

EB-5 Services

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Frequently Asked Questions Concerning the EB-5 Program

by **Steven T. Anapoell and Kate Kalmykov**

Q: WHAT IS THE EB-5 PROGRAM?

A: The United States Citizenship and Immigration Services (“USCIS”) administers the Immigrant Investor Program for the employment-based fifth preference visa category, also known as “EB-5.” Congress created the program in 1990 to stimulate the U.S. economy through investment by foreign nationals into a U.S. enterprise that would create at least ten full-time jobs for U.S. workers. This visa category permits qualifying foreign national investors to obtain lawful permanent resident status (“green card”) in the United States for themselves, their spouses and their unmarried children under the age of 21.

To encourage use of the EB-5 visa category, in 1993 Congress established the Regional Center Pilot Program and set aside 3,000 of the allocated 10,000 visas for investors who invest within designated “Regional Centers.” While these 3,000 are specifically reserved for Regional Center investors, USCIS has publicly stated on numerous occasions that all 10,000 of the EB-5 numbers are available to Regional Center investors should there be that volume of demand. A “Regional Center” is defined at §204.6(e) of the Immigration and Nationality Act as “any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.”

The pilot immigration program has been regularly reauthorized but is not yet permanent. It is currently set to expire on September 30, 2012 but is expected to be reauthorized.



Q: WHAT IS A REGIONAL CENTER?

A: A business entity that has received a designation from the United States Citizenship and Immigration Service to facilitate foreign investment in job creating projects in the United States. The EB-5 Program allows private and public entities to apply for “Regional Center” designation from USCIS.

Q: WHY USE A REGIONAL CENTER?

A: With Regional Center designation a business may attract an unlimited number of foreign investors willing to invest \$500,000 or \$1 million each in a job creating enterprise. The investment threshold is dependent on the location of the project, those in a Targeted Employment Area, or TEA, qualify for the lower capital investment. The Regional Center is charged with the responsibility of administering projects that seek EB-5 investor funding and ensuring compliance with USCIS regulations.

Regional Center investors are permitted to demonstrate through “reasonable methodologies” that their investment resulted in the creation of ten or more direct, indirect, or induced jobs using statistical formulas and models to demonstrate a correlation between their investment of capital into a specific business and indirect jobs created in other businesses within the greater community. Only in Regional Center based filings can indirect and induced jobs be used to satisfy the job creation requirement.

Q: HOW DO I ESTABLISH A REGIONAL CENTER?

A: You must file an application with the USCIS requesting that your business entity be designated a Regional Center. The application will include various items to be submitted to the USCIS, the two most important submission items being a business plan and an economic report supporting the project company’s anticipated job creation (you may also be required to submit documentation confirming the project is in a targeted employment area, or TEA , and anticipated marketing material to prospective investors).

The business plan and economic report must be consistent and adherence to them must be documented at the I-829 conditional removal stage. If not, the USCIS can deny the investor’s request for permanent residency status because of a material change in the project company’s business plan. Further, the business plan and economist’s report must be reliable, because the project company will be held to it with respect to whether permanent residency status will be granted to investors. The economist should use an economic methodology/model generally accepted by USCIS to demonstrate creation of indirect jobs. These models, for example, can be based on the project company’s expenditures, revenues or occupancy/square footage of real estate related projects.

When designing your Regional Center, you should plan for the Regional Center itself and not a particular project. Accordingly, the application should include types of projects the Regional Center intends to sponsor and the industries in which those projects fall. You can provide hypothetical projects as examples. Currently, the application filing fee for Regional Center designation and any future amendments is \$6,230 per filing.

Q. HOW LONG DOES IT TAKE FOR THE USCIS TO REVIEW AND ADJUDICATE AN APPLICATION FOR REGIONAL CENTER DESIGNATION?

A: Currently, the USCIS processing time is 4-10 months. However, the USCIS has stated that it will commence premium processing in 2012. Once available, premium processing would shorten adjudication timeframes to 2 weeks. At this time, the USCIS has not published the cost of such premium processing. Existing premium processing fees are \$1,225. We expect the fee for EB-5 Regional Center filings to be much higher.

