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Francis A. Kwansa
University of Delaware

Xiangmei Yang
University of Delaware

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The Impact of the EB-5 Program in the Hospitality Industry

Now and the Future

Francis A. Kwansa and Xiangmei Yang
Department of Hospitality and Sport Business Management, University of Delaware, Newark, Delaware

ABSTRACT
The Employment-Based Fifth Preference program (EB-5) is one of five categories of employment-based visas that provide permanent residency to foreign nationals in the United States. In return, foreign nationals interested in the program are required to make investments of $1 million in businesses and create a minimum of ten jobs in the United States. Since its creation in 1990, the EB-5 program has had a significant economic impact in the United States through the infusion of external capital into the economy and through the creation of thousands of jobs. The hospitality industry has been one of the popular industries that have attracted a lot of EB-5 capital since 1990. Part of the attraction of the hospitality industry to investors is the labor-intensiveness of the industry, so EB-5 investors are able to meet the job creation requirement of the program easily. There have been recent changes to the program, however lack of congressional authorization of the program in 2021 is holding the changes and the fate of the EB-5 program in limbo. Notwithstanding the current challenges facing the program, the hotel and restaurant industries have benefited greatly from the financing provided by EB-5 investors.

Keywords: EB-5, regional centers, target employment area, Department of Homeland Security

Introduction

The U.S. EB-5 visa, employment-based fifth preference category (Lin, 2015) or EB-5 Immigrant Investor Visa Program, created in 1990 by the Immigration Act of 1990, provides a method for eligible Immigrant Investors to become lawful permanent residents—informally known as "green card" holders—by investing at least $1.0 million to finance a business in the United States that will employ at least ten American workers (Nixon, 2016). This is called the EB-5 direct program or Standard EB-5 program, and it is a permanent provision in the law and does not require reauthorization. Approved EB-5 investors and their families gain permanent residency in the United States and live and work anywhere in the country. Other EB-5 investors use regional centers to invest in a targeted employment area (TEA), which is a region of the United States for which the threshold for investment for an investor to be eligible for the EB-5 visa is $500,000 (as opposed to the usual $1.0 million threshold for the United States as a whole). Generally there are two kinds of TEAs: high unemployment areas (defined as areas having unemployment rate more than 150% of the national average calculated by the Bureau of Labor Statistics) and rural areas (defined as areas outside a Metropolitan Statistical Area).

EB-5 was passed by Congress in 1990 to create jobs for U.S. workers and to infuse new capital into the U.S. economy. In 1993 the Immigrant Investor Pilot Program ("Pilot Program") was created and was extended through September 30, 2012. EB-5 requirements for an investor under the Pilot Program were essentially the same as in the basic direct EB-5 investor program, except the Pilot Program provided for investments that are made through an economic unit known as a "regional center." These regional center investments allow for a less restrictive job creation requirement based upon the creation of "indirect" and "direct" jobs. Consequently, about 90% of EB-5 investments go through the regional centers and only 10% are direct investments. In 2003 Congress passed the Basic Pilot Program Extension

CONTACT: Address correspondence to Francis A. Kwansa, Department of Hospitality and Sport Business Management, University of Delaware, Newark, Delaware 19716, USA. Email: kwansa@udel.edu.
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and Expansion Act to help revitalize the EB-5 program. This act required the Government Accounting Office (GAO) to conduct a thorough review of the EB-5 visa program. This review prompted more program reforms. One such reform was the creation of the Investor and Regional Center Unit (IRCU) in 2005. This unit of the United States Citizenship and Immigration Services (USCIS) has oversight of the EB-5 program, including case auditing, form design, regulation development, and policy creation. Annually the EB-5 program is reauthorized by Congress as a rider to the budget bill, and so the program is reauthorized whenever the budget is passed. In 2020 the EB-5 rider was removed from the budget, requiring Congress to reauthorize the program as a standalone bill. Congress had until June 2021 to pass the EB-5 bill, and it failed to pass before Congress went into recess. So, now the EB-5 program has not been reauthorized and is in limbo until Congress reauthorizes the program.

