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# Lawful Source of Funds

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In EB-5 Adjudications

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05/10/2019

# Terminal Learning Objective - TLO



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By the end of this session, the learner will be able to understand the eligibility requirement that an I-526 petitioner must demonstrate the investment capital was obtained through lawful means.

# Enabling Learning Objectives - ELOs



- The learner will be able to distinguish between source of funds and path of funds.
- The learner will understand the sources of funding common in EB-5 programs, and comprehend the evidence required for source of funds and how to evaluate the evidence for source of funds.
- The learner will be able to grasp the various paths of funds common within the EB-5 program, learn about the required evidence for path of funds, and how to evaluate the evidence for path of funds.

# Overview



- Analyzing Path of Funds and Source of Funds
- Special Considerations in Adjudicating and Evaluating Evidence
- Common Sources of EB-5 Investment
- Non-EB-5 Sources of Capital Invested in NCE
- EB-5 Petitioners Who Are E-2 Non-Immigrant Visa Holders
- Systems

# Analyzing Path of Funds and Source of Funds



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- ❑ The officer must determine if the petitioner has demonstrated by a preponderance of the evidence that the capital invested was owned by the petitioner, and the required investment amount was obtained through lawful means.
  - Definition of capital: Assets acquired directly or indirectly by unlawful means, such as criminal activity, will not be considered capital for the purposes of INA 203(b)(5). 8 C.F.R. § 204.6(e).
  - *Matter of Ho*, 22 I&N Dec. 206 (Assoc. Comm. 1998) – The petitioner must establish that he acquired the legal ownership of the invested capital through lawful means. Mere assertions about the petitioner's financial situation or work history, without supporting documentary evidence, are not sufficient to meet this requirement.

# Analyzing Path of Funds and Source of Funds



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- ❑ **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).

# Analyzing Path of Funds and Source of Funds



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- ❑ **Lawful Source of Funds:** Assets acquired directly or indirectly, by unlawful means (such as criminal activities, e.g., fraud or money laundering) will not be considered capital for the purposes of INA 203(b)(5). See 8 CFR 204.6(e) (definition of capital).
  - To make the determination that the funds are lawful, the officer must track the funds from the original source to determine that the funds were:
    - Acquired through lawful means; and
    - Not obtained from any illegal source.

## Analyzing Path of Funds and Source of Funds



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- *Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998) – Investor cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds without revealing from where the funds originated.



# Analyzing Path of Funds and Source of Funds



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## □ Summary: The analysis therefore contains two parts:

- Lawful path of funds (this also relates to the determination of whether the funds are owned by the petitioner); and
- Lawful source of funds.

