

EB-5 Green Cards for Investors

The investor visa category (EB-5) is an immigrant visa category that creates permanent residency for foreign investors that invest in commercial enterprises in the United States that will benefit the U.S. economy. This immigrant visa is also called employment creation visa or fifth preference category visa. It is specifically targeted at high net worth investors that would like to become US residents without the need for a third party sponsor. In 2009, 4,350 investors used that visa category to obtain permanent residency.

1) Legal Requirements

To qualify under EB-5, the investor applicant has to invest between \$500,000 and \$1,000,000 in a new commercial enterprise that employs 10 American workers full-time and engage in the business through day-to-day management or policy formation.

2) Investment in a “targeted employment area”

Generally, the investor has to invest \$1,000,000 in a new commercial enterprise. However, this amount can be as little as \$500,000 if the investment is made in a “targeted employment area.” The investor will have to submit evidence that demonstrates that the new commercial enterprise has created or will create employment in an area that meets the following requirements:

(i.) For rural areas, evidence that the new enterprise is not located within any standard metropolitan statistical area, or within any city or town having a population of 20,000 or more;

(ii.) For a high unemployment area, evidence that the metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150% or the national average rate; or a letter from the state in which the new commercial enterprise is located which certifies that the area has been designated as a high unemployment area.

3) Investment must benefit the US economy

Generally, the showing that the new enterprise will provide goods and/or services to U.S. markets should satisfy this requirement.

4) Creation of 10 jobs for U.S. workers or other immigrants

The investor and his spouse and children do not count toward the minimum of 10 full-time jobs necessary to qualify for the EB-5 visa. Nonimmigrants are also excluded from this count.

There is no special qualification requirement to fulfill the jobs to be created. In fact, job-sharing arrangements are allowed, where two or more qualifying employees share a full-time position, if the hourly requirement per week is met.

For this purpose, other immigrants include conditional residents, temporary residents, asylees, refugees, and recipients of suspension of deportation or cancellation of removal.

5) The investor applicant must have at least a policy-making role in the enterprise.

This means that the investor must be a corporate officer or director in a corporation or powers consistent with rights, powers and duties normally granted to limited partners under the Uniform Partnership Act.

6) Purchase of an Existing Business

An attractive option for EB-5 investors is to acquire an existing business in the United States and to restructure, reorganize or expand the business thereafter. Under certain circumstances, this will enable the investor to qualify for an EB-5 greencard and to expand grow his business organization in the United States at the same time. Obtaining permanent residency through M&A transactions is especially interesting for foreign investors that have business operations overseas and intend to invest in the United States.

7) Investments in Troubled Businesses

For this purpose, a Troubled Business would be an enterprise doing business for at least 2 years, whose net loss is verified during the 12 to 24 month period before applying for an EB-5 visa. In addition, the referred loss should account for at least 20% of the enterprise's net worth before the loss.

It is crucial to an investment in Troubled Business that the petitioner assures that its current employees will be maintained for at least 2 years, which in fact exempts the investor to comply with the requirement of creation of 10 full-time jobs.

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The pitfall is that the investor can lose his or her conditional residency if the business is not solvent for two years after the investment.

8) Pooling Arrangements

Two or more investors seeking EB-5 visas may join to make an investment as long as each applicant has invested the required amount. The new jobs created by the new enterprise, resulting from the pooling investment, will be allocated among the investors within the pool seeking EB-5 visas.

9) Pilot Program

To encourage immigration through the EB-5 category, Congress created a temporary pilot program in 1993 to enable investors to invest in “designated regional centers”. The pilot program has since been renewed several times. Most recently on October 28, 2009, the Obama administration extended the pilot program through September 30, 2012. USCIS has currently approved almost 70 regional investor centers in 23 states.

The advantage of the pilot program is that the minimum investment amount is set with most centers at \$500,000, and the investor does not need to employ 10 U.S. workers himself. Instead, it is deemed sufficient if the investment will create 10 or more jobs directly or indirectly through the regional center. However, it is strongly recommended to seek advice from experienced immigration attorney because there can be significant differences among the more than 70 regional centers located throughout the United States.

10) Conditional Permanent Residency

Once USCIS approves the investor’s immigrant petition, he or she becomes a conditional resident for two years. To remove the conditional status, an immigrant investor should file another petition within 90-day period immediately preceding the second anniversary of his or her admission to the U.S. as a conditional permanent resident. It is imperative that this is done on time because if the petition is not duly and timely filed, the conditional resident’s status will be automatically terminated and initiation of removal proceedings will take place.

The investor needs to provide evidence that he invested or was in the process of investing the required capital and the investment created or will create 10 full-time jobs as well as evidence that the investor has continuously maintained this investment during the conditional period.

11) Conclusion and Outlook

The application for this visa category is rather complex and can be very time consuming. Apart from immigration law aspects it involves numerous legal challenges dealing with

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corporate, international tax and employment laws which means that prospective investors need to assemble a team of highly qualified advisors to avoid legal issues down the road.

EB-5 applicants should expect anywhere between 6 months to a year for the first phase of the process which results in conditional permanent residency status. In many cases it may be more practicable for investors to come to the U.S. through other visa categories such as the E-2 investors, L-1 intracompany transferee, or EB 1-3 multinational executive or manager routes.

If you consider obtaining permanent residency in the United States, please contact us at +1(703) 992-8810, HAUSWIESNER KING LLP, 8300 Greensboro Drive, Suite 990 McLean, VA 22102 or contact us per email at immigration@hfkllp.com. You can find additional information about us and on our practice areas at www.hfkllp.com.