

# Obtaining the American Dream: EB-5 Million Dollar Investor Visas



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# **INDIVIDUAL INVESTORS (DIRECT INVESTORS)**

Leon Hazany, Esq.

# Individual Investors

Typical Scenarios:

- 1) Individual exploring U.S. Immigration Options – meeting with immigration attorney to discuss immigration possibilities (Primary Goal is U.S. Immigration).
- 2) Investor starting a new business, purchasing existing business, or making some type of investment – usually referred by Business Lawyer, CPA, Business Advisor or Real Estate Professional (Secondary Goal).

# The Basics

Conditional Lawful Permanent Resident Status (“Green Card”) can be granted (INA § 203(b)(5))

- 1) Invest in a New Commercial Enterprise
- 2) Investment Amount \$1,000,000 (sometimes \$500,000 may be enough)
- 3) Employs 10 U.S. citizens or authorized immigrant workers full-time (W-2)
- 4) Day to Day Management or Policy Formation

# New Commercial Enterprise

Must invest in a New Commercial Enterprise, which can be (8 C.F.R. §204.6(h)):

- A Company formed after 11/29/1990
  - ✓ Investor does not need to establish the company; only needs to invest in the company
- A Company formed before 11/29/1990, if:
  - ✓ It has been restructured or reorganized so that a new commercial enterprise results; or
  - ✓ Expanded so that there is a substantial change in the net worth or number of employees.

## New Commercial Enterprise (cont'd)

Restructuring so that new commercial enterprise results – must show Real Changes:

- Products or Services Offered
- Business Structure
- Manner Operated
- Organization of Employees
- Other substantial changes showing that new Business has resulted
- Change in Décor or Implementation of New Business Plan at Howard Johnson Motel not enough (*Matter of Soffici*)
- May Not create Net Loss in Employment (*Matter of Hsiung*)

# Expanding Business

8 C.F.R. § 204.6(h)(3)

Requires 40% increase in:

- Net Worth; or
- Number of Employees.

\* Individual Investor must meet threshold Investment Amount \$1,000,000 (\$500,000), but for 40% test can include new investment funds into project by partners



# The Investment

INA § 203(b)(5)(c):

- Invests \$1,000,000, or
- Invests \$500,000 if the investment is in a Targeted Employment Area (T.E.A.)

# Forms of Investment

- The investment can be in the form of cash, equipment, inventory, other tangible property, cash equivalents, and/or loans secured by the investor's personal assets (so long as investor is personally and primarily liable).
- The Investment must be *At Risk – No Guaranteed Repayment*
- It is not okay to use loans secured by assets of the new commercial enterprise or retained earnings.
- Value of capital is determined in U.S. dollars and at fair market value.

# One Commercial Enterprise

The investment must be in a single commercial enterprise not by combining investments into multiple commercial enterprises.

# Source of Investment Funds

Two Main Objectives:

- 1) Be certain the funds were legally obtained;
- 2) Be certain that the applicant is the one really investing their own funds.

## Source of Investment Funds (cont'd)

- U.S.C.I.S. will Trace the investment funds back to the source;
- They will want to see the paper trail for the investment funds;
- Examples of documentation: bank statements, wire instructions, personal tax returns, business tax returns, salary information, financial statements, loan documents, gift letters, asset purchase and sale records, proof of inheritance, etc.

# Targeted Employment Area (“T.E.A.”)

Question: When can the Investment Amount be \$500,000 instead of \$1,000,000?

Answer: When the Commercial Enterprise is located in a Targeted Employment Area.

# Definition of T.E.A.

INA § 203(b)(5)(A)

- 1) Rural Area (outside of a city or town having a population of 20,000+); or
- 2) High Unemployment Area (area that has experienced unemployment of at least 150% of the national average).

U.S.C.I.S. can consider most recent Bureau of Labor Statistics or a State Designation (not designation by local government)

Will look to the facts in existence at the time of the capital investment or filing of the I-526, whichever occurs first.

# GO-Biz

Governor's Office of Business & Economic Development  
(GO-Biz)

<http://business.ca.gov/Programs/EB5Program.aspx>

Can help you determine if your Commercial Enterprise is located in a T.E.A. in limited cases by City or County, or in other cases by Census Tract.



