OUR PRACTICE

Investors & EB-5 Services

The United States encourages substantial investment, job creation, and trade through temporary and permanent status afforded to certain investors and traders. Temporary E-1 and E-1 investor visas are available for nationals of certain countries having qualifying treaties with the U.S. Permanent options are available for investors who might be able to transfer within an international company, or separately for "EB-5" Employment Creation Investors of $1.8 million or even $900,000 when their investment creates 10 jobs for U.S. workers.

Temporary Visas: E-1 and E-2

Special visa opportunities are available to citizens of certain countries with whom the United States has ratified enabling treaties of commerce. The opportunities exist for traders and investors, and certain of their employees, who wish to come to the United States to develop and direct the operations of an enterprise involving a substantial investment, or who wish to carry on substantial international trade in the U.S.

Treaty Investors and their dependent family members can qualify for the E-2 category, and Treaty Traders and their dependent family members can qualify for the E-1 category.

Treaty Investors

To qualify as a treaty investor:

- The investor, either a real or corporate person, must be a national of a treaty country;
- The investment must be "substantial." It must be sufficient to ensure the successful operation of the enterprise. The percentage of investment for a low-cost business enterprise must be higher than the percentage of investment in a high-cost enterprise;
- The investment must be a real operating enterprise. Speculative or idle investment does not qualify. Uncommitted funds in a bank account or similar security are not considered an investment;
- The investment may not be marginal. It must generate significantly more income than just to provide a living to the investor and family, or it must have a significant economic impact in the United States;
- The investor must have control of the funds, and the investment must be at risk in the commercial sense. Loans secured with the assets of the investment enterprise are not counted as investment; and
- The investor must be coming to the U.S. to develop and direct the enterprise. If the applicant is not the principal investor, he or she must be employed in a supervisory, executive, or highly specialized skill capacity. Ordinary skilled and unskilled workers do not qualify.

Treaty Traders

To qualify as a treaty trader:

- The applicant must be a national of a treaty country;
- The trading firm for which the applicant is coming to the U. S. must have the nationality of the treaty country;
- The international trade must be "substantial" in the sense that there is a sizable and continuing volume of trade;

- The trade must be principally between the U.S. and the treaty country, which is defined to mean that more than 50 percent of the international trade involved must be between the U.S. and the country of the applicant's nationality;
- Trade means the international exchange of goods, services, and technology. Title of the trade items must pass from one party to the other; and
- The applicant must be employed in a supervisory or executive capacity, or possess highly specialized skills essential to the efficient operation of the firm. Ordinary skilled or unskilled workers do not qualify.

Applying as Treaty Investors or Traders

Unlike other many other work-authorizing visa categories, prior approval of USCIS is not required if the applicant is outside the U.S. Applications are made to the U.S. Consulate with jurisdiction over the applicant's foreign residence on Form DS-156E as well as the other forms used for nonimmigrant visa applications. Historically, each consulate has required somewhat different forms of documentation. Although the State Department has tried to standardize the process, some consulates are far more scrutinizing than others, particularly where fraud is common. Like dependents of L-1 workers, the dependents of E-1 and E-2 investors, managers and workers may apply for unrestricted work authorization in the U.S.

Permanent Residence (EB-1-3 and EB-5)

There is not a permanent residence path directly correlated to the E visa, but there are several permanent residence options that tend to be available to foreign nationals who make substantial investments or operate companies involved in trade with the U.S. Plans and strategies for acquiring permanent residence are best made with experienced counsel before the E visa company is established.

Multi-National Business Transferees

One permanent path is for managers and executives who transfer within a multinational business, which is assigned the immigrant category of "EB-1-3." Although that permanent path shares many attributes of the L-1 temporary visa, one need not have used L-1 before pursuing it, and someone who has used E visa status (discussed above) can use it if he qualifies. Importantly, in 2010 USCIS announced questionable agency policy not to consider sole owners as "employees" of a business for purposes of being sponsored for certain immigration status, and for the moment the L-1 and corresponding permanent path might be significantly impacted for sole business owners. It is not clear how much less than sole ownership might avoid USCIS' questionable policy limitation, which is not always imposed in specific cases.

EB-5 Employment Creation Investors

Another well-known path is the "EB-5" preference for "employment creation aliens." An investor from anywhere in the world may file an immigrant petition with USCIS to show that he has invested or is in the process of investing $1.8 million or $900,000 in a "new commercial enterprise" (since 1990) creating full-time jobs for 10 U.S. workers. The investment may be $900,000 if the investment enterprise (where the jobs are created) is located in a rural area (not within the bounds of a town of 20,000 or more AND not within any metropolitan statistical area) or in a defined area (which can include the census tract where the project is located and adjacent census tracts) having a weighted unemployment rate that is 150% of the national average. Once a petition is approved and a visa number becomes available, the investor, spouse, and unmarried children whose “adjusted ages” under the Child Status Protection Act are under 21 can process for permanent residence, either from outside the U.S. or within it. Technically, the investor is supposed to be active in "management" of the enterprise, but a limited partnership is specifically covered in the statute, which allows for minimal active involvement for limited partners or for members of a limited liability company.

