



EB-5 QUESTIONS & ANSWERS IN PLAIN ENGLISH

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What is the EB-5 program?

Also known as “EB-5,” the Immigrant Investor Program was created by Congress in 1990 to stimulate the U.S. economy through job creation and capital investment by foreign investors. Under the pilot immigration program, first enacted in 1992 and rolled out in 1993, certain EB-5 visas are set aside for investments in Regional Center projects. The pilot program is currently authorized until September of 2015. Foreign nationals investing the required funds who demonstrate creation of the requisite number of jobs will receive conditional permanent residency, or a conditional “green card,” in the United States for himself/herself, his/her spouse and all dependent, unmarried children under age 21.

What are the basic requirements for an EB-5 investment?

- *Foreign investor must have invested in, or be in the process of investing, the necessary capital into a project.* Investment must be \$1,000,000 unless the project is located in a Targeted Employment Area (TEA), in which case the investment amount is reduced to \$500,000. Investment must be in a for profit business, not a passive security such as the stock market.
- *Investment must create ten jobs.* This may include both *direct* and *indirect* jobs if the investment is in a Regional Center project.
- *Investor must document the lawful source of the investment funds and trace the investment to the U.S. EB-5 project.*
- *Investment must be “at risk”.* No guarantees for return of funds to the investors may be made by the project.
- *The required investment amount must be used only for job-creating “business activity,”* and not for capital reserves or transaction costs.

What is a Targeted Employment Area (High Unemployment or Rural Area)?

A targeted employment area (TEA) is an area that, at the time of investment, is a rural area or an area experiencing unemployment of at least 150 percent of the national average rate.

A rural area is any area outside a metropolitan statistical area (as designated by the Office of Management and Budget) and outside the boundary of any city or town having a population of 20,000 or more according to the decennial census.

What are the job creation requirements for EB-5?

The investor must create or preserve¹ at least ten full-time jobs for qualifying U.S. workers within two years (or under certain circumstances, within a reasonable time after the two-year period) of the immigrant investor’s admission to the United States as a conditional Permanent Resident.

¹ Investors may only be credited with preserving jobs in a troubled business.



- Direct versus Indirect jobs:

Direct jobs are actual, identifiable, full-time jobs for qualified employees (i.e., W-2 and I-9 employees) located within the commercial enterprise into which the EB-5 investor has directly invested his/her capital. Direct EB-5 investments must prove that ten individual jobs are created for each individual EB-5 investor.

Indirect jobs are those jobs shown to have been created collaterally or as a result of EB-5 capital invested in a commercial enterprise utilizing a Regional Center designation. Economic methodologies are utilized to calculate the number of jobs created and attributed to each investor.

Can investments be pooled?

Yes, the regulations specifically allow immigrant investors to pool their investments with others seeking EB-5 status. Each investor must invest the required amount -- \$500,000 or \$1,000,000. All of the new jobs the new commercial enterprise creates are allocated among those within the pool seeking permanent resident status as EB-5 investor.

What is a Regional Center?

An economic entity, public or private, which is involved with the promotion of economic growth, improved regional productivity, job creation and increased domestic capital investment. Generally these entities focus on a specific geographic area within the United States. Such an entity will need to apply for Regional Center designation from the USCIS to facilitate foreign investment in job-creating projects in the United States. The USCIS can designate an economic entity as an EB-5 Regional Center after it reviews the proposal verifying the plan to promote economic growth.

What is the difference between a Regional Center investment and a direct business investment?

The Regional Center is charged with the responsibility of administering projects that seek EB-5 investor funding and ensuring compliance with USCIS regulations. Regional Center investors are permitted to demonstrate through "reasonable methodologies" that their investment resulted in the creation of ten or more direct, indirect, or induced jobs. This is validated using statistical formulas and models to demonstrate a correlation between their investment of capital into a specific business and indirect jobs created in other businesses within the greater community. Because of the ability to count indirect and induced jobs, it is generally easier to fund larger projects through the Regional Center model.

What is included in calculating the \$1,000,000 or \$500,000 investment amount?