Q: ARE THERE ANY PARTICULAR LICENSES REQUIRED TO OPERATE A REGIONAL CENTER?

A: No particular license is required or provided to own and operate a Regional Center. However, to avail yourself of the benefits of sponsoring projects as a Regional Center, you will need an USCIS approval letter designating your entity as a Regional Center. Further, depending on your state, city or county of operation, you may be required to obtain customary business licenses provided by state and local authorities.

Q: CAN ANYONE OWN AND OPERATE A REGIONAL CENTER?

A: Yes. At this time, we are unaware of any minimum qualifications regarding who may own and operate a Regional Center. Further, at this time, no background checks are undertaken on the principals.

Q. WHEN MIGHT A REGIONAL CENTER'S DESIGNATION BE REVOKED?

A: Generally, when the Regional Center is used as an instrument to commit fraud, embezzlement or crime. .

Q. WHAT ARE A REGIONAL CENTER'S ANNUAL REPORTING REQUIREMENTS?

A: The Regional Center must provide the USCIS with Form I-924A, which describes the annual activities of the Regional Center, the number of jobs created, the number of I-829 petitions denied and approved, certain financial information regarding the project companies, and investor tracking.

Q. WHO ARE ELIGIBLE INVESTORS?

A: Only natural persons. No entities. Each investor must be able to demonstrate that the source of his or her investment funds were lawfully obtained and trace the source of these funds.

Q. HOW ARE REGIONAL CENTER PROJECTS STRUCTURED?

A: Typically, the investors invest in a pooled investment vehicle organized as limited partnerships or limited liability companies. The pooled investment vehicle, in turn, either acquires and operates the job creating project (equity model) or loans funds to the job creating project (debt model). In a limited partnership structure, the organizational documents must provide the investor with voting granted under the Uniform Limited Partnership Act (2001) drafted by the National Conference of Commissioners on Uniform State Laws.

In the equity model, investors become limited partners in a limited partnership or members of a limited liability company and acquire an ownership interest in the Regional Center's business projects. In the debt model, the limited partnership or LLC provides a low interest term loan to the project. Regardless of the structure for each project, all parties involved, including the investor, the pooled investment vehicle, and the principals within the Regional Center, must be mindful that the Regional Center is offering a security with implications under the U.S. Securities Act of 1933, the U.S. Securities Exchange Act of 1934, the U.S. Investment Company Act of 1940, the U.S. Investment Advisers Act of 1940 and applicable state and foreign securities laws.

Q. WHAT TYPE OF PROJECTS CAN BENEFIT FROM A REGIONAL CENTER PROGRAM?

A: Any new commercial enterprise that creates permanent jobs, when structured appropriately, may qualify. Examples of industries and projects include:

- Real estate development (shopping centers, hotels, sports arenas, condominiums, etc.)
- Mining operations
- Restaurant development and management

- Manufacturing plants (auto, plastics, etc.)
- Convention and Conference Centers (sporting facilities and stadiums)
- Call Centers
- Airports or other Transportation Facility programs
- Research facilities (medical, renewable energy, etc.)
- Movie production studios

Q. WHAT IS AN I-526 PETITION AND WHY IS IT IMPORTANT?

A: An I-526 Petition is a petition to the USCIS to be classified as an immigrant entrepreneur for a green card, also referred to as the EB-5 petition. An I-526 Petition requires the immigrant to demonstrate that he or she in the process of investing (or has already invested) at least \$500,000 in a Regional Center or new commercial enterprise. A new commercial enterprise is (i) any enterprise created after November 29, 1990, (ii) any troubled business (i.e., must increase net equity or number of jobs by 40%, but no less than 10 per \$500,000), or (iii) a commercial enterprise that is substantially different than its predecessor (e.g., a former gas station that has been razed and rebuilt to include a car wash or minimart that did not exist previously. The razing and rebuilding of the predecessor gas station will not qualify). A “commercial enterprise” is defined as any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to:

- A sole proprietorship;
- Partnership (whether limited or general);
- Holding company;
- Joint venture;
- Corporation; or
- Business trust or other entity, which may be publicly or privately owned.

