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## Legal Update For Investors Seeking U.S. Permanent Residency

By Na Lan

**S**ince 1990, the EB-5 immigrant visa path has been available to foreigners who invest the required capital in a for-profit business and create at least ten full-time job positions in the United States to obtain lawful permanent residency. Even passive investors, who do not want to be entrepreneurs actively engaging in daily business management, can utilize the Immigrant Investor Pilot Program, aka the Regional Center Program, to qualify for the EB-5 investment-based green cards. The Regional Center Program usually involves pooled investments from multiple EB-5 investors and allows using project-based indirect and induced job creation estimated by economic models to meet statutory requirements. Unlike the permanent direct investment-based EB-5, the Regional Center Program is subject to sunset.



The vast majority of EB-5 investors opted for the Regional Center path, but many unwary investors became victims of fraud and abuse in the EB-5 Regional Center investment projects, given the complicated deal structures involving holding companies, often with hidden conflicts of interest, and lack of broker-dealer securities supervision.

On March 15, 2022, the EB-5 Reform and Integrity Act of 2022 was signed into law, which not only reauthorized the expired EB-5 Regional Center Program through September 30, 2027, but also made numerous amendments intended to curb fraud and promote and reform foreign capital investment and job creation.

The current standard EB-5 minimum investment amount is \$1,050,000. This means that the present fair market value, in U.S. dollars, of the immigrant investor's lawfully derived capital, invested or actively in the process of being invested at risk, in a commercial enterprise must be at least \$1,050,000. The minimum investment amount is reduced to \$800,000, if the immigrant investor invests in a new commercial enterprise that is principally doing business in and creates jobs in a

*Continued on page 2*



Targeted Employment Area (“TEA”) or in a Regional Center-associated infrastructure project. The required capital must remain invested for not less than two years. A TEA is a rural area or a high unemployment area as designated by USCIS.

The EB-5 program allows investors and their spouses, and unmarried children under the age of 21 to file for U.S. permanent residency. The EB-5 investor files the initial immigration petition on either Form I-526 (for standalone investors who make direct investments) or Form I-526E (for Regional Center investors) along with supporting documentation with the USCIS. In the past, investors had to wait for USCIS to first approve their I-526 petitions before they can start consular processing to apply for an immigrant visa at a US embassy or consulate overseas, or seek for adjustment of status if they are in the United States. Upon approval of the immigrant visa or adjustment of status application, the investors and their family members will become conditional permanent residents. Within 90 days of the two-year anniversary of receiving the EB-5 visa, they must submit a Form I-829 petition to remove conditions on permanent resident status.

One major problem EB-5 investors faced was the long-delayed processing time of Form I-526. Even for investors with no immigrant visa backlog, the average processing time ranged from 31 to 58 months. For a Chinese investor, the waiting time could be 10 to 15 years due to the per-country caps on green cards. The new law brings some good news for people who cannot afford the waiting period.

Concurrent filing of the initial EB-5 petition and application for adjustment of status is now available to investors and their family members who are already legally in the U.S. and eligible for a visa number (i.e., having current priority dates in the Visa Bulletin). Though USCIS will not approve the adjustment of status until the underlying EB-5 petition is approved, if the investor and their family members timely file the adjustment of status applications, they can remain in the U.S. after the non-immigrant visa expiration. Moreover, they can apply for the work permit and advance travel document at the same time when they apply for the adjustment of status. This provision particularly benefits investors in the U.S. on non-immigrant visas, such as F-1, E-2, L-1, and H-1B.

EB-5 investors now also enjoy the same benefit as the other types of employment-based immigrants under INA Section 245(k), i.e., forgiveness of up to 180 days of status violation when they apply for adjustment. For investors with derivative children, under the Child Status Protection Act, they may also file for adjustment of status according to the Final Action Date in the Visa Bulletin to freeze the age of the children who may otherwise age out by turning 21 while awaiting for immigration case approval.

Under the new law, each fiscal year USCIS reserves 20% of EB-5 visas for investors who put their money into rural areas, 10% for investing in projects in high-unemployment areas and 2% towards infrastructure projects. Such reserved visa privilege is only available for current EB-5 investors, so it creates a clean new slate and protects them from the old cloud of visa backlog. If a Chinese investor invests in a TEA project, there is no visa backlog right now in the Visa Bulletin. Instead of indefinite waiting in the queue, this investor, if physically and legally in the U.S., can now utilize concurrent filing to adjust status when filing the initial EB-5 petition. Eventually, new investors may use up these set-asides, and create backlog. However, for the time being, because these rules are new, the reserved visas are available on a first-come, first-served basis.

