

Successfully petitioning for an EB-5 visa (part two) Taking a “calculated” risk

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Obviously, one of the biggest concerns for an EB-5 petitioner is “Will I get my money back?” EB-5 investors, like all investors, desire some kind of assurance that their investment capital will be reasonably safe from risk. There are times, however, when risk can be a good thing, and a guarantee can actually be detrimental. Such is the case when it comes to satisfying the investment requirements of the EB-5 program. In order to qualify as an EB-5 investment, the investment funds must be *at risk*. But what exactly does *at risk* mean? This article seeks to answer this question, and to explain the difference between an EB-5 investment that is *at risk* ... and a risky EB-5 investment!

To begin with, it is important to remember that the underlying goal of the EB-5 program is to boost the U.S. economy. By offering EB-5 visas to immigration oriented investors, the federal government hopes to “attract individuals from other countries who are willing to put their capital *at risk* in the United States, with the hope of a return on their investment, to help create U.S. jobs.” Thus, the purpose of the program is to increase U.S. employment and bring much needed liquidity to U.S. businesses by encouraging genuine investments that may have a risk of loss (as opposed to selling bonds that are nothing more than IOUs). Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not constitute an *at risk* investment.

Most importantly, an investment that is *at risk* cannot be guaranteed. In *Matter of Izummi*, the Administrative Appeals Office (AAO) held that if the foreign investor is guaranteed a return, or rate of return, on any portion of his or her investment capital, then that portion of the capital will not qualify as an *at risk* investment. Petitioners should therefore avoid an EB-5 project or Regional Center that purports to guarantee a specific return on investment (ROI) or the full return of the investment.

And while the regulations do not specify what the level of risk must be, they do require that the entire amount of capital needs to be *at risk* to some degree. In *Matter of Ho*, the AAO held that merely establishing and capitalizing a new commercial enterprise, and signing a commercial lease, are not sufficient to show that an immigrant-investor petitioner has placed his capital *at risk*. In other words, evidence that the petitioner has simply deposited investment capital into a corporate account over which the petitioner “exercises sole control” will not satisfy the *at risk* requirement. Rather, the petitioner must be able to demonstrate that this investment was sustained as an *at risk* investment throughout the entire period of the petitioner’s residence in the U.S.

Under 8 C.F.R. § 204.6(j)(2), documentation that may be used to establish that an investment is *at risk* includes, but is not limited to: bank statements, invoices, sales receipts, purchase contracts, U.S. Customs Service commercial entry documents, transit insurance policies, bills of lading or evidence of funds transferred in exchange for shares of stock (however, such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request). The petitioner will also need to prove that investment funds derived through loans, mortgage agreements, promissory notes, security agreements, or some other form of borrowing are secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

Foreign investors will likely view the EB-5 program as an immigration program first and as an investment opportunity second. However, this does not mean that a petitioner should not exercise the same due diligence he or she would for any other large investment, especially in light of the program’s *at risk* requirement. If an EB-5 project or Regional Center claims to offer some kind of “guarantee,” or “insurance” against risk, the petitioner should thoroughly review such claims with an impartial advisor. Experienced attorneys that are very familiar with the EB-5 program can assist immigration oriented investors with this research. They can also help

compare the strengths and weakness of the various investment options in order to make their *at risk* investment a lot less risky!

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