



BY YE XU | Immigration Law

EB-5 RFEs and NOIDs Trend: Third-Party Currency Exchangers

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In 1990, Congress created the employment-based fifth preference (EB-5) program in order to stimulate the U.S. economy through job creation and capital investment by foreign investors. Through this program, qualified foreign investors, their spouse and unmarried children under 21 are eligible to apply for lawful permanent residence of the United States. In order to obtain legal permanent residence through the EB-5 program, a foreign investor needs to fulfill two essential requirements:

- Capital Investment. Make at least \$1 million USD investment or at least \$500,000 USD if investing in a targeted employment area (high unemployment or rural area).
- Job Creation. Plan to create or preserve 10 permanent full-time jobs for qualified U.S. workers.

When an EB-5 petition lacks sufficient supporting evidence, the United States Citizenship and Immigration Services (USCIS) adjudicator will issue a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID). Over the years, USCIS has increased the evidentiary burdens for foreign investors to demonstrate the source and path of the investment funds. Recently, USCIS started to issue RFEs and NOIDs in cases involving third-party currency exchangers.

FOREIGN CURRENCY CONTROL RESTRICTION

Beginning in 2011, the EB-5 program grew rapidly with mainland Chinese investors' participation. According to the U.S. Department of State's Report of the Visa Office 2017, about 81% of the EB-5 visas were claimed by the mainland Chinese investors. However, every Chinese investor needs to face the challenges presented by the Chinese government's currency restrictions. In order to limit the outflow of capital, the Chinese government

imposed an extremely restricted foreign currency exchange and transfer restriction – each Chinese citizen is only permitted to exchange or transfer up to \$50,000 USD per person annually. Accordingly, Chinese investors have two commonly adopted methods to make the capital investments required by the EB-5 program.

Their first option is to solicit the help of friends and family members. An investor transfers the investment funds in Chinese currency to multiple friends and family members. These friends and family members then exchange up to the annual cap of \$50,000 and then wire the U.S. funds to the investor's U.S. bank account or the EB-5 program's bank account. Obviously, this method requires the investor, the friends, and family members to highly cooperate, and it takes a substantial amount of time to plan the movement and to document the supporting documents. Due to the complexity of the first option, more and more investors choose the second option, the currency swap method.

RFEs and NOIDs on Third-Party Currency Exchangers

According to the Black's Law Dictionary, "Currency Swap is an agreement to swap specified payment obligations denominated in one currency for specified payment obligations denominated in another currency." Under this method, an investor exchanges the investment funds with a third-party exchanger who has equivalent U.S. currency in an overseas bank account. Typically, the investor transfers the investment funds to the third-party exchanger's local bank account. After receiving these funds, the third-party exchanger transfers the equivalent amount of U.S. Dollars to the investor's U.S. bank account or the EB-5 program's bank account. Because both the investor and the exchanger conduct the swap

outside of China, they are able to avoid the Chinese currency control restrictions. As a result, the currency swap method is much more practical than bundling through an investor's friends and family.

However, USCIS started to scrutinize the cases using this method recently. In its RFEs and NOIDs regarding the third-party currency exchangers, USCIS relies on *Matter of Ho* and *Matter of Izummi* – two precedent decisions made by the Administrative Appeals Office (“AAO”) in 1998. *Matter of Ho* establishes that investor must demonstrate by a preponderance of the evidence that the capital was his or her own and was obtained through lawful means. *Matter of Ho*, 22 I&N Dec. at 210. *Matter of Izummi* holds that the investor must prove that the capital was his or her own by documenting the path of the funds. *Matter of Izummi*, 22 I&N Dec. at 195. USCIS explains that without evidence to demonstrate the source of funds used by the third-party to assist the investor with the currency exchange, USCIS is not able to determine that the funds exchanged by the third-party were derived from lawful means. Therefore, the investor is unable to establish a legitimate path of the funds and the EB-5 petition will be denied.

However, this use of RFEs and NOIDs is not consistent with USCIS's other EB-5 adjudication standards. For example, sale of property is one of the most popular sources of the funds scenarios. Typically, USCIS only requires investors to show that the source of the money used to purchase the property was obtained through lawful means and USCIS does not question the property buyer's source of funds. Although USCIS has been issuing RFEs and NOIDs regarding the EB-5 petitions using third-party currency exchangers, there is currently no official policy memo or AAO decision has been published justifying this matter. Until then, investors and third-party exchangers alike need to be well prepared when responding to RFEs and NOIDs requesting third-party currency exchanger path of funds evidence. In this area, as in any evolving legal area, both investors and practitioners need to obtain expert legal assistance.

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