In 2019, under the Trump administration, new rules for the EB-5 program went into effect through the Immigrant Investor Program Modernization legislation, and the U.S. Congress extended the program through the remainder of that year. The new rules included an increase in investment amounts due to inflation from $500,000 to $900,000 in TEA and regional center investments, and from $1 million to $1.8 million elsewhere in the direct investments; USCIS will now designate TEAs instead of individual states and certain investors can get priority date retention. However, in June 2021, a federal judge ruled that then Acting Secretary of the Department of Homeland Security was improperly appointed and therefore lacked the authority to sign the Immigrant Investor Program Modernization legislation in 2019. Therefore, the new rules that have been in effect since 2019 are now reversed momentarily until Congress reauthorizes the EB-5 program.

The first step for an investor to start the EB-5 immigration investment is to submit the Petition by Alien Entrepreneur (Form I-526). After the Form I-526 petition has been approved, either the Application to Register Permanent Residence (form I-485) or Adjust Status, is filed with United States Citizenship and Immigration Service (USCIS) for a conditional green card, or the Application for Immigrant Visa and Alien Registration (Form DS-230), is then submitted. Finally, Form I-829, the Petition by Entrepreneur to Remove Conditions, should be applied for (with documents including evidence of job creation) at least 90 days before the two-year anniversary of the granting of the green card (Shen & Kwansa, 2013).

EB-5 projects are most often sponsored by regional centers (an organization designated by USCIS that sponsor capital investment projects for investment by EB-5 investors). Even though EB-5 investors can form their own new commercial enterprises, approximately 90 to 95% of all EB-5 visa applicants invest in a company that is sponsored by a regional center. There are many different EB-5 projects in which investors can choose to invest, they include the following:

- Mixed-use retail
- Hotel
- Sports stadiums
- Restaurants
- Agricultural developments including wineries and farms
- Electric vehicles manufacturing
- Biotech and medical technologies
- Casinos
- Entertainment venues
- Convention centers
- Office buildings

Most EB-5 investors in 2019, based on the number of EB-5 immigrant visas issued by the State Department, came from five countries: China, India, Vietnam, South Korea, and Brazil, and many other investors are from Taiwan, Venezuela, Hong Kong, Mexico, and South Africa (Congressional Research Service, 2021).

In summary, the following major changes were made to the EB-5 program in 2019: 1) priority date retention, 2) increasing the required minimum investment amounts, 3) reforming the TEA designations, 4) procedures for removing conditions on lawful permanent residence, and 5) miscellaneous changes involving technical adjustments to the program. It is expected that when Congress reauthorizes the EB-5 program, then the 2019 changes in the rules will become effective again.

The History and Impact of the EB-5 Program in the Hospitality Industry

The Department of Homeland Security published a study in 2017, which examined EB-5 investor projects during 2012 and 2013. It identified $16.7 billion in total EB-5 capital raised, and an estimated 174,039 jobs that were generated through EB-5 related projects during this two-year period, and this included non-EB-5 investment spending. Most investment spending and jobs were generated through regional centers (Congressional Research Service, 2021). Another study by the EB-5 Investment Coalition in 2019 showed that in 2014 and 2015 a total of $11 billion was raised through the EB-5 Regional Center Program, which represented 2% of all foreign direct investment in the United States during that period. About 66% of the investments were in the construction sector, and others were in hotels and motels; real estate; wholesale trade; architecture, engineering, and related services; and healthcare. Investments created an estimated 355,200 jobs (Congressional Research Service, 2021).

Typically, about 80% of EB-5 financing has gone into real estate and construction. Within the real estate industry, hotels are the most popular, however, investors have also gone into multifamily properties, mixed-use properties and retail. Retail is less attractive because the employees that become employed by the retail stores cannot be credited to the EB-5 investors because they are not directly employed by the EB-5 investor. However, if the newly developed asset is a mixed-use property, say a hotel with condominiums, then the hotel employees along with the condominium employees will be credited to the EB-5 investor. About 90% of the money raised through EB-5 in the past have all been the $500,000 variety. The total financing for a project can come from a wealthy individual or a syndicate of investors enough to accumulate the total capital needed. When different investors have come together in a syndicate then each $500,000 investment must create ten jobs.

