)(3). Specifically, 8 C.F.R. §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

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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 returns will show a sufficient enough income to preclude the necessity of any further documentation. In many cases, tax returns may not reflect a level of income commensurate with the investment being made. In these cases, substantial additional documentation will be required. In some cases, the last 5 years have been low income years (e.g., retirees). In those cases, tax returns from the highest earning years should be added.
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. As with other types of

- cases -- L-1, for example, -- the quantity of documentation required might be greater in suspected high-fraud countries or countries for which the US has national security concerns.
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. See In re of Izummi, 22 I. & N. Dec. 169 (BIA 1998). 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. Although it is not necessary to prove compliance with a country's currency laws, it is necessary to trace the funds from the investor, through intermediaries, to the investment enterprise.
 7. In documenting lawful source of funds, the ultimate focus is on the person who originally obtained the funds and tracing these funds from that person to the investor. 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, as if the giftor were the investor. A logical explanation of the reasons for the gift -- with documentation as appropriate -- should be included. If a gift tax was paid or a gift tax return filed, documentation should be provided. If the source of funds was a loan, the lawful source of the lender's funds must be documented as if the lender were the investor, as well as the lawful source of any collateral put up by the investor for the loan.² The actual loan agreement should be included, as well as a logical explanation -- with documentation as appropriate -- of the reasons for the loan. The reason can be to enable the investor to make a qualifying EB-5 investment. If the source of funds is an inheritance, the decedent's source of funds may be the issue. If the estate and probate documentation is available, include it. The decedent's death certificate and documentation of the relationship between the decedent and the investor are normally part of the package of documents presented.

² If the assets or interests in the EB-5 commercial enterprise are collateral for the loan, the loan cannot be used for the EB-5 investment. 8 C.F.R. § 204.6(j)(2)(v).

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 ownership, appraisal, sale and transfer of funds is certainly required. See In re Soffici, 22 I. & N. Dec. 158 (BIA 1998). 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. If the source of funds is the sale of the investor’s shares of stock in a company, the company’s tax returns may be sufficient, together with any purchase/sale agreements and documentation of the transfer of funds. If the shares were recently acquired, USCIS may want documentation of the source of funds to purchase the shares.
9. The source of funds may be from the US or abroad. However, if the investor obtained the invested money through unlawful employment in the US, issues may be raised by USCIS. If possible, it is best to provide evidence that the source of the invested funds is something other than the unauthorized employment -- even if the funds were accumulated while the investor was not in lawful status.
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 some cases, no one or two transactions, and no one or two tax returns, provides convincing evidence of the lawful source of the investor's funds. In these cases, it may be possible to prove and document that the investor accumulated savings over a period of many years that would be commensurate with the ability to now make a \$500,000 or \$1 million investment. For example, this may be proven through a pattern of steady income over many years that would enable the investor to meet expenses and set aside some extra for savings. Documentation of savings, with interest or wise investments over time, may be sufficient. Another example might be investments in securities that provide dividends that, while not particularly large on an annual basis, when accumulated over time provide substantial savings.
13. Analogy to E visa practice is unhelpful. There is no specific requirement to document the lawful source of funds to qualify as a treaty investor. A treaty investor's funds that come from a gift for the sole purpose of enabling the treaty investor to qualify for E-2 status is not considered a qualifying E-2 investment, while it might be considered a qualifying EB-5 investment.

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.