

A Cumulative Analysis of What USCIS Looks For in EB-5 I-829 RFEs and Denials

By Sonia Sujanani, Stephen Yale-Loehr, & Robert C. Divine¹

Introduction

In two previous articles, published in 2012² and 2013,³ we analyzed and interpreted 2,486 pages of I-829 EB-5 requests for evidence (RFEs) and denial notices released by U.S. Citizenship and Immigration Services (USCIS) in response to two separate Freedom of Information Act (FOIA) requests filed by Invest In the USA (IIUSA), the trade association of EB-5 immigrant investor regional centers. The I-829 responses in these two requests ranged from 2008 to 2011. In 2013 IIUSA received an additional 247 pages of I-829 responses ranging from 2009 to 2013, with the bulk of responses from 2012.

This article expands on our two previous articles by analyzing a number of recent EB-5 I-829 petitions from 2012 and 2013. The current article expands on the previous 469 cases⁴ by adding an additional forty petitions and including previously unreported Notices of Intent to Deny (NOIDs). The third of its kind, the article cumulatively analyzes all three FOIA requests, which total 2,733 pages and 509 I-829 petitions.

This series of three articles analyzes real USCIS responses to I-829 petitions. The materials released in response to the three FOIA requests are instrumental in understanding how USCIS applies EB-5 law to specific factual situations in the I-829 context. As such, this series of articles aims to inform practitioners and potential immigrant investors of trends in USCIS adjudications and how those trends have developed.

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² Stephen Yale-Loehr, Robert C. Divine & Sonia Sujanani, *EB-5 I-829 RFEs: What Does USCIS Look For?*, 17 *Bender's Immigr. Bull.* 1207 (June 1, 2012).

³ Sonia Sujanani, Stephen Yale-Loehr, Robert C. Divine, *EB-5 I-829 RFEs and Denials: A New Analysis of What USCIS Looks For*, 18 *Bender's Immigr. Bull.* 795 (July 1, 2013).

⁴ *Id.* at 795.

EB-5 Overview

The EB-5 visa program has existed for over two decades. Congress enacted the EB-5 program in 1990.⁵ At the time, the program granted lawful permanent resident status to immigrant investors who directly invested in and managed job-creating commercial enterprises. Since 1992, with enactment of the Immigrant Investor Pilot Program, potential immigrant investors could also invest through EB-5 regional centers.⁶ Last year, in 2012, Congress reauthorized the regional center program through September 30, 2015.⁷ Today, there are nearly 400 approved EB-5 Regional Centers.⁸ Comparatively, there were only twenty-five EB-5 regional centers in 2006.⁹ The EB-5 program is growing in multiple ways: geographically, investor interest is now coming “from all corners of the globe,” EB-5 filings have increased year over year for the past three years, and in FY 2012, the U.S. government issued over 7,400 EB-5 visas.¹⁰

As background, a potential EB-5 recipient must first file an I-526 petition for classification in the EB-5 category. Upon USCIS’s approval, the investor becomes a conditional resident for two years.¹¹ Potential EB-5 recipients must undergo a procedure to remove conditions at the end of this two-year conditional period. The procedure is analogous to that followed by people who obtain conditional residence through marriage to a U.S. citizen or lawful permanent resident.¹² The petition to remove conditions is filed on form I-829 and submitted to USCIS’s California Service Center.¹³ This petition must be accompanied by evidence that the applicant has fulfilled all requirements of the EB-5 program, including that the applicant has invested the required capital and that the investment created or will create ten full-time jobs for U.S. workers. The applicant may prove that the jobs were created by including payroll records, relevant tax documentation, and Forms I-9.¹⁴ The I-829 form must also prove that the applicant has “substantially met” the capital investment requirement and has continuously maintained his or her investment during the conditional two-year period.¹⁵

⁵ Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

⁶ Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, § 610, 106 Stat. 1828, 1874; S. Rep. No. 102-918 (1992).

⁷ Pub. L. No. 112-76, § 1, 126 Stat. 1325 (2012) (also removing the word “pilot” from the program name).

⁸ A list of all approved EB-5 regional centers is on the USCIS web site at <http://www.uscis.gov/eb-5centers>.

