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*Practice Group(s):**Real Estate**Immigration*

## EB-5 “Immigration through Investment” Program Extended to 2015

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### I. Introduction

The Immigration Act of 1990 created the EB-5 “immigration through investment” program. It allows foreign nationals to obtain green cards in the United States (the “U.S.”) by making an investment in a project that creates or preserves at least 10 jobs in the U.S. EB-5 affords a “win-win-win” opportunity for foreign nationals to obtain legal permanent U.S. resident status and a return on their investment, U.S. businesses to obtain financing and the U.S. economy to gain needed jobs. This undersubscribed, but increasingly popular, program was scheduled to expire on September 30, 2012. However, the federal government has extended it to September 30, 2015.

Set forth below is a brief overview of the EB-5 program and a summary of its current status.

### II. EB-5 Overview

As the soft economy continues in the U.S., financing generally remains difficult to secure and, when it is available, often comes at a prohibitive price. The dearth of reasonable financing is causing an unfortunate drag on promising new project development and job creation. Meanwhile, many foreign nationals seek permanent residency status in the U.S. and are willing to pay a considerable sum for a “green card” especially if the payment takes the form of an investment that can earn a profit.

A. Investment. EB-5 requires an (i) investment of \$1,000,000 anywhere in the U.S. or \$500,000 in a “Targeted Employment Area” (an area with unemployment at 150% or more of the national average) in a project that (ii) creates or preserves at least 10 jobs for U.S. workers. The jobs must be created within two years (or under certain circumstances, within a reasonable time after the two-year period) after the immigrant investor’s admission to the U.S. Construction jobs are not counted.

B. Residency. An approved EB-5 petition grants the investor, his spouse and minor children conditional permanent legal resident status for two years. A single investment, therefore, can achieve legal permanent U.S. resident status for an entire family. Within the 90-day period before the expiration of the green card, the investor must submit evidence documenting that: (i) the required investment has been made and (ii) at least 10 jobs have been created or preserved. Failure to do so can result in loss of residency status and deportation.

C. EB-5 Projects. EB-5 projects may be small “mom and pop” businesses created and funded solely by the foreign national in the U.S. or large commercial ventures created by a U.S. business and funded by the pooled investment of many foreign nationals. The latter scenario provides an opportunity for U.S. businesses to secure capital at a lower cost than traditional financing sources. Any business seeking financing that will create at least 10 new jobs in the U.S. may wish to consider EB-5.

D. Regional Centers. The EB-5 program allows special “Regional Centers” to be created by a developer and approved by the U.S. Citizenship and Immigration Services (“USCIS”) which afford enhanced benefits for the developer. A Regional Center gives a developer an exclusive territory, such

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as a county, within which EB-5 funds may be utilized for a specific type of project or industries, such as senior living. Developers commonly form an alliance with a municipality that serves as the sponsor of the Regional Center.

A Regional Center also makes it easier to satisfy the job creation requirement by including both the jobs created directly by the project as well as the jobs created indirectly as part of the economic ripple effect caused by the project. For example, if the proposed project is a new manufacturing facility that will create 80 jobs and result in a hotel, a restaurant and a retail center opening nearby that create 20 jobs, all 100 jobs will be counted.

To obtain a Regional Center designation from the USCIS, one must submit a substantial proposal that includes an architectural plan or project description, a business plan with an economic impact forecast, financial projections, a description of risks and a description of the sources and uses of the required capital. Approval (or rejection) of an application for a Regional Center currently takes approximately nine months.

Regional Centers can be used to pool funds from immigrant investors who either (i) acquire an ownership interest in the projects (an equity investment) or (ii) provide a term loan (often five years) to the project (a debt investment). It is important to note that debt investments are not allowed for EB-5 projects that are not in a Regional Center. Also, developers who offer or sell investments in an EB-5 project must be careful to comply with U.S. securities registration or exemption requirements.

E. **Quota.** The USCIS reserves 10,000 immigrant visas (“**EB-5 Visas**”) each year. Of the 10,000 EB-5 Visas available annually (i) 3,000 are set aside for those who invest in Targeted Employment Areas and (ii) 3,000 are set aside for those who invest in projects affiliated with a Regional Center. The EB-5 program is currently undersubscribed, but gaining in popularity.

F. **Downside.** There are some risks and timing issues associated with EB-5 financing. First, there is time and expense involved in seeking approval of a proposed EB-5 project that might not ultimately be approved by the USCIS. Second, even if the project is approved, by the time the project is approved, the investment opportunity might be gone or the economic environment changed for the worse. Third, there is risk associated with finding foreign nationals who are willing to invest in the project. Fourth, for the foreign national, there is the risk that the required number of jobs will not be created and they will not obtain legal permanent resident status.

### III. EB-5 Current Status

The USCIS reported in July 2012 that 209 Regional Centers are operating in 40 states. A complete list of the approved Regional Centers can be viewed at [www.uscis.gov/eb-5centers](http://www.uscis.gov/eb-5centers). The USCIS also reported that 92% of the EB-5 visa petitions are filed by immigrant investors who are investing in Regional Centers. Therefore, Regional Centers have clearly become the preferred investment vehicle for the EB-5 program.

In July 2012, the USCIS also reported that in fiscal year 2012, it approved triple the number of EB-5 petitions than it approved in fiscal year 2009. To accommodate the increase in demand, the USCIS has created a new office and significantly expanded its staff to administer the EB-5 program. The new office will be led by a Chief of Immigrant Investor Programs.

On September 28, 2012, the U.S. government extended the EB-5 program to September 30, 2015.

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### IV. Conclusion

The EB-5 program has been extended to September 30, 2015. If the timing and cost associated with obtaining the necessary USCIS approvals and immigrant investor funding can be structured to accommodate the timing and economics of the project that will create the necessary jobs, EB-5 can represent a relatively low-cost source of capital that compares favorably with alternative sources of capital in today’s market. With interest in the EB-5 program increasing, now may be an excellent time to take advantage of it.

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