

How the ACCC Scandal has Disturbed the EB-5 Market in China – Current Market Trends and Updates

Mona Shah, Esq.

Yi Song, Esq.

Introduction:

On February 6, 2013, the Securities and Exchange Commission (SEC) charged the EB-5 project A Chicago Convention Center (ACCC) and its principal Anshoo R. Sethi with securities fraud. The project was marketed primarily in China, with great pomp and fanfare. It offered 499 limited membership interests to EB-5 investors and managed to sell more than \$145 million in securities, unfortunately under misleading pretenses. There was \$11 million in administrative fees collected from more than 250 investors. Despite a promise to refund this fee should the case collapse, more than 90 percent of the administrative fees have already been dissipated. Fortunately for the investors, the actual investment money was kept in escrow and thereby saved. However, as this event is unprecedented in EB-5 history and the first time an EB-5 transaction of this size has been put on the radar of the SEC. The ACCC case has had profound impacts in EB-5 marketing trends in China.

Current Situation with the ACCC Investors and the Negative Publicity of the EB-5 Program in China

At present, \$147 Million of investor's funds from the ACCC project are held in escrow in US based accounts. On March 6, 2013, the SEC filed a formal opposition to the Investors' Motion to intervene for the investment to remain with the escrow agent or to be transferred to an alternative escrow agent. The SEC opposition¹ is based on a number of factors, including the lack of unanimity amongst the investors and the appointment of a receiver for disbursement of investor funds. The SEC argues that the money should be

¹ SEC v. A Chicago Convention Center, Anshoo Sethi, Case: 1:13-cv-00982 Document #: 34 Filed 03/06/13 with UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

returned directly to the investor. The authors believe that the SEC will prevail in the opposition to the motion to intervene. If the funds will be wired back to the investors' personal accounts, it will take months before the investors' funds can be transferred to a new EB-5 project.

China Central Television (CCTV), the biggest television network in China has highlighted the US Securities and Exchange Commission (SEC) prosecution against ACCC and EB-5 investment as "high risk investment products"². On March 8, 2013, the Chinese Ministry of Foreign Affairs³ warned the Chinese investors of the "EB-5 Fraud" in the immigrant investor program and stated that the Chinese investors should carefully choose among the migration agents. It is very rare for the Chinese Ministry of Foreign Affairs to make such a bold comment. The important issue that should not be forgotten is that the joint action of USCIS and the SEC actually prevented the investment funds from being dissipated.

The EB-5 immigrant investor program in the United States became popular among foreign investors, including Chinese investors, because the US has always been a desirable destination to live. The determining factors include: – having the highest worldwide GDP and the No. 1 world economy; world renowned universities and higher education; the most diverse cultures; basic constitutional rights and freedom; US is still perceived as the land of the opportunities, etc. However, the unrelenting problems of the EB-5 program had started to cause a regression among Chinese investors against investing in the United States long before the ACCC scandal. Though at the end of February 2013, the State Department Visa Office confirmed that as the visa usage dropped in recent months, which is another sign that US has been losing investors to other countries, it is no longer expected that China will reach the country limit quota in 2013.

The negative publicity surrounding ACCC certainly has contributed to pushing potential investors into the arms of the European competition. In the last month alone, we are aware

² Central China Television (CCTV) website on "Six Traps in EB-5 Immigrant Investor Program":
http://wap.cctv.com/caijing/caijingtoutiao/2013-02/18/content_235711_2.htm

³ The Announcement posted on the Chinese Ministry of Foreign Affairs website:
<http://cs.mfa.gov.cn/lsyj/t1013431.htm>

of at least 20 confirmed investors, who had signed up for US EB-5 projects, withdraw, preferring to invest in Portugal instead. Based on our constant interaction with the Chinese investors, brokers and marketing consultants, issues such as the prolonged processing times (investors are tired of waiting for as long as 18 months to obtain a I-526 approval), the greater investment risks, unpredictability in policy making, not to forget the massive amount of negative publicity in China, following the ACCC debacle, have all contributed to this detachment. ⁴

European Countries Offer the “Citizenship for Sale” Option

As the popularity and demand for EB-5 money grows, we have almost come to expect that these foreign investors will want to park their money in no other country but the United States. In actuality, the United States is facing severe competition from other Countries, including Spain, Portugal, Cyprus, Ireland not to mention the United Kingdom and Canada.

In October 2012, Senator Chuck Schumer (R-NY) and Senator Mike Lee (R-UT) proposed an initiative to offer visas to foreign nationals who would invest \$500,000 to purchase a residential property. This homebuyer visa was severely criticized as “citizenship for sale”, a dangerous step toward monetization of nationality. While the United States is debating the morality of the homebuyer visa, other countries such as Spain, Portugal and Cyprus have made the homebuyer visa reality. Foreign investors can purchase a home in Portugal, Spain, Cyprus and Ireland to obtain permanent residency.

Who are Competing with the United States to Attract the Immigrant Investors?

European countries have offered the investors the option to purchase a residential property to obtain permanent residency and eventually EU nationality. Both Portugal and Ireland offer the homebuyer visa for 500,000 euros (approximately \$651,000). Hungary offers residency to those who purchase 250,000 euros worth of government issued bonds. Spain topped the list of minimum investment among all the immigrant investor programs

⁴ CCTV will air a whole program dedicated to the “Fraudulent EB-5 Projects” that jeopardize the Chinese consumers/investors investment safety on Consumer Protection Day on March 15, 2013.

on the global market. To obtain permanent resident status in Spain, the Investor only needs to purchase a home in Spain that is worth at least 160,000 euros (approximately \$208,000).

