



EB-5 GREEN CARD, ETHICS AND TRUMP

Posted on May 22, 2017 by Cyrus Mehta

The EB-5 green card program for foreign investors is very much in the news due to its connection with President Trump!

A [series of news reports](#) have highlighted the Kushner family's attempt to raise funds through the EB-5 green card program from Chinese investors by suggesting Trump's connection to one of its real estate projects through his son in law, Jared Kushner. [Qiaowai](#) is a Chinese agency that acts as an intermediary between Chinese EB-5 investors and EB-5 projects, including the Kushner EB-5 project called One Journal Square in Jersey City. Qiaowai has touted this project's close links to President Trump. When Qiaowai did a road show in China recently, Nicole Kushner Meyer, Jared Kushner's sister, was promoted as the event's "heavyweight honored guest". According to the New York Times, [Ms. Meyer told prospective investors](#) that the Journal Square development project "means a lot to me and my entire family," and that her brother served as chief executive of Kushner Companies before leaving the company to work for the president. Qiaowai's founder, Ding Ying, has boasted about being close to Trump. Its website stated, "The fact that Ms. Ding has once again been invited to attend a presidential inauguration shows that the U.S. Congress values and approves of the Qiaowai group." The US Immigration Fund, is the Regional Center promoting this project in the United States.

This close connection between an EB-5 project, the foreign migration agency, the Regional Center and Trump has resulted in a barrage of criticism as it once again brings up the specter of conflicts of interest. There has already been widespread concern about Trump's [businesses violating the Emolument Clause of the Constitution](#). At the same time, there has been scant commentary on the dilemma that such conflicts involving Trump and his family members pose for the immigration lawyer who represent EB-5 investors. Must the immigration lawyer, when providing a list of viable EB-5 projects that have resulted in green

cards for the investor, now also recommend projects of the Kushner family because of their close proximity to President Trump? While an immigration lawyer should not be acting as an investment advisor, unless licensed, an immigration lawyer may still conduct "[immigration due diligence](#)" on behalf of the client. The immigration due diligence assesses the viability of the project, not with regard to whether it will deliver a rate of return, but from the perspective of whether the investor has a reasonable chance of getting the green card. Such diligence includes evaluating the past I-526 approvals through the project and whether the project will create the requisite 10 indirect jobs per investor to satisfy the EB-5 statutory requirement. It also includes whether the project is in a targeted area that qualifies for the \$500,000 investment, whether the investment capital is at risk, the investor's place in the queue regarding job allocations and a host of other considerations that are unrelated to investment advice. Conducting such immigration diligence is part of the immigration attorney's ethical obligation to be competent under ABA Model Rule 1.1, which provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation

The immigration lawyer must also consider other ethical rules, besides the duty of competence, when representing EB-5 investors:

Rule 1.2 addresses the scope of representation and the allocation of decision-making authority. According to this allocation, the client establishes the objectives, and the lawyer controls the means to pursue them.

Rule 1.4 on communication overlaps with 1.2: "A lawyer shall explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the representation."

Rule 1.0 defines informed consent: "The agreement by a person to the proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

Rule 1.3 on diligence emphasizes the lawyer's commitment to the client. "A lawyer shall act with reasonable diligence and promptness in representing a client." The first comment to Rule 1.3 expands on this statement. "A lawyer

must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."

As part of the lawyer's competent representation and other ethical considerations on behalf of a prospective EB-5 investor client, must the ethical lawyer factor into consideration the EB-5 project run by the Kushner company due to its close relationship to President Trump? This is especially true when an intermediary such as a foreign migration agency in China has enticed the client to invest in a project that is close to the president. The lawyer may need to consider whether there is a likelihood of such an EB-5 project being treated more favorably, for example, by receiving less scrutiny with respect to its job creation plan, thus increasing the chances of a green card for the client? Hopefully, the answer should be "No," but in the age of Trump, expectations have been defied and turned upside down many times over. In the not too distant past, then USCIS Director Mayorkas [was investigated for appearing to show favoritism for EB-5 projects](#) that had connections to Hillary Clinton's brother and Senator Reid. Although Director Mayorkas did not face any sanction at the conclusion of the investigation, in an ideal world, an EB-5 project's connection to Trump or his family ought not to matter. Both the financial advisor and immigration attorney should independently evaluate the project without regard to any political connections. By the same token, even the USCIS should independently evaluate the project, without regard to whether it is connected to a close family member of the president. It is also worth noting that the success or failure of an EB-5 application depends, not so much on the project, but on whether the investor can demonstrate the source of funds. In other words, is the investor able to demonstrate he or she was the owner of the funds from the very beginning? If the investor cannot demonstrate that he owned the funds, as opposed to an uncle depositing the money in the investor's bank account, the EB-5 application will fail regardless of the strength of the EB-5 project. Therefore, the immigration lawyer can ethically advise that the success or failure of an investor's EB-5 application may have nothing to do with how connected it is to the president.

Still, Flaubert said, "There is no truth. There is only perception." If an investor hears that someone who invested in an EB-5 project connected to the Trump name got approved before she did in another EB-5 project, there will always be this lingering doubt in the mind of that investor. While Trump and his family members may yet be unaffected by their conflicts of interest, immigration

attorneys have been left scratching their heads when representing EB-5 investors whether to ask clients to consider EB-5 projects close to Trump. Of course, while we are all witnessing a breathtaking compromise of ethics at the presidential level, it still behooves a lawyer to comply with the ethical rules when representing EB-5 investor clients. It is quite often the case that a foreign migration agent in China, such as Qiaowai, will hire the immigration lawyer to prepare and file EB-5 applications on behalf of its clients. Foreign migration agents play a crucial role in assisting the investor in assembling the documentation to demonstrate lawful source of funds, assisting in communications and translations and monitoring the statuses of all processes and filings of the investor. Still, as [New York State Bar Ethics Opinion 1116](#) recently stated, it is imperative that the lawyer maintain her independence from the migration agent and that the lawyer's judgment not be compromised. Therefore, if the migration agent has steered the investor into an EB-5 project with a close connection to Trump, it is incumbent on the lawyer to still maintain professional independence and to ensure that the lawyer's judgment has not been compromised. The lawyer may wish to advise the client that the foreign migration agencies' claims may be mere puffery. If the lawyer accepts referrals from a foreign migration agent knowing that the investment selected by the agent will not be in the client's best interest, the lawyer may be conflicted and must get informed consent from the EB-5 client under Rule 1.7(b). The client must acknowledge that the lawyer has a relationship with a foreign migration agent who may be steering the client to a project that may ultimately not be in the client's best interest. Under no circumstances may a lawyer pay a referral fee to the foreign migration agent. If the foreign migration agent insists that the referral fee is for payment for expenses for services it provides, those services and expenses have to be identified and disclosed to the EB-5 investor client and should not cost more than services that could be found elsewhere.

Trump can remain in office for four years, and if he wins reelection, for a maximum of eight years, unless he is impeached before that! While Trump and his family members may disregard conflicts of interest and the truth, a lawyer cannot and should not follow suit. The lawyer must stay within the ethical rules - which includes not lying, not being compromised by conflicts and being competent - in order to outlast Trump by many decades.