

EB-5 IMMIGRANT INVESTOR VISA GUIDE

Introduction

EB-5 visas are immigration visas for foreign investors who invest at least \$1 million dollars—or \$500,000 in an economically depressed part of the U.S.—in new, restructured, or expanded businesses in the U.S. which help create jobs for U.S. workers. In the EB-5 Program, immigrants who invest the minimum required capital in job-creating businesses in the U.S. receive conditional permanent resident status for two years. After the two year period, if the investor has satisfied the conditions of the EB-5 Program and other criteria of eligibility, the conditions are removed and the investor and his or her immediate family become unconditional lawful permanent residents of the United States.

EB-5 Visa Basic Requirements

To qualify for an EB-5 visa, the foreign investor must:

- invest minimum level of capital
- in a new commercial enterprise
- that creates no fewer than ten (10) full-time jobs.

Further, the investor must be engaged in the management of the enterprise, either through day-to-day managerial

control or through policy formulation. This requirement is met by evidence that the investor is a corporate officer or holds a seat on the board of directors. However, maintaining a “purely passive role” toward the investment is not permitted.

Full-time employment is defined as “employment in a position that requires at least 35 hours or service per week.” Jobs that are intermittent, temporary, seasonal or transient in nature (such as short-term construction jobs) are excluded from this definition.

It is important to note that the jobs held by the immigrant investor him or herself, or by the immigrant investor’s spouse or children do not count towards the 10 full-time job requirement.

What Is The Minimum Capital Requirement?

As to the capital requirement, the statute governing the EB-5 Program requires that the present fair market value of the immigrant investor’s lawfully-derived capital must be a minimum of \$1,000,000 (USD). An exception exists if the immigrant investor invests his or her capital in a new commercial enterprise that is principally doing business in, and

creates jobs in, a “targeted employment area.” In such a case, the immigrant investor must invest a minimum of only \$500,000 (USD) in capital.

What Constitutes An “Investment” for EB-5 Purposes?

The word “invest” is an important EB-5 term of art. “Invest” is defined to mean “to contribute capital.”

However, a contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the immigrant investor and the new commercial enterprise does not constitute an investment for EB-5 purposes.

In order to qualify as an investment, the immigrant investor must actually place his or her capital “*at risk*.” While there is no minimal degree of risk required, if the immigrant investor is guaranteed the return of a portion of his or her investment, or is guaranteed a rate of return on a portion of his or her investment, then that portion of the capital is not at risk.

Further, evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will be insufficient to show that the investor is actively in the process of investing. Rather, the investor must show actual

commitment of the required amount of capital, in the form of:

- Bank statements showing amounts deposited in enterprise’s U.S. business accounts;
- The purchase of assets for use in the U.S. enterprise;
- Commercial entry documents, bills of lading, and other documents identifying property transferred from abroad for use in the U.S. enterprise;
- Evidence of monies transferred to the new commercial enterprise in exchange for shares of stock; or
- Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the investor, other than those of the new commercial enterprise, and for which the investor is personally and primarily liable.

What Constitutes “Capital” for EB-5 Purposes?

In the EB-5 context, “capital” is broadly defined to take into account the many different ways in which an investor can make a contribution of financial value to a business.

For EB-5 visa purposes, capital is defined as “cash, equipment, inventory, other tangible property, cash equivalents [such as certificates of deposit, treasury bonds, or other instruments that can be converted readily into cash] and indebtedness secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.”

It should be noted that “capital” can also include the immigrant investor’s promise to pay (in the form of a promissory note made out by the investor and payable to the commercial enterprise), provided the promise is secured by assets the immigrant investor owns and the assets are fully amenable to seizure by the U.S. note holder (that is, the commercial enterprise must be able to enforce the note against the underlying collateral).

What Is A “New” Commercial Enterprise?

With a goal of spurring job creation in a wide variety of businesses, the EB-5 Program provides a broad definition of what constitutes a “new” commercial enterprise into which the immigrant investor can invest the required amount of capital and help create jobs.

The EB-5 Program defines “new” as “established after November 29, 1990.”

In addition, a “new” commercial enterprise also means a commercial enterprise that was established before November 29, 1990 and that will be restructured or expanded through the immigrant investor’s investment of capital.

That is, the immigrant investor can invest in an existing business, regardless of when that business was first created, provided that the existing business is simultaneously or subsequently restructured or reorganized such that a new commercial enterprise results. Note that a simple change in marketing strategy or change in ownership does not constitute the kind of restructuring contemplated by the regulations.

Alternatively, the immigrant investor can invest in an existing business, regardless of when that business was first created, provided that a *substantial change* in the net worth or number of employees results from the investment of capital.

“Substantial change” is defined as a 40% increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140% of the pre-expansion net worth or number of employees.

Investment in a new commercial enterprise in this manner does not exempt the immigrant investor from meeting the requirements relating to the amount of capital that must be invested and the number of jobs that must be created.

What Is A “Targeted Employment Area”?

The statute and regulations governing the EB-5 Program define a “targeted employment area” as, at the time of investment, a rural area or an area that has experienced unemployment of at least 150 percent of the national average rate. A “rural area” is defined as any area not within either a metropolitan statistical area or the outer boundary of any city or town having a population of 20,000 or more. In other words, a rural area must be both outside of a metropolitan statistical area and outside of a city or town having a population of 20,000 or more.