Further, USCIS will prioritize the processing and adjudication of petitions for rural area investments. In the TEA determination, a “rural area” is designated by the Office of Management and Budget based on the most recent decennial census of the United States; whereas, USCIS makes the final determination on whether an area qualifies for the high-unemployment designation and whether the investment is in a qualifying infrastructure project. So it is anticipated that rural Regional Center projects will be more attractive, especially to EB-5 investors from China and India, countries with visa backlog.

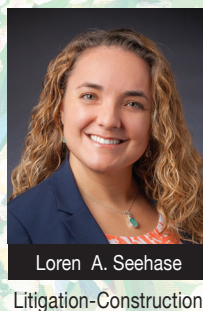
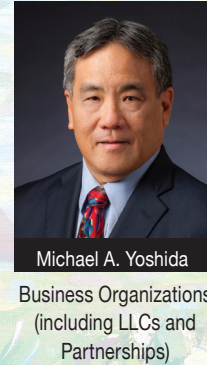
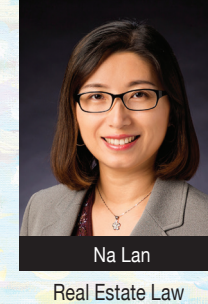
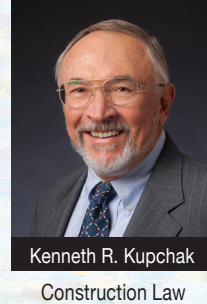
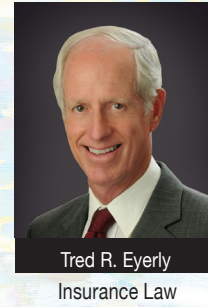
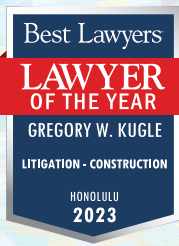
Finally, USCIS is still in the process of gradually releasing new guidance, policies and forms interpreting and implementing the new law. Legal due diligence before making investments remains critical for investors as we enter into this new era of EB-5.

**For more information or questions regarding this article,  
please call Na at (808) 531-8031, email her at [nl@hawaiiilawyer.com](mailto:nl@hawaiiilawyer.com)  
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# Attorney Christopher H. Pang Brings Banking Experience and Impressive Language Skills to the Firm

In 2009, Christopher H. Pang earned a B.A. with a double major in Chinese and Finance, *cum laude*, from Georgetown University. With his finance degree in hand, Christopher went on to hold various banking positions over a seven-year period, first working as a Credit Analyst and Commercial Loan Underwriter at Hawaii National Bank and later as a Corporate Banking Associate at First Hawaiian Bank (FHB). While at FHB, he assisted in reviewing legal documents including credit agreements, guaranties, and other loan documents. It was these very experiences in the field of banking that ultimately led Christopher to pursue a legal career. Today, he is one of Damon Key's newest Associates, practicing in the firm's Business & Commercial Law, Real Estate, and Condominium & Community Association Law practice groups.

"I have always had some interest in the law, but my interest deepened through working in corporate banking and reviewing complex loan documents for syndicated loans, which are of high dollar amount and involve multiple lenders," said Christopher. "Reviewing those documents led me to realize that I wanted to be on the legal side of business transactions and help businesses as an attorney, rather than as a lender."

Christopher earned his law degree, *cum laude*, from the University of Hawaii at Manoa, William S. Richardson School of Law. While in law school, he received the CALI Excellence for the Future Award (highest grade in the class) for numerous courses. He served as Staff Editor and Managing Editor of the Asian-Pacific Law and Policy Journal and co-authored Anatomy of the Aloha State Earned Income Tax Credit, Tax Notes State, Feb. 22, 2021, at 829, with Francine J. Lipman. Christopher was a Summer Associate at Damon Key, where he performed research and analysis for various transactional and litigation matters.

Also prior to joining the firm, Christopher was a Judicial Extern to Associate Justice Sabrina S. McKenna of the Supreme Court of Hawaii and a Judicial Extern to the Honorable James H. Ashford of the First Circuit Court of the State of Hawaii. During this time, he was strongly impacted and motivated upon hearing from Judge Ashford and Justice McKenna that his research and memoranda helped them to decide cases.

In addition to holding his J.D. degree and B.A. double major, Christopher holds a Master of Arts in East Asian Languages and Cultures (Chinese Literature) from Columbia University. Christopher's impressive language skills include a working proficiency in Mandarin Chinese, with the ability to speak, read, and write, as well as varying degrees of proficiency in German, Classical Chinese, Latin, and Ancient Greek.

Christopher was born and raised in Honolulu and attended Iolani School from grades seven through nine. He then moved with his family to the San Francisco Bay Area and graduated from Monte Vista High School in Danville, California. A diligent, analytical and motivated individual and practitioner, Christopher is interested in the Chinese American/Asian American business community, improving neighborhoods, and combating poverty. He also enjoys weightlifting, jogging, and swimming.





