

HOW THE EB-5 IMMIGRANT INVESTOR PROGRAM WORKS

The EB-5 Immigrant Investor Program is a federal program establishing a fifth employment-based preference immigrant visa category. Administered by the U.S. Citizenship and Immigration Service (USCIS), it provides 10,000 visas per year for qualified foreign investors and their immediate families. Their investment must result in a commercial enterprise that benefits the U.S. economy and creates new jobs or preserves existing jobs for American citizens or legal residents. Investors who qualify for EB-5 visas are granted a two year conditional immigrant status in the U.S. In order to remove the conditional immigrant status a petition must be submitted to the USCIS at the end of the second year that requires documentation that all statutory requirements have been met.

To obtain permanent resident status in the U.S., foreign applicants must invest in a commercial enterprise that benefits the U.S. economy and creates or preserves 10 full-time jobs for U.S. citizens or legal residents. The minimum capital investment in the new commercial enterprise is \$1 million, or \$500,000 if investing in a “targeted employment area” (TEA). For purposes of EB-5 investments, a TEA is a rural area or an area that has experienced high unemployment (150% of the national unemployment rate).

Because the task of developing 10 full-time jobs proved difficult, the U.S. Congress developed a temporary pilot program with the same basic requirements of the regular EB-5 program with one major exception; under the pilot program the immigrant investor’s commercial enterprise is not required to directly create or preserve 10 full-time jobs, rather it allows the creation or preservation of 10 or more jobs directly or indirectly as a result of an investment if the commercial enterprise is part of a “regional center”.

Under the pilot program, public or private entities can apply for regional center designation to focus on economic development in a defined geographical region in the U.S. Regional centers also provide a vehicle to facilitate the pooling of investments and for marketing to commercial enterprises to foreign investors as well as providing assistance in applying for EB-5 status and removing conditional residence status. However, foreign investors are not required to invest through a regional center.

Foreign investors in the EB-5 program must be approved by USCIS through an I-526 petition. The petition requires that, at the time of filing: the capital (cash or cash equivalent) must be invested and at risk; the petitioner must show the

potential for day-to-day managerial control or management through policy formulation of the new commercial enterprise; and how the investment will benefit the U.S. economy. A detailed business plan must be submitted with the I-526 petition that demonstrates the need for at least 10 employees within the next two years and indicates approximate dates of hiring. The I-526 petition requires: organizational documentation for the new commercial enterprise; business license; evidence that all capital has been committed; documentation to prove that capital was acquired through legal means; a comprehensive business plan; evidence of managerial capacity of the investor; and evidence of the required employment creation. If applying for EB-5 status under the pilot program, the investment must be made in an approved regional center and show that as a result of the new commercial enterprise 10 jobs will be created, either directly or indirectly.

Following the approval of the I-526 petition and the approval of an adjustment application or admission under an immigrant visa, the foreign investor and his immediate family become conditional permanent residents of the U.S. for two years. The immigrant investor must file a Form I-829 to remove these conditions within the 90-day period immediately preceding the second anniversary of his admission to the U.S. as a conditional permanent resident. Immigrant investors and their immediate families remain in valid status while the I-829 petition is pending. Evidence must be filed that the capital was invested or in the process of being invested, that the investment created or will create 10 full-time jobs and that the individual sustained the actions required for removal of conditions during the conditional residency.