In order for the lower capital investment amount of \$500,000 to apply, the new commercial enterprise into which the immigrant invests must be principally doing business in the targeted employment area and must create the jobs in the targeted employment area.

What Is A “Regional Center”?

In order to encourage immigration through the EB-5 visa classification, the U.S. Congress created a temporary pilot program in 1993,

which provides for more relaxed job creation rules if the immigrant investor makes his or her investment in a new commercial enterprise located within a “Regional Center.”

A “Regional Center” is defined 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.”

A Regional Center is not merely a defined geographic area; rather, it is a business entity that coordinates foreign investment within that area in compliance with the EB-5 statutory and regulatory framework.

Investments within a Regional Center provide foreign nationals the unique benefit of allowing them to count jobs created both directly and indirectly for purposes of meeting the ten (10) job creation requirement.

Another benefit of Regional Centers is that they offer immigrant investors already-defined investment opportunities, thereby reducing immigrant investor’s responsibility to identify acceptable investment vehicles. Further, a Regional Center can manage, direct, and control the projects and developments that the new commercial enterprise initiates. For those who prefer a passive role in the management of their investment, or who do not wish to be involved in

the creation of ten (10) U.S. full time jobs, then the Regional Center is the better immigration option.

How Is Job Creation Measured?

As noted earlier, the creation of at least ten (10) full-time jobs for qualified U.S. workers is a critical element of the EB-5 Program. There are three measures of job creation in the EB-5 Program, depending on the new commercial enterprise and where it is located.

A. Job Creation for Troubled Businesses

The EB-5 Program recognizes that the US economy benefits when the immigrant investor not only creates jobs for new commercial enterprises, but also helps preserve existing jobs for *troubled businesses*.

For EB-5 visa purposes, a “troubled business” is defined as a business that has been in existence for at least (2) two years, has incurred a net loss during the twelve- or twenty-four month period prior to the application date, and the loss for such period is at least equal to 20% of the business’s net worth prior to such loss.

Therefore, when the immigrant investor is investing in a new commercial enterprise that is a troubled business, the immigrant investor must only show that the number of existing employees in the troubled business is being or will be

maintained at no less than the pre-investment level for a period of at least two (2) years.

While job preservation in lieu of job creation is allowed, the numeric requirement of ten (10) jobs remains intact. That is, in the case of a troubled business, ten (10) jobs must be preserved, created, or some combination of the two. For example, an investment in a troubled business that creates three qualifying jobs and preserves seven would satisfy the statutory and regulatory requirements.

B. Job Creation for New Commercial Enterprises Not Associated with a Regional Center

For a new commercial enterprise that is not a troubled business and is not associated with a Regional Center, the EB-5 Program provides that the full-time positions must be created directly by the new commercial enterprise. This means that the new commercial enterprise—or its wholly-owned subsidiaries—must itself be the employer of the qualified employees who fill the new full-time positions.

C. Job Creation for New Commercial Enterprises Associated with a Regional Center

For a new commercial enterprise that is not a troubled business and is located within a Regional Center, the EB-5 Program provides that the full-

time positions can be created either directly or *indirectly* by the new commercial enterprise.

Indirect jobs are those that are held outside of the new commercial enterprise but are created as a result of the new commercial enterprise. For indirect jobs, the new full-time employees would not be employed directly by the new commercial enterprise. For example, indirect jobs can include, but are not limited to, those held by employees of the producers of materials, equipment, or services used by the new commercial enterprise.

Advantages of the EB-5 Visa

The EB-5 Investor Visa is an attractive vehicle for investors seeking to immigrate to the U.S., as it enjoys several distinct benefits.

Most notably, the EB-5 visa allows the investor, his or her spouse and unmarried children under 21 to receive conditional green cards for two years. At the end of the two year period, as long as the investor satisfies the requirements of his or her EB-5 visa, the investor and his or her immediate family will become a permanent green card holder, and eligible for U.S. Citizenship.

Further, unlike other immigration categories, an EB-5 investor does not need a sponsor or a permanent job offer, since the investor is investing his or her own funds. Investment funds may come from a gift,

inheritance, business, or any other lawful activity.

Likewise, an EB-5 investor may invest capital from a gift, inheritance, business, or any other lawful activity

Additionally, unlike other business visa options, the EB-5 visa has no minimum education, prior business or management experience, or specialized knowledge requirements.

Further, with the EB-5 visa, the investor and his or her immediate family enjoy the same benefits of U.S. residence as permanent green card holders and (later) U.S. citizens, including the ability to live, work and study anywhere in the U.S.

These advantages are summarized as follows:

- Permanent Residency (Green Card) for investor and investor's spouse and minor children
- Path to U.S. Citizenship
- No sponsor or permanent job offer required
- No minimum education, prior business or management experience, or specialized knowledge requirements
- Investor (and spouse/minor children) may live, work, and study anywhere in U.S. without special authorization

Other Immigration Options

Professionals who are not eligible for an EB-5 investment visa should be aware that there are other business-related visas for which they may qualify, including the H-1B specialty occupation worker visa, the L-1 intra-company transferee visa, and the E-1/E-2 treaty trader and treaty investor visas.

In this regard, you are invited to view our related business immigration articles on our website. We welcome the opportunity to assist you in your business expansion to the U.S.

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