

Duff on Hospitality Law

## What is 'EB-5' and Why is Everyone Talking About It?

on 3.16.12 | Posted in Employment Law

As a follow up to his excellent presentations at the recent [hospitality forums](#) hosted by Garvey Schubert Barer's [Hospitality, Travel & Tourism](#) practice group, Gregg Rodgers offered to prepare today's post on the often discussed, but horribly misunderstood, EB-5 program. Gregg chairs GSB's [Immigration](#) practice group and is an important member of, and regular contributor to, our Hospitality, Travel & Tourism Practice Group. Gregg has represented those investing funds into their own projects as individuals and into Regional Centers, and he has worked with many potential EB-5 project sponsors (those using investor's funds to finance projects), including new hotel development projects in the Northwest, as they have evaluated their options. Today's post provides a great overview of the EB-5 program and its general requirements.

Thank you Gregg . . .

You may have heard about an influx of foreign investors into the "EB-5" program and wondered – what are they talking about and how can I get my project jump-started with it?

EB-5 is a short-hand reference to the "Employment-Based", 5<sup>th</sup>-listed process for getting status as a lawful permanent resident, also known as a "green card." It was created in the early 1990's, but only came into its own beginning in 2008, when the great recession dried up local funding for major projects. It was then that many creative developers and others realized that making changes to their business model could open up an untapped source of investment, resulting in the creation of a longer-term relationship between developers and investors, and a potential return for investors that included not just increased wealth, but a new life in the United States. "Regional Centers" have become the focal point of EB-5 investment over the past few years.

So, is it worth taking the plunge and seeking foreign investment through the EB-5 program? Here are some of the issues that you should consider.

The basic rules are that a foreign person must (a) make a capital investment of at least one million dollars of his or her own money into a for-profit commercial enterprise that was created or restructured after November 19, 1990, and (b) at least ten full-time jobs must be created as a result of the investment over the required minimal two-year investment period. Some

## What is 'EB-5' and Why is Everyone Talking About It?

---

investments can be as little as \$500,000 based on being either in a rural area or in a location in which unemployment exceeds the national average by 150%. The investor must take on a management role, which can be as minimal as being a limited partner. If, after two years as a green card holder, the investor can prove that the full investment has been made and job creation fulfilled, the government will convert the temporary green card into full status for permanent residence.

Regional Centers have become the main focus of EB-5 investment because many have located themselves within areas that allow for the lower investment level of \$500,000, *and* because the job creation requirement for them allows consideration of direct and indirect jobs, such as at the shops, restaurants and services located near a project funded with EB-5 money.

Another variation of the EB-5 program is for “troubled businesses,” which must have been in existence for at least two years before the date of the investor’s filing. In these cases, the requirement of creating at least ten jobs is replaced by the requirement of simply maintaining the pre-investment level of employment. The business into which the investment is made must be able to prove a financial loss of at least 20 percent of its net worth for the 12-to-24 months preceding filing. At least ten jobs must be maintained under this approach.

Up to 10,000 immigrant visas are available each year, which includes the investor and dependent family members such as a spouse and unmarried children under 21. The program did not issue even 1,000 approvals in any year until 2008, when 1,360 were issued, with that number jumping to over 4,200 the next year. Investment in Regional Centers, which allow for the pooling of funds into mega-projects, has grown in a similar manner, eclipsing individual investor applications by over nine to one. There has been an almost 100% increase in the number of Regional Centers in just the past two years, with more than 200 in 40 states as of the date of this blog.

It would certainly seem that this program should be fully utilized every year because it results in investment in the U.S. *and* job creation. So why isn’t it? There are many answers, including the government’s continued lack of clear guidance as to how to comply with its requirements. Some of the challenges include figuring out how to prove to the government that the money invested was acquired through lawful means and is truly “at risk” of total loss. Documentation of financing is not transparent in China, the source of the largest groups of investors. Counting the jobs created at the end of the two year window is another challenge. Whether it is because of the uncertainties of the process or poor quality of projects, the reality is that as many as 47% of the EB-5 filings have been denied each year, with the investor and his or her family required leaving the U.S. and the American dream. Fortunately, that denial rate appears to be dropping quickly.

A project that needs less than a few million dollars may want to consider seeking EB-5 investment from a limited number of foreign investors, carefully managing the investment and assuring the requisite job creation. Larger projects may focus on investment within a Regional

## What is 'EB-5' and Why is Everyone Talking About It?

---

Center, or creation of their own Regional Center, requiring for a longer-term approach to the process.

Is EB-5 and Regional Center investment a source of funding here to stay, or is it just a temporary source of investment because U.S. sources dried up? After the flurry of the past few years, I expect things to stabilize, with good projects coming and going as their particular needs arise.

To find out more detailed information about the EB-5 program and Regional Centers, visit the U.S. Citizenship and Immigration Services website.

**Tags:** Development, EB-5, immigration, Regional Center, U.S. Citizenship and Immigration Services, visa