⁹ Citizenship and Immigration Services Ombudsman Executive Summary: EB-5 Immigrant Investor Program Stakeholder Meeting (Mar. 5, 2013) [hereinafter March 2013 EB-5 Stakeholders Meeting], http://www.dhs.gov/sites/default/files/publications/cisomb-EB-5-meeting-summary_0.pdf.

¹⁰ *Id.*

¹¹ INA § 216A, 8 U.S.C. § 1186b; 8 C.F.R. § 216.6. *See generally* Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ron Wada, *Immigration Law and Procedure* § 39.07 (2013).

¹² INA § 216, 8 U.S.C. § 1186a.

¹³ 8 C.F.R. §§ 216.6, 1216.6; *see also* 74 Fed. Reg. 912 (Jan. 9, 2009).

¹⁴ 8 C.F.R. §§ 216.6(a)(4)(iv), 1216.6(a)(4)(iv).

¹⁵ 8 C.F.R. §§ 216.6(a)(4), 1216.6(a)(4).

In May 2013, USCIS issued an EB-5 Adjudications Memorandum clarifying the goals of the EB-5 program.¹⁶ The EB-5 program has three essential elements: “(1) (t)he immigrant’s investment of capital, (2) in a new commercial enterprise, (3) that creates jobs.”¹⁷ Each of the requirements for removal of conditions is tied to these three elements.

Methodology

We reviewed the I-829 RFEs, denials, and NOIDs released by USCIS to IIUSA in 2013 (the third FOIA response). This FOIA response did not include investors’ responses to the RFEs or any motions to reopen following I-829 denials. Therefore we do not know the ultimate outcome of the cases.

If USCIS denies an I-829, there is normally no appeal to the agency’s Administrative Appeals Office (AAO) unless USCIS itself certifies the case to the AAO. After an I-829 denial USCIS terminates an EB-5 investor’s status and issues a notice to appear before an immigration judge in removal proceedings.¹⁸ If an immigration judge rules against the investor, the investor can appeal to the Board of Immigration Appeals and then to federal court. We are not aware of any BIA decisions concerning EB-5 investors.

We classified the I-829 materials by issue type focusing on the same six issues as our previous two articles: (1) job creation; (2) sustaining the investment, (3) redemption; (4) pooled trust, (5) business plan; and (6) material change. As in previous articles there were also some miscellaneous issues. In addition, some responses were so heavily redacted that it was impossible to identify any issue. These responses were classified as “No Issue.”

We aggregated the forty case responses from the third FOIA request responses and coded them into an Excel document called “EB-5 USCIS I-829 Issue Trend.xlsx.” We preserved the 469 case responses from the first and second FOIA request (167 and 302 responses, respectively) and incorporated them into this Excel document as well. Finally, we aggregated the data from the three requests to show trends over time. We used pivot-tables and pivot-charts to map the trends, some of which are reproduced below.

Results and Analysis

Third FOIA Response

USCIS I-820 RFEs, NOIDs, and denials in the latest FOIA response typically identified one or more of the following issues, in order of prevalence: job creation, sustaining the investment, redemption, miscellaneous, material change, and business plan.¹⁹ There were no pooled trust issues in the latest FOIA response. However, the latest FOIA response totaled 247 pages and contained only forty cases. As the response only contains a small sample of USCIS

¹⁶ See generally USCIS, Policy Memorandum No. PM-602-0083, *EB-5 Adjudications Policy* (May 30, 2013) [hereinafter EB-5 Adjudications Policy Memo], [http://www.uscis.gov/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20\(Approved%20as%20final%205-30-13\).pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20(Approved%20as%20final%205-30-13).pdf).

¹⁷ *Id.* at 2.

¹⁸ 8 C.F.R. §§ 216.6(d)(2), 1216.6(d)(2).