## Special Considerations in Adjudicating and Evaluating Evidence



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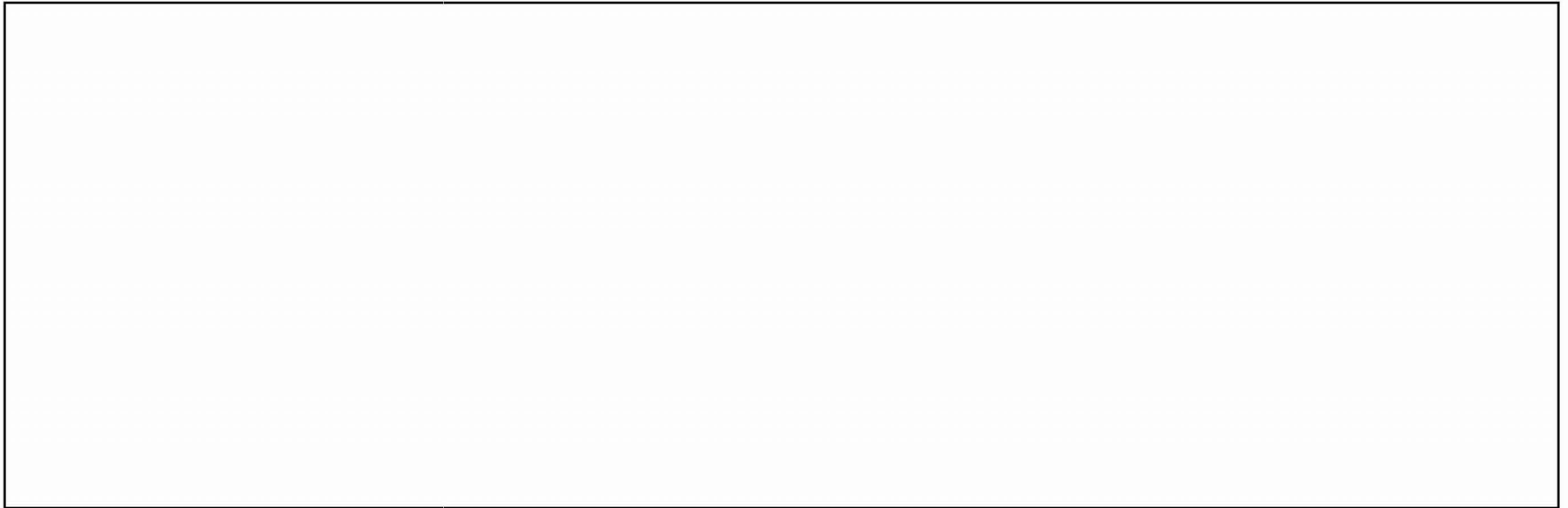
- ❑ Officers must identify the correct eligibility requirement.
  - Officers should be careful not to confuse the required amount of capital and capital at risk requirements with the lawful source (and path) of funds analysis.
  - For example, a petitioner whose funds come from a loan implicates multiple “definition of capital” issues.
    - If the loan is unsecured, does it qualify as “capital”? Pre-*Zhang*, the answer would be no. Post-*Zhang*, refer to office guidance on how to handle this.
    - Lawful Source: Has the petitioner demonstrated that the assets were derived from a lawful source? Post-*Zhang*, officers must still determine that the funds were derived from a lawful source such that they could qualify as “capital”. This is true whether the loan proceeds are treated as “indebtedness” or “cash”.

# Special Considerations in Adjudicating and Evaluating Evidence

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# Special Considerations in Adjudicating and Evaluating Evidence

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## Special Considerations in Adjudicating and Evaluating Evidence



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- ❑ Officers must identify required vs. suggested evidence.
  - E.g., 8 CFR 204.6(j)(3): To show capital obtained through lawful means," the petition must be accompanied, as applicable . . ."
  - Note that if "applicable" (i.e., the evidence pertains to the petitioner's situation), the evidence "must" be provided.

## Special Considerations in Adjudicating and Evaluating Evidence



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- ❑ Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in certain circumstances. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).
  - Objective, corroborating evidence can bolster the credibility of a statement or declaration.

## Special Considerations in Adjudicating and Evaluating Evidence



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- ❑ How far back do we go to determine the lawfulness of the source of funds?
  - It is the petitioner's burden to demonstrate that the capital invested was derived from lawful sources.
  - An adjudicator must be satisfied that the petitioner has established eligibility by preponderance of the evidence.



## Common Sources of EB-5 Investment

- ❑ Sources of Funds Covered
  - Accumulated Funds
  - Sale or Mortgaging of Property
  - Investment into a Business
  - Gifts
  - Marital Property

CHAP Volume 6, Part F, Chapter 6 (Section 25.e. “Invested Capital was Obtained through Lawful Means”)



## Common Sources of EB-5 Investment - Accumulated Income:



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### Accumulated Income:

- The petitioner may have earned and saved sufficient income for the EB-5 capital investment.
- In these cases, it is necessary for the petitioner to show:
  - proof of the claimed income, and
  - evidence of the accumulation of those funds.



## Common Sources of EB-5 Investment - Accumulated Income:

- ❑ If the investment is derived from income, then tax returns (corporate, personal, etc.) may be specifically required, depending on the facts of the case.
  - “Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner . . .” 8 CFR 204.6(j)(3)(ii).
- ❑ Other examples of evidence demonstrating accumulation of income:
  - Bank records demonstrating the accumulation of wealth.
  - Income certificates issued by an employer.