The EB-5 program and the hospitality industry have a long history. Many developers have used EB-5 as senior debt, mezzanine debt, or equity to complete hotel and resort projects throughout the country. To finance a hotel development, the typical financing mix is as follows:

- 10%–20% Equity (EB-5)
- 50%–60% Debt
- 30% as Mezzanine financing (EB-5)

Using EB-5 investment funds for hotel projects in the United States has historically benefited developers. With the opportunity to offer significant savings over conventional loan arrangements, EB-5 financing can prove to be an excellent alternative for developers in the hospitality industry. Hilton, Hyatt Hotels, Marriott, and SLS Hotel & Casino are among the hotel and multi-use developments that have been financed with EB-5 investments. In Southern California, EB-5 projects include Europa Village, in Temecula, the Hilton Garden Inn in El Monte, and the JW Marriott hotel in Los Angeles (Masunaga, 2017). Normally to qualify for EB-5 funding, based on the new rules, hotel developers must demonstrate that their project can generate ten new full-time jobs per each invested $1.8 million. If the project is in a TEA, then $900,000 is required. Generally, for qualifying EB-5 projects in TEA, hotel developers must obtain a TEA designation and letter of authorization, make job count to ensure compliance with USCIS, submit a proper business plan, and calculate loan size which may vary depending on the developer, project, and economic conditions in the United States. All relevant factors, which include the developer's track record of success with similar prior projects, the developer's (and its completion guarantor's) financial stability and reputation, and the project's financial viability will be used to determine the EB-5 feasibility.

Hotel developers may seek assistance from regional centers to evaluate their new projects, raise capital, and make job count. Qualifying for EB-5 is a long journey. To underwrite a deal, consummate arrangements with the developer, prepare the project marketing program and materials, sell projects overseas, and get the funds released for deployment by the project, a considerable amount of work is needed (Butler, 2017). Hotel developers can form a regional center, but it is not recommended, because it entails involvement in the immigration business and obtaining regional center approvals, both of which are time-consuming and difficult.

Investing in the hospitality industry is definitely an optimal option for most investors or those seeking a green card, since it has numerous merits in

contrast to other industries. Generally, a hotel project is a great way to create jobs. A daily operations staff, housekeeping, and ongoing guest services imply that an EB-5 investment in a hotel project has a higher chance of creating more than the requisite ten jobs. If investors want to obtain a permanent visa in the United States, they should look for projects with a high job cushion as this will increase the probability of having their conditional permanent visas become completely permanent. Hotel projects that succeed may generate many permanent jobs for a relatively low percentage of EB-5 capital investment. Furthermore, the marketplace recognizes new hotel investments to be reasonably risk-free in terms of return on capital. EB-5 investors have an opportunity to work with trusted international hotel chains such as Hilton, Marriott, IHG, Choice, and Wyndham that have experience in creating and sustaining successful hotels; therefore, the risk is particularly low in comparison to other potential EB-5 investment opportunities. In addition, the structure of EB-5 hotel projects is easy to comprehend for foreign investors. For first-time investors, the revenue models of hotels are often perceived as more straightforward than those of other projects. For instance, one of the most important factors in a hotel's success is a smart choice of location, something most investors can determine with little more than a map.

Despite numerous advantages of investing in EB-5 hotel projects, investors face several risks, including not getting a return on the invested capital, personal wealth being tied up in illiquid investments with no guarantees or safeguards, the denial of a green card, for investors from mainland China and Vietnam who face a backlog of visa approvals and often must wait a decade or longer (Jahangiri, 2020), as well as fraud. Hotel developers have a greater need for EB-5 capital than other real estate developers, since in the aftermath of the financial crisis of 2018 conventional financing has been very limited for hotel construction. Where construction financing is available, it would usually only provide 45% to 60% of the construction cost (Butler, 2017). Hence, EB-5 financing has become a mainstay for hotel development, and investing in hotels has become the most popular type of project for several EB-5 investors. The EB-5 program has proven to work as an alternative source of financing for hotel projects such as the Hollywood Hotel in Los Angeles and the Courtyard by Marriott and Residence Inn by Marriott in Los Angeles (Chen, 2013). For instance, Driftwood Acquisitions and Development is a subsidiary of Driftwood Hospitality. They launched an EB-5 partnership program in 2015 to attract investment partners to raise capital for a pipeline of hotel development. The Residence Inn by Marriott Flagler Station in Miami was the first property Driftwood placed into the EB-5 portfolio. Ground was broken on the $22.2-million property, and $9 million of the total cost was provided by EB-5 investors. The Residence Inn project received 18 investors in total (O'Connor, 2015). The next EB-5 project after the Residence Inn was the Hilton Canopy in 2016 also using EB-5 financing. Driftwood depended on the EB-5 program as an alternative source of equity to fund the growth of their hotel portfolio. Sometimes the EB-5 money was also utilized to minimize the use of bank loans.