¹⁹ See *infra* Chart 1.

responses, it is more likely that the lack of pooled trust responses is due to randomness rather than a conscious USCIS trend. On the other hand, given the results of our two previous articles, it is more likely that the high prevalence of job creation mirrors a USCIS trend. This is unsurprising given the goals of the EB-5 program discussed above.²⁰

In total, job creation issues comprised 45% of the cases analyzed in the third FOIA response. Sustaining the investment arose in 20% of cases. Redemption issues arose 17.5% of the time. Miscellaneous issues accounted for 15% of cases. All other issues arose less than 10% of the time.²¹

Some cases contained multiple issues. Job creation issues typically arose where there was a problem with the I-9 forms or other employment verification evidence was missing. In particular, I-9 forms came late,²² were not completed properly,²³ the Alien Registration Numbers did not belong to the relevant employees²⁴ or did not match USCIS records,²⁵ or I-551 cards were fraudulent.²⁶ In all cases, fraud or feared fraud was the issue. This is unsurprising. In the words of USCIS Ombudsman Maria Odom, “[EB-5] (p)rogram integrity is critical, and the agency should use existing USCIS Fraud Detection and National Security resources to identify and take action as warranted.”²⁷

USCIS requests for evidence in I-829 petitions tend to request the following evidence to support the investor’s claim that he or she has maintained his or her investment in an ongoing business creating jobs:

- Federal income taxes, with all schedules and attachments, income statements and balance sheets with any financial statements provided (sometimes USCIS requires copies of returns signed by the company and certified by IRS or originally date stamped computer printouts from IRS), including all partners’ K-1 forms;
- Business licenses at city, county or state or federal level;
- Utility bills (usually “most recent” are requested);

²⁰ EB-5 Adjudications Policy Memo, *supra* note 16.

²¹ *See infra* Chart 2.

²² *See, e.g.*, Matter of [redacted], 2013 FOIA Response at 131-35 (Aug. 9, 2012) (one I-9 came a quarter late – did not fulfill two-year conditional period).

²³ *See, e.g.*, Matter of [redacted], 2013 FOIA Response at 21-27 (Aug. 10, 2012) (I-9s were not properly dated and signed).

²⁴ *See, e.g.*, Matter of [redacted], 2013 FOIA Response at 107-11 (Feb. 8, 2012) (A-numbers did not belong to people who claimed them).

²⁵ *See, e.g.*, Matter of [redacted], 2013 FOIA Response at 164-71 (Feb. 7, 2012) (A-numbers did not match USCIS records).

²⁶ *See, e.g.*, Matter of [redacted], 2013 FOIA Response at 235-39 (Jan. 24, 2012) (I-551 cards were fraudulent).

²⁷ March 2013 EB-5 Stakeholders Meeting, *supra* note 9.

- Sales tax returns;
- Seller's permit from the state board of equalization or the like, or evidence that one is not required for the enterprise;
- Major sales invoices that identify the gross sales amount reported on the income and expenses statement or on federal and state corporate income taxes;
- Lease documents, all the way up to the primary lease in the event of a sublease;
- Floor plan of the business premises showing the space occupied and used exclusively by the enterprise;
- Detailed accounts of the enterprise's expenditures reflecting dates, amounts, identity of payee, and reason for payment, such as bank statements, cash disbursement journals, details from relevant general ledger accounts, and other financial records;
- Bank statements, invoices and/or receipts, contracts, and current business license;
- Owned premises: escrow documents used to produce the property and evidence of title, available in the public records of the county recorder's office;
- Assets: some of the major assets that have been purchased for use in the project, including copies of invoices, sales receipts and purchase contracts containing sufficient information to identify such assets, their purchase cost, date of purchase, and purchasing entity;
- Photographs of the inside and outside of the project, showing any company logos, emblems, or signs displayed on or in the building; color photos should show both the inside and outside of all production, warehouse, office and other spaces with equipment, merchandise, products, and employees clearly visible. If space is shared, identify each other organization which is also using the space and identify who uses which space;
- Employment advertisements and documentation of hiring efforts;
- Bank statements showing amounts deposited in the enterprise's U.S. business accounts;
- Evidence of all property transferred from abroad for use in the enterprise, including U.S. Customs Service commercial entry documents, bills of lading, and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market valuation of such property;
- Evidence of monies transferred or committed to be transferred to the enterprise in exchange for shares of stock; and

- Evidence of borrowing secured by assets of the petitioner for which petitioner is personally and primarily liable.

