HANDBOOK OF IMMIGRATION LAW

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CHAPTER 20 - EMPLOYMENT CREATION INVESTOR IMMIGRANTS (EB-5)

The Immigration Act of 1990 established a new investor category for obtaining permanent resident status. 10,000 immigrant visas are to be allocated annually to individuals in this category. In general, to qualify the foreign national investor must invest $1,000,000 in a commercial enterprise that will benefit the U.S. economy and create at least ten full-time employment positions for lawful U.S. workers (excluding the principal foreign national, his or her spouse, and sons and daughter). An investment of only $500,000 is required if the commercial enterprise is in a targeted employment area. The foreign national must be actively involved in the management of the business, either through the exercise of day-to-day managerial control, or through policy formulation. This chapter will discuss the specific requirements for qualifying for permanent resident status under this classification.

A. WHAT IS THE REQUIRED AMOUNT OF THE INVESTMENT?

The amount of capital necessary to make a qualifying investment in a commercial enterprise varies depending on where the commercial enterprise is located and the unemployment rate in that geographic area. The amount of capital necessary to make a qualifying investment in most areas is one million U.S. dollars ($1,000,000). This includes metropolitan areas, which at the time of investment has an unemployment rate significantly below the national average unemployment rates. These areas are called “high employment areas.” The amount of capital necessary to make a qualifying investment in a rural area, or an area which has experienced unemployment of at least 150% of the national average, is only five hundred thousand U.S. dollars ($500,000). These areas are called “targeted employment areas.” Targeted employment areas are designated by the state government of each state in the U.S.

“Capital” is defined by the USCIS as cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the foreign national, provided the foreign national is personally and primarily liable. To constitute a bona fide investment, the foreign national must not contribute his or her capital in exchange for a note, bond, convertible debt, obligation or any other debt arrangement between the foreign national and the new commercial enterprise. In addition, the assets of the commercial enterprise upon which the petition is based many not be used to secure any of the foreign national’s indebtedness. All capital is computed at fair market value in U.S. dollars. Any assets acquired directly or indirectly by unlawful means (such as through drug trafficking or other criminal activities) may not be used for the purposes of this section.

MULTIPLE INVESTORS

USCIS regulations allow the establishment of a single commercial enterprise to be used by more than one investor as the basis of a petition for classification as a foreign national entrepreneur. Each petitioning investor must have invested, or must be in the process of investing, the required amount for the area in which the enterprise is principally doing business, and each individual investment must result

in the creation of at least ten full-time positions for qualifying employees. Alternatively, the establishment of a commercial enterprise may be used as the basis of a petition for foreign national entrepreneur even though there are several owners of the enterprise, including persons who are not seeking classification, provided that all sources of capital invested are identified, and have been derived by lawful means.

B. WHAT IS A COMMERCIAL ENTERPRISE?

A commercial enterprise is any for profit activity formed for the ongoing conduct of lawful business. It may be a sole proprietorship, partnership (limited or general), holding company, joint venture, corporation, business trust, or other entity, and may be publicly or privately owned. A commercial enterprise does not include a noncommercial activity such as owning and operating a personal residence.

The establishment of a new enterprise includes the creation of an original business, the purchase of an existing business, or the expansion of an existing business.

If the foreign national chooses to purchase an existing business, the business must be reconstructed or reorganized in such a way that a new commercial enterprise results. If the foreign national chooses to expand an existing business through the investment of the required amount of capital, a substantial change in the net worth of the business or the number of employees must result from the investment of capital. A "substantial change" means a 40% increase in the new worth or the number of employees in the business. This does not exempt the foreign national from the requirements relating to the amount of capital investment and the creation of full-time employment for ten qualifying employees.

EMPLOYEE CREATION

For purposes of the Employment Creation Investor visa, an "employee" is defined by USCIS as an individual who provides services or labor for the commercial enterprise, and who receives wages or remuneration directly from the enterprise. A "qualifying employee" is a U.S. citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States. The definition may include conditional residents, temporary residents, asylees, refugees, or foreign nationals remaining in the U.S. under suspension of deportation. However, it does not include a foreign national entrepreneur, his or her spouse, sons or daughters, or any nonimmigrant foreign national. The qualifying employee must be employed in a position that requires a minimum of thirty-five (35) hours per week. A job-sharing arrangement is acceptable wherein two or more qualifying employees share a full-time position of at least 35 hours per week. Independent contractors, part-time employment, and combinations of part-time positions even if, when combined, meet the hourly requirement per week shall not be included as full-time employment.

