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Five Tips In Representing Non-Regional Center Individual EB-5 Investors

By Kate Kalmykov

Issues such as documenting the lawful source of funds and tracing from the investor to the new commercial enterprise are common in individual and regional center EB-5 petitions. However, when it comes to individual EB-5s there are many unique and complex issues that the attorney must deal with. These include determining if the investment entity qualifies as a "new commercial enterprise," if it is located in a "targeted employment area," and how to document if the required "employment creation" has occurred or will occur.

1. What constitutes a new commercial enterprise?

In contrast to regional center EB-5 investors, individual EB-5 applicants must demonstrate that their investment is in a new commercial enterprise. For those that make their EB-5 investment in a brand new business, this requirement is relatively straightforward and can be easily proven through the submission of corporate formation documents. An investment in a business established after November 29, 1990 will meet the "new commercial enterprise" requirement. However, those investors that invest in a company created before November 29, 1990, face a tougher challenge. They can meet this requirement in one of two ways. First, they can show that they have significantly restructured or reorganized an existing business. The USCIS has not defined what this entails and has interpreted this requirement restrictively. As a result, this is an argument many EB-5 practitioners shy away from. The second option is to demonstrate that the investor has expanded an existing business. To do this, the investor must not only create ten, full-time U.S. jobs, but they must also expand either the net worth or the number of employees of the business by at least 40 percent. This is a tall order for some, but for others it may be feasible.

2. TEAs aren't just for regional center EB-5s

Individual EB-5 investments are $500,000 if the investment is in a Targeted Employment Area (TEA). The regulations define a TEA as either a rural area or an area that has an unemployment rated of at least 150 percent of the national average. Otherwise, if the investment is not in a TEA, the required amount of investment is $1 million. It is important to remember that TEA designation is not decided at the time the individual makes the EB-5 investment. Rather, the USCIS has stated that the availability of a reduced $500,000 investment is only decided at the time of I-526 adjudication. This means that if unemployment statistics change the investor might find that they must invest the higher $1 million amount to satisfy the EB-5 requirements. If the investor has put their funds in escrow, the date of investment for EB-5 purposes is considered the date that the escrow is released following the approval.

Can multiple investors pool their investments in a single business for EB-5 purposes?

3.

Yes, there is no limit to the number of investors that may qualify for the EB-5 from investment into a single business. In fact, this is often a viable option for smaller projects that cannot wait for the lengthy regional center designation application adjudication process to take place by the USCIS. The downside is that pooled individual EB-5s cannot take advantage of economic models that permit indirect employment to satisfy the ten-job per investor creation requirement.

Be aware of the challenges in documenting job creation

4.

Within 90 days before the two-year anniversary on which the investor received their conditional green card, they must file an I-829 petition to remove conditions of permanent residency. To do so, the investor must prove that they have sustained their investment and created the necessary ten direct jobs. To document the number of employees, investors should submit W-2s, Form I-9s, quarterly and annual tax returns, and payroll records. As long as the position will last for at least two years, the actual employees can vary from day to day or week to week. In addition to showing that they have created ten jobs, the investor must demonstrate that they are held by U.S. citizens or lawful permanent residents. This is often a tall order, as the USCIS has held that submission of I-9 forms alone does not satisfy this requirement. This places investors and businesses in a rather precarious position as they find themselves requesting documentation such as birth certificates, passport biographic pages, and other documents that in any other context would violate the anti-discrimination provisions of Section 274B of the Immigration and Nationality Act.

What happens if the EB-5 investment runs off course after I-526 approval?

5.

Individual investor applicants must submit a business plan that complies with Matter of Ho. If the new commercial enterprise deviates from the business plan, such as a change in the scope of the project, a delay in completion, or the inability to raise the requisite amount of capital, the USCIS may determine that a material change has occurred at the I-829 stage and deny the investor's petition. Unfortunately, the USCIS has not defined what constitutes a material change. Is it a slight digression from the business plan or a major change to the project? If there is reasonable cause to believe that the I-829 may not be approved, the investor must make some tough choices. To protect themselves from being placed into removal proceedings, the investor may choose to file a new EB-5 petition. This petition will require that the investor demonstrate anew that the investment meets all of the EB-5 requirements. If the new EB-5 petition and subsequent green card application are approved, the investor must begin a new two-year conditional residence period. In this scenario, aged-out dependents and divorced spouses will no longer be able to derive the benefit of permanent residency from the principal EB-5 applicant.

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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.