

# Regional Centers: Investing For The Green Card

By

Jeffrey A. Devore\*

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\* **JEFFREY A. DEVORE** is an attorney practicing immigration and nationality law with the law firm of Devore, Devore, Karden & Hernandez, P.A., which has offices in West Palm Beach (Palm Beach Gardens) and Fort Lauderdale (Plantation), Florida. He received his Bachelor of Science degree in Computer Science from Bowling Green State University and his Juris Doctor degree from The Thomas M. Cooley Law School. He was admitted to The Florida Bar on May 4, 1990.

Mr. Devore is Board Certified in Immigration and Nationality law by The Florida Bar and specializes in assisting foreign nationals who want to live and work in the United States and companies that wish to employ them. He is AV<sup>®</sup> Rated by Martindale-Hubbell, indicating very high to preeminent legal ability and very high ethical standards as established by confidential opinions from members of the Bar. Mr. Devore has been recognized as an expert in immigration law by the Florida Courts, has litigated several cases against the Departments of State, Justice and Homeland Security in Federal Court and has written extensively on United States immigration and naturalization matters. He is admitted to practice before the United States Supreme Court, the United States Court of Appeals for the 9<sup>th</sup> and 11<sup>th</sup> Circuits, the U.S. District Courts for the Middle and Southern Districts of Florida, the Northern District of Texas, the Western District of Tennessee, and the District of Arizona.

Recognized by the *South Florida Business Journal* as one of the Best of the Bar and as one of *Florida Trend's* Legal Elite, Mr. Devore is a two time recipient of the Immigration Law Award presented by the Legal Aid Society of Palm Beach County in recognition of outstanding *Pro Bono* service to the community. He is listed in *Who's Who Legal* for his expertise in business immigration and has been named a *Florida Super Lawyer*. Mr. Devore is one of approximately 50 attorneys in the State of Florida certified as a specialist in Immigration and Nationality law.

Mr. Devore is a member of The Florida Bar, the Palm Beach County Bar Association, the American Bar Association, and the American Immigration Lawyers Association (AILA) and is a past President of AILA's South Florida Chapter. He is a former member and past chair of The Florida Bar's Immigration and Nationality Law Certification Committee and serves as Vice President of the Legal Aid Society of Palm Beach County. Mr. Devore can be contacted by telephone at (561) 478-5353 or via e-mail at [jdevore@visabank.com](mailto:jdevore@visabank.com).

## INTRODUCTION

There are limited avenues available to a foreign national who wishes to become a lawful permanent resident of the United States. Most need either an immediate family member or an employer to sponsor them through a process that can take years. However, for foreign nationals with financial means, the employment based 5<sup>th</sup> preference immigrant visa, otherwise known as an EB-5 visa, offers another, often speedier alternative by investing in the United States. Unlike the treaty trader (E-1) or treaty investor (E-2) visas, both of which do not lead to permanent residence, no qualifying treaty between the United States and the investor's country of citizenship is required. The EB-5 program is open to all foreign investors regardless of citizenship. Typically, there are three options for an EB-5 investor. Each requires a significant financial investment and job creation but leads to lawful permanent residence:

1. An *active*<sup>1</sup> investment of One million Dollars (\$1,000,000);
2. An *active* investment of Five hundred thousand Dollars (\$500,000) in a targeted employment area;<sup>2</sup>
3. A *passive*<sup>3</sup> investment of Five hundred thousand Dollars (\$500,000)<sup>4</sup> in a Regional Center.

To qualify for EB-5 status, an investment normally must create full-time employment for at least 10 U.S. citizens, lawful permanent residents or other immigrants lawfully authorized to be employed in the United States. The investor and his spouse and children do not count toward the 10 employee minimum. Nonimmigrants are also excluded from the count.<sup>5</sup>

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<sup>1</sup> An active investment is an investment that by its nature requires the investor to actively participate in the operation of the business either through the exercise of day-to-day managerial control or through policy formation.

<sup>2</sup> A "Targeted Employment Area" is defined as an area which at the time of investment is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

<sup>3</sup> A passive investment is an investment which requires the investor to do little but invest the required capital.

<sup>4</sup> Almost all Regional Centers are located in targeted employment area and thus only require investments of \$500,000. However a Regional Center not in a targeted area would require the full \$1,000,000 investment.

<sup>5</sup> An "employee" for EB-5 purposes is an individual who (1) provides services or labor for the new commercial enterprise and (2) receives wages or other remuneration directly from the new commercial enterprise. This definition excludes independent contractors. The jobs created must be full-time. This means employment of a qualified employee in a position that requires a minimum of 35 working hours per week. Job-sharing arrangements, where two or more qualifying employees share a full-time position, will also serve as full-time employment if the hourly requirement per week is met. Job-sharing does not include combinations of part-time positions even if when combined, such positions meet the hourly requirement per week.