# Crooked Trustees: Bankruptcy May Not be a Safe Harbor for Those Who Misuse Trust Funds

By Jonathan Niichi Marchuk



Setting up a trust can be an effective way to manage assets. It allows the settlor, the person setting up and funding the trust, to control how their assets will be managed, who will receive income generated from the assets, and who will ultimately end up with them. It may also be advantageous for tax purposes and prevent a lengthy probate process after the settlor's death. Trusts require the settlor to choose a trustee, the person who will be in charge of managing the property for the benefit of the beneficiaries pursuant to the terms of the trust. Trustees have a fiduciary duty to act in the best interest of the beneficiaries. As such, when a trustee violates the terms of the trust, the beneficiaries may have legal recourse against the trustee. This frequently occurs when a trustee misuses trust funds to enrich themselves or another party.

A lawsuit may be able to restore misused trust property if the trustee will not do so themselves. Usually, a court will order a "surcharge," which directs the trustee to restore the property, but what happens if the trustee files for bankruptcy in an effort to avoid the surcharge? Is the order useless? Not necessarily. The bankruptcy court may find the misused trust funds to be a non-dischargeable debt, one that survives bankruptcy and can still be collected.

## Trustees have a fiduciary duty to act in the best interest of the beneficiaries.

The Federal Bankruptcy Code lists many types of non-dischargeable debts. Specifically, Section 523(a)(4) includes debts incurred through "fraud or defalcation while acting in a fiduciary capacity. . . ." Since trustees act in a fiduciary capacity for the beneficiaries, the relevant question in these cases is whether there has been "fraud or defalcation" by the trustee.

Section 523(a)(4) requires actual fraud, meaning fraud involving an intentional wrong. In this case, the trustee must have made a false representation that they knew was false (or lacked knowledge of the representation's truth or falsity) in order to induce the beneficiaries' reliance. The beneficiaries must have actually relied and suffered some damage, i.e. a depletion of the trust funds or some other harm. Proving that the trustee intended to induce the beneficiaries' reliance may be difficult. As such, proving defalcation may be a viable alternative.

Defalcation means that the fiduciary, in this case the trustee, violated their fiduciary duties. In *Bullock v. BankChampaign, N.A.*, 569 U.S. 267 (2013), the United States Supreme Court held that the term "defalcation" includes a culpable mental state of the wrongdoer. Specifically, the Court ruled that the fiduciary must either know that their conduct was improper or act in a way that is grossly reckless with regards to their fiduciary duties.

Where the trustee does not have actual knowledge that they are violating the terms of the trust or their fiduciary duties, the facts of the case will determine whether the conduct of the trustee is grossly reckless. Unintentional, small mistakes by the trustee will likely not be enough; however, if the improper conduct of the trustee is so blatant that it is a gross deviation of a law-abiding individual's conduct, then the court may find the debt non-dischargeable. For example, a trustee who misuses large amounts of trust property and/or conceals the misuse from the beneficiaries may meet this standard. So might a trustee who improperly drains a trust in spite of repeated protests by the beneficiaries. Therefore, beneficiaries should consider these, and other exceptions, before dropping the idea of legal action against a trustee who may file for bankruptcy. An exception may allow beneficiaries to recover misused trust property and may help hold a crooked trustee accountable.

**For more information or questions regarding this article,  
please call Jonathan at (808) 531-8031, email him at [jnm@hawaiilawyer.com](mailto:jnm@hawaiilawyer.com)  
or scan the code with your smart phone.**





# Non-Profit Background Serves as Foundation for Attorney David H. Abitbol

It's fair to say that attorney David H. Abitbol, one of Damon Key's newest Associates, knows the meaning of hard work. As an Evening Part-Time student at the University of Hawaii, William S. Richardson School of Law, David carefully balanced the demands of law school while working full-time at the Hawaii Health & Harm Reduction Center, where he served as the organization's Policy & Contracts Manager.

Despite his extraordinary workload, David earned his law degree, *cum laude*. Today, he practices in the firm's Litigation & Dispute Resolution, Land Use & Eminent Domain, Construction Law, and Appeals practice groups. He also serves as a faculty lecturer at the University of Hawaii at Manoa's Political Science Department, where he teaches Constitutional Law. While in law school, David received the CALI Excellence for the Future Award (highest grade in the class) for several courses. He was a member and manager of the Saul Lefkowitz Intellectual Property Moot Court Team and a Senator of the Student Bar Association. David was also a Summer Associate at Damon Key.

