

# Prospects For Development Of EB-5 Regional Centre To Sponsor Foreign Investment In The US Immigration Program

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The EB-5 Program for lawful permanent residence is currently administered by US Citizenship and Immigration Services (USCIS). The Program has concurrent goals of immigration to the US through qualified investment into a commercial enterprise, and job creation for US citizens or lawful residents. Investors receive conditional residency after taking the risk in a qualified investment of their own creation, or as part of a partnership or limited liability company in a regional centre. After two years of receiving such status, the investor may apply for a removal of conditional status at which time it must be shown that 10 qualifying full-time job positions per investor have been created, some direct, some indirect.

The required investment level is \$1m unless the investment is made into a business located in a targeted employment area (unemployment rate that is 150 percent or more of national coverage), or a rural region (less than 20,000 population) or a troubled business enterprise (at least 20 percent decline in value over past 12 to 24 months), at which time a reduced investment of \$500,000 is required.

## Requirements to meet residency

In order for an immigrant investor to receive his/her green card through the EB 5 Program, it must be clearly established that the requisite requirements have been met, namely that: (i) a new commercial enterprise has been established; (ii) the requisite amount has been invested into the commercial enterprise; (iii) a minimum investment of \$1m or \$500,000 is made; (iv) the immigrant investor has demonstrated that the capital investment funds have been obtained legally; (v) the requisite number of full-time jobs have been created; (vi) a minimum of 10 full time direct or indirect employment positions must be established per immigrant investor under the regional centre designation; (vii) the immigrant investor has actively participated in the business by means of having certain voting rights (similar to those of a limited partner of a limited partnership under the Uniform Limited Partnership Act; and (viii) where applicable, employment opportunities have been created within a targeted employment area.

## Regional centre designation

A separate EB-5 Program was implemented by Congress in 1993 to bring new capital into the United States and to create new jobs for US workers by allowing foreign investors to invest in designated regional centres. Of the 10,000 investor visas that are available annually, 3000 are reserved for those who apply under the regional centre program.

Investing in a regional centre additionally provides flexibility through the acceptance of indirect job creation as part of the job requirements. There are currently (as of 15 September 2011) 173 approved regional centres (RCs), operating in 40 states, including the District of Columbia and Guam. Approximately 90-95 percent of the individual Form I 526 petitions filed each year are filed by Alien Investors who are investing in RC-affiliated commercial enterprises.

An RC may be granted jurisdiction over a limited geographic area for the purpose of concentrating pooled investment in defined economic zones.

A RC must demonstrate in its Application that activities will focus on the requested geographic region, and not simply on isolated and unrelated areas within the region.

It may be more appropriate for the RC to initially request a geographic area that is in keeping with the economic impacts of the existing project, and then subsequently file an amendment request for an expanded geographic area as the details and location of future projects become known.

## The relevance of US securities laws

When an RC forms a limited partnership or limited liability company in which the EB 5 investor would become a limited partner or member, the RC is offering an EB 5 investor a security. Therefore, an RC must comply with federal and state laws in conducting the offering of securities.

The SEC adopted Regulation S to provide a 'safe harbour' exemption from registration under the 1933 Act for offerings and sales of securities occurring outside the US. Regulation S was intended to help ►►

US and foreign companies raise capital overseas quickly and inexpensively without having to comply with the expensive and lengthy registration process required under Section 5 of the 1933 Act. By adopting Regulation S as a 'safe harbour' exemption, the SEC is affirming that someone who complies with its requirements will definitely have the benefit of the Regulation S exemption. However, Regulation S is not the exclusive means that must be employed to fall within an exemption for the offering. Also, it is important to mention that Regulation S does not establish an exemption from the antifraud, civil liability or the broker-dealer registration requirements of the Securities Exchange Act of 1934, as amended ('1934 Act'), or other provisions of the federal securities laws. The safe harbour provides that the offer or sale must occur in an 'offshore transaction' outside the US at the time of the sale, and no 'directed selling efforts' may be made in the United States by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing in connection with the transaction.

