

ARE THE ODDS IN YOUR FAVOR?



In the past few years, the EB-5 regional center pilot program has become particularly attractive to the gaming industry as an alternative, low-interest source of capital in a tight lending market. EB-5 funds have broad uses and have successfully been used in the construction of new casino developments, the purchase and renovation of existing casinos, as well as for the development of new gaming technologies and machines across various parts of the U.S. including Mississippi, Nevada, Maryland, South Dakota, and Pennsylvania. Moreover, the United States Citizenship and Immigration Service has stated that EB-5 projects can be implemented on tribal Native American lands, where many gaming projects are found.

For the first time, the Immigration Act of 1990 permitted a foreign national to qualify for permanent residency (green card status) in the U.S. based upon investment into a U.S. business under the employment-based fifth preference category (EB-5). This original program continues to exist today and is commonly referred to as an "individual EB-5." In order for an investor to qualify under this program, they must invest in either an existing company or fund their own. With the individual EB-5 option, the investor will not only be required to commit the EB-5

investment funds to the enterprise, but they are also expected to be actively involved in the day-to-day management of the business. Individual EB-5s are not limited to one investor; they can pool investors together to invest in businesses that they know will create the requisite amount of direct employee positions for each investor. Irrespective of whether the business has one or multiple foreign investors, to qualify for the green card through the EB-5 program, each investor through their investment in the business must demonstrate after a two year period that their investment has resulted in the company hiring at least 10 full-time, U.S. (citizens and permanent residents) workers. The investor must demonstrate that the job creation requirements have been met by submitting evidence that includes W-2s, I-9 Employment Eligibility Verification Forms, and payroll records.

A Second Option

The second and more popular option is to invest in a United States Citizenship and Immigration Services ("USCIS") designated "regional center." The EB-5 regional center pilot program was enacted in 1993, as a way to attract foreign direct investment on a large scale into the U.S. to spur job creation. According to the immigration regulations, a regional center is defined as an entity, organization, or agency that has been approved as such by USCIS. The regional center focuses on a specific geographic area within the U.S. and

seeks to promote economic growth through increased export sales, improved regional productivity, creation of new jobs, and increased domestic capital investment. For large-scale projects, EB-5 regional center designation status is desirable because the job creation requirement can be met not only by demonstrating the creation of direct employment but also through indirect and induced employment. To demonstrate indirect and induced employment, the regional center uses econometric reports that employ recognized economic models such as RIMS II, IMPLAN, REDYN, or REMI to calculate the number of jobs based on a certain amount of input.

The requisite EB-5 investment amount is \$1,000,000. However, if the regional center or investor can demonstrate that the project is located in a rural area or in a "Targeted Employment Area" (TEA) then the investment amount is lowered to \$500,000. A TEA is a geographic area such as a county, municipality, or census tract that has experienced an unemployment rate of at least 150% of the national average. To obtain a TEA designation, the regional center will typically submit an application to the state agency authorized by the state's governor to issue such certifications based on the unemployment rates of a specific areas. In its adjudication, the USCIS through policy guidance has stated that it will defer to the state's designation of what constitutes a TEA when adjudicating EB-5 applications to determine that the foreign national made the proper investment.



YOUR THOUGHTS ON THE G&L COMMUNITY

"SILVERTON'S IT TEAM HAVE BEEN A MEMBER OF INFO-TECH'S GHRC PORTAL FOR JUST A COUPLE OF MONTHS AND WE HAVE ALREADY UTILIZED THE VENDOR LANDSCAPES FOR A SOME PROJECTS. WE HAVE SUBSCRIBED TO INFO-TECH IN THE PAST, BUT LET THE SUBSCRIPTION LAPSE FOR LACK OF INDUSTRY SPECIFIC TOPICS; THE INTRODUCTION OF GHRC HAS RENEWED OUR INTEREST AND ALLOWED THE PRODUCT TO BE MUCH MORE USEFUL TO OUR DEPARTMENT AND INDUSTRY. IT'S PARTICULAR EXCITING TO BE ABLE TO CONTRIBUTE TO THE SUCCESS OF GHRC BY OFFERING CONSTRUCTIVE FEEDBACK AND DISCUSSIONS OF PRODUCTS RELATING TO HOSPITALITY AND GAMING AND KNOWING THAT OUR PEERS ARE DOING THE SAME, IT LENDS CREDIBILITY TO THE REVIEWS RATHER THAN SOLELY VENDOR MARKETING PROPAGANDA. THE GHRC IS AN EXCELLENT COMPLEMENT TO GAMING & LEISURE MAGAZINE."

