

EB-5 Regional Centers: For Many Immigrants, The Key to Unlock the Closed Door

If you are an attorney who represents individual foreign nationals seeking permanent residence in the U.S., you likely have experienced a significant number of potential clients for whom existing immigration laws do not provide a solution that addresses their needs. For many of these individuals, the lack of options is nothing new; for a significant amount of others, paths that previously existed have now been blocked.

Although certainly not for everyone, one manifestly underutilized category that provides an optimal solution for many of these potential clients is the EB-5 regional center investment option. As will be discussed in more detail below, the EB-5 regional center allows a foreign national and his spouse and children to obtain employment authorization relatively promptly; allows the foreign national to work wherever he pleases (or not work if he pleases); and allows his children to go to school in the U.S. and to pay in-state tuition. Given the unprecedented favorable exchange rate for most foreign currencies against the U.S. dollar, the required investment amount - - usually \$500,000 - - is not an insurmountable obstacle to many foreign national clients.

Regional Center Targeted Client List

Let's start by listing the categories of clients who may be looking for an option that doesn't readily appear to be available. Then, I will address whether EB-5 presents a viable option for these categories of clients; and, if so, whether an individual EB-5 petition or a regional center EB-5 petition provides a better option. Finally, for those clients for whom the EB-5 regional center may be the best option, I will provide suggested criteria for choosing among USCIS-approved regional centers.

The following are examples of foreign nationals for whom investment in an approved regional center may be the best immigration option:

1. Retirees - - These potential clients are often devoid of immigration options if they do not have a close family member or employer to sponsor them.
2. Potential H-1B shut out by quota - - This group is growing larger every year. As the H-1B category deteriorates into a lottery, new options - - even if not the most preferable options - - must be explored.
3. H-1B nearing six year limit - - Some of these individuals did not initiate the permanent residence process early enough; others have no permanent residence options available. Unless something can be done very quickly, these individuals will be out of options.
4. Investors from non-treaty countries - - For some foreign nationals, an E-2 nonimmigrant treaty investor visa may be completely sufficient but for the fact that they are not nationals of a country that has an E-2 treaty with the U.S.
5. Individual owner of a business outside of the U.S. who wants to set up a business in the U.S. - - Some of these individuals will not qualify for L-1 status because the overseas company will close upon transfer of the owner/manager to the U.S.
6. Entrepreneurs who want to set up a new business in the U.S. - - Some of these individuals will not qualify for L-1 because there is no related company overseas or because the individual does not have the one year of qualifying experience. Others may not qualify for E-2, L-1 or individual EB-5 because the U.S. company will not create any jobs or sufficient jobs in the near future. Still others may not want to wait to apply for permanent residence until the U.S. company has engaged in active business for one year.
7. Potential L-1 applicants who are nationals of a country (such as China or Russia) for which USCIS views startup L-1s with great suspicion.
8. F-1 student who wants to start a business - - Since on-campus employment for a business unrelated to the needs of the student body, and any off-campus

- employment, may be unavailable to the F-1, wealthy parents may provide an answer.
9. Spouse of permanent resident - - With long quota wait and no derivative status available, visa options are extremely limited.
 10. Doctor who has not passed USMLE 1, 2 and 3 – Unless the doctor has a level of national prominence, H-1B is not an option.
 11. Foreign nationals in a multiple-year immigrant quota waiting list - - As quotas in virtually all family and employment-based categories get longer, and with the prospects worsening, a permanent residence category with no quota wait becomes even more alluring.
 12. CEO/manager of a company who is not a transferee - - With H-1B numbers unavailable, and with labor certification a particularly inappropriate option, another solution becomes necessary.
 13. Parent who does not want to be involved in active management of, or employment in, a business but wants the children to be able to go to school in the U.S. - - F-1 may not be an option either because the children are pre-college or because INA §214(b) may be an obstacle. A relatively prompt route to permanent residence without a commitment that the parent work in the U.S. is an ideal option. The possibility of qualifying for in-state tuition on a relatively expedited basis is a special bonus.
 14. Foreign national affected by Department of Labor regulations requiring employers to pay labor certification fees and costs - - Many employers cannot or will not pay legal fees and advertising costs for a labor certification application on behalf of a foreign national employee. This group of foreign nationals who could previously obtain permanent residence based upon employer sponsorship now needs another option.
 15. Any foreign national with an urgent need or desire to become a permanent resident of the U.S.

