

The EB-5 Immigrant Investor Pilot Program

A technical analysis by ACFI's General Counsel

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The Immigrant Investor Pilot Program (also called the EB-5 “Program”) was created by Section 610 of Public Law 102-395 (October 6, 1992). It is an innovative approach to job creation and economic development that involves the participation of individual foreign investors. Congress designed the Program to create jobs for U.S. workers and to stimulate economic activity in rural areas and in areas of high unemployment.

By making a substantial investment and by creating 10 U.S. worker jobs per investor, eligible foreign investors receive the opportunity to become lawful permanent residents. And by investing through a regional center, these investors are eligible to claim direct and indirect job creation.

A regional center is defined as any economic unit, public or private, engaged in the promotion of economic growth, improved regional productivity, job creation and increased domestic capital investment. Prior law required investment in a regional center to generate an increase in export sales, but amendments in 2000 and 2002 removed the requirement — although the law still encourages export sales.

Up to 10,000 immigrant visas are set aside each year for the Program. Although the Program was temporarily suspended on September 30, 2003, it was reinstated and extended for five years by Congress in November 2003, with a new sunset date in November 2008, and extended again as time ran out in 2012. At this writing there are more than 250 regional centers in the United States, but very few are active. The ones that are account for about 90 percent of the issued conditional EB-5 visas to alien investors.

What is a Regional Center?

Regional center applicants must show, in accordance with 8 CFR 204.6(m), to U.S. Citizenship and Immigration Services (USCIS) how their proposed program will:

- Focus on a geographic region;
- Promote economic growth through increased export sales, if applicable;
- Promote improved regional productivity;
- Create a minimum of 10 direct or indirect jobs per investor;
- Increase domestic capital investment;
- Be promoted and publicized to prospective investors;
- Have a positive impact on the regional or national economy through increased household earnings; and

- Generate a greater demand for business services, utilities maintenance and repair, and construction jobs both in and around the center.

The requirements for an eligible investor under the Program are essentially the same as in the basic EB-5 investor program except that the Program allows for the creation of both direct and indirect job creation. In addition, the eligible investor does not have to be involved in the day-to-day operations of the new commercial enterprise. The minimum capital investment requirement for any EB-5 investor, inside or outside a regional center is \$1 million. But the capital investment requirement for an EB-5 investor in a Targeted Employment Area (TEA) or in a rural area is \$500,000.

The Advantage of Indirect Job Creation

An important advantage to obtaining regional center designation is the indirect nature of the job creation, which is less difficult to achieve than direct creation of 10 new jobs. The requirement of creating at least 10 new full-time jobs per investor may be satisfied by showing that, as a result of the investment and the activities of the new enterprise, at least 10 jobs will be created indirectly through an employment creation multiplier effect. To show that 10 or more jobs are actually created indirectly by the business, reasonable methodologies may be used, such as multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and other economically or statistically valid forecasting tools which support the likelihood that the business will result in increased employment.

America's Center for Foreign Investment, L.L.C., uses the expert economic forecasting and economic impact analysis services of the Dr. Judson Edwards, dean of Troy University's Sorrell School of Business, and former director of its Center for International Business and Economic Development (CIBED), and Dr. Sam Addy, director of the Center for Business and Economic Research (CBER) at the University of Alabama's Culverhouse School of Commerce.

If there are advantages to channeling one's investment through a regional center — and I think there are — it is that a carefully constructed business model designed to deal with removal of conditions within two years after the initial investment, access to the finest econometric data and analysis services available, and tight control of escrowed investment funds can add a measure of confidence and clarity to the investment process.

Targeted Employment Area

A Targeted Employment Area (TEA) is a geographic area or political subdivision located within a metropolitan statistical area or within a city or town with a population in excess of 20,000 with an unemployment rate at least 150 percent of the national unemployment rate. In Alabama, for example, TEAs are identified and designated by the Alabama Department of Economic and Community Affairs (ADECA). ADECA may use a combination of approaches, models, and tools to identify both rural areas and TEAs. Typically a regional center seeks to encompass one or more TEAs. One example of a TEA is a Regional Center which encompasses a large city containing clearly delineated census tracts that have been designated as a TEA by an agency of state government based on the measured unemployment rates for the population residing within those

locations. ADECA performs this function, having been delegated the authority by Alabama's Governor in 1995.