To show direct job creation, USCIS typically requires the following:

- For U.S. citizens: birth certificates with photo identification, certificates of naturalization, or the biographical page of U.S. passports;
- For permanent residents, copy of valid permanent resident card, reentry permit, recent I-485 approval notice, valid audit (I-551) stamp on or opposite immigrant visit in passport along with passport bio/photo page;
- For asylees or refugees: biographical page and photo page of I-571 Refugee Travel Document. If not received yet, refugee or asylee cachet stamp placed in the individual passport at the time of entry into the U.S. along with passport bio/photo page;
- For a foreign national granted suspension of deportation: copy of immigration judge's decision to grant suspension of deportation (or, ostensibly, cancellation of removal);
- State quarterly wage reports;
- I-9 forms for each employee hired by the enterprise. Note that I-9s should be properly completed, signed and dated by the worker and the employer representative;
- IRS Forms 941;
- Federal tax returns;
- Federal forms W-2 or W-3 for each employee; and
- If available, E-Verify confirmation reports.

USCIS frequently states the following in I-829 RFEs about job creation:

USCIS understands that an employer is not expected to know without absolute certainty whether a document is genuine or not. However, with the filing of a petition before USCIS seeking benefits for aliens, the employer should follow appropriate guidelines in determining whether or not the evidence submitted for benefits meets the regulatory guidelines needed to be granted the benefit. In this instance, as noted above, the information provided with the filing of the instant petition does not meet EB-5 guidelines.

The creation of 10 full-time jobs for qualified employees is one of the criteria that need to be met. Employing individuals who are not qualifying employees and/or may have obtained their evidence through fraudulent means does not meet the criteria

established for the creation of 10 full-time jobs or qualified employees through investment. Thus, although it is not a requirement for an employer to verify the status of an employee it seeks to hire through E-Verify, if the employer wishes to seek an immigration benefit for an individual by filing a petition before USCIS, it is recommended that the employer determine that the evidence presented for employment and later with the filing of a petition before USCIS meets EB-5 guidelines.

USCIS appears routinely to check various databases in I-829 adjudications, including the following:

- State Secretary of State databases reflecting the status of registration of the enterprise. Sometimes parties fail to maintain these registrations, and USCIS has claimed that such failure results in failure of the petitioner to demonstrate that he has in good faith substantially met the capital investment requirement and maintained his capital investment when the new commercial enterprise is no longer authorized to conduct business in the state. Thus, investors should check state registration status before filing I-289.
- Google search for the enterprise's business. While such a website is not required, USCIS has mentioned the lack of credibility of the absence of an enterprise website when substantial marketing of the business's products or services is part of the plan.
- USCIS records concerning any permanent residence or other immigration status claimed concerning workers to be counted toward the ten full-time employee requirement.

Overcapitalization Cases

In one I-829 petition involving an enterprise established to perform freight management, transportation brokerage, and warehouse management, the investor produced various corporate formation documents and evidence of \$1,000,000 being placed into a corporate bank account, plus a lease agreement for a warehouse and office space and an industrial building shared by three parties jointly along with bank statements, financial statements, and business invoices. The adjudicator noticed that the "petitioner's business plan does not include a projection of the amount of capital required to get the proposed investment up and running." The evidence showed that the \$1,000,000 investment had never been spent at all, sitting in a bank account. The adjudicator concluded that the investment capital had never been at risk and the enterprise was unnecessarily capitalized. The intriguing aspect of this case that the business plan approved in the I-526 petition had not stated clearly the uses for the \$1,000,000. USCIS issued an RFE, and the outcome of the response is not known.²⁸

USCIS took a similar approach in an I-829 petition by an investor in a transportation company that claimed to have purchased six heavy-duty trucks costing \$560,000 with down payments of \$122,000. The staffing plan for the business did not include any freight delivery

²⁸ Matter of [redacted], 2013 FOIA Response at 145-54 (Apr. 12, 2012).

truck drivers. The officer concluded that the enterprise involved only the requisition of transportation from freight carriers to ship plant products for its clients. The officer found no evidence of actual expenditures, even on the down payment for the trucks. Finding that the investor never had infused the \$1,000,000 into the operation of the enterprise, USCIS denied the petition.²⁹

