

## Immigrant Visas for Employment-Creation Investors: Practice Pointers

By Boyd F. Campbell<sup>1</sup>

Evaluating and preparing immigrant visa cases for employment-creation investors under the EB-5 immigrant visa program represents some of the most difficult and complex work an immigration lawyer can undertake. The process is anything but simple, made more difficult by U.S. Citizenship and Immigration Services (USCIS) adjudications and a number of bad precedent Administrative Appeals Office (AAO) decisions. To help practitioners sort out some of the common issues, this article: 1) provides a brief overview of the eligibility requirements for the EB-5 program; 2) describes the EB-5 application process; 3) explains how to choose among EB-5 and other common alternatives; 4) discusses the choice between individual and regional center EB-5 options; 5) points out key factors in selecting an appropriate EB-5 regional center; 6) explains some of the risks investors face in EB-5 regional center investments; and 7) describes several important issues and potential problems at the “removal of conditions” stage. A sample “accredited investor” questionnaire and a sample regional center “due diligence” checklist are also provided.

Under section 203(b)(5) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1153(b)(5), 10,000 immigrant visas per year are available to qualified individuals seeking permanent resident status on the basis of their investment in a new commercial enterprise. Of the 10,000 investor visas (i.e., EB-5 visas) available annually, 5,000 are set aside for those who apply under a pilot program involving an USCIS-designated Regional Center. A Regional Center is an entity, organization or agency that has been approved as such by USCIS, focuses on a specific geographic area within the United States; and seeks to promote economic growth through increased export sales, improved regional productivity, creation of new jobs, and increased domestic capital investment.

Alien investors who choose to invest through a “regional center” must demonstrate that a “qualified investment” (see below) is being made in a new commercial enterprise located within an approved regional center, and show, using reasonable methodologies, that 10 or more jobs are actually created either directly or indirectly by the new commercial enterprise through revenues generated from increased exports, improved regional productivity, job creation, or increased domestic capital investment resulting from the pilot program.

### **Eligibility**

Permanent resident status based on EB-5 eligibility is available to investors, either alone or coming with their spouse and unmarried children. Eligible aliens are those who have invested, or are actively in the process of investing, the required amount of capital into a “new” commercial enterprise, established after November 29, 1990 (see 8 CFR §204.6(e)) that they have established. They must further demonstrate that this investment will benefit the United States economy and create the requisite number of full-time jobs for qualified persons within the United States.

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In general, "eligible individuals" include those who establish a new commercial enterprise by (1) creating an original business; (2) purchasing an existing business and simultaneously or subsequently restructuring or reorganizing the business such that a new commercial enterprise results; or (3) expanding an existing business by 140 percent of the pre-investment number of jobs or net worth, or retaining all existing jobs in a troubled business that has lost 20 percent of its net worth over the past 12 to 24 months; and who have invested -- or who are actively in the process of investing -- in a new commercial enterprise at least \$1million, or at least \$500,000 where the investment is being made in a "targeted employment area," which is an area that has experienced unemployment of at least 150 per cent of the national average rate or a rural area as designated by Office of Management and Budget; and whose engagement in a new commercial enterprise will benefit the United States economy and create full-time employment for not fewer than 10 qualified individuals; or maintain the number of existing employees at no less than the pre-investment level for a period of at least two years, where the capital investment is being made in a "troubled business," which is a business that has been in existence for at least two years and that has lost 20 percent of its net worth over the past 12 to 24 months.<sup>2</sup>

### **How to Apply**

In some ways, the EB-5 application process is similar to that for family-based marriage cases. After the immigrant petition is approved, the applicant receives conditional-resident status for two years, and near the end of that initial two-year period must apply to "remove conditions."