Rural Area

A rural area is a geographical area that is outside a metropolitan statistical area, or part of the outer boundary of any city or town having a population of 20,000 or less as shown by population indicators. In certain areas involving a sparsely populated state, an approved regional center, such as mine, encompasses both TEAs and rural areas. There is nothing we can do within Standard Metropolitan Statistical Areas unless the unemployment rate in the location of the job-creating enterprise is 150 percent of the national average, which will fluctuate from month to month and is an unreliable metric. When the Alabama Regional Center application was filed in late December 2006, 97 percent of the state was rural.

Required Amount of Investment

Depending on the location of the commercial enterprise to be invested in, the required minimum investment may be either \$1 million or \$500,000. If the investment is located within a TEA or rural area, the required minimum investment is \$500,000. Otherwise, an alien entrepreneur must invest a minimum of \$1 million to qualify.

New Commercial Enterprise

In order to qualify under the Pilot Program, an investment of the required amount (\$500,000 or \$1 million) must be made in a "new commercial enterprise" located within an approved Regional Center.

The law and regulations require that the commercial enterprise in which the investment is made must:

1. Have been created/established after November 29, 1990; or
2. If the investment is made in a pre-1990 enterprise, the alien's investment must have created a 40 percent or more increase in either the enterprise's net worth or number of employees; or
3. The pre-1990 enterprise has been restructured or reorganized so that the result is a new commercial enterprise.

Although the 2002 EB-5 amendments eliminated the requirement that the alien "establish" the new commercial enterprise, the law retained the requirement that the enterprise into which the alien has invested be "new."

At Risk

The regulations and precedent decisions require an alien entrepreneur to incur a reasonable risk for purposes of generating a return on his or her capital investment. As such there should be no guarantees, buy-back arrangements, unsecured promissory notes, or other agreements or

arrangements that — in effect — merely structure or organize the investment for appearances' sake to get permanent resident status for the alien without his capital being fully invested and “at risk” in the new commercial enterprise to create the required 10 jobs.

Engaged in the New Commercial Enterprise

EB-5 Program regulations require that the alien investor be or will be engaged in the management of the new commercial enterprise, either through day-to-day managerial control or through participation in policy-making decisions for the commercial enterprise. But the 2002 amendments to the Program clearly state that investors through a regional center need not be active in the day-to-day operations of the new commercial enterprise. They explicitly approved limited partnerships as one form of structure of a new commercial enterprise, allowing limited partners to exercise their duties and responsibilities under the Uniform Limited Partnership Act.

America's Center for Foreign Investment has adopted the limited partnership model. Eligible investors consider subscription agreements for a limited partnership unit in an America's Regional Center investment project. If accepted, the limited partner then must comply with the Uniform Limited Partnership Act but need not be involved in the day-to-day operations of the new commercial enterprise (i.e., the limited partnership) nor the EB-5 investment project (i.e., the job-creating entity or enterprise).

Process to Apply for Regional Center Designation

There was no established application form to enable someone to make an application to be designated by USCIS as a regional center when I first undertook to prepare a regional center application. Because the regulations at 8 CFR 204.6(m) are so general and vague, USCIS decided to flesh out application requirements via memos and guidance, resulting in a hodgepodge. The process provides that any entity, government or private organization, which desires regional center designation by the USCIS proceed as follows:

1. Submit a request for the approval and designation of a regional center;
2. Focus on a geographic area, which must be contiguous and clearly identified in the application by providing a detailed map of the geographic area of the regional center;
3. Fully explain how at least 10 new full-time job will be created by each individual alien investor within the regional center, either directly or indirectly;
4. Provide an economic analysis that relies on statistically valid forecasting tools that shows and describes how jobs will be created for each industrial category of economic activity (e.g., manufacturing, food production/processing, warehousing, tourism and hospitality, transportation, power generation, and agriculture, etc.).
5. The job creation analysis for each economic activity must be supported by a copy of a business plan for an actual or exemplar capital investment project for that category. The plan must demonstrate that the project is feasible under *current* market and economic conditions.