Tenant Occupancy Cases

Two RFEs issued in 2012 provide insight into USCIS adjudicators' approach to job creation in petitions involving the construction of commercial buildings and the resulting employees of tenants in the building. Starting in 2012, USCIS has started to challenge in I-526 petitions the practice of counting the jobs of tenants in commercial buildings in the absence of compelling evidence that the tenants would not be operating and employing those workers in the absence of that particular space. Nevertheless, many such I-526 petitions were approved before USCIS began raising this issue, and such investors will be filing I-829 petitions for some time. In adjudicating I-829 petitions, USCIS does not seem to be reneging on its past recognition of the tenant occupancy concept under which it approved the I-526, but it does require proof of the tenant occupancy and job levels.³⁰

In one case, the officer noted that the construction had been delayed by a few years and that only 3.7% of the space was leased, as opposed to the 85% projected in the I-526 business plan. The officer gave credit only for the indirect and induced jobs from the construction and for the direct jobs of the sole commercial tenant times the multiplier from the economic model. Apparently the investors had not made use of the regulation honoring any reasonable formula for allocation of job creation among pooled investors in an enterprise. In the absence of an agreed formula, the officer noted the number of investors whose I-829 petitions already had been approved and found that this number already accounted for more than the job creation with which the officer was crediting the enterprise to date. Thus, it appears that USCIS by default applies a "first to I-829 approval" formula for the allocation of jobs in an enterprise in the absence of an investor-agreed formula. Requesting more information, the officer required the investor to submit the most up-to-date list of all the building tenants' signed lease agreements for each tenant, and either an affidavit or "employer information form" from each tenant indicating the date they moved into the property, square footage occupied, type of business operated, number of current full time employees occupying the space, and business sectors of the tenant's operation employing the workers. The officer also required a detailed explanation and evidence regarding how the enterprise will create the number of jobs for all immigrant investors in the enterprise if the property is not 85% occupied by tenants as projected at the I-526 stage.³¹

Cumulative Analysis

Cumulatively, this series of article analyzed 509 USCIS responses from a five-year period ranging from 2008 to 2013. The bulk of responses were from 2009-2011, with thirteen responses from 2008, 122 from 2009, 125 from 2010, 204 from 2011, thirty-three from 2012, and six from 2013. Six responses were so heavily redacted that no date was available. The

²⁹ Matter of [redacted], 2013 FOIA Response at 157-63 (Aug. 28, 2012).

³⁰ See, e.g., Matter of [redacted], 2013 FOIA Response at 81-88 (Apr. 26, 2012).

³¹ Matter of [redacted], 2013 FOIA Response at 186-92 (Apr. 19, 2012).

trends, overall,³² in each year,³³ and the distribution of issues³⁴ remained similar to our previous two articles.

The most prevalent issue, as in our previous two articles, overall and in each year with the exception of 2013 was job creation. Overall, job creation issues arose in 211 out of 509 cases at a rate of 41.45%. In 2008, job creation accounted for 61.54% of responses, in 2009, 64.75%, in 2010, 37.6%, in 2011, 27.45%, and in 2012, 51.52%. As seen in Chart 4 below, although the percentage of job creation issues fluctuates from year to year, job creation has always been the most prevalent issue. Most job creation issues arose due to verification of employment eligibility and full-time/part-time job status. In particular, USCIS seriously reviews the forms I-9, Alien Registration Numbers, Birth Certificates, Passports, I-551 cards, and other documentation provided to support employment eligibility. It is in the best interests of practitioners and potential investors alike to keep accurate records and submit as much supportive evidence as possible to avoid an RFE. Similarly, USCIS routinely does a spot check of full-time/part-time status by calculating full-time wages (using the State minimum wage times the minimum number of hours a week to be full-time) and comparing these wages to the evidence.

The second most prevalent issue was sustaining the investment. Sustaining the investment issues often arose where the investment did not last the entire two-year conditional period, or insufficient evidence of investment was presented.³⁵

All other issues (miscellaneous, material change, business plan, redemption, pooled trust, and no issue) occurred at relatively similar rates. Given the very small differences between the rate of occurrence of these issues in the five-year period and 509 cases, it is statistically impossible to differentiate the relative importance of each of these issues.

