

EB5: The Intersection of Real Estate and Immigration

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There are many ways for foreigners to get green cards to work in the United States and numerous paths to citizenship. The rules are intricate, the options vary depending on the applicant's national origin, and the cases tend to be fact sensitive. Unbeknownst to many, the EB- 5 Visa has become an intersection of real estate and immigration. More and more foreigners, primarily Chinese nationals but also investors from Russia, France, and Egypt are attaining citizenship through the EB-5 programs, which have become the financing sources for an increasing number of real estate projects.

The EB-5 program was established in 1990 by the Immigration and Nationality Act, found at 8 U.S.C. § 1153 (b)(5), as a mechanism to encourage foreign investment in the United States and to create new jobs for U.S workers. EB-5 stands for "employment-based 5th category," one of many categories on which to base a green card or citizenship application. Initially, the foreign applicant had to create an entirely new commercial enterprise to qualify for EB-5 status. The EB-5 program has since evolved and expanded. Today, if a non-U.S. individual invests \$1,000,000 in a business that creates or preserves ten jobs or more for U.S. workers (excluding the investor and his immediate family)¹, and the investor's application is approved, the investor and his/her dependents will be granted conditional permanent residence.² After about two years, if the foreigner can demonstrate that her investment has fulfilled each of the EB-5 job creation requirements, the conditions on the visa will expire and the applicant will

¹ 8 C.F.R. Section 204.6 (j)(4)(i)

² 8 U.S.C. Section 1153 (b)(5)(c)

be granted permanent residence.³ Thereafter, in five years, the applicant can file for U.S. citizenship.⁴

Historically, approximately 10,000 EB-5 visas are allocated each year to foreigners worldwide; however, the program is an underutilized path to citizenship because, to date, that annual limit has never been reached. In recent years, two revisions to the law have made the EB-5 visa process a more travelled road to citizenship. The first provides that the minimum investment amount may be reduced to \$500,000 if the investment is made in a "Targeted Employment Area". The United States Citizen & Immigration Service (the "USCIS") in essence defines Targeted Employment Area ("TEA") as either (i) a rural area, or (ii) an area experiencing unemployment of at least 150% of the national average rate.⁵ If the proposed new business location is not in a TEA, the investor may gather the relevant publicly available state or federal statistics and submit them with its petition to the USCIS to have a new TEA determination made. Increasingly, state business development groups are assisting in designating new areas as TEAs.

The other popular revision is the modification to the EB-5 program that allowed investment into Regional Centers. Initially, real estate was considered inappropriate for an EB-5 investment. After all, the construction of a million dollar property typically would be finished within two years and would not create 10 sustainable jobs. However, the modification to the EB-5 program ameliorated this concern.

³ 8 C.F.R. Section 216.6

⁴ 8 C.F.R. Section 216.6

⁵ 8 C.F.R. Section 204.6 (e)

A “Regional Center” is defined by the USCIS as “any economic entity, public or private, which is involved with the promotion of economic growth, improved regional productivity, job creation and increased domestic capital investment”.⁶ Investments within a Regional Center allow foreign nationals to count jobs created both directly *and indirectly* for purposes of meeting the 10 job creation requirement. For example, if a project is to build a hotel, those hotel jobs subsequently created can be counted as jobs created by the EB-5 construction project. This use of Regional Centers was first introduced as a pilot program in 1993, and in 2003 President Obama made it a permanent feature.

How does the process work? First, the Regional Center obtains preapproval for its selected EB-5 projects, then foreigners invest in that Regional Center. Regional Center certification arguably lends legitimacy that helps in marketing to foreign nationals. These passive investments have been likened to those in a closed end mutual fund: the Regional Center is a third party investment vehicle which pools capital from multiple EB-5 investors, then invests in various multimillion-dollar projects and charges an administrative fee for its management services. As of February, 2012, there were 218 Regional Centers, predominately in California, Florida and Washington. According to the USCIS website (uscis.gov) in early April 2014, there were 577 Regional Centers.⁷ A Regional Center being listed on the website does not indicate an endorsement by the USCIS.

