

EB-5 Practice Alert

As part of the heightened scrutiny USCIS has been applying to lawful source of funds evidence in I-526 petitions, USCIS adjudicators are now questioning inconsistencies between information provided in a petitioner's I-526 petition and nonimmigrant visa applications (DS-160 forms) the petitioner has previously submitted.

USCIS generally reserves the right to verify information in a petition using sources independent of the evidence provided by the petitioner, and it frequently does so. For example, in the EB-5 context, USCIS adjudicators regularly use independent Internet searches to confirm information that I-526 petitions state about regional center projects. If an adjudicator discovers information that conflicts with what is stated in the project's business plan and supporting materials, the inconsistency will normally trigger either a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) by the adjudicator.

Thus, USCIS's practice of independent verification is not new. What is relatively new, however, is USCIS's implementation of this practice in the EB-5 context by investigating prior DS-160 forms submitted by I-526 petitioners (although we have seen this type of verification in the context of L-1 petitions). In particular, adjudicators are now comparing an individual's work experience as presented in the individual's I-526 petition with the individual's employment history as stated on previous DS-160 forms. By signing a DS-160 form, a visa applicant certifies that all answers on the form are true and correct under the penalty of perjury. Similarly, by signing on page 3 of the I-526 form, a petitioner certifies under penalty of perjury that the evidence submitted with the petition is true and correct. Therefore, if an I-526 petition presents information that appears to be in conflict with the answers provided on the DS-160, an adjudicator will use the discrepancy to challenge the credibility of the I-526 evidence. In light of USCIS's stringent examination of lawful source of funds evidence, we recommend the following:

1. When outlining a source of funds strategy, an EB-5 investor should provide a complete history of prior nonimmigrant visa applications and list the employment history that was provided on prior DS-160 forms—names of employers, dates of employment, position titles, job duties, etc.
2. If there are any discrepancies between the information submitted with previous DS-160 forms and the petitioner's resume provided to explain background and source of funds for EB-5 purposes, obtain clarification. In our experience, discrepancies may be due to the fact that an individual is simultaneously self-employed by several different companies but did not list all of them on a DS-160 form, or even due to differing English translation of the same company's Chinese name.

I-526 petitions should not be filed without clarifying the petitioner's employment history and experience information. This information is often a core part of the lawful source of funds explanation and must be credible.

