

## The EB-5 Program And Its Relevancy To Purchasing Real Estate

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In 1990, Congress established the EB-5 program to bring new capital investment into the country and to create jobs for U.S. workers. The EB-5 program allocates 10,000 EB-5 immigrant visas per year to foreign nationals seeking permanent residence on the basis of their capital investment in a commercial enterprise in the United States.

It is premised on three core elements: (i) a foreign national investor's investment of capital, (ii) in a new commercial enterprise, (iii) that creates jobs for US workers.

In 1993, Congress enacted the "Immigrant Investor Program" to encourage foreign nationals seeking permanent resident status to invest in business and economic development opportunities in Regional Centers in order to promote economic growth. A Regional Center is not merely a defined geographic area but rather is a business entity that coordinates foreign investment within that area.

The EB-5 program is administered by the United States Citizenship and Immigration Services ("USCIS").

### Investment Of Capital

The regulations define capital investment as cash, cash equivalents, equipment, inventory, and other tangible property, and indebtedness secured by assets owned by the foreign national provided that he is personally and primarily liable. Capital is defined broadly in order to take into consideration the many ways by which a foreign national can make a contribution of financial value to a business.

The regulations also provide that the immigrant investor must invest at least \$1 million in a new commercial enterprise that creates at least ten jobs. However, if the investor chooses to invest in a new commercial enterprise that is doing business in and creates jobs in a targeted employment area ("TEA") the amount may be \$500,000.00. A TEA is either a high unemployment area, (calculated as an area with an unemployment rate that is at least 150% of the national average), or a rural area.

Another essential element of the EB-5 program is that the capital invested must be at risk. For the capital to be at risk, there must be a risk for loss and a chance for gain.

### New Commercial Enterprise

Investors may be eligible for an EB-5 immigrant visa if they have invested, or are actively in the process of investing, the required amount of capital into one of the following for-profit business-types:

- (i) a new commercial enterprise created after 11/29/1990; or (ii) an enterprise which will expand to 140% of pre-investment net worth or number of employees, or; (iii) a troubled business in which jobs will be preserved.

### Jobs For US Workers

A qualified U.S. worker is a U.S. citizen, LPR, asylee or refugee. Jobs created for nonimmigrant workers and/or members of the EB-5 investor's family are not qualifying. The investor must also have at least a policy-making role in the enterprise. If the foreign national investor chooses to invest in a Regional Center, it is not required that the immigrant investor's enterprise itself employ ten US workers. Instead, it is enough if ten or more jobs will be created directly or indirectly as a result of the investment.

### Investment In Real Estate

Given the conditions of the EB-5 program and the broad definition of capital investment, in a direct EB-5 investment, property purchased in connection with an active business operation may qualify as a basis for an EB-5 filing. The property must be connected to the operation of an active business, it must be necessary to the operations of the business and must be a contribution to the financial value of the business. Passive investments in real estate however are not likely to qualify because it is highly unlikely that a purchase of a stand alone property will result in the creation of ten full time jobs. In other words, investing the requisite amount of capital in the United States is not enough for a foreign national to obtain permanent residence—the capital invested must create jobs.

The USCIS has therefore taken the position that the purchase of real estate alone does not create the requisite jobs. Therefore, it is preferable for foreign investors in certain instances to lease the premises instead of purchasing them and use the capital investment to satisfy the job creation requirement. The rationale behind the USCIS' position is based on the nation's interest in promoting the immigration of foreign nationals who invest in new, restructured or expanded businesses which will in turn create jobs for US workers.

Prospective immigrants—who invest the requisite amount of capital in a new commercial enterprise and create a least ten jobs for US workers—are granted conditional permanent residence for a two year period. After the two year period, the foreign national investor must file to remove the conditions to obtain unconditional lawful permanent residence. In order to successfully remove the conditions, the investor must show that he has satisfied the criteria of eligibility and in fact created the requisite number of jobs. An EB-5 application for permanent residence is ultimately successful only when the capital creates employment opportunities.

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