Conclusion

In total, IIUSA's three FOIA requests resulted in the cataloguing of 509 USCIS I-829 RFEs, NOIDs, and denials. Although some years had smaller samples than others, certain trends have remained constant in the five-year cross-section these FOIA requests encompass. It is clear, for example, that job creation is the most prevalent issue in USCIS RFEs, denials, and NOIDs.

Given the goals of the EB-5 program, it is no surprise that USCIS views the job creation requirement seriously. Practitioners and potential investors alike should bear in mind USCIS's commitment to integrity and its searching review for fraud, particularly when verifying employment eligibility. Similarly, sustaining the investment has consistently appeared as the second most prevalent issue.

Nevertheless, current trends may differ from what we found in the data. Although this third FOIA contained cases adjudicated as recently as March, 2013, we have analyzed only six cases from 2013 and thirty-three from 2012. Given that over 7,400 EB-5 visas were issued in

³² See *infra* Chart 3.

³³ See *infra* Chart 4.

³⁴ See *infra* Chart 5.

³⁵ See, e.g., Matter of [redacted], 2013 FOIA request at 12-20 (Apr. 26, 2012) (wire transfer statements are insufficient to show investment).

2012 alone, our sample of 509 cases from five years continues to graze the surface of USCIS EB-5 I-829 adjudications, especially given the lack of follow-up responses to RFEs. However, the responses and this series of articles offer a glimpse at USCIS' EB-5 priorities in I-829 adjudications.