There are other advantages for the Chinese investor interested in Europe. In Portugal, for example, no source of funds documents is required, the process takes as little as 6 months and even the investor's parents are included in the petition. The investors have nearly no risk in obtaining the permanent resident status. None of the countries mentioned above require the immigrant investor's capital be placed "at risk". The investors immediately obtain a residential property in these countries. The agents/investors admit that they understand it may not be the best investment products, considering the on-going debt and housing crisis in those countries. But the permanent residency in those countries is a safety net.

Another advantage of the homebuyer visa in European countries is investors consider it as a fast track to E.U. citizenship. Any E.U. country passport is a valid travel document in all E.U. countries. It gives the investors access to European countries like the United Kingdom, which have restricted immigration policies. Chinese immigration agents and brokers are all encouraging this investment, as there is a faster turnaround, no I-829 headache and overall, less work. The typical commission to the agent is 12% to 17% of the € 500,000 with at least 10% up-front payment to the agents.

The Market Outlook

It is not all doom and gloom for the EB5 Industry, despite all the above mentioned competition and other issues. On the down side, the properties, particularly in Spain and Portugal are mostly foreclosed or "crashed" properties, left over from the construction boom of 5 years ago. Those Investors who want to emigrate for the sake of their children's education will continue to prefer the US. There will always be a market for US immigrant investor program; however, the Chinese investors and agents will be even more cautious in choosing the good investment projects. Large-scale projects may become more difficult to sell. It will take longer to fill a certain project than it is.

For countries that offer the homebuyer visa, such as Portugal, they continue to be heavily in debt. Euro zone funding to Portugal is expected run out in the third quarter of 2014⁵. If the Country defaults on the debt, as appears likely in Portugal 2014, long term recession, currency devaluation and social instability follows, as occurred in Argentina in the early 2000's. The residential properties that the Chinese Investors are purchasing will have low resale value, nothing close to the sum paid. When we raised these points with Chinese agents promoting Portugal, the response was: "we are not promising a return of capital, only permanent residency".

Conclusion

In a meeting Mona Shah & Associates with the President of Beijing's Exit / Entry Industry Trade Association⁶ and major global migration agencies in December 2012, we were told that that there is always a market for the US, but we have to work together to beat the competition. Once the furor over the Chicago Convention Center calms, and there are more EB-5 success stories, we are confident that eventually, the tide of public opinion will pull the straying Chinese investors back to the US. The question is how long does it take.

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⁵ [WSJ.COM: WHAT'S NOW | JANUARY 24, 2013](http://online.wsj.com/article/SB10001424127887323854904578261653244885768.html)
<http://online.wsj.com/article/SB10001424127887323854904578261653244885768.html>

⁶ The Exit Entry Administrative Office under the Ministry of Public Security is the governmental agencies that regulates and supervises all global migration issues in China. The Exit Entry Industry Trade Association is the quasi-government organization that supervises the activities of the migration agencies and enforces the government policies regarding immigration in China.

About the authors:



Mona Shah, Esq. is Managing Partner at Mona Shah & Associates, a New York City based-immigration firm. She is highly proficient and well-versed in the field of immigration law, particularly on EB-5 matters. Mona has successfully raised 75 million for a Time Square Hotel through EB-5 financing and frequently represents both EB-5 Investors and Regional Centers. Mona is experienced in establishing EB-5 Regional Centers and boasts several years of filing EB-5 Investor petitions for both regional centers and private non-regional center investor cases. In addition, Mona has handled with complex, multi-faceted Requests of Evidence (RFEs) for both the Regional Centers and investors.

As a former Crown Prosecutor with the British Crown Prosecution Service, Mona became proficient in advocacy and litigation. Mona possesses unique specialization in both litigation and business immigration matters.

Mona was one of the four original founders of New York City Regional Center and the only Immigration Attorney on the team. She was a Partner at the New York Immigration Fund Regional Center and has exclusively handled all aspects of the Times Square Hotel Project. At present, Mona represents several EB-5 investors and multiple regional centers in their related petitions and applications.

Mona has authored and published numerous articles including EB-5 related articles, which have been published extensively. She is frequently called upon to speak on various immigration matters. She is often featured as a guest speaker at legal seminars and on local television news programs. Mona has been honored for her work by various groups and non for profit organizations.

Mona graduated from the University of Northumbria in England in 1990. Mona was admitted as a Solicitor of the *Supreme Court of England & Wales* in 1993, and was admitted to the *New York Bar* and the *United States Federal Bar* in 1997.

Yi Song, Esq.



Yi Song, Esq. is an attorney at Mona Shah & Associates in New York City. She is also licensed to practice law in People's Republic of China and practiced corporate and tax law. Born and Raised in Beijing, Yi has the first hand experiences with Chinese market and culture. Before joining Mona Shah & Associates, she worked at a securities litigation firm in Manhattan. She clerked at China's high court – the Supreme Court of People's Republic of China. At Mona Shah & Associates, Yi practices EB-5 law and securities law and works on many successful EB-5 capital raising projects. She obtained her LL.B. degree from Beijing Foreign Studies University and she is a graduate from Georgetown University Law Center in Washington, DC. Her articles on EB-5 and securities law are published by LexisNexis, AILA, eb5info.com, ILW. Yi is a native speaker of mandarin Chinese. She speaks fluent English and basic French.