The entire amount of the investment need not be funded out of the investor's cash on hand. Eligible capital for investment includes cash, equipment, inventory, other tangible property, cash equivalents and amounts borrowed by the investor². All capital must be valued at fair market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) are not permitted capital for EB-5 investments; accordingly, source of funds tracing is an important component of an EB-5 program.

² Amounts borrowed may be included only to the extent that the debt is secured by assets owned by the investor, the investor is personally and primarily liable and the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.



Can funds be gifted to a family member for the investment?

Yes. Gift recipients should be prepared to demonstrate that any applicable gift taxes will be paid. Additionally, the funds from the giftor must be traceable to a legal source.

Must the entire investment amount of the investment be made at the time of filing an EB-5 petition?

The entire amount of the investment need not have been made at the time of filing the petition. However, the investor must prove availability of the funds and an actual legal commitment of the required amount of capital. A mere intention to invest or plans for a future investment where there is no present commitment of the funds will not qualify. Many projects do not wish to risk the availability of funds and will therefore insist that the full investment be funded immediately. Often times the funds, or a portion of the funds are placed into an escrow account.

How can one demonstrate that the capital used was legally acquired?

Legally acquired capital includes funds generated from lawful businesses, salaries, investments, property sales, inheritances, gifts and loans. These sources can be proven by submitting:

- Foreign business registration records
- Personal and business tax returns, or other tax returns of any kind filed anywhere in the world within the previous five years
- Documents identifying any other source of money

An investor must also submit certified copies of all pending civil or criminal actions and proceedings and any private civil actions involving money judgments against the investor within the past 15 years.

How are TEAs designated?

The USCIS will consider the applicability of a TEA when reviewing the I-526 petition, which must be accompanied by:

- In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located either within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or
- In the case of a high unemployment area:
 - Evidence that the area where the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or
 - A letter from an authorized body of the government of the state where the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area.



Persons wishing to demonstrate that a project falls into a TEA may make a request of the responsible entity for TEA designation or collect the evidence directly as noted above. This process should be reviewed carefully by a team of EB-5 professionals. Not all states will issue letters establishing a high unemployment area TEA designation.

Review of the TEA applicability is made at the I-526 individual investor petition stage and not at the earlier time the Regional Center I-924 is filed (see “Is it difficult to establish a Regional Center?” below). For “marginal” TEAs (those that barely meet the criteria), this is something to consider.

How can I find out whether a particular area has already been designated a TEA?

Many states publish lists with defined acceptable TEAs. Unfortunately, there is no master list at this time.

Is it difficult to establish a Regional Center?

In order to be designated as a Regional Center by the USCIS, a business entity must file a Form I-924 with the USCIS. The application must include information about the proposed Regional Center and a project example. The project example may be a real, “shovel-ready” project or may be a hypothetical project. Key exhibits to the submission are a strong project business plan and an economic report prepared by an economist that understands the EB-5 program which describes the project’s anticipated job creation. The road map described in the business plan and economic report must be followed. Any material changes will require an amendment to the I-924 and further processing time by the USCIS. Because a Regional Center can be used for multiple projects, it is typically desirable to describe in the I-924 a geographic area and types of industries and projects beyond the initial project. Both the geographic area and the types of industries and projects must be grounded in reality and defensible based upon business fundamentals. Perhaps the largest obstacle to establishing a Regional Center is the approval time for designation. As of this writing, that period is running over 12 months although the USCIS states the target processing time is four months.

How are Regional Center projects generally structured?

Generally an investor’s funds are invested in a single-purpose, pooled investment vehicle, such as a limited partnership or limited liability company. The pooled investment vehicle, in turn, either acquires and operates the job creating project (equity model) or makes a loan of funds to the job-creating project (debt model). In the equity model, investors become limited partners in a limited partnership or members of a limited liability company and acquire a direct or indirect ownership interest in the Regional Center’s business projects. In the debt model, the limited partnership or LLC provides a low interest term loan to the project. An experienced team of EB-5 professionals will determine the specifics based on the needs of the project, the expectations of other project investors and the competitive marketplace for EB-5 investors.

Must the EB-5 investors be active in the business?

