

LAWFUL SOURCE AND PATH OF FUNDS



Informal Value Transfers (IVT)

5/6/2019

Terminal Learning Objectives

By the end of the training, the learner will be able to identify and adjudicate I-526 petitions where Petitioner utilizes a third party exchanger to facilitate a transfer of funds to the NCE.

Enabling Learning Objectives

- The student will understand and define terms “informal value transfer” “exchanger” “hawala.”
- The student will understand eligibility requirements that are impacted when IVT is present.
- The student will identify a fact pattern where IVT is present in a Form I-526, including use of:
 - A licensed exchanger
 - An informal exchanger.
- The student will be able to apply relevant eligibility requirements to the facts.
- The student will be able to evaluate the evidence for IVT based on each eligibility scenario.

Enabling Learning Objectives

- The student will learn the proper approach to the adjudication cases with IVT issues.
- The student will be able to identify common IVT scenarios.
- The students will learn to identify systems to be used and how to use them in the adjudication of cases with IVT issues.

Overview

1. Definitions of “IVT” and “exchanger” and “hawala”
2. Identifying IVT scenarios
3. Eligibility requirements impacted by IVT issues:
 1. Has Petitioner satisfied burden to establish capital belongs to Petitioner (path of funds)
 2. Has Petitioner satisfied burden to show that funds were lawfully derived (source of funds)
4. Evaluating the evidence
5. Other considerations in IVT adjudications
6. Systems checks

Identifying IVT: Break in Path of Funds

To prove that the capital was his or her own, the petitioner must document the path of funds from the petitioner to the NCE. See *Matter of Izummi*, p. 195; see also *Matter of Soffici*, 22 I&N Dec. 158, 165 n.3 (Assoc. Comm. 1998): Interpreting 8 C.F.R. § 204.6(e) as requiring that a petitioner establish the funds invested are his or her own.

- This requires review of the petitioner's documentation and explanation regarding how the capital amount used for the investment was obtained. See 8 CFR 204.6(j)(3)(i)-(iv).

Identifying IVT: Break in Path of Funds

Is there a break (or breaks) in the path of funds from Petitioner to NCE?

- Path of Funds
 - How funds were accumulated or obtained and how funds traveled from the original source all the way to NCE (or to NCE's escrow account).
 - Each step of the path must be sufficiently documented.
 - If a step is not documented, an RFE/NOID may be necessary.

Identifying IVT: Break in Path of Funds

- Example: Petitioner claims he derived EB-5 funds through a mortgage loan. Petitioner received the loan proceeds in his bank account in Pakistan. Petitioner then transferred the funds from his account in Pakistan to another individual in order to convert the funds from local currency into U.S. dollars. The third party, in exchange, transferred his own U.S. dollars to the NCE.

Identifying IVT: Licensed Exchanger

If there was a break in the path of funds, did Petitioner use a third party exchanger to facilitate transfer of funds to NCE and was there a currency swap involved?

- Is the exchanger a licensed third party money exchanger (e.g., a licensed and registered money services business)?

Identifying IVT: Licensed Exchanger

- Example: Petitioner transfers funds from his bank account in Vietnam to the bank account in Vietnam of currency exchange broker. Petitioner and currency exchange broker agree that the latter will “swap” the value of the transfer by crediting Petitioner with equivalent funds in the currency exchange broker’s bank account in Hong Kong. Currency exchange broker transfers the funds to Petitioner’s account in Hong Kong. Petitioner, then transfers the funds to NCE’s bank account in the U.S.

Identifying IVT: Unlicensed Exchanger

If there was a break in the path of funds, did Petitioner use a third party exchanger to facilitate transfer of funds to NCE and was there a currency swap involved?

- Is the exchanger an unlicensed third party money exchanger (e.g., Petitioner's friend)?

Identifying IVT: Unlicensed Exchanger

Example: Petitioner transfers funds from bank account in China to exchanger's bank account in China. Petitioner and exchanger agree that the latter will "swap" the value of the transfer by crediting Petitioner with equivalent funds in exchanger's bank account in Hong Kong. Exchanger then transfers funds from exchanger's Hong Kong account to NCE's bank account in the U.S.

Common IVT Scenarios

Scenario 1

- Petitioner transfers funds bank account in Country A to exchanger's bank account in Country A. In exchange, exchanger transfers U.S. dollars from bank account in Country B into the NCE's U.S. bank account.

Common IVT Scenarios

Scenario 2

- Petitioner transfers funds from bank account in Country A to exchanger's bank account in Country A. In exchange, exchanger transfers U.S. dollars from bank account in Country B into Petitioner's bank account in Country B. Petitioner then transfers U.S. dollars from bank account in Country B to the NCE's U.S. bank account.