## Common Sources of EB-5 Investment – Sale or Mortgage of Property



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### Sale or Mortgaging of Property

- ❑ A petitioner's source of funds may be derived from real property, generally through either the sale of property or the mortgage of property.
- ❑ In these property-related instances, the petitioner would generally be required to demonstrate sufficient accumulated funds used to purchase the property in the first place.
- ❑ If accumulated funds are claimed as the lawful source of funds to purchase the property, then generally the petitioner would be required to show that the accumulated funds were obtained lawfully.

## Common Sources of EB-5 Investment – Sale or Mortgage of Property



- ❑ Examples of documents typically found and considered probative evidence in scenarios where the capital investment is derived from property include:
  - Ownership registration documents
  - Purchase contract
  - Sales contract
  - Sales tax or transfer tax payment receipts
  - Bank receipts or other financial transaction records evidencing payment
  - Appraisal or property value
  - Mortgage contract and/or loan contract

## Common Sources of EB-5 Investment – Sale or Mortgage of Property



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### ❑ Sale of a property Example:

A Petitioner from China asserts he sold a property in 2017 for RMB 4,000,000 and this was the source of his EB-5 investment. Petitioner asserts the property was initially purchased in 2000 for RMB 500,000. In addition to evidence relating to the 2017 sale, the officer may request evidence to demonstrate that the source of funds used to initially purchase the property in 2000 was derived from a lawful source.

## Common Sources of EB-5 Investment – Investment into a business



- ❑ A petitioner's source of funds may be obtained from his or her ownership interest in a business (e.g., capital from the sale or liquidation of an investment in a business, or capital from dividends or other distribution of profits).
- ❑ In these instances, a petitioner generally must demonstrate sufficient accumulated funds used to purchase the ownership interest in the company.
- ❑ The petitioner generally must demonstrate that the accumulated funds used to purchase the ownership interest in the company were obtained lawfully.



## Common Sources of EB-5 Investment – Investment into a business

- ❑ Examples of documents typically found and considered probative evidence in scenarios where the capital investment is derived from a business include:
  - Business license
  - Financial audit reports
  - Tax returns
  - Company bank statements
  - Capital verification reports
  - Shareholder resolutions authorizing the petitioner to take a loan
  - Loan contracts between the petitioner and the company



## Common Sources of EB-5 Investment – Investment into a business

- ❑ In such cases, the petition must generally include evidence to show:
  - Company ownership interest at issue was purchased by the individuals claimed by the petitioner; and
  - The property was either sold or mortgaged as claimed.



# Common Sources of EB-5 Investment – Gifts



## Gifts:

- ❑ In some instances, petitioners contribute capital that is derived from a gift.
- ❑ Generally, gifts are an acceptable way for the petitioner to obtain the EB-5 capital investment, provided that the source of the gift is lawful.
- ❑ Who gifted the funds?
  - Most gifts are given between family members.
    - If the capital is derived from joint marital property, it is generally unnecessary for a husband to gift funds to the wife, and vice versa. To demonstrate validity of the marriage, the record should contain a marriage certificate or other documentation evidencing the relationship.
  - Unrelated third parties may also gift funds to the petitioner.

# Common Sources of EB-5 Investment – Gifts



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## ❑ Evidence – Gift Letter

- If the source of capital contributed to the NCE is a gift, generally the record includes a gift letter or statement written by the gift donors, confirming that they gave the gift to the petitioner, and stating that the gift is able to be used by the petitioner.
- When reviewing the letter, the officer must determine whether at the time the petition is filed, the capital was the petitioner's (i.e., the gift was made prior to filing the petition) and whether the donor has placed any additional conditions on the gift.
- If language in the gift letter makes the transfer a loan, rather than a gift, the officer should follow the office guidance regarding loan proceeds post-Zhang.

# Common Sources of EB-5 Investment – Gifts



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- ❑ In all cases, the petitioner must still establish that the gifted funds come from a lawful source. To do so, the officer must examine the source of the funds that the gift donors used to make the gift to the petitioner.
- ❑ It is noteworthy that the giftor can transfer the funds directly to the NCE on the petitioner's behalf and the funds does not need to be in actual possession of the petitioner.



