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# green cards for investors in troubled businesses: a reward for preserving american jobs

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*MSK Client Alert*

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The current worldwide recession has inflicted a lot of pain on U.S. businesses and their employer owners, shareholders, and employees. Nevertheless, a good number of foreign investors are looking to the United States, with its current "buyer's market," as a relatively safe place to invest during turbulent times. Our federal government welcomes this investment, and as an added incentive for those thinking to put their money into America, the U.S. offers permanent resident status (more commonly known as a "green card") to those investors from overseas who invest in "troubled businesses," thus preserving the jobs of U.S. workers. For some individuals with the financial means, this is a way to a new life in the United States.

The purpose of this alert is not to offer any sort of investment advice. Troubled businesses are, by their very nature, investments which can carry enormous risks involving significant sums of money. For that reason, individuals who are considering applying for U.S. immigration benefits should seek the assistance of qualified financial professionals and rely on their own common sense before making such a commitment. Nothing substitutes for thorough due diligence on the part of an investor in any business. Accordingly, the purpose of this article is only to describe one such immigration option which is available, under current law, for those who have decided that investment in a troubled business is the way they wish to proceed.

## **The EB-5 Immigrant Investor Program**

Many are familiar with the EB-5 immigrant investor program, the so-called "million dollar investor" green card. This program allows an investor from almost any country, with no prescribed level of academic credentials or work experience, to invest one million dollars (U.S. \$1,000,000) into a U.S. business. In certain cases, where the investor's capital is invested in a high-unemployment area (as defined by government labor statistics), a half million (U.S. \$500,000) is

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sufficient. The investor's immediate family (spouse and children under age 21) may be included in the investor's petition and receive a green card as well.

Under the million-dollar investor program, the investment may be a new business venture or an existing business. There are also "regional centers" which pool the money of various investors, but that type of investment will be discussed separately in a future *MSK Immigration Alert*. If the investment is in an existing enterprise, the business need not be a troubled one, although, by definition, any "troubled business" would already be in existence. Specifically, the regulations define a troubled business as one which has been in existence for more than two (2) years but which has incurred a net loss for accounting purposes (based on generally accepted accounting principles) during the 12- or 24-month period before the investor's immigrant petition is filed. The loss taken during the period must also be equal to or greater than 20 percent of the business' net worth prior to the loss.

### **Waived for Troubled Businesses: The Employment Creation Requirement**

In the standard EB-5 million-dollar investor scenario, an investor is required to demonstrate that his or her investment will produce at least ten (10) full-time positions for qualifying U.S. employees. To qualify, the employee must be either a U.S. citizen, permanent resident, conditional resident, refugee, asylee, or certain persons granted indefinite residence in the U.S. by an immigration judge. An employee with a nonimmigrant visa does not qualify, nor does a member of the investor's immediate family.

Many potential immigrant investors find the job creation requirement daunting and this requirement is a deterrent to investors who wish to use their capital to start up a new enterprise but are uncertain their business plan can support the creation of ten (10) new jobs. The waiver of this requirement is an advantage for the investor in a troubled business - he or she need not **create** ten (10) new jobs with the EB-5 investment. Rather, it is enough that the investor's investment **preserves** the number of existing employees at no less than the pre-investment level for a minimum of two (2) years. Since the EB-5 green card is granted on a conditional basis for two (2) years before it becomes "permanent," the investor would first show how his or her investment would preserve the existing employee level. Two (2) years later, when seeking to make the green card permanent, the investor would demonstrate, through payroll records and related employment documents, that he or she has succeeded in maintaining the pre-investment level of employees.

Thus, for those foreign investors who, through the investment of their capital, rescue American businesses and preserve the jobs of U.S. workers, the government will provide a reward in the form of a grant of lawful permanent residence -- without the creation of one (1) additional job. Of course, if additional jobs are created for U.S. workers, all the better, and the case for approval may be stronger.

### **Other Important Requirements**

The investor must also demonstrate that his or her investment was made with capital acquired through lawful means, and it is the investor's burden to prove that that is the case. Additionally, the investor in a troubled business must assure that the business will adhere to any applicable regulatory requirements specific to the



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business and possess whatever business licenses may be legally necessary for the business to remain in operation. An investment in a troubled business may be comprised of the pooled resources of more than one petitioning investor, so long as each investor has contributed at least the minimum amount of capital (\$1M or half of that amount in a high-unemployment area).

As with any other EB-5 individual investments, the investment must not be a purely passive one. This means the investor must either be engaged in day-to-day management of the venture, or at least be active in "policy formulation" over the enterprise's corporate policies. Needless to say, the investor must provide a business plan which shows how the capital will be invested and how the target of preserving the number of employees will be achieved over the two (2) year period.

A person may file an immigrant investor petition either while outside the country or while in the United States. At all times before and after an immigrant investor petition is filed and pending with the government, any investor currently in the United States must maintain his or her legal immigration status. The filing of an immigrant investor petition does not relieve a person within the country of the requirement that he or she maintain legal status in the United States. Serious consequences, including disqualification from obtaining a green card, deportation, or exclusion from the United States may result in the cases of individuals or family members who violate these rules.

### **Conclusion**

The EB-5 "million-dollar investor" green card program provides a vehicle for permanent residence for those who have the means to invest in our country, creating jobs or preserving them. Specifically, the "troubled business" provisions of the program may not be for everyone who has the means to invest, but, for some, it can provide the means to a new life in the United States for themselves and their families - while their investment keeps the lives of others intact.

MSK's experienced team of immigration attorneys have years of experience finding the right immigration solutions for employers and investors alike, and invite you to contact them with any questions you may have with regard to the EB-5 immigrant investor program, whether it be for a new enterprise, an existing and thriving business, or a troubled business as described in the above article.