Regional Centers

Investors in a USCIS-approved "regional center" in a designated area may show creation of the 10 jobs by indirect means. Private parties have established regional centers throughout the country. The regional centers with an established and growing track record have tended to collect groups of EB-5 and non-EB-5 investors into discrete projects, allocating the created jobs among the EB-5 investors. By far most EB-5 petitions are through regional centers, the number of which has vastly expanded in recent years, but most regional centers have had relatively little real activity.

Securities Law Issues

Regional centers and investment enterprises typically want to avoid requirements to "register" securities offered to EB-5 investors; thus, they tend to require the investor to meet certain exemptions under "Regulation D" as "accredited" investors who have either a net worth over $1 million (individually or jointly with spouse, not including value of home), or income for the last two years over $200,000 for an individual or $300,000 for spouses together. Regulation D offerings in the past must have avoided "general solicitation," but the 2012 JOBS Act allows general solicitation as long as the offeror takes reasonable steps to confirm the purchaser of the securities is "accredited." Regional centers and business developers sometimes also seek exemption from "Regulation S" in offering securities outside the U.S. Using these exemptions properly requires careful advice of competent securities counsel, and the consequences of noncompliance can include SEC or state government enforcement actions and private litigation resulting in personal liability to return the investment with interest, particularly if the investments do not fare well.

Investors should heed advice of the U.S. Securities and Exchange Commission to Ask Questions before investing in any business and may wish to review the SEC's web page for investors at investors.gov. Any concerns should be addressed with a competent business advisor and perhaps also a securities lawyer representing the investor. Investments can fail, and a business failure normally will mean loss of immigration benefit. Promoters suggesting that an investment is "guaranteed" or "no risk" should be treated with extreme skepticism.

New or Existing Businesses

Most EB-5 investment entities were created after November 1990 and thus constitute a "new enterprise" under the EB-5 requirements. An investment in a business established before December 1990 may qualify as a "new enterprise" for EB-5 purposes if it has been restructured so that a new enterprise results, or if the investment expands the business by 40 percent of the pre-investment number of jobs or net worth. Regardless of whether the enterprise is "new" or not, mere replacement of a seller's capital cannot be expected to gain EB-5 approval. The government seems to expect new, additional capital to create new jobs that did not exist before.

A capital infusion into a business created after November 1990 does not need to meet the 40% rule, but of course must create ten jobs per EB-5 investor.

On a related but separate issue concerning existing businesses, by regulation an investor can receive credit for job creation merely by saving jobs if the investment preserves throughout the two-year period of conditional residence *all* existing jobs in a troubled business that has lost 20 percent of its net worth over the 12 to 24 months preceding investment. Only a few "troubled business" projects have been approved by USCIS.

Source of Funds and OFAC Licenses

A substantial portion of EB-5 investors have been from China, Vietnam, India, Korea, Hong Kong, and Taiwan. Each country can present special challenges in terms of documenting the sometimes extensive path of funds from earning to investment in compliance with laws. Investment from certain countries (no longer Iran) presents the special challenge of obtaining licenses from the U.S. Department of Treasury's Office of Foreign

Assets Control (OFAC) to allow the investment enterprise(s) to provide services to the investor. If required, licenses must be obtained before money is transferred.

EB-5 Challenges

Some of the biggest challenges for EB-5 investors typically include:

- Showing that the invested funds came from legitimate sources and were not amassed or transferred in violation of laws.
- Showing how the jobs will be created in the time required by USCIS policy.
- Balancing the need to create 10 jobs and have the capital "at risk" with the desire for investment stability, timely return, and profit.
- Finding an investment project with a solid “capital stack” of other capital with a clear path to complete the job creating project, keep the EB-5 capital invested in the original project or one or more "reinvestment" opportunities until the end of the investor's potentially lengthy immigration process, and repaying the capital (and returns) when USCIS policy allows.

Conditional Residence

Once USCIS approves the petition, the investor, spouse and children may apply for conditional permanent residence through an immigrant visa from abroad or adjustment of status within the U.S. During the three-month window leading up to the second anniversary of permanent residence approval, the investor and family must file another petition to show that the investment was made and the jobs were created or how uncontrollable delays have prevented completion which can be accomplished in the reasonably near future.

In early years of the EB-5 program, USCIS showed an unfortunate tendency to apply strict standards at the second (I-829) stage, sometimes reneging on first-stage (I-526) approvals. While USCIS has taken steps to administer the program more consistently and predictably, the prospect of second-stage denial calls for careful arrangements with experienced counsel. The process of lengthy adjudications and waits for visa numbers requires careful planning.