Regional Center Background

Partly because regional center investments address the needs of the foreign nationals described above, and partly because the standards for individual EB-5 petitions are so restrictive, the number of EB-5 regional center petitions has increased substantially in recent years and now well exceeds the number of individual EB-5 petitions.

Before discussing the details of EB-5 regional center petition filings, some background is in order. Established in 1992, the U.S. Immigrant Investor Pilot Program has had a troubled past. The program was suspended in 1997 because of two major problems:

- a. Failure by investors to complete their total investments; and
- b. Failure of the investment projects to create jobs.

Under the new guidelines of the program, issued in 2002, regional center investors are now required to invest the full \$500,000 before submitting the I-526 petition, thereby resolving the first problem. As will be discussed in more detail below, the second problem has been resolved to a greater extent by some regional centers and to a lesser extent by others. For this reason, choosing the optimal regional center is a critical decision.

The Immigrant Investor Pilot Program remains a “pilot program” with continuing extensions through the present date. The latest extension expires September 30, 2008. Because of the success of the program both in terms of attracting investors and in terms of providing capital for economic development and job creation, as well as demonstrated support within the headquarters office of USCIS, as of the date of this article there is an expectation - - but not certainty - - that the pilot program will be extended by Congress.

Comparing Regional Center and Individual EB-5

The major advantage of the regional center as compared with an individual EB-5 investment is that the investment has been pre-approved by USCIS with respect to the qualifying amount of the investment and with respect to the job creation requirement. 8 C.F.R. § 204.6 (m). As a result, for purposes of approval of the I-526 investor petition, the remaining issues are tracing the funds from the investor to the regional center and proving the lawful source of the investor's funds. This eliminates the need to deal with the many complicated issues involved in an individual EB-5 petition for which the investment enterprise has not been pre-approved, such as whether the investment entity qualifies as a "new commercial enterprise;" whether the investment is in a "targeted employment area;" whether the investment is in a "troubled business;" whether the requisite "employment creation" has taken place; and whether the investment meets the "establishment" of a new commercial enterprise standard.

In addition, the regional center option is advantageous because:

- Indirect employment creation is allowable;
- There is presently no quota waiting list;
- The government generally expedites adjudication of the investor petition;
- The foreign national can work anywhere he wants; or not work, as he pleases;
- The foreign national's children may stay in the U.S. and study in the U.S.; and
- The foreign national can travel in and out of the U.S. as frequently as she desires.

The following analysis illustrates the similarities and differences between the individual EB-5 investment and the regional center investment with reference to some of the major elements involved in EB-5 adjudications:

Amount of Investment:

Virtually all of the approved regional centers have been approved as “targeted employment area” investments, thus qualifying for the reduced \$500,000 investment requirement. 8 C.F.R. § 204.6 (e). Individual EB-5 investments are either \$500,000 or \$1,000,000 depending upon whether the investor can prove that the investment is in a “rural area” or in an area which has experienced unemployment of at least 150% of the national average rate. Otherwise, if the investor does not meet her burden of proof on these points, the required amount of investment is \$1,000,000.

Job Creation:

An individual EB-5 petition requires proof of “full-time employment” as direct employees (not independent contractors) of ten U.S. workers. 8 C.F.R. § 204.6 (j)(4). Although technically the requisite employment does not have to have been created at the time of approval of the I-526 petition, adjudication history reveals great difficulty in getting cases approved based upon business plans showing that the requisite employment will be created within the two year period before the necessity of filing a condition removal petition.

