

Got \$500,000? The U.S. Beckons

By Tricia Wang, Attorney-at-law

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In the last few years, the EB-5 immigrant visa category has attracted the interest of high net-worth investors seeking to immigrate to the United States. USCIS reported to have received 1,257 Form I-526 petitions in FY 2008. For a \$500,000 investment in a regional center of a foreign investor's choice, the investor and his or her immediate family become eligible for conditional green cards. They become permanent a few years later upon evidence that the investment has created at least 10 jobs for U.S. workers.

Under the program, developers sometimes working with local officials apply to the Immigration agency for "regional center" status. Once approved, a regional center markets its program overseas to investors who become equity partners. The projects promise only modest returns. But that isn't the concern for foreign investors whose main goal is US green cards.

South Dakota, one of the first states to tap into the program in 2004, credits the immigrant-investor scheme with reviving its dairy industry and starting a new meat-packing sector. According to the Congressional Research Service, the South Dakota International Business Institute's Dairy Economic Region program (SDIBI South Dakota Dairy) provides an EB-5 Regional Center story that illustrates how the successful implementation of an EB-5 program can positively impact a community. Approved in June 2005, the SDIBI South Dakota Dairy program attracted more than 60 immigrant investors who infused approximately \$30 million into the South Dakota economy. Their combined investment was leveraged to secure approximately \$90 million in bank financing for various dairy investment projects. These EB-5 investments directly created 240 jobs. Using RIMS II modeling to predict the correlation between monies invested and employment creation, the combined investment also is credited with generating an additional 638 indirectly-created jobs, and over \$360 million in additional funds to the region.

Around the U.S., regional centers under the EB-5 program have attracted over \$500 million in foreign funds. Projects include dairy farms in Iowa, nut farms in California, schools and health-care facilities in Alabama, ethanol plants in Texas, a film and TV production studio in Pennsylvania, and many more.

However, the program isn't a slam-dunk for applicants. On the contrary, qualifying a person for EB-5 status is one of the most complicated subspecialties in immigration law. A sophisticated knowledge of corporate, tax, investment, ethics, and immigration law is required. Investors must discard normal investment opportunities in favor of investments structured to meet the unrealistic requirements of ever-changing interpretations by the U.S. Citizenship and Immigration Services (USCIS).

I. History of the Regional Center Program

In 1990 Congress established the fifth employment-based (EB-5) preference category for immigrants seeking to enter the United States to engage in a commercial enterprise that will benefit the U.S. economy and directly create at least ten full-time jobs. INA § 203(b)(5)(A)(ii); 8 U.S.C. § 1153(b)(5)(A)(ii). Congress allocated 10,000 immigrant visas annually for this employment-based preference category, although less than 1,000 visas were used annually.

To encourage use of the EB-5 visa category, Congress established the Immigrant Investor Pilot Program in 1993 and set aside 3,000 of the allocated 10,000 visas for investors who invest within designated “regional centers.” The original set-aside was 300 visas annually. In 1997, Congress increased the set-aside to 3,000 annually.

The number of EB-5 immigrant visas issued increased from 583 in FY 1993 to 1,361 visas in FY 1997. However, informal General Counsel guidance in the mid-1990s permitted investors to obtain status without actually committing their entire investment amount to the business.

In 1998, the USCIS Administrative Appeals Office (AAO) issued four precedent decisions that altered the previously issued guidance and substituted new and more restrictive interpretations of the law. Almost all of denied TEA and Regional Center I-526 petition cases were based on, the then commonly-used grounds to deny I-526 cases, such as **lack of lawful source evidence, guarantee of investment amount by the new commercial enterprise to the individual investors, usage of promissory notes, not actually investing the entire amount and the use of reserve funds by the new commercial enterprise to pay back individual investors.**

Figure 3: Changes in Selected EB-5 Legal Guidance Issue	Pre-1998 AAO Decisions	Post-1998 AAO Decisions
Establishment of “new” enterprise	Business must be created after November 1990	Investor must personally be involved in establishment of business* ^C
Source of funds	General representation and proof of legal generation of fund accepted	Legal generation of funds must be traced with particularity ^{A,C&D}
Promissory notes	Considered at face value; no limit on duration; need not be perfected; foreign collateral acceptable	Must prove fair market value; ^C duration generally restricted to two years; ^C must be perfected; foreign collateral must be seizable ^B and marketable ^C
Guaranteed returns	Permitted generally	Prohibited ^C
Redemption provisions	Permissible but may not exercise until after two year conditions lifted	Impermissible to enter redemption agreement within two-year conditional period ^C

^A Matter of Soffici, 22 I&N Dec. 158 (Assoc. Comm’r Examinations 1998).