To get immigrant investor status for your client, you must file Form I-526, Immigrant Petition by Alien Entrepreneur, with the USCIS California Service Center. Form I-526 must be filed with supporting documentation which clearly demonstrates that the individual's investment meets all requirements, such as establishing a new commercial enterprise, investing the requisite capital amount, proving the investment comes from a lawful source of funds, creating the requisite number of jobs, demonstrating that the investor is actively participating in the business; and, where applicable, creating employment within a targeted employment area.<sup>3</sup>

The minimum \$500,000 investment must be irrevocably committed to an escrow agent bank in the foreign national's own country in order for USCIS to recognize that the alien investor is in the process of investing. Once the Form I-526 is approved, the escrow agent bank releases the funds to the investment project and the immigrant investor obtains status as a conditional resident by filing Form I-485, Application to Register Permanent Residence or Adjust Status, if residing within the United States, or by applying for an immigrant visa at a U.S. consulate abroad, if residing outside the United States. The USCIS California Service Center, which adjudicates these cases, is taking an average of four to five months to do so, but say they are committed to reducing that time to a 90-day adjudicative process.

In order to become a lawful permanent resident, eligible investors must file Form I-829, Petition by Entrepreneur to Remove Conditions with the California Service Center. Form I-829

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<sup>2</sup> 8 CFR § 204.6(h)

<sup>3</sup> 8 CFR § 204.6(j)(1)

must be filed within 90 days prior to the end of the second year of an alien investor's admission to the United States as a conditional resident or via adjustment of status.<sup>4</sup>

### **Choosing Between EB-5 and Other Options**

Sometimes EB-5 is the only option. For example, Client A is in the United States on an L-1A visa. Subsequently, during a site visit, USCIS determines that Client A is not qualified for the position of executive and revokes his L-1A visa. Client A has a pending I-140 to obtain an immigrant visa as a multinational executive or manager. The I-140 petition is now in jeopardy and will very likely be denied soon. Client A, who has \$500,000 to invest through a regional center, makes the investment, files an I-526 petition and withdraws the I-140.

Client B came to the United States on an E-2 visa, having made a small investment in a chain of convenience stores. Now, six years later, he has the \$500,000 necessary to invest through a regional center. I call this an E-2 conversion, and it makes perfect sense for those investors who are eligible.<sup>5</sup>

Client C came to the United States on an F-1 visa and later got an H-1B visa. He is in his fourth year of H-1B visa status and is aware of the backlog in the EB-3 employment-based visa category. But he is from a relatively wealthy Korean family which made its money in the automobile manufacturing business. Client C has substantial stock holdings in his father's company that were made as gifts to him over a period of years. He wants to sell some of his stock in order to raise \$500,000 to invest through a regional center and obtain an available EB-5 immigrant visa.

### **Choosing Between Individual EB-5 Program and Regional Centers**

The key differences are as follows:

The investor in the regular EB-5 Program must invest \$1 million, unless the investment project is in a "targeted employment area", in which case the minimum investment amount is \$500,000. In addition, the investor will need to be actively involved in the day-to-day management of the enterprise. Finally, the investor's \$1 million investment must create 10 direct jobs, and his I-829 petition must be adorned with 10 W-2 forms and I-9 forms, and proof that the jobs — for U.S. workers only — are full-time, a minimum of 35 hours per week.

Although the investment amounts above are unaffected by investment in a regional center project, the investor need not be actively involved in the day-to-day management of the enterprise. If the investment vehicle is established as a limited partnership, for example, the investor will need to be involved only to the extent required by the Uniform Limited Partnership Act. Regional centers often have attractive takeout strategies to enable the investor's money to be returned in four or five years.<sup>6</sup>

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<sup>4</sup> 8 CFR § 216.6(a)

<sup>5</sup> Retained earnings from a business investment by an E-2 visaholder may be used for EB-5 Program purposes.

<sup>6</sup> Section 610, Appropriations Act of 1993

Next, regional centers may use economic impact methodologies such as RIMS II, IMPLAN, Redyne and Remi to show the creation of indirect and induced jobs. These methodologies, when applied to direct job creation, wages, taxes, and other factors, produce a multiplier that enables economists to predict how many indirect jobs and induced jobs will be created by the creation of a number of direct jobs. If there are enough direct, indirect, and induced jobs projected to more than cover all investors in the project, you may have a stronger model than an individual EB-5 investment that does not use a regional center.