The investment doesn't have to be in cash. The investor may contribute property (e.g., goods, machinery), but will need appraisals, bills of lading, receipts, etc. to demonstrate value and actual contribution. Also, the cash or other property may be acquired by the investors as a gift and need not be earned. The key issue is to demonstrate that funds are lawful and that the source of funds are from a lawful activity.

The immigrant files an I-526 with the USCIS. Once approved, the immigrant files (i) a Form I-485, Application for Adjustment of Status in the U.S. for a green card, or (ii) if the applicant is outside the U.S. they will consular process through the U.S. consulate or embassy in their home country.

Q. WHAT IS AN I-829 PETITION AND WHY IS IT IMPORTANT?

A: An I-829 Petition is a petition to the USCIS requesting that the residency status of the visa granted to the investor pursuant to the I-526 Petition be changed from conditional to permanent. The investor is required to file the I-829 Petition no later than 90 days prior to the 2 year anniversary that the immigrant received his or her green card. The USCIS approval of the I-829 Petition is less about the investor and more about the jobs created pursuant to the business plan submitted by the Regional Center for the related job creating project. The documents required for verification will depend on the methodology used in the economic report. For example, if the methodology was based on direct job creation by the project, USCIS will require submission of the project company's W-2s, quarterly payroll reports and I-9s to confirm the creation of direct jobs. When an expenditure or revenue model is used, the project company will be required to demonstrate expenditures, revenues or occupancy depending on the model selected.

Steven T. Anapoell is a shareholder in the Irvine office of Greenberg Traurig, P.C., where he focuses his practice on forming private equity, distressed debt, real estate, venture capital and special strategy funds, mergers and acquisitions, private and public securities offerings, debt and equity investments and financings, and structuring and negotiating complex corporate transactions. Mr. Anapoell has been selected by Los Angeles magazine as one of Southern California's "Super Lawyers" in the areas of Securities & Corporate Finance, Business/Corporate and Tax for the years 2009 – 2012. He also holds a rating of preeminent in his field by Martindale-Hubbell. Mr. Anapoell is the former chair of the Limited Partnerships and Limited Liability Companies Committee, State Bar of California Business Law Section. He is the author and 2011 update author of Chapter 6A – Drafting a Private Placement Memorandum Under Regulation D (the Continuing Education of the Bar California) – *Financing and Protecting California Businesses*; the 2011 update author of Chapter 5A – Issuing Common Shares to Founders and Investors (the Continuing Education of the Bar-California) – *Financing and Protecting California Businesses*; and the co-editor and co-author of *Guide to Organizing and Operating a Limited Liability Company in California* (second edition), Business Law Section of the State Bar of California.

Kate Kalmykov serves as Of Counsel in the New Jersey and New York offices of Greenberg Traurig, LLP. Kate has wide-ranging experience working on EB-5 immigrant investor matters. She regularly works with developers across a variety of industries, as well as private equity funds, on developing new projects that qualify for EB-5 investments. This includes creation of new regional centers, having projects adopted by existing regional centers or through pooled individual EB-5 petitions. For existing regional centers, she regularly helps to prepare amendment filings, exemplar petitions, address removal of conditions issues and develop internal regional center compliance programs. Kate also counsels foreign nationals on obtaining greencards through either individual or regional center EB-5 investments, as well as issues related to I-829 Removal of Conditions. Kate is a frequent speaker on the topic of EB-5 topics and is regularly invited to speak at conferences sponsored by the American Immigration Lawyers Association, the American Bar Association, as well as related industry events.

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