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EB-5 Foreign Investor Program: The Immigrant-Investor Visa

By Roger Bernstein

As the US unemployment rate soars to a 14-year high and economists predict an economic downturn that will rival the worst recession since the end of world war two – there must be some hope to our country's fiscal malaise. One particular federal program shines as a bright star over a sea of economic distress. In recent years the **EB-5** Foreign Investor program has successfully married foreign investors with

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disadvantaged communities throughout America. A diverse range of businesses including dairy farms, ski resorts, renewable energy, real estate, and entertainment have been the beneficiary of this federal program known as the **EB-5**, or the immigrant-investor visa

The **EB-5** program, administered by the United States **Citizenship** and Immigration Services ("USCIS") was initially created in 1991 to encourage foreign investment in the United States. Unlike many of the other immigrant visa categories that involve excruciatingly long wait times, the **EB-5** program provides a conditional green card to a successful applicant and his/her family immediately upon approval by the USCIS. The investor can arrive in the United States knowing that he and his family have Permanent Resident status and can apply for U.S. **citizenship** after 5 years.

Section 203(B)(5) of the Immigration and Nationality Act allocates approximately 10,000 immigrant visas each fiscal year for those qualified applicants who invest in a new commercial enterprise that employs at least ten full-time workers. The standard **EB-5** program requires that an investor contribute \$1,000,000.00 to a commercial enterprise that creates ten direct jobs in the United States. Of the 10,000 allocated visas, 3,000 are set aside for those who invest at least \$500,000 in a "Targeted Employment Area" (TEA). If the investor meets the investment and job creation requirements, he and his immediate family are rewarded with a "green card," lawful permanent residency, in the United States.

In 1992, the USCIS offered an alternative to direct investment under the **EB-5** category known as the "Regional Center Pilot Program." A Regional Center is a public or private business engaged in the promotion of economic growth, improved regional productivity, job creation, and increased domestic capital investment. The Regional Center Program is suitable for an investor who wants to engage in a more passive role in the management of their investment. Unlike the original program, the pilot program does not require that the immigrant investor to directly employ ten workers, as long as the investor can reasonably demonstrate that the regional center has indirectly created or induced ten or more jobs and improved regional productivity per investor. The Regional Center Pilot Program was suspended due to under-funding and mismanagement. However, in 2003 its shortcomings were addressed and the **EB-5** program has been invigorated with new life. Today more than 75% of all approved cases in the **EB-5** category are through Regional Centers.

There are two principal requirements for the Immigrant Pilot Program: (1) a passive investment of \$500,000 into a designated Regional Center in a Targeted Employment Area (TEA); and (2) the investment must directly or indirectly create ten United States jobs per investor. An important advantage to obtaining the immigration visa through a Regional Center Program is the requirement of creating and sustaining at least ten new full time jobs is satisfied by showing that, as a result of the investment and the activities of the new enterprise, at least ten jobs are created indirectly through an employment creation multiplier effect.

The procedural path to the green card is broken down into three stages. First, the Immigrant Petition by Alien Entrepreneur (Form I-526) must be approved. Second, the alien must either adjust his/her status or apply for an immigrant visa abroad. Last, a Petition by an Alien Entrepreneur to Remove Conditions (Form I-829) must be filed with USCIS within 90 days before the second year of the adjustment of status or the alien investor's admission to the United States. All conditions of the I-829 must be met. These conditions include: (1) proof that the requisite amount of money has been fully invested; and (2) that the full time jobs have been created or, in the case of a Regional Center Program investment, have been indirectly created. Once Form I-829 is submitted, it takes an average of 12 months for the USCIS California Service Center, which adjudicates the **EB-5** petitions, to make a decision.

Evaluating and preparing **EB-5** applications is a complex and difficult process. Hurdles one may face include tax planning issues, tracing the source of the investment funds, selecting the appropriate investment or Regional Center, interpreting applicable laws and regulations which at

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times lack clear guidance, and overcoming restrictive Board of Immigration Appeals (BIA) decisions. When deciding which program best fits a person's needs, it is important to weigh the advantages and the disadvantages of each investment program.

A traditional **EB-5** visa is the best option for investors who wish to invest in a new or existing business, have a desire to maintain an active role in the management of their own operation, have one million dollars to invest, or \$500,000.00 to invest in a designated TEA directly, and can shoulder the burden of creating ten new full time jobs.

Conversely, for those who prefer only to invest \$500,000.000, maintain a more passive role in the management of their investment, and do not wish to be directly involved in the creation of ten jobs, then the Regional Center Program is the best option. From a financial standpoint the Regional Center Program is a favorable alternative to the traditional **EB-5** visa. A lower capital investment means less risk. Additionally, there is no responsibility to maintain the high cost of ten direct employees for over two years.

The **EB-5** program has proven to have a positive impact on the United States economy and job creation. In 2006 alone the **EB-5** Immigrant Investor and Regional Center program resulted in the aggregate total of over \$250 million in immigrant investor capital inflow to the United States economy and the creation and/or preservation of 5,000 jobs in areas of high unemployment. Projections for 2007 are estimated to be an aggregate total of \$500 million dollars, and 10,000 jobs principally in areas of high unemployment. Whatever program is selected, it is important to note that prior to acquiring residency the investor should consult with a tax advisor regarding tax consequences.

The **EB-5** visa creates a win-win situation by connecting foreign investors' international fortunes to depressed economies and high unemployment areas around our country. In exchange for their investments, the investors receive a reasonable rate of return and green cards for themselves and their family. When fully utilized it is estimated that the program will contribute between \$1.5 – 3 billion in foreign capital to the United States economy each year. Such investments could have a significant impact on our economy. Of equal importance this program will also provide and /or preserve more than 30,000 jobs for United States workers each year.

For additional information on pursuing residency under the **EB-5** category or obtaining a Regional Center Designation, please contact Roger Bernstein at (305) 895-0300 (305) 895-0300 or by email at rbernstein@visaattorneys.com.



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