KIRK GOLDING, VP OF IT, SILVERTON HOTEL & CASINO

BE A PART OF THE G&L COMMUNITY! JOIN US ON  

Courtesy of iStock



How It Works

The following is an example of how it works - a developer is looking to build a new casino project in a specific geographic area in the U.S. such as Las Vegas and is seeking capital for that purpose. The developer may have encountered difficulty in securing all of the capital needed for the gaming project because they are overextended, traditional credit sources are unavailable or they simply want lower interest financing. The developer can apply to the U.S. to become a regional center. If a regional center already exists in the geographic area, the developer may enter into an agreement to have the regional center amend the designation through a filing with the USCIS to include that particular project. The initial application will include corporate and securities offering documents such as a private placement memorandum, subscription agreement, a limited partnership, or LLC agreement, as well as a business plan, econometric report, regional center marketing plan, regional center operational plan, feasibility / market study and other documentation establishing that the project is viable.

Once approved by USCIS the regional center will take their project to market to attract foreign investors. This often involves working with international consultants and brokers to source investors. Investors interested in the regional center will subscribe to an EB-5 investment vehicle structured as either a limited partnership or limited liability company, specifically created for the purpose of financing the development project. This company may then either obtain an equity stake in the development project or alternatively use the EB-5 funds to provide a low interest loan to the developer.

Once investors subscribe, funds may be transferred to the project immediately or held in escrow until each individual's application for the EB-5 visa is approved. If the casino developer is seeking to raise \$100 million and the project is located in a TEA, then they will need 200 EB-5 investors. Although, the casino itself may not employ 2,000 U.S. workers, an economic study using an indirect methodology may be able to project that 2,000 jobs will be created through the construction of the casino building, as well as the operations of the casino facility. This is because the casino's customers will spend money at the casino, dine at the facility's restaurants, perhaps spend the night at a hotel associated with the casino, and also shop at all of the retail stores. All of these activities in turn will generate job creation within the geographical area where the project is based, thereby satisfying the job creation requirements of the EB-5. The green card that investors initially receive is conditional and valid for two years. At the end of the two-year period, the investor must file a petition to remove conditions of residency with the USCIS. As part of that application, the regional center must provide documentation that they completed the project as described in their business plan - i.e. it was built and the funds were expended. By doing so, the USCIS can determine that the jobs, both direct and indirect have been created, thereby satisfying EB-5 program requirements.

Regional center designation is not a one-time occurrence. Once obtained it can be reused to fund other projects. If subsequent projects are outside the scope of the initial designation either by industry or geographic area, then a request for expansion may be filed with the USCIS. Regional center owners may also adopt other projects

under the auspices of their regional center for a fees or equity in the project. A final option may be to purchase an existing regional center that is approved by USCIS but is not in operation.

Risks of EB-5

EB-5 financing is not without risks. USCIS policies with respect to the EB-5 program are extremely fluid and often applications can be delayed while a new area of the program is reinterpreted by the agency. Proper securities structuring and compliance with limitations on advertisements is key to keeping from running afoul of SEC requirements. Careful due diligence and screening of investors is essential to ensure that individual investor petitions are approved by USCIS. Project principals should also be aware that obtaining regional center designation does not guarantee that they will be able to successfully raise funds through the program. The regional center will need to implement an effective marketing plan and agreements with U.S. based broker dealers or overseas marketing agents to be able to attract interested investors to the project and successfully raise capital. EB-5 investors themselves also take a risk by investing in the project. If it is unsuccessful, they may not only lose their ability to recoup their investment, but they may also not be able to obtain the removal of their conditions of residency to allow them to remain in the U.S. as lawful, permanent residents. Retaining experienced EB-5 counsel to ensure ongoing immigration, securities, and tax compliance is the solution to creating and maintaining a thriving and successful center or project.

Kate Kalmykov is Of Counsel at Greenberg Traurig, LLP. Kate regularly works with developers, private equity funds and organizations on developing projects that qualify for EB-5 investments. This includes creation of Regional Centers, having projects adopted by existing centers and individual EB-5s. Kate regularly helps to prepare I-924 amendments, exemplar petitions, and develops compliance programs. She also counsels foreign nationals on individual or Regional Center EB-5s, as well as issues related to I-829 Removal of Conditions. To learn more visit www.eb5insights.com. Greenberg Traurig Gaming Practice attorneys represent casino owners, operators, real estate developers, gaming manufacturers, investment banks and Indian tribes in the development, management, financing, acquisition and restructuring of gaming projects.