Before entering law school, David was with Waikiki Health, an organization committed to providing affordable, quality medical and social services. He first served as the HIV Program Quality Assistant, providing counseling and testing. He then worked his way up to HIV Medical Case Manager and then HIV Program Manager.

David holds a Bachelor of Arts in Political Science from the University of Hawaii at Manoa, where he graduated with High Honors. While taking a Political Science course on law and politics, David quickly realized how intellectually challenging and stimulating the law was, finding much gratification in studying, analyzing, and learning about it. Today, his greatest skill is his creativity and out-of-the-box approach to problem solving. "I love that this job gives me an opportunity to tackle complex legal issues, while working directly with clients. By taking a client-centered approach, I will always fight for the person behind the case and will always strive to serve their needs," said David.

David is a graduate of Damien Memorial School. He grew up in Waianae and spent his summers visiting his family in Israel, where he holds dual-citizenship. His unique upbringing exposed him to diverse cultural perspectives that continues to inform his world views today.

"I am Native Hawaiian, and growing up in a Native Hawaiian family I learned important values such as respect, responsibility, and the duty we share to care for our home in Hawaii. I believe embodying these values grounds me in my work as an attorney at Damon Key," said David. He is a lifelong supporter of University of Hawaii sports, as well as a fan of mixed martial arts. He also enjoys taking yearly trips to Lake Tahoe to go snowboarding. In his spare time, he enjoys cooking, going to the beach, and spending quality time with family and friends.





# Island Ties Draws Attorney Jonathan Niichi Marchuk to Damon Key

**J**onathan Niichi Marchuk grew up in Chapel Hill, North Carolina, but spent many of his childhood summers visiting extended family in Hawaii. His mother, who was born and raised in Kaneohe, provided a strong connection to the islands. What was once a summer connection has now evolved into full residency as Jonathan launches his legal career here at Damon Key, where he is a new Associate practicing in the firm's Insurance; Land Use & Eminent Domain; and Wills, Trusts & Estates practice groups.

Jonathan earned his law degree from William & Mary Law School in Williamsburg, Virginia. While in law school, he received the CALI Excellence for the Future Award (highest grade in the class) in Human Resource Management for In-House Counsel. He was a member of the Phi Delta Phi Legal Honor Society and served as Class Representative with the Asian Pacific American Law Student Association. He was a member of the William & Mary Bill of Rights Journal. As a second-year law student, his Student Note, Not So Objective Indicia: Why Ballot Referenda and Public Polling Would be a More Concrete Standard for Eighth Amendment Objective Indicia Analysis, 30 WM. & MARY BILL OF RTS. J. (Fall 2022) was selected for publication.

Jonathan served as a clinic student with the Lewis B. Puller, Jr. Veterans Benefits Clinic in Williamsburg. He represented veterans seeking benefits from the Department of Veterans Affairs for service-related injuries and researched veterans' benefits law to draft petitions and letters on behalf of clients. Serving at the Clinic was a gratifying experience for Jonathan. "The veterans were suffering from conditions they developed due to their service, and many of them were severely disabled. They were always so grateful for our help and it was really fulfilling to make a difference for people who truly deserved it," said Jonathan.

Jonathan earned a Bachelor of Arts, *cum laude*, from Davidson College in Davidson, North Carolina, graduating with Honors in Philosophy. While there, he served as the Co-Editor-in-Chief of The Davidsonian, the student newspaper.

During a time when Jonathan briefly considered going into medicine, he worked as a Medical Scribe at the University of North Carolina Physician's Network. He became involved in a pilot program that treated obesity patients in a primary care setting. "When patients came to the clinic, they would talk about their lives and their problems. Some of our patients had legal concerns that needed addressing just like their medical ones. I had a great experience as a medical scribe, but my strengths being in research and writing helped me realize that I would be better suited to help people as an attorney," said Jonathan.

In his spare time, Jonathan enjoys watching every genre of movie, but has a penchant for psychological thrillers. He is a big ice hockey fan, going to the Carolina Hurricanes games with his brother and father since he was very little. In addition to working to serve the firm's clients, Jonathan hopes to one day continue pro bono work in veteran's benefits.





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### Attorneys in the News



**Jonathan N. Marchuk, David H. Abitbol and Christopher H. Pang** sworn in as Damon Key's newest attorneys.



**Christine A. Kubota** was at the Kahala Hotel & Resort for the Weinberg Foundation 2022 Employee Giving Program. Christine was representing Kristi Yamaguchi's Always Dream with fellow board member Louise Ing. Mr. Sid Tsutsui, Comptroller of the Weinberg Foundation, presented Christine and Louise with the award.

Christine along with other Japanese American community leaders (not pictured), went to thank the former Governor and First Lady of Hawaii for their efforts to better U.S.-Japan relations.