### **Choosing a Regional Center**

The prudent practitioner will learn everything he or she can about the regional center and find the answers to these questions: (1) Who are the regional center principals and what are their reputations? (2) What is the regional center's business model? (3) What is the regional center's economic impact methodology? (4) Does the regional center rely heavily upon indirect and induced job creation? (5) In reviewing the regional center's project securities offering (sometimes called a private placement memorandum or confidential information memorandum) what is the period of time the investor's funds will be used? (5) How many I-526 petitions and I-829 petitions filed through the regional center have been approved by USCIS? (6) What is the takeout strategy for return of the investor's funds? (7) Does the regional center say its investment projects are "safe" and "guaranteed"? These are red flags.

These are just a few of the questions you must find answers to in order to adequately represent your client. If you are not a financial wizard — and who is these days? — you may wish to employ a broker or dealer who is also an EB-5 Program consultant and who can evaluate the business plan, securities offering, and investment project for you.

Currently there are about four business models that regional centers employ. The dominant model is limited partnerships, primarily because Congress amended the EB-5 Program in 2002 to specifically provide for the use of limited partnerships. Another is a real estate investment trust, a third is a venture capital fund, and a fourth is a limited liability company that functions much like a partnership. Of these four business models, the venture capital fund that invests in a variety of projects is the most susceptible to problems in proving creation of jobs and full investment of the required amount, in the author's opinion.

### **Risks for the Regional Center Investor**

The most prominent risk is that Congress may not reauthorize the Immigrant Investor Pilot Program by September 30, 2012. This is one of the longest-running pilot programs in U.S. history. It routinely gets caught up in the political furor over immigration when it is, in fact, a job creation program. If Congress does not reauthorize the Immigrant Investor Pilot Program by September 30, 2012, USCIS has opined that it will adjudicate I-829 petitions already in the pipeline, but will not allow the filing of new I-526 petitions.

What if the regional center project fails to create enough jobs to cover all investors in the project? Who wins and who loses? Obviously some investors will be covered; others will not.

How is that determined? Does the regional center have a plan in case enough jobs are not created? You should ask.

What if the investment project itself fails and there are no jobs and no money to return to investors. Do the investors have any security, such as a first mortgage on a building, or UCC1s on equipment? Will your investor client be left with nothing? These are things to think about before you advise your client to invest through a regional center.

### **Issues and Problems in Removal of Conditions**

At the I-829 petition stage, there are two conditions that must be met: Your investor client must prove that the full investment amount was invested in the job-creating enterprise, and he/she must prove that 10 full-time U.S. worker jobs were created. Generally, most investors can prove, through reasonable accounting methods, that their full investment was available to the job-creating enterprise, but that's not enough for USCIS. The investor must prove that the money was at work, creating jobs.<sup>7</sup>

Fees paid to lawyers, accountants, consultants, etc., don't count. USCIS wants to see the money going toward new job creation, and your investor client has to prove it. Regional centers can help with economic impact methodology tools that show the creation of indirect and induced jobs by inputting direct jobs. Accounting firms can help by showing that the full investment amount was injected into the project to create the jobs. W-2 forms and I-9 forms are relied upon by USCIS to make the job-creation determinations. It is important to keep in mind, however, that USCIS has been known to challenge I-829 petitioners on the job-creation issue by arguing that even though the employer fully complied with all legal requirements with respect to document review and completion of the I-9 forms, the government's databases show that the employee who claimed on the I-9 to be authorized to work is in fact an undocumented worker and therefore cannot be counted as a U.S. worker; thus, worker's position cannot be counted as a job created.

USCIS could decide to readjudicate issues already adjudicated at the I-526 stage. They're not supposed to, but — you have been warned — they might.

Finally, if the 10 jobs are not there for your investor, you can argue that they will be created "within a reasonable time," but I would certainly want to have an economist study the project to advance his or her professional determination on when those jobs might be created in the future.

In consulting with your prospective EB-5 client, remember that USCIS is a law enforcement agency and has no economic development mission. You can reasonably expect USCIS to be hostile toward the EB-5 Program and mismanage it far into the future. As I like to say, the EB-5 Program is difficult to work with on a good day. Investor beware.

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<sup>7</sup> 8 CFR § 216.6(a)(4)

