

## USCIS EB-5 PROGRAM – CURRENT STATES/PROS & CONS

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### **RE: Regional Center Establishment**

The EB-5 Program for lawful permanent residence is currently administered by US Citizenship and Immigration Services (“USCIS”). The Program has concurrent goals of immigration to the US through qualified investment into a commercial enterprise, and job creation for US, citizens or lawful residents. Investors receive conditional residency after taking the risk in a qualified investment of their own creation, or as part of a separate entity in a regional center (the “**Regional Center**”). After two years of receiving such status, the investor may apply for a removal of conditional status at which time it must be shown that 10 qualifying full-time job positions per investor have been created, some direct, some indirect or induced.

The required investment level is \$1,000,000 unless the investment is made into a business located in a targeted employment area (unemployment rate that is 150 percent or more of national coverage), or a rural region (less than 20,000 population) or a troubled business enterprise (at least 20% decline in value over past 12 to 24 months), at which time a reduced investment of \$500,000 is required.

In order for an immigrant investor to receive his/her green card through the EB-5 Program, it must be clearly established that the requisite requirements have been met, namely that: (i) a new commercial enterprise has been established; (ii) the requisite amount has been invested into the commercial enterprise; (iii) the requisite number of full-time jobs have been created; and (iv) a minimum of 10 full time direct or indirect employment positions must be established per immigrant investor under the regional center designation

Investing in a Regional Center additionally provides flexibility through the acceptance of indirect job creation as part of the job requirements. There are currently (as of March 1, 2012) 218 approved Regional Centers, operating in forty (40) states, including the District of Columbia and Guam. Approximately ninety-two percent (92%) of the individual Form I-526 petitions filed each year are filed by Alien Investors who are investing in Regional Center-affiliated commercial enterprises.

### **The Relevance of US Securities Laws**

When a Regional Center forms a limited partnership or limited liability company in which the EB-5 investor would invest, this constitutes an offering of a security. Therefore, the Regional Center and the issuer company must comply with federal and state laws in conducting the offering of securities.

The SEC adopted Regulation S to provide a ‘safe harbour’ exemption from registration under the 1933 Act for offerings and sales of securities occurring outside the U.S. However, Regulation S is not the exclusive means that must be employed to fall within an exemption for the offering. It is important to mention that Regulation S does not establish an exemption from the antifraud, civil liability or the broker-dealer registration requirements of the Securities Exchange Act of 1934, as amended (‘1934 Act’). The safe harbour provides that the offer or sale must occur in an ‘offshore transaction’ outside the US at the time of the sale, and no ‘directed selling efforts’ may be made in the United States by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing in connection with the transaction.

States generally prohibit issuers from paying a commission to anyone effectuating a securities transaction unless the recipient is a registered broker-dealer or agent. In addition, a third party who receives any transaction-based compensation in connection with a securities transaction may also be deemed a broker-

dealer. On the other hand, if a third party does nothing more than provide the name and contact information of a potential investor to the issuer, the third party may be considered a 'finder' rather than a broker-dealer and therefore legally entitled to receive a finder's fee without being registered as a broker-dealer.

### **Regional Center Creation - Advantages**

The Regional Center provides a degree of credibility to foreign investors that rely upon the USCIS licensing to purportedly provide some degree of oversight to the process. Many Regional Centers serve as marketing arms to developers in order to not only provide for the use of the Regional Center designation, but also provide marketing services for raising capital.

A particular project within the Regional Center may be pre-approved by USCIS and other projects can be included with or without additional filings. The Regional Center designation is a one-time designation allowing future projects to be marketed within such region without incurring the delays of obtaining regional approval and the Regional Center can profit by utilizing its designation to help fund projects developed by others for fees and/or participation in the venture.

Developers of projects including real estate, technology, health care, retail and other industries are incentivized to utilize the EB-5 Program to raise capital since capital has become unavailable from traditional sources. Foreign investors offer a relatively cheap source of capital, although there is a time delay when EB-5 funds can be accessed since the funding process generally involves the creation of a Regional Center and obtaining I-526 Petition approvals for each investor. USCIS has proposed to adopt a premium processing system to expedite both of these processes, but such procedures are not expedited to be in place until sometime in 2012 as to the I-924 application only and at a later time for the I-526 petitions.

### **Difficulties With Regional Center Process**

The most significant problem with the Regional Center concept is obtaining the initial license yet. The cost of these services could well exceed \$100,000 and there are no assurances that the Regional Center will be approved, especially given the fact that the current demand rate exceeds fifty percent (50%). In addition, there is a significant time delay without premium processing to obtain approval, and under current conditions the process can easily take 6 to 8 months, and then the processing of the I-526 petitions for the subscribing investor can likewise take another 6 to 8 months before the funds can be accessed, unless a shortened schedule for releasing funds from escrow is used.

### **Conclusion**

As stated by the Profit Policy memorandum published by USCIS on November 9, 2011:

“Congress created the EB-5 Program to promote immigrants’ investment of capital into new commercial enterprises in the United States so that new jobs will be created for U.S. workers. The EB-5 Program provides for flexibility in the types and amounts of capital that can be invested, the types of commercial enterprises into which that capital can be invested, and how the resulting jobs can be created. This flexibility serves the promotion of investment and job creation and recognizes the dynamics of the business world in which the EB-5 Program exists. Our careful and thoughtful adjudication of petitions in the EB-5 Program should be mindful of these important principles.”

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