Tables and Charts

Chart 1

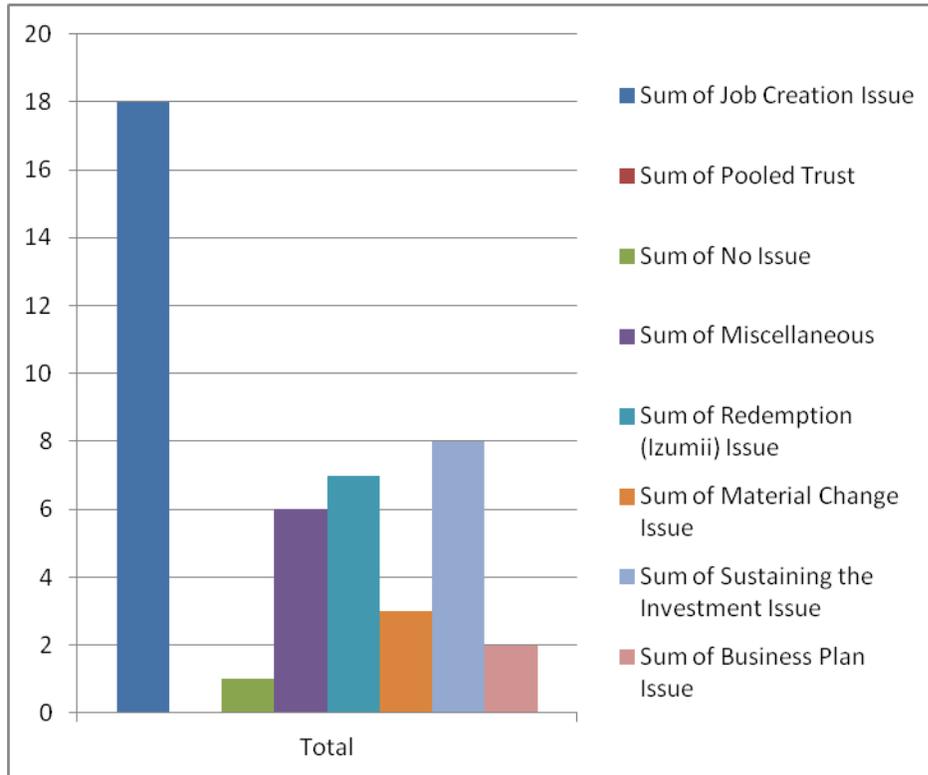


Chart 2

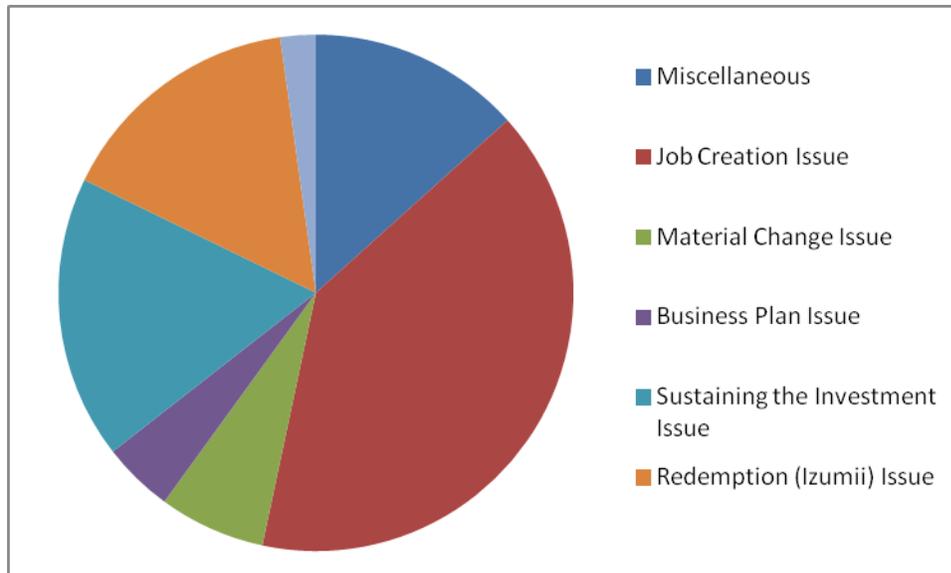


Chart 3

