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PROCEDURES AND TIMING FOR EB-5 GREEN CARDS THROUGH INVESTMENT

by Mark Ivener, Attorney

For foreign investors looking for freedom and flexibility to live and work in the United States in a way accommodating to their lifestyles, the EB-5 investor category can provide an excellent opportunity to accomplish this goal through the obtaining of Green Cards.

There are essentially two EB-5 programs, i.e. the Direct Investment program and the Regional Center program. In order for an applicant to qualify under the Direct Investment program, the following three basic requirements must be met: investment in a new commercial enterprise; investment of at least \$1 million (or \$500,000 in certain cases) into the business, and creation of employment for at least 10 full-time U.S. workers.

The investment may consist of various forms of capital, including cash, equipment, inventory, property, and other tangible equivalents. An investment amount of \$1 million is generally the minimum. However, \$500,000 is acceptable if the business is situated in a “targeted” employment area, i.e., one that has experienced unemployment of at least 150 per cent of the national average rate or a rural area.

The second program within the EB-5 category, i.e. the Regional Center program, is ideal for the retiree or inactive investor due in large part to the “indirect employment” feature of this program. The Regional Center program advantageously removes the 10 full-time employee requirement of the Direct Investment program and substitutes the less-restrictive “indirect employment creation,” which allows the investor to qualify by proving 10 direct and/or indirect employees who are new to the Regional Center.

The EB-5 policy management requirement is minimal in that the investor can be a limited partner and still qualify as long as the limited partners have a policy making role. Thus, for those who are not interested in day-to-day management or running an active business, Regional Center programs offer a more acceptable inactive form of investment, than do most Direct Investment program investments.

Another advantage of Regional Center programs that adds to the flexibility of this Green Card category is that the investor is not required to live in the place of investment; rather, he or she can live wherever he/she wishes in the United States.

Each Regional Center program must be pre-approved by CIS in order to be eligible to offer investments to applicants who want to qualify for EB-5 Green Cards. CIS has approved over 600 Regional Centers.

The procedure for filing an EB-5 Investor Green Card petition is relatively straightforward. The investor must present evidence that traces the funds through bank transfers and other documentation, from the investor directly to the enterprise. The money can be the investors own funds or in the form of a loan or gift, which would allow a parent to gift a son or daughter.

After the investor completes a thorough business and financial due diligence analysis of the viability of the Regional Center business opportunity, the investment is made and an I-526 petition is filed by the foreign investor with CIS, requiring CIS to approve that the applicant (source of funds) and the investment are eligible for EB-5 status, which takes an average of 6-12 months for Direct Investment and about 6-18 months for Regional Center cases.

If the investor is already in the U.S., generally in valid work status, he or she then applies for a Green Card through CIS. No interview customarily is required, and approval for most cases is currently taking approximately 6-8 months. If the investor resides abroad, an application for the Green Card is generally made at the U.S. Embassy or Consulate in the investor's home country, where an interview is necessary. Approval of the Green Card in this case takes on average about 6-8 months. Thus, the entire immigration process generally takes about 20-24 months. This is the situation for most EB-5 applicants based on November 2015 CIS and State Department Consular processing times; however times may vary depending on the facts of each case.

China EB-5 Quota News

There is currently about an extra year and a half backlog and it is expected to get longer.

Green Card

Once CIS or a U.S. Consulate approves the investor's Green Card, it is conditional for a period of two years. Conditional Green Card status confers the same rights as the permanent Green Card. Between 21-24 months after the conditional Green Card has been approved, the investor must reconfirm that the investment has been made and that the employment requirement has been fulfilled. An I-829 application to remove the conditional Green Card status is then filed with CIS; processing currently takes about 12 months.

Once the condition has been removed, a full Green Card is granted for permanent resident status. From the filing of the I-526 application until approval of the Removal of Conditions usually takes about 5 years, subject to the Chinese quota discussion above. Thereafter, in an approved Regional Center case, depending on the terms of their agreement, if the investment is sold, the investor will still maintain the permanent Green Card.

In summary, freedom to live anywhere in the United States, a passive form of investment with no required direct management responsibilities, priority standing within the Immigration process, and an accelerated path to Green Card procurement – all are important factors which make the EB-5 Green Card Regional Center category an ideal vehicle for the inactive investor or retiree who wishes to live and/or work in the United States. As with other U.S. Immigration visas, applicants also need to take into account U.S. and foreign tax and other business and personal planning considerations.

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