

## Successfully Petitioning for an EB-5 Visa (part three)

There is more to “job creation” than meets the eye

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At the heart of EB-5 Program is the creation of jobs. No matter how much money a foreign investor invests in the United States, he or she will not get an EB-5 visa if the investment does not result in the requisite number of new jobs. The statute requires the creation of “full-time employment for not fewer than ten United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant’s spouse, sons, or daughters).” This law is very straightforward, but the evolving rules and regulations of the U.S. Citizenship and Immigration Services (USCIS) have turned the simple goal of creating new jobs into a rather complex issue.

In order to be considered eligible for an EB-5 visa, a petitioner must first file a Form I-526 petition that includes sufficient documentation to prove that the requisite ten *full-time* jobs will be created. A full-time job is a job that requires a minimum of 35 work-hours per week. The documentation that must be submitted along with the Form I-526 petition includes photocopies of relevant tax records, Form I-9, or other similar documents for ten qualifying employees.

For a standard (non-Regional Center) EB-5 petition, these full-time jobs must be created *directly*. *Direct* jobs are jobs that are directly created by the new commercial enterprise. However, it is important to recognize that it is the new commercial enterprise, not the investment funds, that creates the jobs. This distinction is significant because it means that jobs created prior to the infusion of the investor’s capital (i.e. under bridge financing) can still qualify. That is, even though the full-time permanent positions may have opened during a period of interim financing, such positions still count because they were nevertheless created by the new commercial enterprise.

For a Regional Center investment, these ten full-time jobs can be created *indirectly*. *Indirect* jobs are jobs that are held outside of the new commercial enterprise, but that are created as a result of the new commercial enterprise. Proof of these indirect jobs can be shown using reasonable economic methodologies. The USCIS has further clarified that such indirect jobs can qualify even if they are located outside of the geographical boundaries of the regional center.

Investing in a *troubled business*, whether through a standard EB-5 investment or through a Regional Center, allows for “job preservation” in lieu of job creation. A *troubled business* is defined as a business that has been in existence for at least 2 years, has incurred a net loss for accounting purposes during the previous 12 or 24-month period, and the loss for such period is at least equal to 20% of the troubled business’ net worth prior to the loss. For this type of investment, the petitioner need only show that the number of existing employees is being, or will be, maintained at no less than the pre-investment level for at least two years.

It is important to note that the USCIS does not require that the ten *full-time* jobs be created at the preliminary Form I-526 filing stage. The regulations only require the submission of documentary evidence that establishes that it is more likely than not that the jobs will be created “within a reasonable period of time.” But this “within a reasonable period of time” allowance is not open-ended. The petitioner must submit a comprehensive and credible *business plan* to establish a likelihood of job creation “within the next two years.” This *business plan* must comply with all of the requirements that the USCIS has set forth in *Matter of Ho* by being sufficiently comprehensive and credible.

During the ninety-day period prior to the two-year anniversary of the date on which the immigrant investor obtained conditional lawful permanent resident status, the immigrant investor must file a Form I-829 to remove the conditions and become an unconditional lawful permanent resident. Removing the conditions requires proof that the petitioner either created or can be expected to create “within a reasonable period of time” the requisite number of new

jobs. Jobs that will be created up to one year *after* the two-year anniversary of the alien's admission as a conditional permanent resident, or adjustment to conditional permanent resident, generally may be considered to be created "within a reasonable period of time."

Creating jobs is a key goal of the EB-5 Program, but the USCIS policies governing job-creation can be complicated. The regulations vary depending on the form of the investment, and requirements differ at each stage of the petition process. An experienced attorney that is very familiar with the EB-5 Program can help clear up any confusion and can guide petitioners through the entire procedure. In this way, EB-5 investors can spend more time thinking about making money, and spend less time worrying about making jobs.

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