

EB-5 Immigrant Investor Program

Cryptocurrency in Form I-526 Adjudications

5/25/2021

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Terminal Objective

By the end of the training, the participant will have a general overview and understanding on how to review and adjudicate Form I-526 where the source or path of funds includes cryptocurrency.

- This training was developed to support the Interim Operational Guidance for Review of Cryptocurrency in the Source or Path of Funds in Adjudication of Forms I-526.

Enabling Learning Objective

- The student will understand the challenges associated with cryptocurrency transactions.
- The student will understand eligibility requirements that are impacted when cryptocurrency is present in the source of funds.
- The student will be able to apply relevant eligibility requirements to the case specific facts.
- The student will be able to identify key factors for evaluating evidence in adjudicating cryptocurrency cases.
- The student will be able to identify fraud and national security concerns specific to cryptocurrency.

Some Relevant Authorities

- 8 C.F.R. § 204.6(e)
- 8 C.F.R. § 204.6(j)(3)
- *Matter of Ho*, 22 I&N Dec. 206 (Assoc. Comm. 1998)
- *Matter of Ho*, 22 I&N Dec. 206, 210-11 (Assoc. Comm. 1998)
- *Matter of Izummi*, 22 I&N Dec. 195 (Assoc. Comm. 1998)
- *Matter of Soffici*, 22 I&N Dec. 158 (Assoc. Comm. 1998)
- *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010)

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Some Relevant 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 Relevant 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 Relevant 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.

Topics Covered in this Training

- Potential Challenges with Cryptocurrency Transactions and Lawful Source of Funds.
- Key Factors to Consider in the Source of Fund Analysis with Cryptocurrency cases.
- Key Concerns for Fraud and National Security and Indicators Specific to Cryptocurrency.

Limitations of Training

Like the interim guidance, this training was developed from a sample of cryptocurrency cases and is not comprehensive and not intended to capture every cryptocurrency scenario or case specific set of facts.

The identification of cryptocurrency trends and patterns from a larger sample of cryptocurrency cases, and the additional operational knowledge gained from adjudicating these cases will provide the information and experience to develop more comprehensive formal policy guidance and updated training.

Guidance for Adjudicators: Challenges with Cryptocurrency Transactions

- Cryptocurrency may be used to elude financial controls and regulation, avoid trusted third party verification, and conceal the identity of parties to a transaction.
- Many cryptocurrency transactions, exchanges, purchase methods and storage mechanisms make tracing and verifying transactions difficult.

<https://www.justice.gov/ag/page/file/1326061/download> (last accessed Oct. 10, 2020)

Guidance for Adjudicators: Challenges with Cryptocurrency Transactions in Lawful Source of Funds

It may be difficult for the Petitioner to establish the following (by a preponderance of the evidence):

- 1) The funds belong to the petitioner. See 204.6 (e); *Matter of Soffici*, 22 I&N Dec. 158, 165 n.3 (Assoc. Comm. 1998).
- 2) The funds were acquired directly and indirectly by lawful means, 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).

Guidance for Adjudicators: Key Factors in Source of Funds Analysis

Key Cryptocurrency Factors impacting SOF analysis, include, but are not limited to:

- Cryptocurrency Account Ownership
- Blockchain Transaction History
- Commingling
- Tax Returns
- Cryptocurrency Service Providers
- International Transactions and Jurisdictional Regulations

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Key Factors: Ownership of Cryptocurrency Funds and Account/Wallet

Many accounts and wallets used to purchase, transfer, exchange or hold cryptocurrency are anonymous or pseudonymous. The petitioner should submit evidence that demonstrates ownership of cryptocurrency funds and account/wallet ownership.

- Account/wallet ownership through unique identifiers such as, but not limited to:
 - Full name,
 - passport number; or
 - other sufficient evidence directly linking petitioner to the single account/wallet.

Key Factors: Commingling

Commingling in cryptocurrency may occur in the following forms:

- An individual makes multiple deposits of cryptocurrency that belong to him/her into a single cryptocurrency account or wallet.
- A designated custodian will hold cryptocurrency belonging to various individuals or entities in a single wallet or cryptocurrency account.

Key Factors: Commingling

- Capital deposited into an account from which the petitioner's investment was withdrawn was lawfully derived; and See 8 CFR 204.6(j)(3)(i)-(iv).
- A demonstration that capital that has been shown to be lawfully derived can be separated from capital that has not been shown to be lawfully derived; and
- That only lawfully derived capital is being used as a source of funds for the petitioner's investment. See 8 CFR 204.6(j)(3)(i)-(iv).