Cumulative Frequency of Issue

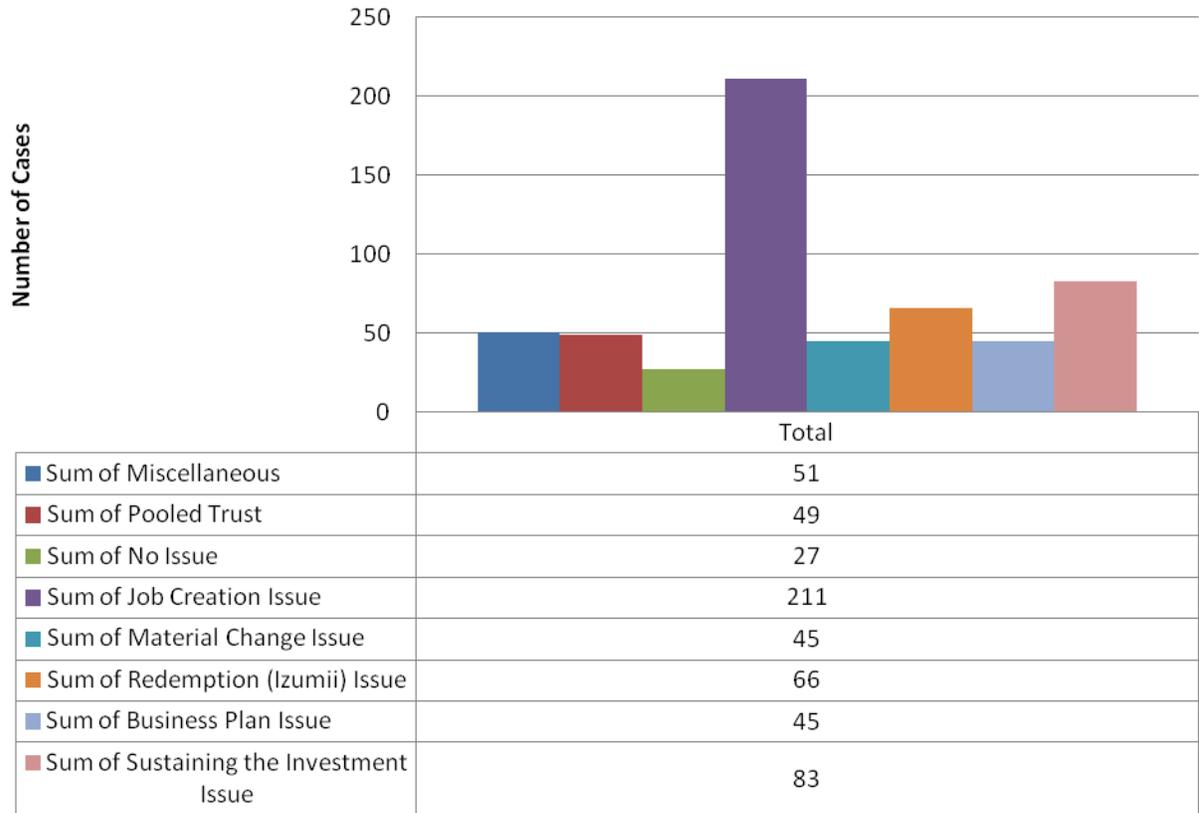


Chart 4

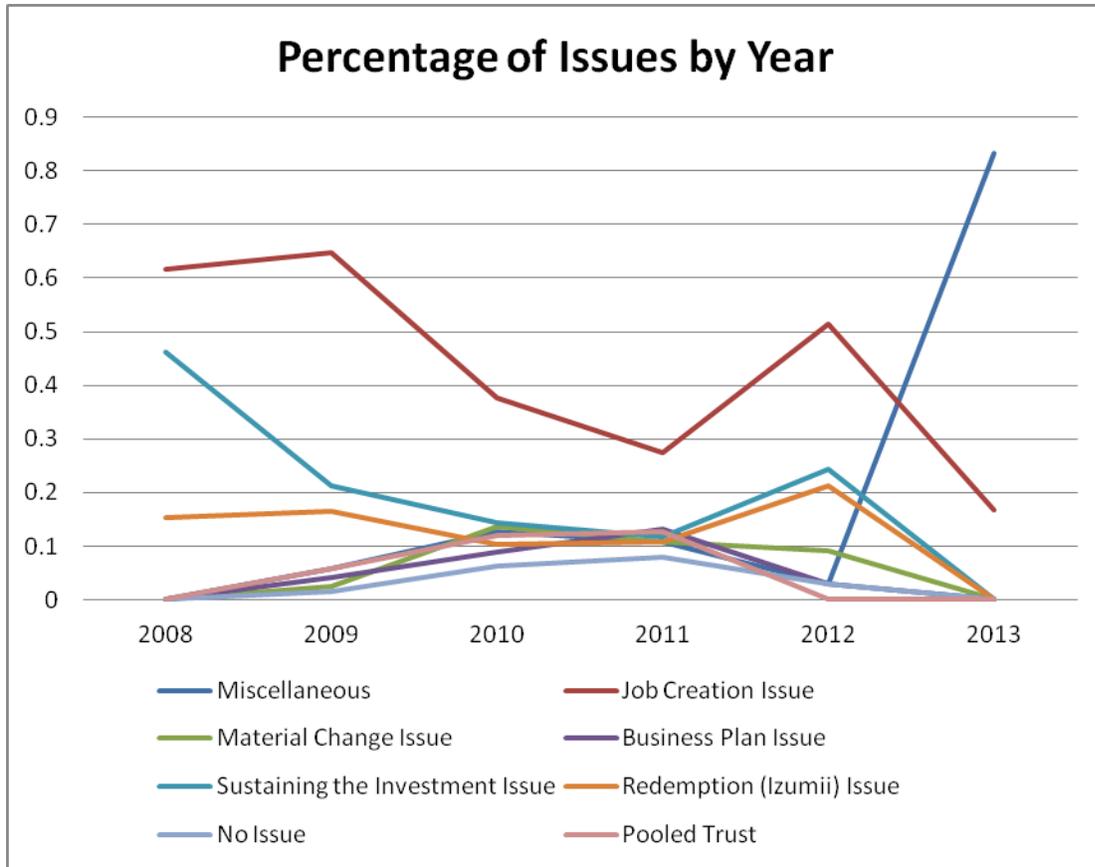


Chart 5