# Employment Creation

- Must Create Full-Time Employment for at least 10 qualifying U.S. citizens or immigrant workers within the 2-year Conditional resident (Green Card) period
- Full Time/ Permanent Employment (W-2)
- If the positions created are not all yet filled, U.S.C.I.S. will look to business plan to determine if nature and projected size of Commercial Enterprise will create need for not less than 10 qualifying employees

## Employment Creation (cont'd)

- Creation of Direct Jobs (between the Commercial Enterprise and Employees)
- Troubled Business Employment - Do not need to create the 10 new jobs, if it is a Troubled Business
- (where investment sustains current employees (at least 10) of a Commercial Enterprise which experienced a net loss for one or two years exceeding 20% of net worth)

# Investor Involvement

Investor will engage in Day-to-Day Business or Policy Formation, 8 C.F.R. §204.6(j)(5)

- Title and description of job duties
- Evidence of being corporate officer or director
- Powers are consistent with rights and powers normally granted for that position

# Application Process

- Initially apply for 2-year Conditional Residency (Green Card) using U.S.C.I.S. Form I-526, and pay \$1,500 application fee
- Submit extensive documentation showing that requirements met; Burden of Proof is on the investor
- Normally will work with a business plan writer as well as CPA for financial projections
- Current Processing Times on [www.USCIS.gov](http://www.USCIS.gov)
- Once approved granted 2-year residency (Green Card)
- 90 days prior to expiration of 2-year residency, must file a Petition for Removal of Conditional Status (Form I-829)
- During I-829 process must demonstrate that: 1) required capital has been invested, 2) Sustained the enterprise and investment, and 3) created the requisite jobs

# **REGIONAL CENTERS – EB-5 PILOT PROGRAM**

Anibal Sanchez, Esq.

# What are Regional Centers?

- A Regional Center is an entity designated by U.S. Citizenship and Immigration Services (“USCIS”) which is involved with the promotion of economic growth, including improved regional productivity, job creation, and increased domestic capital investment.
- As of November 1, 2013, USCIS had approved approximately 400 Regional Centers.
- Regional Centers are part of the Immigrant Investor Pilot Program. The program has been authorized through September 30, 2015.

## What are Regional Centers? (cont'd)

- An immigrant investor may obtain permanent residence in the United States through a qualifying investment into a commercial enterprise operated or sponsored by a Regional Center.
- A commercial enterprise operating within a Regional Center receives the benefit of counting direct and indirect jobs towards the job creation requirement for each of its investors.

# Obtaining Regional Center Approval

- An application must be made to USCIS on Form I-924
- The application must include evidence of the following:
  - ✓ The geographic scope of the proposed activity
  - ✓ How the regional center will promote economic activity within the proposed geographic region
  - ✓ Provide details on how direct and indirect jobs will be created through capital investment
  - ✓ Provide information about the proposed project – either hypothetical or actual project