^B Matter of Hsiung, 22 I&N Dec. 201 (Assoc. Comm’r Examinations 1998).

^C Matter of Izummi, 22 I&N Dec. 169 (Assoc. Comm'r Examinations 1998).

^D Matter of Ho, 22 I&N Dec. 206 (Assoc. Comm'r Examinations 1998).

Following issuance of the AAO's precedent decisions, EB-5 visa applications dropped dramatically. Between FY 1998 and FY 2008, USCIS had an average approval rate of approximately 44 percent. See *Citizenship and Immigration Services Ombudsman Recommendation from the CIS Ombudsman to the Director, USCIS March 18, 2009*.

In addition, USCIS took action to remove some existing investors from the United States based on the retroactive application of the principles set forth in the precedent decisions. While most investors lost legal challenges, one group of affected investors did successfully challenge the retroactive application of these decisions in one federal court. In May 2001, the Federal District Court in *Chang v. United States* ruled that Legacy INS could not apply the new standards of adjudication retroactively in connection with approved EB-5 petitions. In 2003, the Ninth Circuit Court of Appeals issued its opinion on *Chang v. U.S.*, 327 F.3d 911, 928-29 (9th Cir. 2003). The Court of Appeal found that retroactive application of the 1998 precedent decisions was improper.

In 2002, the President signed special legislation that attempted to rectify the situation. Immigrant investors affected by the retroactively applied 1998 AAO decisions were provided an additional two years to demonstrate that they made a supplemental investment, and in combination, that they met the minimum required qualifying investment and created and/or preserved ten jobs. This subgroup includes only those EB-5 investors whose Forms I-526 (Immigrant Petition by Alien Entrepreneur) were filed and/or approved between January 1, 1995, and before August 31, 1998. See 21st Century Department of Justice Appropriations Authorization Act, §§ 11031-37, Pub. L. No. 107-273 (Nov. 2, 2002). However, new regulations needed to implement this legislation remain outstanding, and these cases cannot be adjudicated until final rules are issued.

In 2005, USCIS established an EB-5 unit at USCIS headquarters, the Investor and Regional Center Unit (IRCU), and announced the agency's intention to re-invigorate the EB-5 program. The U.S. program lately has become popular among investors from South Korea, China, Venezuela and Saudi Arabia desperate to bypass the uncertainty and years-long wait to gain residency through traditional means.

II. Statutory Requirements and a few Key Legal Issues

A. Creating a New Commercial Enterprise and engaging in its management

(1) Creating an Original Business

Although the regulations permit three methods of establishing a new commercial enterprise, creating an original business offers the least problematic way of investing for EB-5 purpose. Any for-profit entity formed for the ongoing conduct of lawful business may serve as a commercial enterprise, including sole proprietorships, partnerships, holding companies, joint ventures, corporations, business trusts, etc. However, the term

“new commercial enterprise” does not include noncommercial activities, such as owning a personal residence.

The INA also requires an EB-5 applicant to enter the United States to "engage" in a new commercial enterprise. The investor must therefore maintain more than just a passive role in the business. The regulations require an EB-5 applicant to be involved in the management of the new commercial enterprise. The regulations state that the petitioner must either be involved in the day-to-day management of the business or manage it through policy formulation.

(2) Regional centers

Investors may choose to invest in regional centers (which are usually structured as limited partnership) and become a limited partner. According to the *Uniform Limited Partnership Act* ("ULPA"), holding a position as limited partner in case of a limited partnership will satisfy the management requirement.

a. What is a regional center?

A “regional center” is defined as “any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.” 8 C.F.R. § 204.6(e) (2008).

b. How to become a regional center?

The Investor and Regional Center Unit (IRCU) reviews and approves the submissions of applicants seeking Regional Center designation. Applicants are required to provide a “detailed prediction regarding the manner in which the [R]egional [C]enter will have a positive impact on the regional and national economy....” 8 C.F.R. § 204.6(m)(3)(iv) (2008). The proposal must be supported by “economically or statistically valid forecasting tools, including, but not limited to, feasibility studies ... and/or multiplier tables.” 8 C.F.R. § 204.6(m)(3)(v).

B. Amount of Investment

The minimum qualifying investment amount is \$500,000 for commercial enterprises located within a rural area (or targeted employment area), and is otherwise \$1,000,000. INA § 203(b)(5)(C)(i); 8 U.S.C. § 1153(b)(5)(C)(i). Investing in an approved regional center does not automatically reduce the required investment from \$1 Million USD to \$500,000.00USD. In order to qualify based on an investment of \$500,000.00USD, the applicant must also invest in a targeted employment area. Fortunately, most if not all of the investment projects located within approved regional centers are also located in targeted employment areas.

