

The Latest Milestone In EB-5 Enforcement? Prison Time

By **Allissa Wickham**

Law360, New York (August 10, 2017, 9:18 PM EDT) -- Two people have been handed prison sentences this year in cases over EB-5 visa program fraud, and while it is still possible that more criminal matters could be brought, such cases have the added challenge of needing significant resources and an element of criminal intent, according to attorneys.

So far, 2017 is shaping up to be a notable year for EB-5 fraudsters getting jail time. First, a Chicago-area man who admitted to defrauding Chinese investors out of \$160 million through the federal government's EB-5 visa program was sentenced to **three years in prison** in February.

In that case, Anshoo Sethi pled guilty to one count of wire fraud in January 2016, admitting he falsified documents and lied to string along nearly 300 Chinese nationals who believed they would get a temporary visa to the U.S. through the EB-5 program in exchange for their support of a purported plan to build a convention center and hotel complex.

Several months after Sethi's sentencing, real estate developer **Lobsang Dargey** was sentenced to four years in prison on Aug. 4, having pled guilty earlier this year to charges of a wire fraud conspiracy and a "scheme to conceal information" from the U.S.

Prosecutors claimed Dargey had "fraudulently obtained" more than \$235 million from a commercial lender, an institutional investor and immigrant investors. Specifically, they said Dargey defrauded more than 280 foreign investors by "falsely promising them" permanent residency via the EB-5 program.

On top of the large amounts of money involved, the cases are significant for being criminal in nature, as much of the enforcement in the EB-5 world has been through civil cases with the U.S. Securities and Exchange Commission.

"[I]n general, criminal cases are much more difficult and resource-intensive endeavors to pursue," noted Douglas Hauer, an attorney with Mintz Levin Cohn Ferris Glovsky and Popeo PC. "So, the only instances where we'll see criminal actions is where there is clear evidence that an individual engaged in criminal conduct — and that means that the individual had a guilty mind, or the 'mens rea,' to actually commit a wrongful act."

Simply put, prosecutors may not have perceived an element of criminal intent in some of these cases, according to Bill Mateja of Polsinelli PC, who previously worked as a prosecutor at the U.S. Department of Justice.

"It does seem to me, though, that there are cases that the SEC has pursued, where a U.S. attorney's office may have deemed that there wasn't criminal intent," Mateja said. "It's one thing to engage in civil securities fraud, another to engage in criminal securities fraud."

Still, those with their eyes on the EB-5 industry aren't ruling out future criminal cases. Ronnie Fieldstone, an attorney with Arnstein & Lehr, predicted that there could be some other cases "of a more minor nature," and that it's possible we still might see criminal charges related to the EB-5 case over the Jay Peak ski resort.

"I hate to say, [but] the jury's out on that case," he said.

Mark Abueg, a spokesman with the DOJ, declined to comment when asked if there were any plans for charges to be filed in relation to the Jay Peak EB-5 situation.

In some ways, the criminal and SEC actions may also help to reassure investors that fraud in the EB-5 industry is being addressed. Peter Joseph, the executive director of IIUSA, an EB-5 trade group, argued that the justice process coming to an end on some of the bigger cases has instilled an "important aspect of confidence in the marketplace." He also noted that his organization is keeping an eye out for any future criminal developments.

"I do assume that some of the SEC actions that have already been taken in the last few years, that are separate from these two cases, could potentially get to the criminal side of the equation," he said. "My understanding [is] that that's generally the order of things, and so what we're keeping a close eye on that as well."

Meanwhile, federal prosecutors in New York **have subpoenaed** Kushner Cos., the real estate development company owned by the family of White House Senior Adviser Jared Kushner, over its dealings with the EB-5 visa program, according to published reports, adding another level of intrigue to discussions surrounding the program.

On top of all this, the EB-5 regional center program is up for reauthorization at the end of September. But with Congress tasked with passing budget legislation and potentially tackling tax issues this fall, it remains to be seen whether any legislative reforms to the EB-5 program will materialize before the reauthorization deadline hits.

--Additional reporting by Kevin Penton. Editing by Pamela Wilkinson and Catherine Sum.