## Common Sources of EB-5 Investment – Marital Property

### Marital Property:

- Generally, for purposes of the source of funds analysis, the officer can consider joint marital property as assets belonging to both the husband and wife.
- The husband and wife each have the ability to use these funds, even if the funds were earned by the other spouse.
- If the capital is derived from joint marital property, it is generally unnecessary for a husband to gift funds to the wife, and vice versa.
- To demonstrate validity of the marriage, the record must contain a marriage certificate or other documentation evidencing the relationship.

# Non-EB-5 Sources of Capital Invested in NCE



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“....The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur even though there are several owners of the enterprise, including persons who are not seeking classification under section 203(b)(5) of the Act and non-natural persons, both foreign and domestic, provided that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means.” 8 CFR 204.6(g)(1) (emphasis added).

# Non-EB-5 Sources of Capital Invested in NCE



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- ❑ **Standalone context:** A petitioner in a standalone case must demonstrate the lawful source of funds for all non-EB5 capital that is invested in the NCE.
- ❑ **Regional-Center context:** A petitioner in a regional center case must demonstrate the lawful source of funds for all non-EB5 capital that is invested in the NCE. If the non-EB5 capital is invested in the JCE and not the NCE, then 204.6(g)(1) does not apply.
  - In some cases, the NCE and the JCE are the same entity. If the NCE and the JCE are the same entity, then the petitioner must demonstrate the lawful source of funds for non-EB5 investments into the NCE/JCE.

# Non-EB-5 Sources of Capital Invested in NCE



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- ❑ General considerations for both standalone and regional center cases:
  - 204.6(g)(1) only applies to investments made by owners of the enterprise, because 204.6(g)(1) states “. . . provided that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means” (emphasis added).
  - Note the language in the regulation, “. . .and non-natural persons, both foreign and domestic. . .”

# Non-EB-5 Sources of Capital Invested in NCE



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- ❑ Example: A petitioner is investing \$500k in a standalone NCE that is operating a restaurant. The petitioner claims that a non-EB-5 investor is investing \$200k for 50% of the shares in the NCE. Although the partner is not seeking EB-5 classification, the petitioner is still required to provide evidence to demonstrate the lawful source of the partner's \$200k investment.



# Non-EB-5 Sources of Capital Invested in NCE



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- ❑ Example: A petitioner is investing \$500K in a regional center NCE that is a limited partnership. The NCE is pooling funds from 10 EB-5 investors who will be limited partners in exchange for their investment. The general partner of the NCE, who is not an EB-5 investor, has also invested in the NCE. The petitioner must provide evidence to demonstrate that capital invested by the general partner has been derived by lawful means.

## EB-5 Petitioners Who Are E-2 Non-Immigrant Visa Holders



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### E-2 Visa Holders

- ❑ An E-2 treaty investor visa is reserved for foreign investors of countries that have a treaty of commerce and navigation with the United States.
- ❑ E-2 investor visas allow foreign investors to temporarily enter and work in the United States based on a substantial investment in a bona fide enterprise.
- ❑ Although there is no fixed amount of required capital for an E-2 visa, many investments that may qualify for E-2 eligibility are less than the required minimum amount of capital that would qualify for EB-5 eligibility.

## EB-5 Petitioners Who Are E-2 Non-Immigrant Visa Holders



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### E-2 Enterprise Separate from Investor

- ❑ As with any other business entity, E-2 visa investors may not use the undistributed profits of an E-2 enterprise formed as a separate legal entity for the purposes of making an EB-5 investment into a separate NCE. Most E-2 enterprises are formed as separate and distinct legal entities from their owner(s) (the general exception being E-2 enterprises operated as sole proprietorships). For E-2 enterprises operated as sole proprietorships or E-2 enterprises that are also claimed as a NCE for EB-5 purposes, you should raise the issue to your supervisor for additional review and analysis.
- ❑ Investors may, however, receive a distribution of money from the separate E-2 enterprise, and then use that money to make an EB-5 qualifying investment.