An exception to the requirement of the creation of ten full-time positions is made in the case where a foreign national makes the required investment in a troubled business. A "troubled business" is one that has been in existence for at least two

years, and has incurred a net loss for accounting purposes during the twelve- or twenty-four month period prior to date the foreign national files his or her petition. The financial loss to the business must be at least equal to 20% of the business' net worth prior to the loss. If a foreign national invests the required amount of capital in a troubled business, the number of existing employees, whether greater or less than ten full-time employees, must be maintained at no less than the pre-investment level for a period of at least two years.

C. FILING THE PETITION

The petition to obtain permanent resident status under this classification must be filed on Form I-526, "Immigrant Petition by Alien Entrepreneur." The petition must be signed by the foreign national and his or her authorized representative, and accompanied by the current fee amount. The foreign national may file the petition on his or her own behalf. It must be filed with the USCIS Service Center in California.

SUPPORTING DOCUMENTATION:

Extensive evidence must be submitted with the Form I-526, "Immigrant Petition by Alien Entrepreneur," to document that the foreign national has invested or is actively in the process of investing the required amount of lawfully obtained capital in a new commercial enterprise in the U.S. which will create at least ten full-time positions for qualifying employees.

To show that a new commercial enterprise has been established in the United States, the foreign national must submit:

1 As applicable, articles of incorporation, certificate of merger or consolidation, partnership agreement, certificate of limited partnership, joint venture agreement, business trust agreement, or other similar organizational document for the new enterprise;

2. A certificate evidencing the authority to do business in a state or municipality, or if the form of the business does not require any such certificate, or the state or municipality does not issue such a certificate, a statement to that effect; or

3. Evidence that, as of a certain date after November 29, 1990, the required amount of capital for the area in which the enterprise is located has been transferred to an existing business, and that the investment has resulted in a substantial increase in the net worth or number of employees of the business to which the capital was transferred. Evidence must be in the form of stock purchase agreements, investment agreements, certified financial reports, payroll records, or any similar instruments, agreements or documents evidencing the investment in the commercial enterprise and the resulting substantial change in the net worth or number of employees.

To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of

generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The foreign national must show actual commitment of the required amount of capital. Such evidence may include but is not limited to:

1. Bank statement(s) showing the amount(s) deposited in U.S. business account(s) for the enterprise;
2. Evidence of assets that have been purchased for use in the U.S. enterprise, including invoices, sales receipt, and purchase contracts containing sufficient information to identify such assets, their purchase coat, the date of purchase and purchasing entity;
3. Evidence of property transferred from abroad for use in the U.S. 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 value of such property;
4. Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or non-voting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or
5. Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

To show that the petitioner has invested or is actively in the process of investing capital obtained through lawful means, the petition must also be accompanied, as applicable, by:

1. Foreign business registration records;
2. Corporate, partnership, or any other entity in any form which has filed in any country or subdivision thereof personal tax returns including income, franchise, or property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
3. Evidence identifying any other sources of capital; or
4. Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

To show that a new commercial enterprise will create no fewer than ten full-time positions for qualifying employees, the petition must be accompanied by:

1. Documentation consisting of photocopies of relevant tax records, Forms I-9 or other similar documents for ten qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
2. A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten qualifying employees will result, including approximate dates within the next two years, and when such employees will be hired.

To show that a new commercial enterprise that has been established through a capital investment in a troubled business meets the statutory employment creation requirement, the petition must be accompanied by evidence that the number of existing employees is being, or will be maintained at no less than the pre-investment level for a period of at least two years. Photocopies of tax records, Forms I-9, or other relevant documents for the qualifying employees, and a comprehensive business plan must be submitted in support of the petition.