In fact, mainland China accounts for most of the capital flowing to the U.S. hospitality industry as well as over 70% of the dramatic increase in applicants in EB-5 (Shen & Kwansa, 2013). An increasing number of Chinese investors looked for hotels to purchase in gateway cities when China's hotel and real estate markets experienced a general slowdown in 2008, and investors from mainland China turned their attention to overseas markets. Besides investment in existing U.S. hotels, Chinese investors have become rapidly engaged in the development of new hotels in the United States. For instance, the Greenland Group of Shanghai purchased the 6.3-acre "Metropoli" site in downtown Los Angeles, for $150 million in 2013. The Greenland Group planned mixed-use development projects on the site including a 350-room Hotel Indigo, the InterContinental Hotel Group trademark "branded boutique" (Chen, 2014).

Apart from investing in hotels, investors are also interested in investing in restaurants, especially chain restaurants. Like the hotel industry, where traditional bank financing is virtually nonexistent and equity investments are prohibitively expensive, restaurant operators are gradually moving to EB-5 financing. There is a strong need for an EB-5 vehicle that provides capital to well-known and financially healthy restaurant chains (Bernstein, 2016). Restaurant franchises offer proven and established business models making it easy for new owners

to participate. For instance, the Miami Subs Grill, a fast-casual restaurant, began attracting EB-5 investors and franchisees in 2013. With about 35 stores across Florida, the chain also has locations in Hawaii, Indiana, and South Carolina, Guyana, and Texas. The chain plans to open several locations across the Middle East and Malaysia too. The Voodoo BBQ and Grill restaurant chain brought Voodoo BBQ of New Orleans to South Florida, attracted ten investors through the EB-5 program—a total of at least $5 million—to help finance four locations including the Pembroke Pines and Fort Lauderdale areas, both of which opened in 2013. They also completed a deal with ten investors to fund four more locations, including Hollywood and Boca Raton. Sonic Hamburgers started using the EB-5 program in 2011, CKE Restaurant Inc., LDV Hospitality have also used the program. The restaurant investments similarly can be categorized into two: regional center projects and direct investment restaurant projects. Normally regional center investors are rarely involved in the day-to-day operations of a restaurant, however, in the direct investment restaurant model the investors will typically take on daily management responsibilities. The key benefits of investment in restaurant projects include:

- the short construction time (preparation time is shorter, and construction can be completed in as little as six months in contrast to other large-scale projects);
- sufficient employment (restaurants can generate sufficient employment opportunities to fulfill the requirements of EB-5). Since restaurant projects are labor-intensive, there is a need to employ a large staff, and other jobs generated by developers;
- simple subscription and lower risk if the project fails. The monetary amount required in opening a restaurant is generally less than $2 million. Often project developers also partially contribute funds to the project, consequently each restaurant only needs one or two investors to complete the needed funding;
- and the economic climate has little impact on restaurant projects (even when the economy is slow, the restaurant business is still comparatively stable).

Despite the many benefits of investing in restaurants, numerous challenges exist in executing restaurant projects. The independence and uniqueness of each restaurant are critical to the success of the EB-5 investment projects. Even with successful branding of the chain restaurant, each restaurant's operating experience and location would have a significant impact on the success of the project.

To sum up, in comparison with other industries, the hospitality industry is a wise and low-risk option due to its numerous merits and the variety of projects available. To stay competitive and attract consumers whose preferences and needs change all the time, the hospitality industry requires ongoing capital and financial support for construction, acquisition, equipment renewal, and continuous refurbishment of properties on a regular basis. Consequently, the EB-5 investment program is without a doubt one of the most valuable sources of financing, through which the hospitality industry can continually grow and stay competitive.