This document focuses on the third option, Regional Centers, which were created in 1993 when Congress established The Immigrant Investor Pilot Program. Regional Centers offer two benefits to investors: 1) A passive investment opportunity; and 2) the ability to claim job creation through indirect employment.

## **WHAT ARE REGIONAL CENTERS AND HOW DO THEY WORK?**

A regional center is “any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment. In layman’s terms the purpose of the regional center is to benefit the United States economy and create full-time employment for not fewer than 10 qualified U.S. workers,<sup>6</sup> as well as generate a return on the investor’s capital which has been placed at risk.

After the investor completes a thorough business and financial due diligence analysis of the viability of the business, the investment of \$500,000<sup>7</sup> is made into the petitioning regional center. It is a requirement that the investment actually be “at risk” and the investor must understand that there is a possibility that a portion if not all of their monies invested could be lost should the investment fail. Extensive documentation obtained from the investor as well as the chosen Regional Center is filed in support of an immigrant visa petition with United States Citizenship and Immigration Services (USCIS). It takes approximately four to six months for USCIS to make a decision on the visa petition (though this time frame can vary). Upon approval, an alien, may, if eligible, apply for adjustment of status in the United States or alternatively consular process at an American Embassy abroad.<sup>8</sup>

One of the benefits of regional center investing is that the necessary creation of 10 full-time jobs may be through “indirect” rather than “direct” job creation. An indirect job is one that is created beyond the commercial enterprise upon which the investment is made (i.e. the job is created as a result of the regional center project). The ability to make a

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<sup>6</sup> A qualified worker is a United States citizen, a lawful permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur’s spouse, sons, or daughters, or any nonimmigrant alien.

<sup>7</sup> All Regional Center programs also charge an administrative fee which is paid in addition to the capital investment.

<sup>8</sup> An investor’s spouse and children under twenty-one (21) years of age are also eligible for lawful permanent residence as dependents.

passive investment and rely on indirect job creation makes regional center investing appealing to those investors seeking lawful permanent resident status.

## **WHO SHOULD CONSIDER A REGIONAL CENTER INVESTMENT?**

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

- **Retirees:** Since the United States does not have a retirement visa these individuals are often devoid of immigration options if they do not have a close family member or employer to sponsor them.
- **Potential H-1B aliens shut out by the H-1B 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, should be explored.
- **H-1B aliens nearing the six year H-1B 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 may be out of options.
- **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 United States.
- **Individual owner of a business outside of the U.S. who wants to set up a business in the United States:** 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.
- **Entrepreneurs who want to set up a new business in the U.S.:** Some of these individuals will not qualify for L-1 status 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.
- **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.**
- **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.
- **The spouse of a lawful permanent resident:** With a long quota wait and no derivative status available, visa options are extremely limited.

- **Doctors who have not passed the USMLE 1, 2 and 3:** Unless the doctor has a level of national prominence, an H-1B is not an option.
- **Foreign nationals subject to 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.
- **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.
- **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.:** An F-1 may not be an option either because the children are pre-college or because establishing a foreign residence abroad may be problematic. 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.
- **Foreign nationals 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.
- **Any foreign national with an urgent need or desire to become a permanent resident of the U.S.**

## **STRICT DOCUMENTATION REQUIREMENTS**

Perhaps the most complicated aspect of investing in any type of EB-5 investment is establishing that the capital investment made by the investor was lawfully obtained. In many EB-5 cases, documenting the lawful source of funds can be the most arduous and time consuming part of the process. The investor should be forewarned of the need for substantial documentation. Sometimes, the investor may have gone to great lengths to avoid having documentation of the very transactions that now have to be proven for purposes of the EB-5 petition. A good rule of thumb is that if the attorney can understand through the documentation where the money came from, the chances of being able to satisfy USCIS are greatly enhanced.

The definition of “invest” means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien investor and the commercial enterprise *does not* constitute a contribution of capital for the purposes of an EB-5. Thus, an alien investor cannot loan the commercial enterprise money and consider those fund as part of the investment.

However, indebtedness secured by assets owned by the alien investor may be considered capital, provided the investor is personally and primarily liable for the debts and the assets of the enterprise upon which the petition is based are not used to secure any of the indebtedness. Indebtedness secured by assets of the subject enterprise is not considered capital since it is not considered “at risk”.

The law requires that an investor incur reasonable risk for purposes of generating a return on his or her investment. Guarantees, buy back arrangements, unsecured promissory notes, and/or other agreements or provisions that structure or organize the investment for appearance sake only without the investor’s capital truly being fully invested and at risk in the investment are not permissible.

USCIS requires an investor not only to trace and prove “where the money came from”, but that the funds were lawfully acquired as well. Documenting lawful source of funds requires extreme attention to detail, knowledge of business documentation standards, finance, and accounting. Many financial transactions require a multitude of documents to evidence, and USCIS will insist on all of the detailed documentary evidence.

