Successfully petitioning for an EB-5 visa (part four)

Decide between a standard EB-5 investment and a Regional Center
by knowing a few key differences

By Jeffrey C.P. Wang and John Frederick ("Rick") Karch

*** This article first appeared in Inside Counsel Magazine on December 4, 2013: http://bit.ly/1z9IVGw**

One of the most common questions asked by EB-5 clients is, "Which type of EB-5 investment is best? A standard EB-5 investment? Or a Regional Center?" And the answer we give is always the same, "It depends." Each program has its advantages and disadvantages, and every EB-5 petitioner has different goals. Petitioners must make a personal assessment and conduct a thorough cost/benefit/risk analysis in order to choose the investment path that is right for them.

These are the core requirements of the EB-5 Program that must be met in order to qualify, no matter which form of investment one chooses: 1) invest $1,000,000 in a new commercial enterprise (or $500,000 if the business is in a Targeted Employment Area [TEA]), 2) prove the lawful source of all investment funds, 3) prove that the investment capital is at risk, and, 4) prove that the investment will lead to the creation of ten full-time permanent jobs (or preserve existing jobs if the investment is in a troubled business that has lost 20 percent of its net worth).

The standard EB-5 program, under which one directly invests in a stand-alone project, involves a great deal of personal effort on the part of the client; however, this was the only option available when the EB-5 Program first began in 1990. The investor must first seek out and find a new commercial enterprise that qualifies for the EB-5 program, and then he or she must directly engage in the day-to-day management of that business. This means that the investor will likely need to live in the area where the commercial enterprise is located during the entire term of the investment, and until becoming a U.S. citizen (which usually takes five years or more).

A key requirement under a standard EB-5 investment is that the commercial enterprise in which one has invested must directly create at least ten full-time permanent jobs for qualifying employees. Thus, the USCIS will closely examine the I-9 immigration forms and time records of employees in order verify that the employees are authorized to work in the U.S., and that they are working at least 35 hours per week.

In 1992, Congress established another EB-5 investment option, called the Regional Centers, through the Immigrant Investor Pilot Program. An entity that seeks to be designated as a Regional Center must submit a proposal that satisfies all of the USCIS requirements in order to qualify.

This form of EB-5 investment is more passive, as the Regional Centers will set up and manage the investment project for the investor. Therefore, a petitioner can live anywhere in the U.S. since they have no day-to-day managerial responsibilities.

Another key advantage of investing through a Regional Center is that the ten full-time permanent jobs can be created either directly or indirectly. Indirect jobs are defined as jobs created collaterally or as a result of capital invested by an investor in a commercial enterprise affiliated with a Regional Center. This can even include people employed outside the boundaries of the Regional Center.

It is important to note that while the Regional Centers will provide much of the documentation that is necessary to satisfy the USCIS requirements, and prove the credibility of the EB-5 investment, the petitioner (and his or her immigration attorney) must personally prove the lawful source of the investment funds.

Despite the apparent advantages of investing through Regional Centers, many investors nevertheless prefer to invest in a standard EB-5 project. Skilled businessmen and experienced investors may not like the idea of giving up control of their investment, and the management of the enterprise, to those who may not have their level of business acumen. A Regional Center may also take longer to get approval, and it may lose its designation as a Regional Center if it fails to timely file an annual Form I-924A for continued eligibility.

There is also the danger of fraud. The USCIS has issued an investor alert about fraudulent investment scams that exploit the Immigrant Investor Program, warning: "The fact that a business is designated as a regional center by USCIS does not mean that USCIS . . . has approved the investments offered by the business . . . ." EB-5 investors must remember that all EB-5 investments must be at risk, therefore the Regional Centers may not guarantee a return on investment (ROI). Such a guarantee may not only jeopardize an otherwise qualified EB-5 investment, it may be an indication of fraud.

Before a petitioner decides on which type of investment to make, the implications of choosing either program must be carefully considered. A standard EB-5 investment may be the right choice for experienced investors, but it may be the wrong choice for petitioners seeking a passive management role. A Regional Center, on the other hand, may be the right choice for an investor who does not want to be burdened with creating direct jobs, but it may be the wrong choice if the Regional Center offers any kind of guarantee on the investment. And though the decision is highly individual, an experienced EB-5 attorney can guide you every step of the way, even if you choose the investment path less traveled.

About the Authors

Jeffrey Wang

Jeffrey C.P. Wang is the managing partner and founder of WHGC, P.L.C. Mr. Wang's practice focuses on handling the legal concerns of international and domestic corporations. In addition to his J.D., Mr. Wang has two advanced Masters of Law Degrees from the University of Washington and the Southern Methodist University School of Law. JeffreyWang@WHGCLaw.com

John Frederick (Rick) Karch is a partner at WHGC, P.L.C. and a member of the International Corporate Transaction Group. His practice focuses on financial and tax concerns for individual and corporate clients. In addition to his J.D., Mr. Karch is a California CPA, holds an M.B.A. in Finance from Harvard Business School and Masters of Law in Taxation from the University of San Diego. RickKarch@WHGCLaw.com