Common IVT Scenarios

Scenario 3

- Petitioner transfers funds from bank account in Country A to third party's bank account in Country A. Exchanger transfers U.S. dollars from bank account in Country B to a third party individual's bank account in Country B, who then transfers the funds into the NCE's U.S. bank account.

Common IVT Scenarios

Scenario 4

- Petitioner transfers funds from bank account in Country A to a third party individual's bank account in Country A. In exchange, a company owned by third party individual transfers equivalent U.S. dollars from its bank account in Country B into Petitioner's bank account in Country B. Petitioner then transfers U.S. dollars to NCE's U.S. bank account.

Eligibility Requirements and Impact When IVT Exists

- Evaluate evidence to determine if Petitioner has met burden to satisfy eligibility requirements.
- **Petitioner invested required amount of capital**
 - When the officer cannot determine that the capital belongs to Petitioner based on the path of funds through the exchanger.
 - INA §§ 203(b)(5)(A)(i), (C)(i); 8 C.F.R. §§ 204.6(f)(1), (j)(2):
Petitioner must generally invest or be actively in the process of investing at least \$1,000,000 of capital in a new commercial enterprise. See also *Matter of Ho*, 22 I&N Dec. 206 (Assoc. Comm. 1998, d. *Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998), *Matter of Soffici*, 22 I&N Dec. 158, 165 (Assoc. Comm. 1998).

Eligibility Requirements and Impact When IVT Exists

- Evaluate evidence to determine if Petitioner has met burden to satisfy eligibility requirements.
- Lawful Source of Funds:
 - When the officer cannot determine that the funds were lawfully derived due to involvement of a third party exchanger/broker. 8 CFR 204.6(e) (definition of capital); 204.6(j)(3); *Matter of Ho*, 22 I&N Dec. 206 (Assoc. Comm. 1998) , *Matter of Izummi*, 22 I&N Dec. 195 (Assoc. Comm'r 1998).

Eligibility Requirements and IVT: Examples

EXAMPLE #1 (required amount of capital issue):

- Petitioner and exchanger agree to engage in a currency swap.
- The record contains evidence that exchanger sent \$500,000 to NCE on Petitioner's behalf.
- The record does not contain evidence that Petitioner sent the equivalent amount in RMB from his bank account in China to exchanger's bank account in China.
- As a result, Petitioner has not established the path of funds such that he can demonstrate the capital invested in the NCE belongs to him.

Eligibility Requirements and IVT: Examples

EXAMPLE #2 (lawful source of funds issue):

- Same scenario as example 1 where Petitioner and exchanger agree to engage in a currency swap.
- The record does not contain any evidence of the source of exchanger's funds.
- Petitioner has not established that the funds invested in the NCE derived (directly and indirectly) from lawful sources because the record does not contain evidence of the lawful source of exchanger's funds.

Eligibility Requirements and IVT: Examples

EXAMPLE #3:

- Petitioner sends exchanger RMB 3.5 million (approximately USD \$500,000) to exchanger's bank account in China.
- Exchanger sends \$500,000 from his Hong Kong bank account to Petitioner's Hong Kong bank account.
- Petitioner sends \$500,000 to NCE from his Hong Kong account.
- The record does not contain evidence of an agreement between Petitioner and exchanger regarding the funds that were deposited into Petitioner's Hong Kong bank account by exchanger.
- Without an explanation regarding the transaction between Petitioner and exchanger (unexplained break in path of funds) to confirm that these are the same funds that Petitioner lawfully derived in China (e.g., from salary, etc.), Petitioner has not established that the funds invested in the NCE were lawfully derived.

Evaluating the Evidence

- **Petitioner Invested Required Amount of Capital**
 - If Petitioner has not provided any evidence relating to the funds transferred from his/her account to exchanger's account, the officer could request:
 - Bank statements establishing the transfer of funds from Petitioner to exchanger.
 - Any other evidence deemed sufficient to establish that Petitioner is the legal owner of the funds.

Evaluating the Evidence

- **Petitioner Invested Required Amount of Capital**
 - If Petitioner provided evidence that establishes he/she is the legal owner of the funds transferred from his/her account to exchanger's account, and then exchanger transferred the funds to the NCE, but there is no evidence that exchanger did so on behalf of Petitioner, the officer could request evidence that the petitioner (and not the third party) invested the funds.
 - Common types of evidence could include -a currency swap agreement.