States generally prohibit issuers from paying a commission to anyone effectuating a securities transaction unless the recipient is a registered broker-dealer or agent. All states require that broker-dealers and agents register in the states in which they operate (there are a few limited exceptions). States will interpret the activities that qualify as 'effectuating a securities transaction' broadly, as will the Securities Exchange Commission (SEC). Performing due diligence, negotiating terms of the offering, soliciting the investors, and handling the funds of the investors are activities that states and the SEC have found to qualify as broker-dealer activities.

In addition, a third party who receives any transaction-based compensation in connection with a securities transaction may also be deemed a broker-dealer.

On the other hand, if a third party does nothing more than provide the name and contact information of a potential investor to the issuer, the third party may be considered a 'finder' rather than a broker-dealer and therefore legally entitled to receive a finder's fee without being registered as a broker-dealer.

A Florida court in *SEC v. Kramer*, No. 8:09-cv-455-T-23TBM (M.D. Fla. Apr. 1, 2011) has rejected the Securities and Exchange Commission's single-factor transaction-based compensation test for broker activity, perhaps signalling a more favourable view toward 'finders' in the future. The court held that an array of non-exclusive factors should be evaluated to determine whether a finder is engaged in broker activity. These factors include – in addition to receipt of transaction-based compensation – participation in securities transactions at key points, negotiation of the terms or details of a transaction, offering of advice

or valuation information, and the aggressive pursuit of investors, for example.

#### **Developer motivation to utilise EB-5 Program**

Developers of both real estate and non-real estate projects are incentivised to utilise the EB 5 Program to raise capital since capital has become unavailable from traditional sources.

Foreign investors offer a relatively cheap source of capital, although there is a serious impediment as to the timing of when EB 5 funds can be accessed since the funding process generally involves the creation of an RC and then obtaining I 526 Petition approvals for each investor, which combined process is currently taking in excess of 12 months. USCIS has proposed to adopt a premium processing system to expedite both of these processes, but such procedures are not expedited to be in place until the spring of 2012 as to the I 924 application only and at a later time for the I 526 petitions.

An EB 5 investment involves flexibility in the structure, since the ultimate investment in the business enterprise can be in the form of debt or equity, with an EB 5 separate entity being formed for the benefit of the investors in the program to fund the investment.

#### **Regional centre creation – EB process**

The development of a regional centre involves the following professionals: (i) immigration lawyer familiar with EB-5 process; (ii) economist familiar with EB-5 process; (iii) EB-5 Business Plan Writer familiar with EB-5 process; (iv) securities/corporate attorney familiar with EB-5 process; (v) bank/escrow agent that will serve to escrow funds on behalf of EB-5 investors; and (vi) marketing firm/commissioned agent – migration brokers; in-house marketing; broker-dealer agents; and finders.

The RC designation enables the business enterprise being funded to count indirect and induced employment opportunities, and not just direct jobs, in meeting the 10 full-time jobs per investor requirement. A particular project within the RC may be pre-approved by USCIS and other projects can be included with or without additional filings. The RC designation is a one-time designation allowing future projects to be marketed within such region without incurring the delays of obtaining regional approvals and the RCs can profit by utilising its designation to help fund projects developed by others for fees and/or participation in the venture. However, the significant time and cost of establishing an RC must be considered as well as the fact that each new project may need to obtain separate USCIS approval, and RCs have ongoing administrative and filing requirements with USCIS in order to avoid decertification.



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### Conclusion

As stated by the Profit Policy Memorandum published by USCIS on 9 November 2011: “Congress created the EB 5 Program to promote immigrants’ investment of capital into new commercial enterprises in the United States so that new jobs will be created for U.S. workers. The EB 5 Program provides for flexibility in the types and amounts of capital that can be invested, the types of commercial enterprises into which that capital can be invested, and how the resulting jobs can be created. This

flexibility serves the promotion of investment and job creation and recognizes the dynamics of the business world in which the EB 5 Program exists. Our careful and thoughtful adjudication of petitions in the EB 5 Program should be mindful of these important principles”. ■

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