## EB-5 Petitioners Who Are E-2 Non-Immigrant Visa Holders



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### E-2 Enterprise Separate from Investor

#### □ Example:

Petitioner is presently on an E-2 non-immigrant visa in the United States, and has invested \$200,000 into Acme Corporation, the E-2 enterprise. Petitioner then makes a \$500,000 investment into Beta Corporation, the NCE, using \$300,000 from his personal account, and \$200,000 from Acme Corporation's business account to fund the investment. The \$200,000 transferred from Acme Corporation's business account is not qualifying capital because those funds belongs to Acme Corporation, not the Petitioner. Acme Corporation must first distribute the \$200,000 to the Petitioner before the Petitioner contributes the capital to the NCE. Petitioner must demonstrate ownership of the \$200,000 at the time the capital is invested into the NCE in order for it to constitute a qualifying investment of capital

# Systems

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# Systems

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# Crypto Currency



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If you see cryptocurrency (e.g. Bitcoin, Ethereum, Ripple, etc.) anywhere in the source of funds claim, then please email IPO policy and your first line supervisor to seek guidance.

# Training Scenarios



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## Scenario 1:

The petitioner invests in a coffee shop (standalone). She also has a non-EB5 partner (who is a USC). The petitioner and her partner both invest \$500,000 each. The record only contains the evidence to demonstrate the petitioner's lawful source of EB-5 capital.

- Does she need to demonstrate her partner's lawful source of capital invested in the coffee shop?



# Training Scenarios



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## Scenario 2:

The petitioner claims that he had formed an engineering firm with other investors. The petitioner claims that his investment in the firm is in the form of his knowledge and expertise in the field of engineering. He claims that his knowledge and expertise is valued at \$1 million in investment capital. The record contains sufficient evidence to demonstrate the petitioner's vast knowledge in the field, such as his resume, his successful academic work, several notable newspaper articles about his knowledge and background in the field etc.

Does this qualify as the petitioner's investment in the NCE?

# Training Scenarios



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## Scenario 3:

The petitioner obtained a mortgage loan secured by property that he purchased with lawfully sourced funds. The loan document states that the purpose of the loan is restricted to renovating the property and that any other use of the funds will result in a breach of contract. The petitioner used the proceeds of the loan to invest in the NCE.

Are the petitioner's funds considered lawful?

# Training Scenarios



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## Scenario 4:

An EB-5 investor (the petitioner) provides income tax returns from the U.S. to establish his lawful source of funds to invest in the NCE. In the cover letter, the petitioner states that he overstayed his visa and was working without authorization during the years that he was not in lawful status; however, he was paying taxes on that income (using a tax identification number (TIN)). He currently has Temporary Protected Status (TPS). He used accumulated income and savings from the years that he was working without authorization to purchase trucks that he is contributing to the NCE as part of his investment.

Is the petitioner's income that was used to purchase the trucks from a lawful source?

Is the petitioner's contribution of the trucks considered an investment?

# Relevant 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.
- ❑ 8 C.F.R. § 204.6(e) –Assets acquired directly or indirectly by unlawful means, such as criminal activity, will not be considered capital for the purposes of INA 203(b)(5).

# Relevant Authorities



To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the Form I-526 petition must be accompanied, as applicable, by:

- Foreign business registration records;
- Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
- Evidence identifying any other source(s) of capital; or
- Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years. 8 CFR 204.6(j)(3).

# Relevant Authorities



- ❑ *Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998) –
  - Investor cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds without revealing from where the funds originated.
  - In addition, to prove that the capital was his or her own, the petitioner must document the path of funds from the petitioner to the NCE such as by wire-transfer records.
- ❑ *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.

# Relevant Authorities



- ❑ *Matter of Ho*, 22 I&N Dec. 206 (Assoc. Comm. 1998) –
  - The petitioner must establish that he acquired the legal ownership of the invested capital through lawful means. Mere assertions about the petitioner's financial situation or work history, without supporting documentary evidence, are not sufficient to meet this requirement.
- ❑ USCIS Policy Manual – Volume 6 – Immigrants, Part G – Investors – Chapter 2 – Eligibility Requirements – Section 1 (Capital)
- ❑ CHAP Volume 6: Petitions, Part F: Petitions for Investors and Entrepreneur



Questions?



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