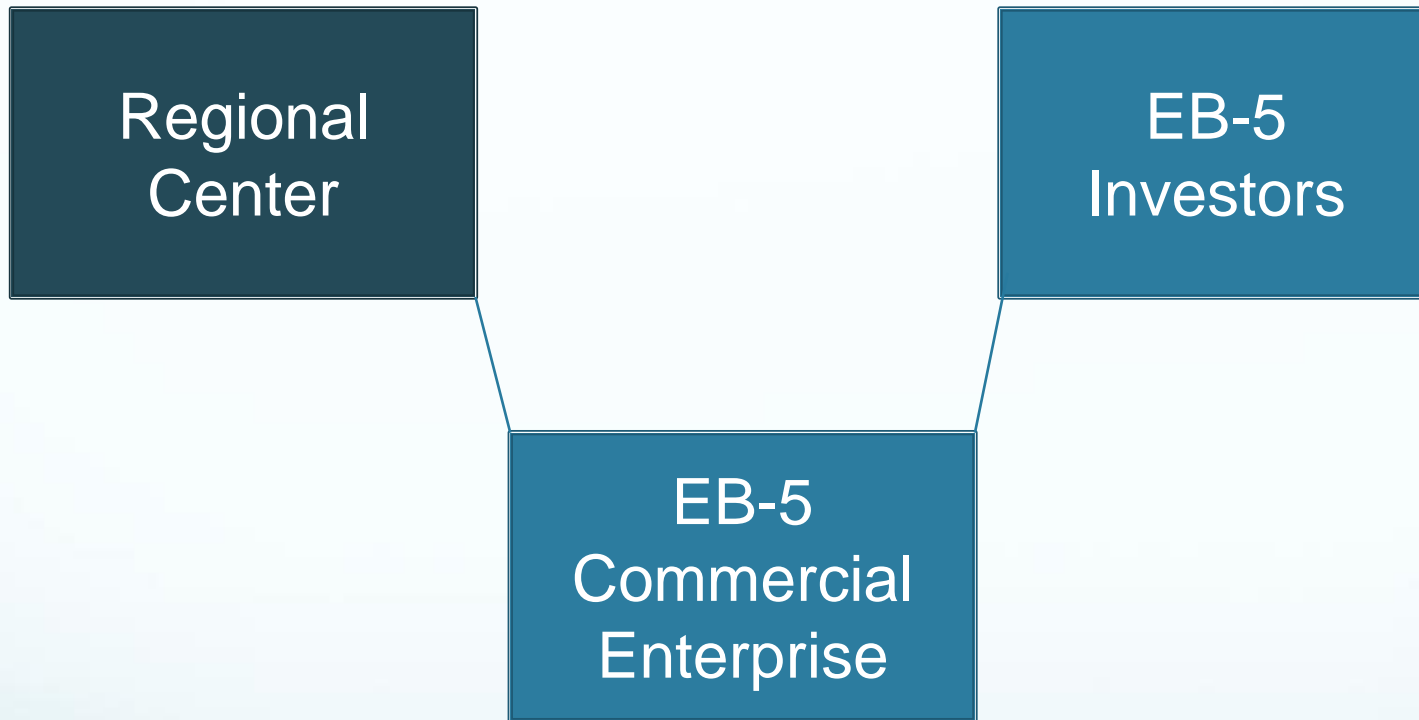
# Operating a Commercial Enterprise within a Regional Center

- Foreign investors must invest into a qualifying commercial enterprise operating under the auspices of an approved Regional Center.
- Regional Center approval from USCIS may be based on a hypothetical project or an actual project.
- Many Regional Centers establish projects within targeted employment areas to allow investors to qualify for EB-5 benefits through a \$500,000 investment.

## Operating a Commercial Enterprise within a Regional Center (cont'd)

- Regional Centers generally will create commercial enterprises that are managed or owned by the Regional Center. Foreign nationals will in turn invest into the enterprise that is owned or managed by the Regional Center.
- Investments into EB-5 commercial enterprises are securities offerings and a PPM and related offering documents should be provided to investors

# SAMPLE COMMERICAL ENTERPRISE STRUCTURE WITHIN A REGIONAL CENTER



# Submitting an EB-5 Investor Application Through a Regional Center

- Individual Investors must submit applications for EB-5 classification.
- The EB-5 commercial enterprise should provide each investor with evidence necessary to file their individual cases. This includes but is not limited to:

# Submitting an EB-5 Investor Application Through a Regional Center (cont'd)

- A EB-5 compliant business plan
- Evidence that the investment capital has been received and placed “at risk” by the commercial enterprise
- Evidence that the commercial enterprise is located in a TEA if investors are seeking to acquire their permanent residence through a \$500,000 investment
- An economic analysis detailing how at least 10 direct and indirect jobs will be created for each investor
- Evidence that the foreign investor will participate in the management of the enterprise.
- A copy of the PPM and any other applicable offering or corporate documents

# I-829 Processing For Investors

- Each investor must submit an I-829 application prior to the expiration of their 2 year conditional green card
- Evidence from the commercial enterprise that should be included in the application:
  - ✓ Confirmation that the EB-5 investment capital has been utilized, or will be utilized, in a manner consistent with the business plan approved during the application process
  - ✓ Evidence that the enterprise is operating as described in the business plan
  - ✓ Evidence that at least 10 jobs have been created per investor.