For EB-5-financed new hotel projects, it is crucial to demonstrate that the new hotel is not simply taking jobs from existing hotels in the area but creating new jobs. This implies that the new hotels financed by EB-5 funds may create employee turnover problems at existing hotels through poaching of employees in that area, as well as loss of guests if the guest demand is not growing in that area. Hence, USCIS requires evidence that show that there is enough guest demand in a local market to support the opening of a new hotel without causing existing hotels in the area to lose occupancy. On the other hand, due to EB-5 hotel owners´ cultural differences, entrepreneurial intentions, and international experience, they may face more challenges in maintaining organizational alignment than non-EB-5 owners. The success of a hotel's operations might be affected by those challenges; consequently EB-5 hotel owners are more likely to suffer huge financial losses related to employees, management, and operations. Furthermore, EB-5 hotels may perform poorly regarding employee satisfaction, retention, turnover, and guest satisfaction since some EB-5 investors' primary objective is to obtain permanent residency in the United States, and financial returns on EB-5 investments are often secondary. They may not place the necessary attention on service quality thereby causing a decrease in customer satisfaction.

The EB-5 investment program, particularly in the hotel industry, is a popular way for investors seeking immigration to the United States to participate, especially from China where the demand for high-quality EB-5 investments remains high. On the contrary, for foreign investors seeking high return on investment, EB-5 projects may not be able to provide the huge financial return they expect, because usually, hotel developers offer less than a 4% return on investment to generate funding through the EB-5 program. The average annual return on investment for a typical EB-5 investor is approximately 1%, since the investor is usually charged the investment management fee and shares a certain percentage of the return with the investment management company (Shen & Kwansa, 2013). Yet the EB-5 program remains a significant source of funding for the hospitality industry, as the industry requires financial resources to stay competitive. Moreover, the EB-5 investment program benefits the U.S. economy by boosting tourism development and increasing the demand for hotels and restaurants, as well as providing a means for the United States to obtain foreign capital and raise employment rate. Between 2008 and 2015, the EB-5 program generated over $20 billion in economic investment resulting in the creation of over 730,000 American jobs. The EB-5 program was even exempted from President Trump´s immigration ban due to its job-creating power. Despite its critical role in the hospitality industry and contribution to the U.S. economy, the EB-5 investment program is unstable, as it is easily affected by international and political issues, global economy, new administration, and regulations in the United States, natural disasters, and so on. For instance, during President Trump's administration, the proposed increase in investment amounts from $500,000 to $900,000 in a TEA and from $1 million to $1.8 million elsewhere could make attracting new investors more difficult. Moreover, changes in the EB-5 rules in 2019 that changed the classification of some areas from TEA to non-TEA have led to smaller companies and projects getting a larger share of the EB-5 investment market, while most big investors may have lost interest in areas under the newly restricted set of Targeted Employment Areas. They have been replaced by smaller developers who might require only one to five investors. Since those countries have developed networks for raising small amounts of capital, investors from countries such as Mexico, Brazil, India, and South Africa could make up a larger slice of the EB-5 investment market (Mclntyre, 2020). Generally, unpredictable factors may influence investors´ activities and confidence as well as impact the U.S. hospitality industry. Some current global trends that may affect the EB-5 investment program include (EB5 Affiliate Network, 2020):

- Latin America's pandemic and currency issues have deflated EB-5 stakeholders' hopes for the market.
- Due to political strife between China and Hong Kong, investment activity in the special administrative region (SAR) has slowed.
- In recent years Vietnam has emerged as a rising star in the EB-5 immigration sphere behind China's waning EB-5 investment activity.
- Although Vietnamese EB-5 investment activities have generally begun to increase, the pandemic has curtailed much of the country's investor undertakings.
- The activities of a few primary immigration agents and their work with a variety of subagents in South Korea are attracting a lot of attention in the hospitality industry, and the pandemic does not seem to hamper investor appetite.
- Investors from Russia and others in the Commonwealth of Independent States in the region have indicated a significant amount of interest in U.S. immigration programs.
- South Africa has been identified as a potential up-and-coming EB-5 investment player to watch.