The difficulty of documenting the lawful source of funds often varies greatly by country. It can be especially difficult in countries where no tax returns are required to be filed or where full disclosure of revenues and profits on tax returns is the exception rather than the rule. Where tax returns are not required to be filed, this should be documented. Where tax returns are required to be filed but the individual’s tax returns show very little income, the documentation of the source of funds should provide overwhelming evidence to counter the negative implication that comes from a review of the tax returns.

Documenting lawful source of funds is a different requirement than the requirement to trace the funds from the individual investor to the investment enterprise. The latter also needs to be done in great detail. For countries with restrictions on the outflow of currency, this can be especially difficult, since the investor may engage in several layers of transactions between the money leaving the investor’s account overseas and arriving in the U.S. enterprise. In documenting lawful source of funds, the ultimate focus is on the person who originally obtained the funds. If the investor obtained all of the funds on her own, this is not an issue. If the funds were the result of a gift, the lawful source of the giftor’s funds must be documented. If the source of funds was a loan, the lawful source of the lender’s funds must be documented, as well as the lawful source of any collateral put up by the investor for the loan. If the source of funds is an inheritance, the decedent’s source of funds may become an issue.

Very often in documenting lawful source of funds, the attorney or client must make a judgment regarding how far back to go with the documentation. For example, if the

source of funds is a real estate transaction that resulted in substantial proceeds from the sale of real estate, the documentation of the real estate sale is certainly required. If the real estate was purchased within the last several years, it is highly recommended to document how the investor obtained the money to purchase the real estate that has now been sold. If the real estate was purchased 30 years ago, it may be impossible to provide such documentation. There is no clear line regarding how far back one must go to obtain documentation, with "reasonableness" being the rule of thumb. The same concepts apply to, for example, securities transactions. For inherited money, if the decedent earned his or her money 50 years ago, USCIS may agree it is not possible to document the earning of those funds at the present time.

If the investor obtained the invested money through unlawful employment in the U.S. issues may be raised by USCIS. Although primary documents should be obtained wherever possible, written statements, affidavits and resumes can help fill some of the holes in the primary documentation and can help to paint a picture that satisfies the USCIS examiner that the invested capital had a lawful source.

## **CONDITIONAL PERMANENT RESIDENCE**

Upon approval and the grant of permanent residence, an investor and his or her spouse and children under 21 years old are granted "conditional permanent residence." This status is granted for a period of two years. Conditional residents have the same rights to live, work, travel, and accrue time toward naturalization as "unrestricted" permanent residents.

In an effort for USCIS to ensure that an investor has complied with the requirements of the EB-5 program, in the 90 day window prior to the expiration of the investors' conditional resident status, the investor must file a petition to remove the conditional basis of his lawful permanent residence with USCIS. Along with the petition, evidence establishing that the investment was sustained during the previous two years and that the required 10 jobs have been created or can be expected to be created within a reasonable period of time must be submitted. Upon approval of this petition, the condition is removed and the investor, spouse and children are all "unrestricted" lawful permanent residents of the United States.

## **IMPORTANT QUESTIONS FOR A FOREIGN NATIONAL INVESTOR**

It is important that an alien considering investing in an EB-5 regional center retain a team of advisors to assist him in undertaking due diligence to evaluate the feasibility of the investment in his particular circumstances. At a minimum, the team should include an immigration attorney to assist in determining immigration feasibility, a business attorney

to assist in reviewing contracts such as subscription and /or purchase agreements, and an accountant or tax attorney to review any possible tax consequences. Questions that the investor should pose to his team should include (but should not be limited to) the following:

1. When was the Regional Center created?
2. Is the Center involved in any litigation past or present?
3. Do the principals have any criminal convictions?
4. How long has the EB-5 company been doing business?
5. When can I sell my investment and what is that process?
6. What is the projected return on the investment?
7. What is the return on previous EB-5 projects?
8. How many EB-5 projects has the regional center completed?
9. How much beyond the \$500,000 investment will I have to pay?
10. Is the EB-5 project limited to only foreign nationals? Can a U.S Citizen invest as well?
11. Do I get any interest on the money before it is actually spent by the project?
12. How often is a return paid?
13. What formula is used to determine the return?
14. What happens if my visa is denied? Do I get my \$500,000 investment returned? What about any other fees paid?
15. How many visa approvals and how many visa denials has the center obtained?
16. What is the success rate in having the conditions on residence removed?

## **CONCLUSION**

Regional Centers offer investors a fast track method to becoming a permanent resident of the United States. United States Citizenship and Immigration Services will need to be satisfied that the invested funds were lawfully obtained in order to the application to be successful. Most importantly, however, is that one should not lose sight that ultimately an investment in a Regional Center is just that, an investment, and should be treated as such.

# EB-5 Immigrant Investor Timeline/Flowchart