Yes, but a range of activities or investor rights are considered active for this purpose. The EB-5 statute requires the investor to participate in the management of the new enterprise through either being involved in the day to day managerial control of the enterprise or by managing it through policy formulation. The investor must be prepared to show the government that the requirement will be met. Examples of evidence of this requirement include:



- a detailed job description for the position held by the investor;
- evidence that the investor is a corporate officer or on the board of directors; or
- evidence that the investor will be involved in direct management activities or policymaking activities of a general or limited partnership. According to the regulations, providing evidence that a limited partner has rights, powers and duties commensurate with those normally granted under the Uniform Limited Partnership Act (ULPA) is acceptable.

The importance of having the correct corporate structure and underlying agreements cannot be overstated. Merely calling the investor a limited partner pursuant to the ULPA in a partnership agreement does not automatically mean that the person will be deemed to be involved in the management of the project.

Are there any compliance responsibilities for Regional Centers?

A Regional Center must monitor its investors, the funds and the job creation of the projects. A Regional Center must also file an annual compliance report, I-924A, with the USCIS. A Regional Center is also responsible for performing a reasonable amount of due diligence on each of the project's investors. Such due diligence includes reviewing the investor's source of funds and tracing such funds into the investment. When an investment is made into a project affiliated with a Regional Center there is generally a one-time administrative fee ranging from \$40,000 to \$75,000 charged to offset some of the costs to administer these compliance related responsibilities as well as market the project and/or Center.

Are EB-5 investments subject to securities laws?

Yes. There are no specific exemptions to any U.S. securities laws for EB-5 investment programs. All participants in these programs must therefore comply with the U.S. Securities Act of 1933 and state "blue sky" laws concerning the offer and sale of securities, the broker-dealer registration requirements of the U.S. Securities Exchange Act of 1934, the U.S. Investment Advisers Act of 1940 and state equivalents, and the U.S. Investment Company Act of 1940, as well as all applicable foreign securities laws. Compliance typically means either registration or concluding that an exemption from registration is available. Press reports from September 2012 indicate that an internal memorandum prepared by the USCIS notes that Regional Centers "are not even making good-faith attempts to conform their offering documents to basic securities regulations." Multiple federal regulatory agencies, including the USCIS, the Securities and Exchange Commission and the Office of Homeland Security Office of Inspector General are aware of and likely investigating securities law violations of EB-5 projects and Regional Centers. Moreover, aggrieved investors can bring private actions for damages associated with securities law violations at any time.

Accordingly, no one should take comfort in the lack of securities law enforcement to date, and comprehensive securities compliance must be built in to every EB-5 program.



Who can utilize the EB-5 foreign investment program?

Any projects that create jobs can use the program. Some common examples are:

- Real estate development (shopping centers, hotels, mixed use, condominiums, etc.)
- Alternative energy, including solar, wind and geothermal
- Restaurant development and management
- Assisted living facilities
- Casinos and resorts
- Amusement parks
- Manufacturing plants
- Waste management facilities
- Convention and conference centers
- Sporting facilities and stadiums
- Airports or other transportation facilities
- Research facilities (medical, renewable energy, etc.)
- Movie production studios
- Infrastructure projects
- Charter schools

Do projects need to be affiliated from a legal entity standpoint, with the Regional Center that is housing their project?

While EB-5 projects that are administered under the auspices of a Regional Center receive the benefit of indirect job creation, the relationships between the Regional Centers and individual projects have morphed over the years. Some Regional Centers promote only projects they directly control. Others act in a pseudo-investment banking role, facilitating EB-5 capital for an unaffiliated project, while maintaining a close relationship with such project – for example as general partner of a lender fund.

Recently, some Regional Centers have partnered with unaffiliated projects and minimized their role in the project. This model is sometimes referred to as “leasing” the Regional Center designation. The regulations do not appear to prohibit such agreements, but the USCIS has not yet opined on the validity of such relationships. For any such program, compliance responsibilities and representations made by the Regional Center in their original designation application should be considered throughout the process.

Does an investor select a project or a Regional Center?

An investor generally selects a project, but the reputation of the Regional Center can make a big difference. Investors are wise to seek independent legal and business assistance when contemplating an EB-5 investment.