Key Factors: Blockchain Transaction History as Evidence

- **Blockchain transaction history may be submitted as evidence to demonstrate lawful source of funds.**
 - They may be like bank statements, which are often provided by petitioners in cases where investment comes from accumulated funds.
- **Blockchain transaction records format:**
 - Submitted in raw, encrypted or complex forms may not allow for sufficient review of relevance and probative value.
 - Submitted with an independent blockchain analysis report derived from a certified party may allow for sufficient review of relevance and probative value.

Key Factors: Tax Returns

- As applicable, petitioners must provide tax returns filed within 5 years to demonstrate the lawful provenance of their capital investment. *See* 8 CFR 204.6(j)(3)(ii)
- The tax returns submitted may contain information that is relevant and probative with respect to the petitioner's asserted use of cryptocurrency (e.g. the value and timing of the petitioner's acquisition, ownership, and exchange of the cryptocurrency). *See* 8 CFR 204.6(j)(3)(ii)

Key Factors: Cryptocurrency Service Providers

The Financial Crimes Enforcement Network (FinCEN) outlines the following as considered Money Service Businesses (MSB) and subject to Anti-Money Laundering (AML), Combatting Financial Terrorism and other licensing and regulatory requirements.

- Individuals and entities that offer money transmitting services involving virtual assets such as cryptocurrency exchanges and kiosks.
- Certain issuers, exchangers, and brokers, of virtual assets.

<https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf> (last accessed Oct. 1, 2020).

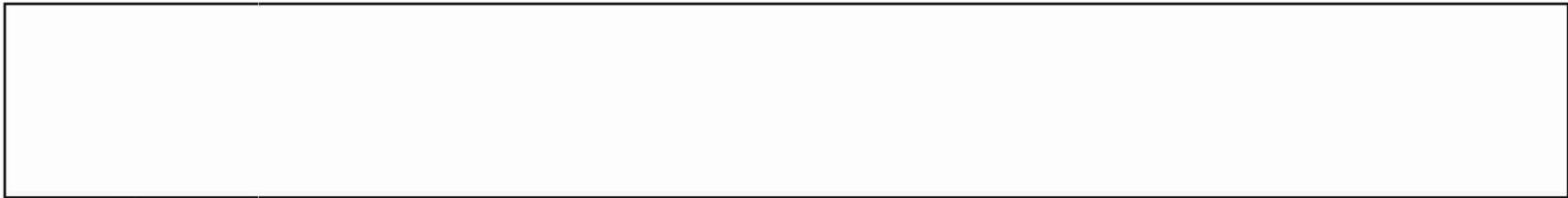
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Key Factors: Cryptocurrency Service Providers

- If the record does not contain information identifying the exchange or transmission provider, the adjudicator may request additional information to address insufficiencies.

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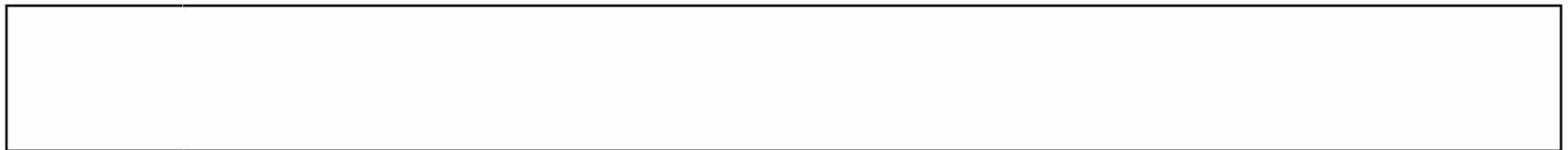
Key Factors: International Transactions and Jurisdictional Regulations

- The use of virtual currencies is banned in some countries, therefore making it illegal to purchase or conduct transactions with cryptocurrency and other forms of virtual currency.
- Some countries and jurisdictions require all cryptocurrency and virtual currency transmissions to adhere to specific aspects of financial regulations.
- Generally international and jurisdictional regulations on cryptocurrency may be ascertained in open-source searches

Key Factors: International Transactions and Jurisdictional Regulations

- In instances of concerns regarding the lawfulness of petitioner's virtual currency transactions conducted outside of the United States which may impact the petitioner's ability to demonstrate by preponderance of the evidence that investment was obtained through lawful means;
- The adjudicator may request additional evidence from the petitioner to address evidentiary insufficiencies, and/or

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Key Concerns: Fraud Detection and National Security (FDNS)