“Rural area” is defined as “any area other than an area within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States).” INA § 203(b)(5)(B)(iii); 8 U.S.C. § 1153(b)(5)(B)(iii); *see also* 8 C.F.R. § 204.6(e) (2008).

“Targeted employment area” means that “at the time of the investment, a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate).” INA § 203(b)(5)(B)(ii); 8 U.S.C. § 1153(b)(5)(B)(ii); *see also* 8 C.F.R. § 204.6(j)(6) (2008).

C. What is the legal meaning of “Investing” for EB-5 purpose?

The INA requires that an EB-5 petitioner have invested or be in the process of investing. Although it specifically states that the investor may be "in the process of investing," as a practical matter USCIS requires the entire investment to be invested and at risk in the commercial enterprise before the I-526 immigrant petition will be approved.

The INA also states the term "invest" means to contribute 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 commercial enterprise does not constitute a contribution of capital and will not be counted as an investment.

"Capital" is defined in the regulations as cash, equipment, inventory, other tangible property, cash equivalents and indebtedness secured by assets owned by the alien provided that he or she is personally and primarily liable and the assets of the new commercial enterprise are not used to secure any of the indebtedness.

(1) Indebtedness

Although not specifically referred to in the INA, the regulations state that indebtedness secured by assets owned by the alien entrepreneur may also be considered capital, provided the investor is personally and primarily liable for the debts and assets of the enterprise upon which the petition is based are not used to secure any of the indebtedness.

(2) At risk

The Administrative Appeals Office ("AAO") has held that merely putting cash into the corporate account of a business does not show that the capital is "at risk" for the purpose of generating a return. The AAO has also held that the full amount of the required capital must be expended by the enterprise directly toward job creation or the capital is not considered at risk of loss.

D. Qualified EB-5 Investor and Lawful source of fund and path of fund

The USCIS requires that investors prove (1) that the source of the invested capital is “lawful,” and (2) that the investor has a “level of income” or has accumulated sufficient wealth that would enable the investor to invest. It is highly important to document that the EB-5 petitioner lawfully obtain the money used for the commercial enterprise

investment (the “source of funds”). Also it is equally important to show a clear path of funds from an EB-5 petitioner’s bank account into the account of the EB-5 commercial enterprise.

(1) Who can be qualified as EB-5 investor?

Qualifying investors currently in the US on a non-immigrant visa need to be **accredited investors**. An accredited investor is a term defined by various security laws that describes investors permitted to invest in certain types of higher risk investments, limited partnerships, hedge funds and angel investor networks. In the US an individual is considered to be an accredited investor if he or she has a net worth of at least US\$1 million or has made at least US\$200,000 each year for the last two years (US\$300,000 with spouse if married) and has the expectation to make the same amount in the current year. Even if you are residing outside the US and do not need to be an accredited investor, you need to document sufficient funds to show you can support self and family after immigration.

(2) Lawful source of fund

8 CFR §204.6(j)(3) lists the documentation required to prove the lawfulness of funds used in EB-5 cases:

- a. Foreign business registration records;
- b. Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
- c. Evidence identifying any other source(s) of capital; or
- d. Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

The documentary burden on petitioners in post-1998 AAO EB-5 decisions can be best characterized as “hypertechnical,” *Spencer Enterprises v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Cal. 2001), *aff’d*, 345 F. 3d. 683 (9th Cir. 2003). While the source of funds is an historical investor-owned asset, if the petition neglects to include evidence of a “pattern” of income sufficient to support the original purchase of the house, USCIS might issue a request for evidence (RFE) seeking information concerning the source of funds for the original purchase of the house.

(3) Investment fund must be from Investor’s personal Account

Consider an EB-5 investment funded by a corporate dividend from an investor's solely owned foreign corporation. One may choose to simply make the capital investment directly from his or her corporate account into the account of the EB-5 commercial enterprise, reasoning that since the foreign business is solely owned, why bother with the time and expense of transferring funds from the business account to a personal account and then on to the EB-5 commercial enterprise. Unfortunately, USCIS would most likely disagree. According to USCIS, retained earnings, even in a sole proprietorship, cannot be used for EB-5 investment purposes. The EB-5 petitioner can issue a dividend to himself out of retained earnings, pay personal income taxes on the income, and then reinvest that money and satisfy USCIS requirements.

E. Job Creation

A qualifying investment in a new commercial enterprise must create full-time employment for at least ten U.S. citizens, lawful permanent residents, or other immigrants lawfully authorized to be employed in the United States. INA § 203(b)(5)(a)(ii); 8 U.S.C. § 1153(b)(5)(A)(ii); *see also* 8 C.F.R. § 204.6(j)(4)(i) (2008).

