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Basics of EB-5 Lending

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Introduction. In 1990, Congress created the fifth preference category for employment-based immigration, commonly referred to as the EB-5 Immigrant Investor Program, in Sections 203(b)(5) and 216A of the Immigration and Nationality Act.[1] This was the first (and to date only) time that Congress had authorized a visa category specifically for the purpose of facilitating the admission of immigrant investors as lawful permanent residents of the United States. Congress' main purpose in creating the EB-5 program and providing for a special process for an immigrant investor to obtain permanent lawful residency in the United States on a somewhat expedited basis is to stimulate the national economy through job creation and capital investment.[2] The EB-5 program[3] has been extended several times and was most recently extended through September 30, 2015. As of the date of this paper, it appears likely that Congress will renew the Program,[4] with various industry trade groups, such as IIUSA, reporting that the Program could be made permanent in September (although with some changes). Recent data, particularly since 2008, suggests that the Program continues to gain in popularity.[5] The federal agency that administers the immigration process, including the EB-5 Program, is the United States Citizenship and Immigration Service ("USCIS").[6]

BASICS OF EB-5

General Qualifications for the EB-5 Visa. The EB-5 Program is available to those immigrants seeking permanent lawful residency in the United States and who have invested, or are in the process of investing,[7] at least $1 million of capital[8] in a new commercial enterprise (or "NCE")[9] employing at least 10 full-time[10] American workers. A lower investment minimum of $500,000 is available for those individuals who invest in a project in a "targeted employment area" ("TEA") or "rural area."[11]

Key Observation. With regard to maximizing the prospects of a successful "raise" of EB-5 capital for a particular project, the parties obviously strive to qualify a project as being in a TEA since the minimum investment hurdle is lower and, consequently, the pool of eligible investor applicants larger. Each state has been delegated the authority by the EB-5 Program to make this determination. Accordingly, for a developer interested in using EB-5 capital, one of his first steps might be to request a TEA designation letter from the particular state. This would also be one of a number of key items that a traditional lender might include in its due diligence checklist when evaluating whether or not to lend to a project relying, in part, on EB-5 capital. See both "Considerations for Traditional Lenders When EB-5 Capital is in the Capital Stack" beginning on page 6 and Exhibit A at the end of this paper.

With respect to "direct" investments (i.e., the investment of the immigrant's capital is made directly into the enterprise responsible for creating the jobs) and "indirect" investments (i.e., the investment of the immigrant's capital is made through or with the assistance of a Regional Center[12]), the investor must show that the project was responsible for creating at least 10 "direct" or "indirect" jobs, as the case may be, within *two years* of an approved I-526 application.[13] If a direct investment is being made, then the number of jobs created for counting purposes must also be "direct," meaning the individuals whose jobs are being created must actually be employees of the job creating enterprise, or "JCE". However, if the project is

affiliated with a qualified and approved Regional Center, the additional jobs that can be counted as being created by the JCE may be "indirect" as well as "direct." Most new businesses generate many more indirect jobs than direct jobs and, accordingly, a project's likelihood of meeting any job requirement target should be enhanced when the project is affiliated with a Regional Center.

Counting the Jobs. For each EB-5 investment of $1,000,000 or, if in a TEA, $500,000, the project must generate[14] 10 jobs. Each job must be full-time (i.e., requiring a minimum of 35 working hours per week) and held by an American worker.[15] For purposes of being counted, a job can be not only a function of the construction activity but also a function of the operations of the project once construction is completed. Unless the EB-5 applicant invests through an approved and qualified Regional Center, the proposed applicant will be making a "direct" investment in which only "direct" jobs will be counted.[16] As mentioned above, projects that are sponsored through an approved and qualified Regional Center are only required to generate "indirect" jobs as well as a subcategory of indirect jobs referred to as "induced jobs."[17] Indirect jobs are performed by persons who are not W-2 employees of the JCE but that are created, nonetheless, as a result of the project. For example, the jobs created by the producers of the material, equipment and services used or incorporated in the JCE's capital project, and who are not directly employed by the JCE, are counted for purposes of meeting the 10-job per investment target. For purposes of counting jobs that are indirectly created, the requirements for satisfying the USCIS' idea of a "job" appear to be quite lenient: full/part-time, permanent/temporary, or employee/independent contractor.[18] Moreover, the location of the job being created does not necessarily have to be at the project site (for example, the jobs created by the manufacturers of any components of the project, even if in another state, and any of the service providers (such as lawyers and accounts) for the project may be counted in tallying the job creation totals). Induced jobs that are created by the workers, both direct as well as indirect, that spend their increased income on local consumer goods and services are counted as well. However, despite the presumed flexibility of what is considered a job, the documentary burden of proof evidencing the number of induced jobs created outside of the Regional Center's approved territory must be detailed and verifiable.[19]

Fortunately, all of the jobs created by virtue of the project are allocated to the EB-5 investors.[20] An allocation does not need to be made among persons not seeking legal resident status under the EB-5 Program.[21] As a result, even though the amount of EB-5 capital may be small when compared with the other sources of financing and equity in the project, the jobs that are created are given credit to the EB-5 capital.[22] Notwithstanding the above, while all sources of capital can be allocated to the EB-5 investors for purposes of counting the number of jobs created, one limitation that the parties (particularly the developer) need to understand is that not all construction expenditures are deemed by USCIS to create jobs.[23]

Timing Consideration. In connection with the business plan prepared by the developer or Regional Center in its application to USCIS for approval of the project, there must be a reasonable demonstration to USCIS that the required number of jobs will be created within ***two and one-half years*** from the time USCIS approves the immigrant's I-526 petition.[24]

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