The EB-5 program has been slow to evolve. In 2005, a Government Accountability Office report found that investors were not utilizing the program because of “an onerous application process; lengthy adjudication periods; and the suspension of processing on over 900

⁶ 8 C.F.R. Section 204.6 (e)

⁷ U.S. Citizenship and Immigration Services. ["EB-5 Regional Center"](#)

EB-5 cases—some of which date to 1995—precipitated by a change in the USCIS’s interpretation of regulations regarding financial qualifications.”⁸ However, in 2011, the USCIS began modifying the program to foster an increase in the number of applicants. By the end of 2011, over 3,800 EB-5 applications had been filed, compared to under 800 applications in 2007.⁹ To put this in perspective, remember there are about 10,000 EB-5 visas available each year.

The demand for EB-5 money became more popular because of the ongoing recession and commercial banks’ continuing hesitancy to make construction loans. In addition, Dodd Frank has put many more restrictions on bank lending, causing developers to seek alternative funding sources. Regional Centers are an attractive capital provider: they can be more flexible and offer more reasonable terms than commercial banks because their primary objective is not to make a profit but rather to safeguard principal and create jobs which lead to the issuance of the coveted visa. Although EB-5 money is used for manufacturing and other projects, real estate transactions are favored since they involve a tangible collateral asset and thus are perceived by investors as more secure. EB-5 financing has been successfully employed in the construction of numerous hotels, medical facilities, charter schools, and government infrastructure projects throughout the country. In particular, EB-5 money has been used in connection with many larger prominent New York City projects such as the Barclay Center in Brooklyn and Durst’s Bank of America Project at Bryant Park. It is contemplated that EB-5 money will be involved in the development of part of the Penn Yards project.

⁸ United States Government Accountability Office (2005), *IMMIGRANT INVESTORS: Small Number of Participants Attributed to Pending Regulations and Other Factors*

⁹ McGeehand, Patrick (2011), "Rules Stretched as Green Cards Go to Investors", *The New York Times*

Not surprisingly, a cottage industry has grown up around the EB-5 program as it requires numerous experts. To name a few, there are migration consultants who specialize in marketing to off-shore agents; migration agents/ brokers who procure investors; immigration, corporate and real estate attorneys who structure and consummate the deals; and economists who do the job analysis and prepare the economic reports.

Although the EB-5 program has had many good results, there also have been disappointments and fraud claims associated with the program. One such example is the Chicago Convention Center case. In February, 2013, The Securities and Exchange Commission (SEC) charged Anshoo R. Sethi with fraudulently selling over \$145 million in securities and collecting \$11 million in administrative fees from more than 250 investors, most of whom were Chinese nationals. Believing it was a way to get green cards through the EB-5 immigrant investor program, foreign investors were allegedly duped into purchasing interests in a company known as “a Chicago Convention Center” (ACCC) to finance the construction of a hotel/conference center near Chicago’s O’Hare Airport. The project was to be built on a site once occupied by Sethi’s family’s budget hotel, where rooms cost as little as \$33 a night and there were weeds at the bottom of an empty swimming pool, according to the [Chicago Tribune](#)¹⁰. In March, 2014, the United States District Court for the Northern District of Illinois Eastern Division issued the final judgment in the Securities and Exchange Commission v. A Chicago Convention Center, LLC¹¹, (“ACCC”). ACCC conducted a fraudulent offering targeting the EB-5 Immigrant Investors. The judgment included \$3.9 million civil penalties including \$1.45 million against ACCC, \$1.45 million against the regional center entity, and \$1 million against Sethi individually.

¹⁰ “Fast Track to the American Dream” by Antonio Olivo, Chicago Tribune, July 15th, 2012

¹¹ SEC v. A Chicago Convention Center, LLC, et al.

No. 2013-70, Civil Action No. 13-cv-982, U.S. District Court for the Northern District of Chicago, 4/19/2013

In conclusion, although some may find the EB-5 program problematic, it has been a source of funds for many valuable and important projects. Its future growth will depend to some extent on both the economic situation in the United States and overseas. Certainly, it is an example of how local real estate has gone global. Who knew real estate lawyers would have to pay attention to immigration law?

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