To show that the petitioner is or will be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial control, or through policy formulation, as opposed to maintaining a purely passive role in regard to the investment, the petition must be accompanied by:

1. A statement of the position title that the petitioner has or will have in the new enterprise, and a complete description of the position's duties;
2. Evidence that the petitioner is a corporate officer or a member of the corporate board of directors; or
3. If the new enterprise is a partnership, either limited or general, evidence that the petitioner is engaged in either direct management or policy making activities. If the petitioner is a limited partner and the limited partnership agreement provides the petitioner with certain rights, powers and duties normally granted to limited partners under the Uniform Limited Partnership Act, the petitioner will be considered sufficiently engaged in the management of the new commercial enterprise.

If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:

1. In the case of a rural areas, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and the Budget, or within any city or town having a population of 20,000 or more as based on the most recent U.S. census.
2. In the case of an area of high unemployment:
    a. Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area or the county in which a city or town with a population of 20,000 or more is located, and in which the new commercial

enterprise is principally doing business, has experienced an average unemployment rate of 150% of the national average; or

b. A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area, or of the city or town with a population of 20,000 or more in which the new commercial enterprise is doing business has been designated a high unemployment area.

D. PRECEDENT AAO EB-5 DECISIONS

There are four precedent decisions made by the Administrative Appeals Office (AAO) regarding EB-5 cases: *Matter of Soffici*, *Matter of Izumii, Matter of Hsuing,* and *Matter of Ho*.

In *Matter of Soffici*, the Associate Commissioner for Examinations held that the petitioner was ineligible for classification as a foreign national entrepreneur under INA §203(b)(5) because the applicant failed to show: (1) that he had invested, or was in the process of investing, the qualifying amount of capital; (2) that he had established a "new" commercial enterprise; or (3) that his business had engaged in the employment maintenance or employment creation of 10 full-time jobs for U.S. workers.

Two weeks subsequent to *Matter of Soffici*, a second precedent decision was issued in *Matter of Izumii*. In *Izumii*, the AAO dealt with three types of financial arrangements distinct from those used in *Soffici*, again raising serious questions regarding whether the investor's capital is being placed "at risk" in creating the investment enterprise. The AAO held that the following investment and financing features of investor visa petitions no longer qualified as "investments" for EB-5 purposes.

Following *Soffici*, the AAO issued two other precedent decisions in *Matter of Hsiung* and *Matter of Ho*, denying two EB-5 visa petitions filed by petitioners who had: (1) failed to put their personal funds "at risk"; (2) not proved that they had obtained the funds in a lawful manner; and/or (3) failed to satisfy the employment creation requirement.

It is absolutely necessary to review the above cases for specific legal precedent holdings and conclusions to determine whether a case may qualify in the future. All cases must be prepared in direct compliance with these four precedent decisions as well as any future AAO decisions.

E. REGIONAL CENTER PROCESSING AND ADVANTAGES

INTRODUCTION

Foreign investors and others desiring to live and work long term in the United States may wish to consider the relatively little-known EB-5 Investor Green Card as an effective means to accomplish this goal.

As a general rule, foreigners ("non-resident aliens") wishing to live and work full-time or part-time in the United States are called upon to choose between available immigrant (Green Card) and non-immigrant (long term temporary) visa options. In some cases, more than one option is applicable. In other cases, this may not be so.

Immigrant visas typically require either a close family connection with a U.S. citizen or permanent resident (Green Card holder) or an employment based connection (see complete explanation on www.usworkvisa.com). Non-immigrant work visas can be applied for by foreign professionals (via H-1B visas), "treaty traders" or "treaty investors" from countries with treaties with the U.S. (via E visas) or intra-company transferees (via L visas).

For U.S. tax reasons, foreigners wishing to invest or spend significant time in the U.S. have often tended in the past to prefer non-immigrant visas, which may allow avoidance of U.S. tax resident status (and consequent exposure to the U.S. worldwide taxation system), by limitation of stays in the U.S. each year to less than 120 days, on the average.

However, non-immigrant visas may not always be available. For example, E visas are limited to nationals of countries which have treaties with the U.S. (see list of treaty countries on www.usworkvisa.com) and require substantial trade between the U.S. and the treaty country or an investment of significant cash and management time in a qualifying active job-creating business. L visas are limited to executives, managers or specialized knowledge personnel who have been employed continuously abroad by a parent, branch and affiliate or subsidiary of a U.S. company for 1 of the 3 years preceding an application for admission to the U.S. H-1B visas for professionals are subject to quota restrictions and time delays. Even F-1 student visas from certain countries are becoming harder to qualify for and generally do not permit gainful employment in the U.S. Furthermore, non-immigrant visas are generally limited, duration-wise, and are not easily convertible to immigrant visas (except for L-1A managers or executives.).