The Impact of COVID-19 on EB-5 Hotel Projects

There is no doubt that COVID-19 has had a profound impact on the global economy. The hospitality industry, which is very vulnerable to economic volatility and disasters, was one of the most affected industries by the global pandemic. Many restaurants and hotels shut down permanently; numerous employees in this industry were laid off. The entire hospitality industry was in financial distress. According to Oxford Economics for the AHLA, the hotel

industry generated $1.2 trillion in business sales and supported 8.3 million jobs (direct and indirect) in 2018 accounting for $395 billion in wages, salaries, and other compensation. This equates to about 4.2% of total employment in the United States. All these metrics were directly impacted by the COVID-19 economic downturn which affected thousands of jobs and revenues including tax revenue. To aid this industry's survival during the pandemic, the government provided financial support to entrepreneurs and small businesses. The Small Business Administration (SBA) allowed eligible hotel businesses to borrow up to $2.0 million to cover payroll, debt service, and other expenses. Nevertheless, government financial aid was insufficient to compensate for the COVID-19's massive economic losses. The decline in construction activity caused by the pandemic has had a significant impact on the EB-5 market (McIntyre, 2020).

In terms of EB-5 investors, the pandemic has resulted in a possible inability to meet regulatory requirements, such as job creation, rendering them unable to immigrate to the United States despite all their invested time and money, as well as potential or inability of EB-5 projects to recoup their capital contribution. If a project is unable to recover from the financial effect of an economic downturn, the investment will never be returned to investors (Dilbone & Karwasra, 2020). The loss of jobs in 2020 because of the pandemic as well as the impact on the hospitality sector could make it more difficult for would-be investors to sign on to new projects, since the law still requires that ten new jobs be created per investor for obtaining a green card (McIntyre, 2020). Unless there are exceptional circumstances, investors who have been in the United States on conditional green cards, are expected within three years to deliver on the jobs projected to be created. The I-829 application will be adjudicated by USCIS—which is often about three years after an I-829 is filed. The adjudicator will determine whether the jobs will be generated within a reasonable time after the adjudication. Nevertheless, it is more likely that USCIS is unable to perform their site visits as a result of the pandemic, which is a valuable tool for USCIS to ascertain the legitimacy of projects, and this would lead to delays in I-829 adjudications as well as regional center compliance reviews (Dilbone & Karwasra, 2020).

In terms of hotel projects, some scenarios include the following:

- A hotel is built, and the needed full-time jobs were created, and then layoffs occurred in 2020 due to COVID-19. The I-829s of the investor should be granted. For I-526s, approval is less certain.
- A hotel is built and just opened. Most full-time jobs were created, but not sufficient for all EB-5 investors due to COVID-19 fall-off of business. I-829 rules allow an additional year for job creation, and slow processing of I-829 applications may require a few more years to prove the needed jobs were created. However, if the economy remains slow, then the force majeure argument can be used. The I-526 and I-829 applications will probably be granted.
- A hotel is half built and capital has been invested, and then construction is paused as the economy is uncertain. This would seem to be a force majeure situation.
- A hotel has not been built and construction is delayed while waiting for the economy to come back and investors' capital has not been spent. It is unclear if the force majeure rules will allow I-526 and I-829 approval. However, EB-5 immigration is rather slow and there will be time for business to recover from COVID-19.
- A hotel is built, jobs are created or not, and the hotel is shuttered (or bankrupt) due to COVID-19. This would appear to be a force majeure situation.

In conclusion, the pandemic has brought a set of uncertainties not only to the hospitality industry but the entire global economy. Under this special and unprecedented circumstance caused by COVID-19, it is difficult to predict with accuracy the future of the EB-5 investment program, and whether it will be able to stimulate the economy of the United States and revive the hospitality industry again as it did during the 2008 recession. Clearly, the two key reasons why foreign investors invest in the EB-5 program include obtaining the permanent residency in the United States to realize their "American dream" and profiting from the project in which they have invested. However, the economic downturn, high unemployment rate, as well as political

issues brought about by the pandemic have led to social turmoil in the United States, which is likely to undercut potential investors´ confidence. Furthermore, travelers may be hesitant to travel abroad; as a result, hotel demand in the United States remains low, which may curtail the interest of investors in the EB-5 program. Due to the various uncertainties, EB-5 investors must adopt a wait-and-see approach. The fate of the reauthorization of EB-5 program, along with the 2019 rule changes, is still in the hands of Congress.

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