This problem is solved with the regional center petition since the employment creation has been pre-approved. In addition, pursuant to 8 CFR §204.6 (e), the regional center can qualify based upon indirect employment creation generated in the community through the regional center investment.

Although an investment in the regional center should not raise the issue of employment creation for purposes of the I-526 approval, the choice of regional center in which the investment is made is critical. In order for the investor to have conditions removed after the end of the two year conditional period, USCIS will have to be satisfied that the direct or indirect employment creation has actually taken place and that the job creation has taken place in the targeted employment area. 8 C.F.R. § 204.6 (a)(4). Choosing a

regional center with a track record of employment creation thus enhances the likelihood that the investor will, in fact, be able to remove conditions, and become a non-conditional permanent resident on track to citizenship (if desired). The investor should scrutinize how job creation is documented and calculated and the economic models of job creation methodologies utilized for determining indirect job creation.

Management:

As part of the pre-approval process, the regional center had to satisfy USCIS that the investors would be engaged in the “management” of the enterprise as opposed to maintaining a “purely passive role.” 8 C.F.R. § 204.6 (j)(5). This must be proven on a case-by-case basis by the individual EB-5 petitioner.

Most of the regional centers are limited partnerships. Pursuant to 8 CFR §204.6 (j)(5)(iii), if the petitioner is a limited partner and the limited partnership agreement provides the petitioner with the rights, powers and duties normally granted to limited partners under the Uniform Limited Partnership Act, the investor will be considered sufficiently engaged in the management of the enterprise. As a practical and legal matter, this requirement can be met by a limited partner without the necessity of the investor committing to any specific amount of time or engaging in any day-to-day management, since such activities are performed by the general partner.

Source of Funds:

The requirements for the investor to prove the lawful source of her investment funds is the same for individual and regional center EB-5 petitions. 8 C.F.R. § 204.6 (j)(3). In both cases, the documentation requirements are extensive.

Timing:

USCIS has committed to expedited processing of regional center petitions. In most cases, this results in I-526 approval within two to five months of filing. Since the quota is current for this category of immigrants, within two to five months of filing of the I-526, the investor and his family who are in the U.S. are able to file applications for permanent residence, employment authorization and advance parole travel documents. The timeframe is generally slower for individual EB-5 petitions.

Choice of Regional Center

Assuming that the above analysis leads to the conclusion that an EB-5 regional center investment may be a good or the best option for a particular foreign national, a critical decision still remains. There are presently approximately 20 regional centers that have been approved by USCIS. Some of the approved regional centers have long and well-established track records; other are newly established and relatively untested. Because of the importance of the regional center's continued existence throughout the condition removal process, and the importance of the predicted job creation - - direct or indirect- - actually occurring in order to accomplish condition removal, the choice of regional center is an especially important one.

For this reason, the author has compiled a list of questions that may be relevant in enabling an investor to choose the optimal regional center both for immigration purposes and for purposes of addressing his investment needs and desires. In reviewing this list with their clients, most attorneys will want to draw a clear line between providing immigration advice and providing business/tax/investment advice. Presumably, it is the immigration attorney's role to provide some guidance on the immigration ramifications of a decision to invest in any particular regional center. Equally clearly, the immigration attorney will likely want to steer clear of providing any non-immigration advice.

The following is a suggested due diligence list:

1. *When was the regional center approved by USCIS, and has it gone through recertification?*

Regional centers that have more recently been approved may have very little track record of successful immigrant petitions or of job creation. Some regional centers have become inactive, and some have not been recertified.

2. *Has the regional center's program been reviewed by the AAO?*

If so, there is an added level of security.

3. *Is the regional center affiliated with any government entity?*

If so, an added level of credibility exists; and the government entity may have experience in job creation.

4. *How many years of experience does the general partner or principal in the investment project have in working with immigrant investor programs?*

Some of the general partners or regional center creators have little or no experience with immigrant investor programs. Others have extensive experience both in the United States and with investor immigrant programs in other countries.

