EB-5 Immigrant Investor Program

The U.S. Congress created the employment-based fifth preference ("EB-5") immigrant visa category in 1990 for immigrants who invest in and manage U.S. commercial enterprises that benefit the U.S. economy through what is labeled the "EB-5 Program." It is open to citizens of all countries. For a business to quality, it must create or save at least 10 full-time jobs for U.S. workers for each EB-5 investor. Job creation can be proven in one of two ways. The business in which the capital is invested (called a "New Commercial Enterprise" or "NCE") can create ten actual jobs for US workers who work an average of 35 hours per week. Alternatively, the NCE can affiliate with a with a government approved 'Regional Center', which then allows the NCE to prove job creation with the use of econometric formulae.

On March 15, 2022, Congress enacted the EB-5 Reform and Integrity Act of 2022. The Reform Act settled the minimum investment amount, which had been increased by USCIS only to be reduced by the courts (who invalidated the rule increasing the amount). The minimum amount required to invest is now $1.05 million, although that amount is reduced to $800,000 if the investment is made into a new commercial enterprise principally doing business in a high unemployment area or rural area (called a "Targeted Employment Area" or "TEA"). A very notable difference between how TEAs were handled before the Reform Act is now only the Department of Homeland Security (presumedly via USCIS) will certify TEAs, as opposed to the old system of allowing states to certify. It will now be much harder for a project to qualify for the reduced investment amount.

The Reform Act attempted to reauthorize the regional center program. To the shock and dismay of many, USCIS announced that they interpreted the Reform Act to abolish the old regional center program and start one anew, thus requiring redesignation of the over 600 previously active regional centers. This process would take years, effectively killing the regional center program for the foreseeable future. Since the announcement, two law suits have been filed. One by the Behring Regional Center and the other by a group of Regional Centers and the Regional Center trade association. The initial hearings do not bode well for a speedy restoration of the regional center program. Notwithstanding the merits of the suits, it may take significant time for the courts to resolve the issues. Until then, only Direct EB-5 investments (not involving a regional Center) are possible. This is of particular importance to prospective investors who have children that are approaching the age of 21. A green card will be issued for the investor, spouse and **all children under the age of 21 at the time of filing.** Under the Child Status Protection Act, a child's age is 'frozen' at the filing date. So for people who have kids nearing their 21st birthday, their only option at this time is a Direct EB-5 Project.

The Reform Act had other important changes for the EB-5 Program. For Direct EB-5 projects, now, only one EB-5 investor is allowed to invest per project. This greatly limits the available supply, in particular as no regional center projects are possible. The second significant change is the provision of 'set asides' of visas for investors who invest

in TEA projects. This change will have a dramatic effect on the processing time for investors from countries subject to 'retrogression', which is the delay imposed by the US State Department on the issuance of a visa for anyone from a country that has overconsumed visas compared to other countries. The only country currently in retrogression is China. For investors from China, the current wait time in non-TEA projects is between 12 and 20 years or more! If they invest in a TEA project it should be approximately 4-5 years. Other countries that have previously been in retrogression or are at risk of it include India, Vietnam and South Korea.

The investor starts the immigration process with the investor's US immigration attorney filing an I-526 Petition with USCIS, which is the request for the investor (and his or her family) to receive a conditional lawful permanent residency status (a green card) based on making a compliant investment in a US company. If the investor is located in the US, the investor can immediately file for employment authorization and travel parole (for the investor and his or her family). Otherwise, upon approval of the I-526 Petition by the USCIS, the petition transfers to the National Visa Center ("NVC"). The NVC will then send a notification to the Investor's foreign Embassy that has jurisdiction to process immigrant visas, and will send visa application documents for the investor to complete. The Investor's immigration attorney will work with the Investor to complete these forms, which are filed directly with the Visa Section at the U.S. Embassy. The investor will then schedule a visit with their Visa Section at the embassy. If the investor is still in the US, he or she can file for adjustment of status to receive the lawful permanent residency (green card) and avoid the consular process.

The I-526 petition is a substantial undertaking. The regulations require that the capital for the investment come from funds that are owned by the investor. Generally, that means that if loans are taken to provide the needed investment capital, those loans should be secured by collateral owned by the investor with a value that is at least equal to the amount of the loan. This requirement was recently challenged in Zhang v. USCIS, in which the federal district court (recently affirmed by the US Court of Appeals) invalidated the USCIS prohibition against unsecured loans. (For additional information, see *EB-5 Funds Obtained From Unsecured Loans Now Legal Under Zhang*

Further, the investment funds must be proven to be from legal sources, such as trade/business, investment income, gifts or inheritance. USCIS has essentially required the equivalent of a forensic audit to document the flow of all funds back to the source. A proper EB-5 source of funds often involves thousands of pages of materials. Typical legal fees for representing an investor and preparing the source of funds is $15,000 or more.