6. The business plan should identify any and all fees, surcharges, or other like remittances that will be paid to the regional center or any of its principals or agents through EB-5 capital investment activities.

7. Identify NAICS codes. Use two- to three-digit codes if you can support the request with enough business plans and economic studies.

8. Statement that describes the methodologies that the regional center will use to track the infusion of each EB-5 alien investor's capital into the job creating enterprise, and to allocate the jobs created through the EB-5 investments in the job creating enterprise to each associated EB-5 alien investor. Identify the anticipated minimum capital investment threshold (either \$1 million or \$500,000) for each investor.

9. Provide a description of the past, current, and future promotional activities for the regional center. Include a description of the budget for this activity, along with evidence of the funds committed to the regional center for the promotional activities.

10. Submit a plan of operation for the regional center which addresses how investors will be recruited, and how the regional center will conduct its due diligence to insure that all immigrant investor funds affiliated with its capital investment projects will be obtained from lawful sources.

11. Provide a general prediction which addresses the prospective impact of the capital investment projects sponsored by the regional center, regionally or nationally, with respect to increases in household earnings; greater demand for business services, maintenance, utility services and repair; and construction both within and without the regional center.

12. Fully describe and document the organizational structure of the regional center. Provide representative capital investment offering documents, business structure, and operating agreements of the proposed commercial enterprises that will be affiliated with the regional center, and show how they are compliant with the EB-5 statutory and regulatory requirements, as well as the AAO's binding EB-5 precedent decisions.

This does not sound simple, and it's not. It is extraordinarily complicated. And there is a \$6,230 fee charged by USCIS for these applications, and more heavy costs in time and money to pay for and prepare these applications. Regional center applications are filed with the California Service Center in Laguna Niguel, California.

USCIS reviews and adjudicates regional center applications and may request additional clarifying information and evidence to support representations made in the application. If USCIS determines that the application meets each of the requirements for regional center designation, then the designation is issued via a letter to the applicant signed by the service center director. If USCIS determines that the application does not meet all of the requirements for such designation, then a request for additional evidence may issue. Based on the application and its supporting evidence, USCIS makes a final determination to approve or deny the regional center application.

I agree with my colleagues who run regional centers or serve as outside legal counsel to active regional centers that qualifying an eligible foreign investor for EB-5 status is one of the most complicated subspecialties in immigration law. Anyone who undertakes to establish or manage a regional center or to represent an individual foreign investor under the EB-5 Program should be aware that sophisticated knowledge of corporate, tax, investment, and immigration law are required.

America's Center for Foreign Investment was established on June 11, 2007, as the first regional center to adopt a business model providing for maximum geography, maximum industries and economic clusters, and hosting arrangements for EB-5 investment project developers (the job-creating enterprises).

Despite the current popularity of the EB-5 Program around the world, the Program periodically sunsets. The Program's reauthorization for five more years is not assured, but is likely to occur because there is bipartisan support for the Immigrant Investor Pilot Program. Sen. Patrick Leahy and few other senators and members of Congress support the EB-5 Program, but USCIS seems determined to declare all EB-5 visa petitioners terrorists or drug dealers and intent upon strangling it with more restrictions, demands for impossible-to-obtain information, and constant changes to both regulations and policy without benefit of the Administrative Procedures Act. We must be vigilant to make the Pilot Program permanent. We must work with Congress to make sure the Program continues to enable individual foreign investors an opportunity to seek permanent residence status in the United States and to create new U.S. jobs.

ENDNOTE: I invite your comments. They should be directed to me via email — usvisa2000@hotmail.com.

Boyd Campbell has practiced immigration and nationality law in Montgomery, Alabama, since 1988. He served on AILA's EB-5 Investors Committee for four years, one year as vice-chair and one year as the EB-5 Committee liaison to the California Service Center. He has served as an AILA mentor for many years and is a frequent speaker at AILA national and chapter conferences and seminars. He represents regional centers and is general counsel and director of America's Center for Foreign Investment, the largest regional center in the nation. He is included in The Best Lawyers in America in the field of immigration law, and his law firm is listed in Best Lawyers / U.S. News & World Report Best Law Firms. His website, the Immigration Law Center on the Internet -- visaus.com -- which provides information about immigration and U.S. visas, has been on the World Wide Web since 1994.