

The EB-5 Investment Visa

This relatively recent (1990) immigrant visa category seeks to favor entry of immigrants who are entering the United States for the purpose of engaging in a commercial enterprise that will involve creation of at least ten, full-time jobs.

The EB-5 investment visa may be distinguished from the other E investment visas, in that very strict conditions must be fulfilled in regard to employment and a minimal capital investment must be made under this category.

Although the minimum amount required to invest for the EB-5 is \$1 million, this amount may be reduced to \$500,000 in the event that the investment is made in a “targeted employment area”.

To qualify under the EB-5 category, the new commercial enterprise must:

- (1) have been established by the investor;
- (2) be one in which the person is in the process of investing at least \$1 million, or \$500,000 if in a “targeted employment area”;
- (3) benefit the U.S. economy;
- (4) create full-time employment for at least 10 U.S. workers;
- (5) the immigrant investor must have a policy-making role in the business.

Under EB-5, two or more individuals may join to make an EB-5 investment, provided that each investor has invested the required capital and each investment results in the creation of the requisite number of full-time positions.

1. Creation of a new commercial enterprise

There are basically three ways to demonstrate the creation of a new commercial enterprise. The business may be “new” (in whatever form, such as creation of a sole proprietorship, partnership, holding company, joint venture, corporation, business trust, etc.), or involve the purchase and restructuring of an existing business or expansion of an existing business. Investing in a troubled business may also qualify an investor for EB-5 classification.

Indeed, the primary criteria of the EB-5 immigrant visa is the creation of at least 10 new employment opportunities, and the means of such employment generation are important for the file, but secondary to job creation.

2. The capital investment

The investor must make an investment in capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the entrepreneur and the new business does not constitute a contribution of capital.

The amount of the investment must be equal to at least \$1 million, unless the investment is made in certain “targeted employment areas” (generally, areas specified by the individual states where the unemployment rate is equal to or more than 150 percent of the national average). In the event of an investment in a “targeted employment area”, the minimum investment is decreased to \$500,000.

3. Benefiting the U.S. Economy

This additional requirement, while it seems that it is obviously met if the business creates U.S. jobs, nonetheless must be demonstrated to the satisfaction of the immigration and naturalization service. Generally, this requires a showing that the new business provides goods or services to U.S. markets.

4. Job creation

To qualify for EB-5 status, the investment must create full-time employment for at least 10 U.S. persons, meaning U.S. nationals, lawful permanent residents or other immigrants lawfully authorized to be employed in the U.S.. The investor himself/herself does not count, nor does the investor's spouse and children. Non-immigrants are also excluded.

These full-time jobs need not exist upon making the EB-5 petition. The investor may, for example, support a petition with a comprehensive business plan demonstrating a need for at least 10 employees within the next two years. This business plan, to be worked out with legal counsel, would provide the approximate dates during the next two years when the employees would be hired.

Furthermore, for investment in an existing, troubled business, the job creation criteria are met when the investor shows that the number of existing employees will be maintained.

5. Role of the immigrant investor in the business

It is not sufficient for the investor to establish a business plan and investment and then absolve himself of involvement in the business. The EB-5 investor must either be involved in the managerial control of the commercial enterprise or manage it through policy formulation. This requirement is generally satisfied if the EB-5 investor is a corporate officer or board member, for example.

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The EB-5 process requires a great deal of preparation and foresight, and a sophisticated knowledge of immigration law and jurisprudence. Indeed, your immigration attorney would have to carve out a personalized solution which is consistent with caselaw in this domain of immigration law. Therefore, consideration of EB-5 status should be done in close cooperation with legal counsel.

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