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EB-5 – A Call to Foreign Investors From U.S. Developers and Business Owners

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The EB-5 program, a pathway to U.S. citizenship for foreign investors via the United States Citizenship and Immigration Services' ("USCIS") Immigrant Investor Program, has been a vehicle for domestic economic stimulation and a doorway to the U.S. for foreign investors for over twenty years. However, while the program has seen a recent uptick in utilization, its opportunities for both foreign investors and domestic businesses alike have been less than fully realized. In the recent past, only about one-tenth of the 10,000 visas available annually under EB-5 are actually issued, providing tremendous potential and opportunity for a substantial increase of investment under the program. More specifically, EB-5 should be recognized as a mutually-beneficial means through which foreign investors seeking U.S. citizenship and domestic entities in need of financing each can attain their respective goals.

EB-5 Investments

In order to qualify under the EB-5 program, a foreign investor must make a \$1,000,000 investment, or a \$500,000 investment if in a "Targeted Area," in a "new commercial enterprise" which creates at least ten new full-time jobs for qualifying U.S. workers, all within a two-year conditional period. Targeted Areas are comprised of either (i) a rural area not located within a city having a population of 20,000 or more, or (ii) a high unemployment area enduring an unemployment rate that is at least 150 percent of the national average. As part of the initial application, an immigrant investor must show that the entire \$1,000,000 or \$500,000 for a Targeted Area investment has been made at the time of application. Such investment may be in the form of cash or cash equivalents, as well as equipment, inventory or other tangible property that is contributed to the business, but a loan to the enterprise from the investor will not qualify. The immigrant investor also must establish as part of the application that he or she has invested in a qualifying commercial enterprise. The investor, however, need not show that he or she established the enterprise; investment in an enterprise established by someone else is sufficient. Typically, a qualifying commercial enterprise is a newly-formed, for-profit business, but an investment in an existing for-profit business, which the investor sufficiently restructures or expands, also will qualify. Additionally, while the regulations require the immigrant investor to maintain an active, controlling or policy-forming position in the business, participating as a corporate officer, board member or limited partner, as applicable to the entity structure, may suffice.

The investor also must show, in addition to the required investment amount in a qualifying commercial enterprise, that not fewer than ten new full-time jobs will be created as a result of the establishment or the restructuring/expansion of the business. This requirement may be satisfied either by providing documentation that at least ten new qualifying full-time employees or ten additional qualifying full-time employees, in the case of the restructuring/expansion of an existing business, have been hired and are currently employed by the business at the time of application or by providing a comprehensive plan detailing the creation of at least ten new full-time positions prior to the end of the two-year conditional period. To qualify, the persons employed must be either U.S. citizens, lawful permanent residents of the U.S. or other immigrants legally authorized to be employed in the U.S.

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EB-5 Pilot Program

In addition to the primary EB-5 program described above, a separate EB-5 vehicle, known as the Immigrant Investor Pilot Program (“Pilot Program”), has more flexible job creation requirements, specifically allowing the ten full-time jobs to be created indirectly. To qualify under the EB-5 Pilot Program, the immigrant investor must make his or her investment through a “Regional Center,” as designated by the USCIS. The regulations define Regional Centers as “any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment.” A center seeking approval and designation by the USCIS must submit a proposal illustrating how it will create jobs indirectly in a specific geographic region through increased exports. Some Regional Centers exist within Targeted Areas, allowing for the reduced \$500,000 investment, while others do not. Merely being designated as a Regional Center, however, does not automatically guarantee that all projects within the Regional Center’s boundaries will qualify for EB-5 status. In addition to demonstrating that the target project is within the geographic area of the approved Regional Center, an immigrant investor still must make the required \$1,000,000 or \$500,000 investment (as applicable), establish a new commercial enterprise or invest in an expansion/restructuring of an existing enterprise that will undertake the project, and demonstrate that the project will create a minimum of ten new full-time jobs, either directly or indirectly, through revenues generated from increased exports resulting from the project. To show that at least ten jobs will be created indirectly, according to the regulations, the immigrant investor may employ such methodologies as “multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and other economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment.” While the requirements of the Pilot Program may appear onerous from an immigration perspective, the flexibility it affords with regards to job creation and the availability of projects already in place within approved Regional Centers make this option attractive to immigrant investors.