Since overseas tax regimes and tax rates have tended to become more and more onerous, U.S. tax resident status may not now be materially disadvantageous as compared with tax residence in some other countries. In any event, U.S. income tax rates generally will apply to U.S. earned income and U.S. situs asset transfers. Treaties may be utilized to avoid or reduce double taxation of the same items in more than one country. Pre-immigration tax and business planning may effectively avoid the need to subject pre-owned foreign assets or income to adverse U.S. taxation. Also, family members who do not have substantial foreign assets or foreign income (e.g. students, young professionals, spouses, adult children, etc.) may be suitable applicants for EB-5 Investor Green Cards without adverse tax consequences.

Accordingly, EB-5 Investor Green Cards in the U.S. may be an attractive option for those intending long-term or permanent residence in the U.S.

For example, EB-5 Green Cards may provide the following advantages over non-immigrant and other types of visas:

- Only a minimum of approximately $500,000 in certain cases or $1 million may need to be invested (can be investor's own funds, a loan not secured by EB-5 investment or a gift);
- For Regional Center EB-5 programs, a separate active 10 job-creating business is not needed (indirect employment creation is accepted for Regional Center cases);
- Fast-track immigrant (Green Card) status (typically in about 1 ½ - 2 ½ years) may be available for EB-5 Regional Center cases;
- Avoid 5+ year quota backlogs for certain Employment based Green Card/Labor Certification applications;
- Avoid 5 – 20 year quota backlogs for all Family based Green Card categories except spouse or parent of a U.S. citizen;
- No requirement to live in area where investment is made in Regional Center EB-5 case; applicant can work, go to school or retire anywhere in the U.S.;
- No day-to-day management of an active business is required for Regional Center cases, however, applicant has a policy-making role as a limited partner; and
- Other typical non-immigrant visa restrictions (e.g. professional job requirements, prior overseas employment, single children who turn 21 no longer qualify under parent's visa, etc.) may be avoided.

EB-5 INVESTOR GREEN CARDS

There are essentially two EB-5 programs, i.e. the Regular program and the Regional Center (pilot) program. In order for an applicant to qualify under the Regular program, the following three basic requirements must be met: (1) investment in a new commercial enterprise; (2) investment of at least $1 million (or $500,000 in certain cases) into the business, and (3) creation of employment for at least 10 full-time U.S. workers.

The investment may consist of the contribution of various forms of capital, including cash, equipment, inventory, property and other tangible equivalents. An investment amount of $1 million is generally the minimum. However, $500,000 is acceptable if the business is situated in a "targeted" employment area, i.e. a rural area or one that has experienced unemployment of at least 150 per cent of the national average rate, as designated by the U.S. Office of Management and Budget.

The second program within the EB-5 category, i.e. the Regional Center program, is ideal for the retiree or inactive investor due in large part to the "indirect employment creation" requirement and possible limited partner features of this program. The Regional Center program advantageously removes the 10 employee requirement of the Regular program and substitutes the less-restrictive "indirect employment creation," which allows the investor to qualify for an EB-5 Investor Green Card

without hiring 10 people in the company that the investor has invested in. So, in a nutshell, under a Regional Center program, the investor can qualify by presenting evidence that 10 jobs will be created throughout the Regional Center economy, supported by an economist's report obtained by the Regional Center.

Also, the EB-5 policy management requirement is minimal in that the investor can be a limited partner with only a policy-making role and still qualify. Thus, for those who are not interested in day-to-day management or running an active business, Regional Center programs offer a more acceptable form of investment for the inactive investor, than do most Regular program investments.

Another advantage of Regional Center programs that adds to the flexibility of this Green Card category is that the investor is not required to live in the place of investment; rather, he or she can live wherever he/she wishes in the United States. For example, the investor may invest in a Regional Center in the State of Washington, but choose to live in upstate New York.