# **BUSINESS LAW CONSIDERATIONS**

Robin Mashal, Esq.

# Corporate Law

Individual (direct) investor

## 1. Form business as a “new commercial enterprise”

- ✓ Entity formation
- ✓ Drafting charter documents, issuing shares
- ✓ Business permits
- ✓ Immigrant investor be engaged in management

## 2. Acquire existing business:

- ✓ “Reorganize and restructure” so it qualifies as a new commercial enterprise
- ✓ Due diligence - corporate law, tax law, liabilities
- ✓ Plan of reorganization



# Corporate Law (cont'd)

## Regional Center

1. New commercial enterprise – Limited Partnership
2. Regional center applicant – LLC or C Corp, and it acts as a GP of the LP
3. Regional center proposal to US Citizenship and Immigration Service (USCIS):
  - ✓ Offering memorandum
  - ✓ Statement of risk factors and disclosures
  - ✓ Subscription agreement
  - ✓ Limited partnership agreement
  - ✓ Overall business plan (business plan writer)
  - ✓ Economic impact analysis (economist) – prediction on job creation, positive impact on regional and national economy; provide studies and analyses

# Securities Law

- Federal and “Blue Sky” securities regulations apply to selling investments in regional centers
- Generally, any “securities” offered to the public must be “registered” unless “exempted” by rules
- Security: debt or equity instruments
- SEC Registration: expensive; for public companies
- Exemptions (safe harbors)
  - ✓ Reg. D – coordinated with state Blue Sky laws
  - ✓ Reg. S
- Investor is advised about risks of investment

# What is a “Security”

The Securities Exchange Act of 1934 defines a security as:

"Any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, any put, call, straddle, option, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited."

# Rule 506 of Reg. D

Rule 506 exempts (17 C.F.R. § 230.506):

- Any issuer
- Offer and sell unlimited amount of securities
- No general advertising or solicitation
- To an unlimited number of persons
- No more than 35 un-accredited investors
  - ✓ Each non-accredited investor has such business/financial knowledge and experience to evaluate the investment risk
  - ✓ Required disclosures to non-accredited investors per Rule 502(b)
- Timely file Form D with SEC and pay the fee

# Accredited Investor

“Accredited investor” is a person whose:

- Net worth (alone or combined with spouse) exceeds \$1M
- Individual income for past two years and current year exceeds \$200K/year
- Joint income with spouse for past two years and current year exceeds \$300K/year

By limiting sales only to accredited investors, issuers avoid the need to make disclosures required under Rule 502(b)

# 25102(f)

§ 25102(f) of Calif. Corporate Security Laws of 1968:

- Any offer or sale of security
- To 35 or less persons
- Purchaser has preexisting relationship with offeror, or has business/financial experience to have capacity to protect their interests
- For purchaser's own account
- No publication or advertisement
- File notice with Calif. Commissioner of Corporation and pay fee

# Reg. S

General requirements of Reg. S:

1. Offer and sale of securities in an “offshore transaction”
  - Seller believes the buyer is offshore at time of transx.
  - Transx. occurs in a “designated offshore securities market” (e.g. Canadian stock exchange)
  - Transx. not pre-arranged with a buyer in the U.S.
2. No “direct selling efforts” in the U.S.

Unlike Reg. D, complying with Reg. S does not provide an automatic exemption from state securities registrations.

An issuer may simultaneously rely on Reg. S. (offshore offerings) and Reg. D (offerings within U.S.)

# Employment Law

Must create 10 full-time jobs for U.S. legal residents for each EB-5 investor:

- ✓ Employment Contracts
- ✓ Employee Handbooks
- ✓ Tax withholdings
- ✓ Employee benefits



# Tax Considerations

- Tax ramifications of U.S. income/loss (including those from EB-5 investments)
- “Nonresident Alien” (person not U.S. citizen) – subject to U.S. withholding taxes, unless they become a “Resident Alien”:
  - ✓ “Green Card Test” – includes conditional permanent resident
  - ✓ “Substantial Presence Test” – present in U.S. total 183 days over 3 years
- Resident aliens are taxed on “worldwide income”
- Effect of Tax Treaties
- Estate planning – estate tax, gift tax, GST