5. *How many years of experience do the principals involved in the regional center have in job creation?*

In order for the condition removal to be successful, actual jobs will have to be created. Principals who have extensive experience in actually creating jobs should be a consideration.

6. *Does the regional center investment include direct job creation, indirect job creation, or both?*

Although indirect job creation is acceptable for regional centers, projects with at least some significant amount of direct job creation may be safer alternatives.

7. *How many I-526 petitions have been filed by investors in the regional center? How many have been approved? How many have been denied?*

The regional center's track record is of critical importance. A record of a substantial number of approvals and no denials is optimal.

8. *How many I-829 condition removal approvals have the regional center investors received? How many denials?*

This is ultimately one of the most important questions. Approval of the I-526 petition is not the ultimate goal; approval of the I-829 condition removal petition is the goal. From an immigration point of view, the safest regional center investments are those in regional centers with condition removal approvals.

9. *Does the investor have to make a deposit or pay any fee for the offering materials?*

If so, the investor needs to evaluate the benefits of investing in a regional center that has such requirement versus one that does not.

10. *What is the amount required to be paid by the investor?*

In virtually all regional centers, the investment amount is \$500,000. Regional centers generally have additional costs and fees of \$25,000 to \$50,000.

11. *Is payment made into an escrow account? Is the investment amount refunded if the I-526 is not approved?*

The provision of an escrow account with the money remaining in escrow until the I-526 petition is approved is a critical security feature for the investor. This is perfectly appropriate on EB-5 cases.

12. *Can the investor redeem his investment following condition removal?*

The investor will certainly want to have an understanding of the likelihood of being able to redeem his investment after a specified period of time following condition removal. With some regional centers, this is fairly certain; with others it is not.

13. *What provisions are made regarding the security of the investment?*

Needless to say, the investor wants to perform due diligence regarding the likely security of his investment.

14. *What use is made of the investor's funds? What is the type or types of projects?*

Regional center investments may involve commercial building projects, condominiums, hotels, films, studios or other projects.

15. *What is the form of the investment—limited partnership, LLC or other?*

Limited partnerships are most common; however, other forms of investment exist in different regional centers.

16. *What has been the rate of return to investors historically?*

As with other investments, investors may need to balance the importance of immigration track record, security of the investment and rate of return on the investment.

17. *Does the regional center provide regular reporting of the status of the investment to the investors, and at what intervals?*

Optimally, the investor should receive a regular report with an update on the investment project, job creation and new investment opportunities.

18. *What precautions are taken to monitor job creation? What steps are taken if the requisite job creation has not occurred?*

The investor should look for a project with detailed job reporting on a regular basis and with a provision that failure to create the required jobs establishes a basis for reinvestment of the proceeds in another project, so as to keep the investor's immigration and investment process on schedule.

19. *Who are the attorneys who regularly represent the regional center?*

Some regional centers require the investor to use the regional center's attorney to file the investor petition, and others do not. The regional center's immigration attorney may provide review and counseling to an investor's attorney.

20. *Does the regional center's attorney contact the foreign national directly, or can the referring attorney maintain all contact with the foreign national?*

With some regional centers, the attorney deals with the investor directly. With others, even if the regional center's attorney is handling the investor petition, the attorney may deal only with the referring attorney at the referring attorney's request.

21. *Does a referring attorney get any fee from the regional center?*

Most regional centers provide a fee to a referring attorney. Each individual attorney needs to determine any ethical considerations involved in accepting such referral fee under the rules of professional responsibility of the state in which the attorney practices.

Conclusion

Although certainly not a solution for a majority of clients, the combination of diminishing immigration alternatives and the "cheap" U.S. dollar for nationals of many countries makes the regional center EB-5 option worth serious consideration in developing strategies for many clients. However, not all regional centers are created equal. Both the attorney and her client should exercise careful due diligence in selecting an appropriate center to maximize immigration and investment benefits.