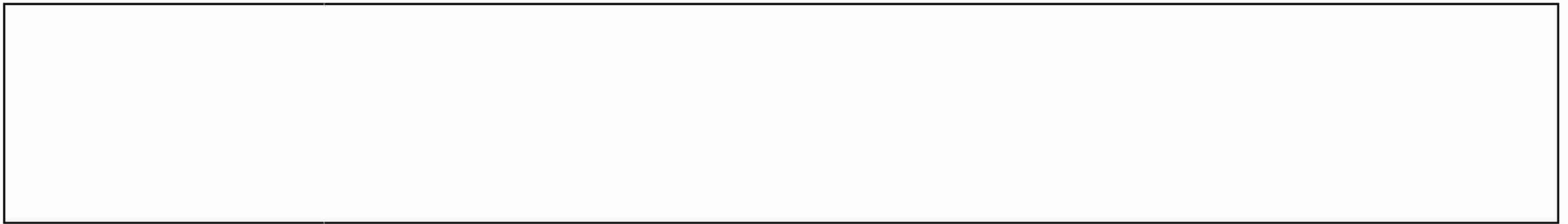
Department of Justice's (DOJ) Cyber Digital Task Force has identified that the illicit uses of cryptocurrency will typically fall into three categories:

- 1) financial transactions associated with the commission of crimes;
- 2) money laundering and the shielding of legitimate activities from tax, reporting, or other legal requirements; and/or
- 3) crimes, such as theft, directly implicating the cryptocurrency marketplace itself.

<https://www.justice.gov/ag/page/file/1326061/download> (last accessed Oct. 10, 2020)

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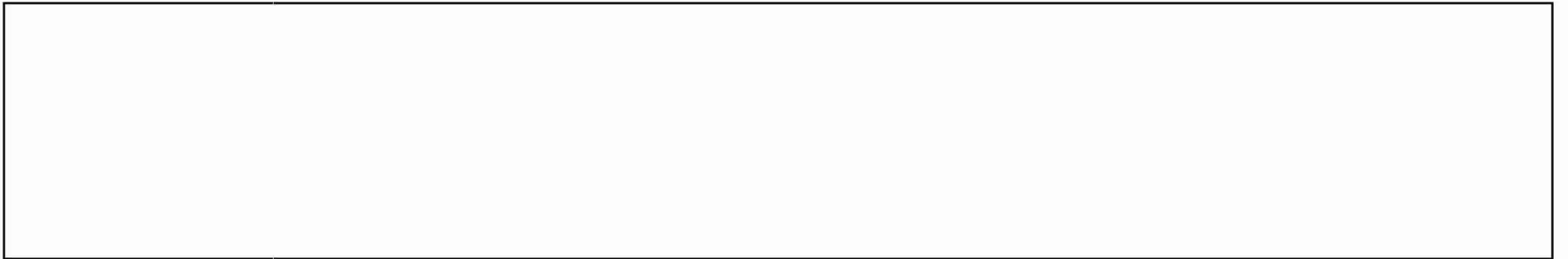
Key Concerns: Fraud Detection and National Security (FDNS) Indicators



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Key Concerns: FDNS Indicators

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Key Concerns: FDNS Indicators

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Additional Information: Cryptocurrency Service Providers

FinCEN has an open source MSB Registrant Search Web page. According to FinCEN the MSB Registrant Search contains entities that have registered as Money Services Businesses (MSBs) pursuant to the Bank Secrecy Act (BSA) regulations at 31 CFR 1022.380(a)-(f), administered by the Financial Crimes Enforcement Network (FinCEN).

Link: <https://www.fincen.gov/msb-state-selector>

Additional Information: Blockchain Transactions

Some more widely used cryptocurrencies make their blockchain transactions available in public ledgers. If the petitioner has provided the transaction ID, the transaction history can likely be verified using the following open-source tools:

- <https://live.blockcypher.com/>
- <https://www.blockchain.com/explorer>

Summary

The training provided an overview of the challenges with cryptocurrency transactions, and guidance for adjudicators on reviewing some of the key factors in the evidence related to the source of funds analysis.

Additionally, the training identified some of the key fraud and national security concerns specific to cryptocurrency and information for adjudicators to increase awareness.

Next Steps at IPO

- The current cryptocurrency cases will be disseminated to designated adjudicators assigned to the specialized effort.
- PIERS language will be updated to request current cryptocurrency cases are worked only by the designated team assigned and require adjudicators to seek supervisory concurrence from the assigned SAO prior to any final adjudicative action.

Questions?

About this Presentation

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