What does an investor do to obtain his permanent residence, or “green card”?

Once an investor has selected the investment and subscribed to the entity, an I-526 Petition by Alien Entrepreneur is filed with the USCIS. The investor must submit the following evidence:

- that he/she has invested in a “for profit” new commercial enterprise;
- if applicable, that the new commercial enterprise has been established and is principally doing business in a targeted employment area (TEA);
- that the investor will be actively involved in the management of the new commercial enterprise (as discussed above);
- that the individual has invested or is in the process of investing the amount required (\$1,000,000 or \$500,000);
- that the investment funds were obtained through lawful means;
- that the new commercial enterprise will create at least ten full-time positions—not including the investor, his/her spouse or children, or any temporary or nonimmigrant workers, or individuals who are not authorized to work in the United States;
- a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, not fewer than ten employees will result from that individual’s investment;
- for Regional Center-affiliated projects, the investor must show that the capital investment was made in accordance with the Regional Center’s business plan.

Generally, the Regional Center and project will provide a package to the investor with the requisite details for the Regional Center and project business plans.

What happens after the I-526 is approved?

Upon approval of the Form I-526 petition, the investor will file either

- if physically present in the US, a Form I-485, Application to Register Permanent Residence or Adjust Status, with the USCIS to adjust status to conditional permanent resident within the United States, or
- if abroad, a DS-230, Application for Immigrant Visa and Alien Registration, with the Department of State to obtain an EB-5 visa for admission to the United States.

The EB-5 investor and his/her derivative family members are granted conditional permanent residence for a two-year period upon the approval of the I-485 application or upon entry into the United States with an EB-5 immigrant visa.

What happens after the investor’s two years of Conditional Residency?

The investor will need to file Form I-829, Petition by Entrepreneur to Remove Conditions, 90 days prior to the two-year anniversary of the granting of the EB-5 investor’s conditional resident status (green card). At that time the project will need to present evidence that the investment was made and sustained, the jobs were timely created and the original business plan submitted to the USCIS was followed with no material changes. The documents required for verification of job creation in a Regional Center project will depend on the methodology used in the economic report. The submission will include receipts, financials and bank statements. In a direct investment project, the USCIS will require submission of the project company’s W-2s, quarterly payroll reports, Form I-9s and other filings to confirm the creation of direct jobs. If



the USCIS approves this petition, the conditions are removed from the EB-5 applicant's status and the EB-5 investor and derivative family members will be allowed to permanently live and work in the United States.

Will an investor's family also be granted the green card?

Spouses and dependent, unmarried children under the age of 21 (derivative family members) may accompany or follow to join the investors. There are special rules involved for children who turn 21 during the process that should be discussed with legal counsel.

Are any countries excluded from eligibility for the EB-5 Visa program?

The EB-5 Visa is open to all nationalities.

How many visas are available in the EB-5 program?

10,000 visas are available each fiscal year for investors and their dependents.

How can Sheppard Mullin help you?

Representing Regional Centers, individual project companies and foreign nationals considering EB-5 investment our experienced interdisciplinary team can assist with all aspects of the EB-5 program. No matter the role for a particular engagement, Sheppard Mullin provides a comprehensive view of the EB-5 program to maximize the odds of favorable outcomes. Our expertise includes sophisticated advice on securities law issues that pervade every aspect of the EB-5 program, as well as transactional issues such as debt and equity capitalization, real estate agreements and title issues, franchise agreements and power purchase agreements.

Key members of our team have two decades of experience in the EB-5 program. Our lawyers have actively participated in the recent and rapid evolution of EB-5 from an obscure means for an individual to gain a green card through active investment and management of a small U.S. business, to a viable means of funding significant portions of the capital stack for industrial-scale projects. Understanding the need for compliance with both immigration and securities laws is a critical part of the services we offer to our clients.

The government has on several occasions issued memoranda and policy interpretations that rejected EB-5 designs and practices that previously met no objection. Accordingly, we believe that EB-5 professionals must not only have experience in prior successful programs, but also be able to anticipate and avoid problems that may occur as the USCIS becomes increasingly sophisticated and multidisciplinary in its adjudication.

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