

Immigrant Investors: Two Choices, One Goal

Foreign nationals seeking permanent resident status in the U.S. are relying on the investment route more frequently than ever before. Various reasons might be surmised for the increase in popularity of the investment option, including the increasing unavailability of other options under U.S. immigration laws and the significantly decreased value of the U.S. dollar. The result is that the required amount of investment—either \$500,000 or \$1,000,000—translates into smaller equivalent amounts to foreign nationals using currencies with greatly enhanced value in conversions to dollars.

The foreign national who wishes to use the investment option for permanent residence has two basic choices. One choice is to find his own individual investment vehicle in which he will invest and play a role in management. The second option is a government-approved “regional center” investment. This article will discuss both of these options and compare and contrast advantages and disadvantages of each.

As an overview, the major advantage of the individual investment option is that the foreign national accomplishes not only an immigration purpose but also a purpose of investing in a business that may provide significant returns and may provide a source of income and a livelihood on an ongoing basis. However, there are far more immigration law hurdles to be overcome than with the regional center investment.

The regional center investment is often the quickest and most secure option (assuming the investment is made in a regional center with a strong immigration track record). The immigration

process is often quicker, and there are far fewer legal issues to be confronted. However, the investor is not running his own business, and the rate of return may be lower than in a successful individual investment.

With either option, the amount of the investment is \$1,000,000, unless 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. If so, the amount of the required investment is \$500,000. Most (but not all) of the regional centers are located in such \$500,000 “targeted employment areas.”

Both options require the investor to prove that her investment has resulted in the creation of “full-time employment” of 10 U.S. workers. The big difference is that individual investors must prove direct employment of the 10 employees. With regional centers, U.S. Citizenship and Immigration Services has pre-approved the employment creation using a standard that allows a combination of direct employment and indirect employment creation using various accepted econometric models.

Both investment options prohibit purely passive investment. In other words, the investor must be engaged in the “management” of the enterprise. In this regard, it should be noted that most of the regional centers are limited partnerships. Pursuant to regulation, if the petitioning investor 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.

One of the biggest stumbling blocks for the individual investor is proving that the investment has been made in a “new commercial enterprise”. This issue is pre-approved for the regional center investments. A “new commercial enterprise” can be created by an individual investor in one of three ways:

- Establishing a brand new business;
- Acquiring an existing business and engaging in significant “restructuring or reorganization”. This alternative is rarely used and has not been defined.
- Expanding an existing business. This option requires the investor to prove not only the creation of 10 new jobs but also the expansion of either net worth or number of employees of the business by at least 40%.

If the investor invests in a “troubled business” (a business with substantial losses as quantified in the regulations), there may be an opportunity to qualify based on preserving existing employees as opposed to adding new ones.

Another issue that is significant for both the individual and the regional center investor is proving the “lawful source of funds.” Substantial documentation is required to prove that the investor did not acquire the funds through unlawful means. If the funds are the result of a gift, this requirement must be met for the giftor. If the funds are the result of a loan from an individual, this requirement is applicable to the creditor. Documentation utilized to meet this requirement may include tax returns, real estate transactions, securities transactions, inheritance documentation, stock dividends, employment records, bank records, etc.

Related to—but separate from—the lawful source of funds requirement is the requirement to trace the funds from the individual investor to the new commercial enterprise. In some cases, this is as

simple as a wire transfer document from an individual's bank account to the investment enterprise. In other cases involving countries with restrictions on outbound currency transfers, this can be extremely complex, often involving transfers to multiple parties. It is important to note that the investment must come from the individual investor. An investment from a corporate entity, including a wholly-owned corporate entity, will not qualify.

With both the individual and the regional center investor, upon approval of the permanent resident application, the foreign national receives "conditional permanent resident status". This means that the "green card" that the investor receives is valid for two years. During the 21 to 24 month window after approval, the investor must file an application to remove conditions on residence. As part of this process, the investor must prove that the investment funds have not been withdrawn and that the requisite jobs have been created. For individual investors, this can be highly problematic if the vicissitudes of business are such that a downturn in the economy has resulted in a reduction in the workforce. For the regional center investor, although indirect employment creation in the community is allowed and although USCIS has pre-approved the employment creation element for purposes of approval of the original investor petition, the regional center has the burden to prove two years later that the actual projected employment has occurred. For this reason, even though all of the regional centers have been pre-approved, the choice of regional center is a critical one. As of the date of this article, only a small number of the regional centers - - Philadelphia being one - - have actually gone through the entire process resulting in successful permanent green cards for their investors.

Needless to say, the immigrant investor options are not the panacea for all foreign nationals seeking permanent residence status in the U.S. However, for an increasing number of them, it has provided a solution during times when other paths have been blocked. For the investors who choose this

option, it is important to put together a team including not only the immigration lawyer but also business, tax and/or securities counsel to advise on the multiplicity of issues that go into determining whether the investor option is a good decision for a particular client.