Evaluating the Evidence

- **Lawful Source of Funds**

- When Petitioner uses third party to exchange funds, Petitioner must still establish by a preponderance of evidence that the source of the funds invested was derived, directly and indirectly, through lawful means. 8 CFR 204.6(e), (j)(3).
- If third party exchanger is a licensed money exchanger/money services business (MSB)/money service operator (MSO)/etc), the officer may wish to request documentation to show that it is legitimate and/or licensed and registered money service business, or was at the time of transaction with Petitioner.

Evaluating the Evidence

- **Lawful Source of Funds**

- E.g., In Hong Kong, the license to conduct foreign currency exchanges is issued to an MSO by the Commissioner of Customs & Excise, Money Service Supervision Bureau, Kowloon, HK

https://www.customs.gov.hk/en/whats_new/licensing/index.html

Evaluating the Evidence

- **Lawful Source of Funds**
 - If third party exchanger is not licensed money exchanger (e.g., a casual acquaintance or friend), the petitioner must establish that the third party exchanger's funds derive from a lawful source.
 - If the record does not provide evidence of the source of the third party exchanger's funds, then a RFE is appropriate.

Evaluating the Evidence

Hawala

- “*Hawala* is an alternative remittance channel that exists outside of traditional banking systems. *Hawala* is a method of transferring money without any actual movement.”
- “*Hawala*” is an alternative remittance channel that exists outside of traditional banking systems. Transactions between *hawala* brokers are made without promissory notes because the system is heavily based on trust and the balancing of *hawala* brokers' books.

<http://www.investopedia.com/terms/h/hawala.asp> (last visited on April 26, 2019)

Evaluating the Evidence

- **Lawful Source of Funds**

- Hawala
 - Evidence showing that the Hawala broker is registered as a money service business with the financial regulatory agency of the country/countries at the time of the transactions where they conducted business involving Petitioner's funds.
 - Evidence showing that the Hawala broker was a lawful business entity at the time of the transactions where they conducted business involving Petitioner's funds.
 - May require Office of Foreign Assets Control (OFAC) research.

Other Considerations

- Affidavits alone are generally insufficient to establish the source of funds in third party exchanger's account after the break in the path. Sufficient evidence to corroborate the source, maintenance and transfer of funds in the third party exchanger's account could include:
 - bank statements
 - transfer slips
 - currency swap agreement
 - etc.

Other Considerations

- If Petitioner claims that exchanger is not willing to provide Petitioner with requested documents, this could result in a denial. Simply going on the record without supporting documentary evidence does not satisfy the burden of proof. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Assoc. Comm. 1998).
- If any third party exchanger funds, after the break in the path of funds, are in the United States, the AO must contact the IVT working group before proceeding-issues involving U.S. law may be involved.

Systems Checks for IVT

(b)(7)(e)

Some Key Authorities

- INA §§ 203(b)(5)(A)(i), (C)(i); 8 C.F.R. §§ 204.6(f)(1), (j)(2): Petitioner must generally invest or be actively in the process of investing at least \$1,000,000 of capital in a new commercial enterprise.
- INA 203(b)(5)(B)(i) – sets aside visas for qualified immigrants who invest in a new commercial enterprise which will create employment in a targeted employment area (TEA).
- INA 203(b)(5)(C)(ii) – Minimum required amount of capital. Reduced(\$500,000) investment amount if investing in a targeted employment area.
- 8 CFR 204.6(f)(2) – Minimum required amount of capital reduced to \$500,000 if invested in a targeted employment area.
- 8 CFR 204.6 (j)(iii) – Investment in a new commercial enterprise located within a regional center approved for participation in the Immigrant Investor Pilot Program.

Some Key Authorities

- 8 C.F.R. § 204.6(e): Definition of Capital
 - “Capital” means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the immigrant investor, provided that the immigrant investor is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.
 - All capital invested by an immigrant investor shall be valued at present fair market value in United States dollars.
 - Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital.
- 8 C.F.R. § 204.6(j)(3): Evidentiary requirements for demonstrating that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means.

Some Key Authorities

- *Matter of Ho*, 22 I&N Dec. 206, 210-11 (Assoc. Comm. 1998): A petitioner must show that he or she has placed his or her own capital at risk, i.e., that he or she was the legal owner of the invested capital, and that he or she acquired the legal ownership of the invested capital through lawful means.
- *Matter of Soffici*, 22 I&N Dec. 158, 165 n.3 (Assoc. Comm. 1998): Interpreting 8 C.F.R. § 204.6(e) as requiring that a petitioner establish the funds invested are his or her own.

Some Key Authorities

- *Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm. 1998):
 - To show that the capital was his or her own, Petitioner must document the path of the funds.
 - A petitioner cannot establish the path of the funds merely by submitting bank letters or statements documenting the deposit of funds in the NCE and without showing if the money came from the petitioner's overseas accounts, from his U.S. accounts or from some other source.

Questions?

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