Under mandate by Congress, Regional Center EB-5 petitions are given priority by CIS (formerly INS), which, among other benefits, often results in a quicker path to approval. Each Regional Center program must be pre-approved by CIS in order to be eligible to apply for EB-5 Green Cards. Currently available, among over 45 others, is the following long-term active EB-5 program:

- A real estate limited partnership program that offers an investment in industrial properties in Seattle. This program, which was granted CIS designation as a Regional Center in 1996, generally involves purchasing low-yielding industrial properties, and converting them to commercial, e.g., office space, retail shops, a hotel and storage space, etc. Investors participate as limited partners of a limited partnership, and can earn a monthly return from a share of tenant rentals after property renovation, as well as a share of future appreciation from the project when sold. Investment periods vary, but cannot end before receipt of the permanent Green Card by the investor.

The procedure for obtaining an EB-5 Investor Green Card is relatively straightforward. The investor must generally produce 5 years of tax returns to substantiate the source of investment funds. The funds can be the investor's own money or in the form of a loan not secured by the EB-5 investment or a gift, which would allow a parent to gift a son or daughter. Gift taxes, if required in the investor's home country, must be paid. He or she must also present evidence that traces the capital, through bank transfers and other documentation, from the investor directly to the EB-5 enterprise. This provision of the regulation, which requires clear evidence that the source of funds was procured by legal means, arose from earlier concerns of Congress over money laundering issues.

After the investor completes a thorough business and financial due diligence analysis of the viability of the EB-5 business, the investment is made and an I-526

petition is filed by the foreign investor with CIS, requiring CIS to certify that the applicant and the investment are eligible for EB-5 status. The approval of the petition takes on average 6 months for Regional Center cases and longer for Regular cases.

If the investor is already in the U.S., he or she then applies for a Green Card through CIS. No interview customarily is required, and approval for most cases has been taking approximately 12 months. If the investor resides abroad, an application for the Green Card is generally made at the U.S. Embassy or Consulate in the investor's home country; however, in this case, for Consular processing purposes, an interview is necessary. Approval of the Green Card in this case takes on average also about 10 months in most countries.

In either of the above scenarios, in most Regional Center cases, the entire process generally takes about 1 ½ years. This is the situation for most applicants, based on the April 2009 CIS and State Department Consular processing times, however times may vary depending on the circumstances of each case.

Once CIS approves the investor's Green Card, it is conditional for a period of two years. Conditional Green Card status confers the same rights as the permanent unconditional Green Card.

Between 21-24 months after the conditional Green Card has been approved, the investor must reconfirm that the investment has been made or is still in place and that the employment requirement has been fulfilled or maintained. An application to remove the conditional Green Card status is then filed with CIS.

Once the condition has been removed, a full Green Card is granted for indefinite permanent resident status in the United States. From the time of application for the conditional Green Card until approval of the Removal of Conditions, should usually take about four years in most cases. Thereafter, in approved Regional Center programs, depending on the terms of their agreement, the investment may be sold, and the investor will still maintain the permanent Green Card. U.S. Citizenship is possible about two and a half years later (five years after approval of the conditional Green Card), upon satisfaction of residence and other criteria.

Freedom to live anywhere in the United States, a passive form of investment with no required direct management responsibilities (other than a limited partner policy making role), priority standing within the Immigration process, and an accelerated path to Green Card procurement – all are important factors which make the little-known EB-5 Investor Green Card category via a Regional Center program an ideal investment vehicle for the inactive investor or retiree who wishes to live long term in the United States.

OTHER U.S. TAX AND BUSINESS CONSIDERATIONS

As in all U.S. immigration planning situations, various additional planning considerations should be taken into account. For example:

1. Pros and cons of the EB-5 visa versus other types of visas (immigrant and non-immigrant);
2. Additional legal and financial due diligence to be carried out prior to commitment to any EB-5 (or other) U.S. investment or business project;
3. Pre-immigration tax and business planning desirable for incoming immigrants with significant non-U.S. assets and/or income;
4. U.S. family law considerations for immigrant married couples with children or separately owned assets, particularly if coming from non-community property jurisdictions;
5. Forward planning for non-immigrants (e.g. students, employees, diplomats, etc.) who may wish to remain permanently in the U.S. after their non-immigrant visas status expires;
6. Qualification, licensing and admission requirements for operation of local business, conduct of licensed profession, obtaining of local financing, establishment of credit, obtaining U.S. life and/or health insurance benefits, etc.; and
7. Choice of most appropriate family applicant for a visa in light of the foregoing issues.