

Immigrant Investors: The EB-5 Program



By Michael Wildes

The Immigrant Investor Program, also known as "EB-5," provides a means for foreign nationals to obtain Lawful Permanent Resident Status (a "Green Card") in the United States through specific types of investments, thus affording them the opportunity to live and work permanently in America. Congress created the EB-5 program in 1990 to stimulate the U.S. economy through job creation and capital investment by foreign investors. After a very slow start, the program has grown and flourished. Foreign nationals utilize this program not only as a path to permanent residence, but as a means to eventual naturalization as well; once a certain period of time as a green-card holder has passed, qualified individuals may apply for U.S. citizenship. This article aims to provide residents of other countries with a better understanding of the process of becoming a U.S. permanent resident through investing in the EB-5 program.

To qualify under the EB-5 program, an individual must invest in an American new commercial enterprise. This is defined as an enterprise established after November 29, 1990 (or if established prior to that date, the investor must have purchased the existing business and restructured it as a new commercial enterprise), or the enterprise must have expanded through the investment so that a 40% increase in the net worth or the number of employees occurred. The enterprise can be for any for-profit purpose formed to conduct lawful business, including a corporation, joint venture, holding company, partnership, sole proprietorship or business trust. Non-commercial activity such

as owning and operating a personal residence is not included in the definition of commercial enterprise.

Capital Investment Requirements

There are two different types of investments that can be made for EB-5 purposes. The first involves a minimum investment of \$1 million, and the hiring of 10 full-time workers qualified to work in the U.S. The other option is investing in a Targeted Employment Area (a qualifying rural area or an area with a high unemployment rate). The minimum qualifying investment in a Targeted Employment Area in the U.S. is \$500,000. A targeted employment area must be a rural area or an area experiencing unemployment of at least 150% of the national average rate at the time of the investment.

The capital investment may be made in cash, equipment, inventory, other tangible property, cash equivalents and indebtedness secured by assets owned by the foreign investor, provided that he/she is personally and primarily liable and the assets of the new commercial enterprise are not used to secure any of the indebtedness. The capital should be valued at fair-market value in United States dollars. Capital does not include any assets acquired (directly or indirectly) by unlawful means, such as criminal activity. Borrowed capital will not count for the EB-5 investor program. A primary part of the EB-5 application includes proving, by extensive documentation, the investment funds' derivation.

The Job Creation Requirements

In addition to the actual investment, EB-5 immigrant investors must create or preserve at least 10 full-time jobs for qualifying U.S. workers within two years of the investors' admission to America. A quali-

fied U.S. worker is a U.S. citizen, permanent resident, or other immigrant legally authorized to work in the United States. However, this definition does not include the investor, his/her spouse, children or a foreign national in non-immigrant status (such as an H-1B visa holder) or who is not authorized to work in the U.S.

EB-5 Regional Centers

An EB-5 immigrant investor may invest in an approved Regional Center, which is a public or private economic entity involved in the promotion of economic growth, improved regional productivity, job creation and increased domestic capital investment. Individuals seeking to organize an approved Regional Center can apply to USCIS and submit a proposal. When a Regional Center is approved, USCIS recognizes it as an economic entity that is a designated participant in the EB-5 program. The EB-5 Regional Center Program does not require that the foreign investor's enterprise itself directly employ 10 full-time U.S. workers. Instead, it is enough if 10 or more jobs will be created directly or indirectly as a result of the investment. Regional centers are USCIS-approved entities in designated geographical areas for which the U.S. government has determined that investments will create the necessary 10 jobs per investor, whether directly or indirectly. Virtually all of the regional centers are located in established Targeted Employment Areas (TEAs) and qualify for the reduced \$500,000 investment minimum.

Conditional Permanent Residence

After the requisite forms, applications and supporting documents have been submitted and an EB-5 immigrant visa has been approved by USCIS, EB-5 investors (and their derivative family members, if any) may be granted conditional perma-

nent residence for a period of two years, provided that they secured the approval of their applications to adjust to permanent resident status, or upon their arrival to the U.S. on their EB-5 immigrant visas. The investor must apply for the conditions to be removed within 90 days prior to the two-year anniversary of receiving conditional permanent resident status. If this application is also approved, then the investor will enjoy permanent resident status without conditions, allowing him/her (and derivative family members) to permanently live and work in the U.S. and eventually apply for naturalization. There is no requirement that the investor work for the Regional Center at all.

Documents and Forms

Investing in EB-5 projects is not a game for amateurs. Risks are inherent in the project and fraud abounds. The EB-5 application requires very extensive documentation and evidence that must be submitted to the government documenting each step of the EB-5 application process. Without doubt, it is always best to consult with an expert immigration attorney to assist with preparation of such an extensive and complex application.

**This article is based on information available as of its publication and is not intended to be all-inclusive or to furnish advice in a particular case. We are not responsible for any changes in regulations that may occur subsequent to publication. Please feel free to contact our office for further information and advice.*

Michael J. Wildes, is the Managing Partner of Wildes and Weinberg, P.C. Wildes and Weinberg, P.C. has offices in New York, New Jersey and Florida. If you would like to contact Michael Wildes please email him at michael@wildeslaw.com and visit the firm's website at www.wildeslaw.com.