The second part of the I-526 petition are the materials related to the NCE. The standards that govern an acceptable business plan were articulated in a case entitled In Matter of Ho. Generally the plan must establish that the NCE will create the required jobs (or in the case of the regional center, engage in the types of business activity that are the assumptions upon which the econometric formulae calculate job creation), and is generally credible. The NCE may engage in any sort of legal trade or business. It is

best to avoid controversial areas such as cannabis, even when legal in a given state, due to issues with Federal laws. Competent business plans are often dozens of pages, with detailed financial projections and hundreds and sometimes even thousands of pages of supporting materials. The budget to prepare all other needed materials for a project can be $50,000 to $75,000 for smaller projects to a quarter million or more for larger ones. To properly prepare a project, expertise is needed in corporate law, immigration law, management consulting, financial modelling, and business plan writing. Typically, projects that have created an EB-5 investment program, will charge an administrative fee of $50,000 to cover these and other related costs.

After approval of the I-526 petition and receipt of the investor's green card, the investor is technically a 'conditional' lawful permanent resident. The condition is that the company receiving underlying investment, the NCE, will create the needed jobs. Following the start of the lawful permanent residency status, the investor then must file a petition to remove the condition on Form I-829. At this stage the NCE provides the investor's immigration attorney with all the needed information to prove that the funds were spent according to the business plan and that the job creation has occurred.

The current processing time for the I-829 is at least two years. The investors status will be extended for as long as the I-829 is being processed by USCIS. Once approved, the investor is an unconditional lawful permanent resident. After a total of five years from the date of the beginning of the conditional lawful permanent residency status, the investor will be entitled to become a US citizen if desired. This is not a requirement; the lawful permanent resident can be maintained indefinitely.

All EB-5 projects are subject to certain structural limitations. Most notably, the investment capital must be 'at risk'. This means that the investment is subject to total loss so all investments in all NCEs must be equity investments. If the investment in the NCE is guaranteed or collateralized in some way, the structure would violate the regulations. Note, many regional center projects utilize a more complex legal structure for the investment, due to their ability to prove labor creation through econometric formulas. Technically, the formulas are determining the indirect and induced labor created through the economic activity. This is the activity of firms other than the NCE. In these projects, the sponsors separate the NCE, which accepts the investor capital, from the job creating entity (JCE), which undertakes the project. The NCE, in which EB-5 capital always must be an equity investment, can then invest in the JCE as either an equity investment or a loan. The loan can and often is collateralized by the assets of the JCE. Often, sponsors and practitioners gloss over the structural distinction between the NCE and the JCE. It is always the case, if properly structured that the investment into the NCE will be an equity investment for which there can be no guarantee or rights to collateral owed directly to the investor. Any rights of these sorts will be owed only from the JCE to the NCE and not to the individuals.

The investment must also be irrevocable, meaning that the investor does not have the right to demand repayment at a particular time or upon a set of predefined events. As noted above, the timetable from beginning to end of even a non-retrogressed investor is

at least six years (and potentially far longer for Chinese investors). This is often longer than the loan term or project timeline. Unfortunately, because of the requirement that the investor's capital remain at risk for the duration of their immigration process (or at least through the filing of the I-829 based on recent guidance, and the investment cannot be redeemed at the investor's demand some other condition being met, some projects must redeploy the capital that is returned from the NCE to the JCE. USCIS has created significant confusion around what Regional Center sponsored NCEs are and are not permitted to do in respect of redeploying capital so they do not run afoul of the rules. Even the most recent policy memorandum did not materially clarify the issues. Things can get very confusing and risky to an investor. For example, it is possible to have someone who invests in an NCE that makes a secure loan to a JCE, after which the NCE then redeploys the capital that was repaid from the JCE into some new project that may or may not be a secured loan. Non-regional center projects avoid these issues. The money is invested with the JCE as the NCE and the JCE are one and the same. Accordingly, there is no need for redeployment, as the investment is always with the NCE and will remain so during the entire term of the investor's EB-5 immigration process.

The issues outlined above are complex and the USCIS position with respect to them is still evolving. As an investor contemplates an investment in a third-party project or in their own project it is paramount to have advisors with experience in both the corporate, finance and immigration aspects of the program to properly advise and or structure the transactions.