Interpretational Complexities

The EB-5 program developed big problems in the past when investors and promoters pushing the limits depended on and overstretched opinions from former immigration officials on what exactly was required. While the current program has restored integrity and credibility and has resulted in significant investment in targeted areas of the U.S., some unresolved answers and the inevitable temptations of opportunity pose a long term threat to investors who blindly join any promoter claiming eligibility. USCIS has been trying to resolve general issues (sometimes not so favorably). Questions have included:

- what exact methodologies may be used to determine indirect job creation (IMPLAN, RIMS II, other), including in what geographic areas (within TEA, within regional center jurisdiction, or broader), whether and which construction jobs may count (may depend on duration and location of construction and specific position), whether and when jobs arising from tenant occupancy or hotel visitor spending may count (may depend on "excess demand"),
- whether a relatively passive investor in an LLC or other arrangement enjoys the explicit statutory blessing of limited partnerships (generally, yes),
- how long a building project may be delayed with funds in a holding pattern without failing the test for removal of conditions (broad USCIS discretion),
- when and how a project must show the actual jobs created for removal of conditions (it depends on what was predicted and how),

- whether a developer may promise to refund an investment in the event that removal of conditions is denied (no),
- at what point in a $500,000 investor's process (project first offering, subscription, money transfer, petition filing, or escrow release) a business' non-rural location must meet the definition of a "targeted area" with an unemployment rate of 150% of the national average (at time of investment or petition filing, depending on circumstances and involvement of escrow),
- to what extent and by what means can investors themselves or an investment enterprise seek to minimize risk by insurance or third party obligations (arguably allowable in the abstract, but because the alien investor's capital must be "at risk" and of the prohibition on indemnity, redemption, or a guaranteed buy-back arrangements for the alien investor's investment in the commercial enterprise, these arrangements need to be scrutinized carefully),
- whether developers may employ an array of simultaneous or staggered projects for larger groups of investors in arrangements resembling a mutual fund, and whether they must rigidly allocate investors to specific projects for purposes of credit for job creation (rigid tracking to one or more specific projects, identified in detailed business plans in the I-526 petition, seems required),
- whether the EB-5 investors in a "troubled business" must save 10 jobs total or 10 jobs each (10 jobs each) and whether at least some investors in a pooled “troubled” project can have conditions removed if the project saves even one less job than at the time of investment (no),
- Whether EB-5 capital can replace bridge financing (generally, yes, if the bridge financing arrangements are temporary, which is not clearly defined, and intended at time of injection to be replaced with EB-5 capital when available),
- Whether "commercial enterprises" in regional centers may loan capital to other job creating entities (yes, under certain circumstances) and whether such lenders may obtain insurance or other guarantees of repayment (apparently yes, as long as each investor's capital is "at risk" in the lending enterprise),
- What kinds of changes to a project constitute a "material change" preventing I-829 approval (frighteningly unresolved),
- How long an investor must sustain investment in the commercial enterprise (until the second anniversary of the date the investor was granted conditional permanent resident status, which corresponds to the expiration date on the investor's permanent resident card and the investor's I-829 due date),
- How long a commercial enterprise extending a loan to or making an investment in a separate job-creating entity must maintain that loan or investment (until the jobs are created, which is generally until construction is complete and the project is stabilized),
- What a commercial enterprise must do if the job-creating entity repays the loan or returns the investment but investors in the commercial enterprise cannot yet receive return of their investment (it must reinvest the funds, but the parameters of reinvestment are very unclear, as discussed here, and
- Whether an investor can use the proceeds of a loan to invest in a commercial enterprise (USCIS says only if the loan is secured by the investor's own assets, but the issue is under litigation).

Naturally, developers and investors hunger for clarity on the front end, but USCIS adjudication times make approval of investments and projects before subscription by investors generally unrealistic. Investors will sometimes be trapped by petition denials, either unable to retrieve their investment when an I-526 has been denied, or facing I-829 denial to remove conditions. In those situations, the parties may be willing to take matters to court.

How We Can Help

Baker Donelson's Immigration Group represents scores of international businesses and investors in their business, litigation, employment, and immigration matters. We can help an international business establish its "substantial trade or investment" and its employees' qualification for individual E visas. We help ensure that E

visa holders are given the proper duration of stay by immigration inspectors, and we help workers and family members decide how to manage extensions of stay and renewal of visas. We coordinate temporary status with pursuit of permanent residence as may be desired. We guide the international worker in personal concerns about immigration status that inevitably arise when performing international assignments.

We advise and advocate for developers, regional centers, and foreign national investors in relation to the "EB-5" employment creation program. We help clarify the rules with USCIS, seeking input from the Department of Commerce concerning direct foreign investment. We craft filings by regional centers and investors seeking program designation, project recognition, investor petition approval, and removal of conditions. We seek administrative solutions in difficult cases and have been successful in this, but we are prepared to appeal or litigate adverse determinations. We can assist in public policy development, including program extensions and law changes, in combination with our firm's highly respected National Public Policy Group.

Our firm has scores of lawyers focusing on securities, commercial real estate, and other business law areas particularly relevant to entrepreneurs and to developers seeking to pool investments. We have lawyers with extensive experience in Regulation D and S exemptions. When requested, we can help evaluate, set up and acquire companies through investment, and guide the business and workers in employment and income tax issues and coordinate with other tax preparers and advisors.

Our firm's International Group obtained the first licenses for regional center enterprises from the Department of Treasury's Office of Foreign Assets Control (OFAC) allowing investments from sanctioned countries. We have the combination of interdisciplinary knowledge and experience that is particularly useful in investment-oriented immigration.