Visa and Residence

Once a complete and proper EB-5 application is filed with the USCIS, the immigrant investor typically will receive a conditional permanent residence visa within a few months (usually six to eight), enabling the investor to live and conduct business in the U.S. during the two-year conditional period. The immigrant investor’s immediate family (spouse and children under age 21) also are allowed to reside in the U.S. during this period. After the two-year period, if the immigrant investor has fulfilled his or her investment obligations and the “new commercial enterprise” has created the requisite ten new full-time jobs, then the immigrant investor is granted legal permanent residence in the U.S. under EB-5, including the same privileges for applicable family members as during the conditional period. As legal permanent residents, the immigrant investor and his or her applicable family members would have the privileges of maintaining permanent residence and working in the U.S. However, further steps would need to be taken prior to obtaining U.S. citizenship.

At-Risk Investment

As part of the EB-5 application process, an investor must demonstrate that he or she has placed the required amount of capital at risk for the purpose of generating a return on such capital. The “at-risk” requirement can typically be satisfied by an equity investment (and not through a loan by the investor). However, if such investment is made through a qualified Regional Center and the immigrant investor acquires equity in such Regional Center, then the “at-risk” requirement may be

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satisfied if such Regional Center, in turn, either provides a loan to the applicable project or invests equity therein.

Opportunities and Challenges for U.S. Developers and Businesses

Aside from the obvious benefits the EB-5 program offers to immigrant investors, the clear intent of EB-5 is to stimulate domestic economic growth. As such, companies specializing in real estate development that are seeking financing may look at the EB-5 program as a potential vehicle for attracting funding, including possibly becoming designated as a Regional Center or using an existing Regional Center vehicle to facilitate the process. Developers in the hospitality and leisure industry, in particular, already have benefited significantly from the EB-5 program via large amounts of offshore investment utilized for the construction of hotels in the U.S. While a \$1,000,000 investment alone may not be sufficient to completely fund such a development project, the EB-5 program allows for multiple immigrant investors to pool their capital into a single new commercial enterprise, so long as each investor contributes the requisite amount and at least ten full-time jobs are created from each investment. Thus, developers may be able to look to a conglomerate of immigrant investors as a means of funding their next project.

Developers should be mindful, however, of the challenges related to raising funds through an EB-5 Regional Center. Such challenges may include, among other things, the following: (i) the registration of a Regional Center may be time consuming and costly; (ii) raising funds in a foreign country may take substantial time, and there is no guarantee that the effort will be successful; (iii) potential investors may be reluctant to have a closing with respect to their investments before they obtain their U.S. conditional permanent residence permits, and they may require the developer to hold the EB-5 investment funds in escrow pending the issuance of their conditional permanent residence permits (in order to enable redemption of their investment funds if the permits ultimately are not issued); (iv) if the investment is made through a loan to the developer, the loan will likely not be eligible for prepayment for a period of several years, in order to satisfy the requirement that the investment be “at risk” until removal of the investor’s conditional status by the USCIS; and (v) each investor must demonstrate (typically through an econometric study conducted for a Regional Center) that the end development project employs the minimum of ten full-time positions for each immigrant investor. Additionally, various securities regulations, such as those addressing registration and/or exemption of offers and sales of securities with the U.S. Securities and Exchange Commission, can complicate stock issuance in the EB-5 context and need to be considered in order to assure that issuers making offers to foreign investors comply with all such regulations.

Despite the challenges presented by the EB-5 program, developers seeking investment funds and/or franchisors seeking to expand should consider and evaluate the EB-5 program as a vehicle for alternatively-sourced capital for their projects. As evidenced by the recent investment surge in U.S. hotel development using EB-5 compliant enterprises, the program clearly creates a viable mechanism for foreign capital to be accessed by U.S.-based developers and franchisors. K&L Gates is well versed regarding the requirements and provisions of the EB-5 program; and with its extensive real estate, land use, immigration, securities and finance capabilities, K&L Gates is uniquely positioned to advise clients as they navigate the EB-5 program and avail themselves of its benefits.

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