(1) Qualified employees

The jobs must be for U.S. citizens, lawful permanent residents, or other immigrants lawfully authorized to be employed in the United States. Conditional residents, temporary residents, asylees, refugees, and recipients of suspension of deportation or cancellation of removal may all be considered employees for EB-5 purposes. The investor and his or her spouse or children may not be counted toward the job creation requirement but other family members should qualify as employees for EB-5 purposes. 8 C.F.R. § 204.6(e) (2008).

The term "employee" is defined in the regulations as an individual who: (a) provides services or labor for the new commercial enterprise, and (b) receives wages or other remuneration directly from the new commercial enterprise. Accordingly, independent contractors will not qualify as employees for the purposes of the investor category.

(2) Full time

Section 203(b)(5) of the INA requires that the investment in a new commercial enterprise will create full-time employment for not fewer than 10 qualified employees. The INA further defines full-time employment as "employment in a position that requires at least 35 hours or service per week at any time, regardless of who fills the position."

a. The full time job must be "permanent", rather than temporary. USCIS has interpreted the full-time employment requirement to exclude jobs that are intermittent, temporary, seasonal or transient in nature. *See, e.g., Spencer Enterprises v. U.S.*, 229 F.Supp.2d 1025 (E.D.Cal. 2001).

b. Construction jobs. Historically, construction jobs have not been counted toward job creation because they are seen as intermittent, temporary, seasonal and transient rather than permanent. USCIS, however, now interprets that direct and indirect construction jobs that are created by the petitioner's investment and that are expected to last at least 2 years, inclusive of when the petitioner's I-829 is filed, may now count as permanent jobs. Although employment in some industries such as construction or tourism can be intermittent, temporary, seasonal or transient, officers should not exclude jobs simply because they fall into such industries.

c. It is the position created, rather than employee occupying the positions that are counted for EB-5 purpose. The consideration is given on whether the positions, as described in the petition, is continuous full-time employment rather than intermittent, temporary, seasonal or transient. For example, if a petition reasonably describes the need for general laborers in a construction project that is expected to last several years and would require a minimum of 35 hours per week over the course of that project, the positions would meet the full-time employment requirement. However, if, for example, the same project called for electrical workers to provide services during three to four five week periods over the course of the project, such positions would be properly deemed to be intermittent and not meet the definition of full-time employment. Generally, it is the position that is critical to the full-time employment criterion, not the employee. Accordingly, the fact that the position may be filled by more than one employee does not exclude a position from consideration as full-time employment. For example, the positions described above would not be excluded from being considered full-time employment if the general laborers needed to fill the positions varied from day to day or week to week as long as the need for the position remains constant. This interpretation is consistent with 8 C.F.R. §204.6(e), which, as part of the regulatory definition of full-time employment includes job sharing arrangements. However, multiple part time positions (i.e. part-time waiters, cashiers, etc.) may not be combined to create one full time position.

It is important to note, however, that this new interpretation does not override the regulatory definitions of employee and full time employment at 8 C.F.R. §204.6(e). Thus, all positions must still be filled by qualifying employees, and such positions may not be filled by independent contractors.

(2) Special rules for regional centers

Special rules apply where the investment is made within an approved "regional center". Where an applicant invests in a regional center, the new commercial enterprise does not have to directly employ 10 U.S. workers. Instead, it is sufficient to show that 10 or more jobs will be created directly (i.e. through the use of independent contractors) or indirectly (i.e. using economically or statistically valid forecasting devices) as a result of the investment.

a. "To show that 10 or more jobs are actually created indirectly by the business, reasonable methodologies may be used. Such methodologies may include economically

or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment.” 8 C.F.R. § 204.6(m)(7)(ii) (2008).

Most Regional Centers use RIMS II, REMI, or IMPLAN economic analysis. RIMS II is the upgraded version of the original Regional Industrial Multiplier System (RIMS) created by the U.S. Department of Commerce, Bureau of Economic Analysis, and is used in public and private sector project planning as a model to predict regional output, earnings, and employment in specific geographic and industrial settings. See “Regional Multipliers from the Regional Input-Output Modeling Systems (RIMS II): A Brief Description;” www.bea.gov/regional/rims/brfdesc.cfm (accessed Jan. 8, 2009).

Aliens filing I-526 petitions for investments to be made through a regional center may use reasonable methodologies to establish the number of jobs created. 8 C.F.R. § 204.6(j)(4)(iii). However, some of the economic models may not expressly consider temporal aspects of job creation, and will not be able to conclusively state that indirect jobs will be created within two years. In such circumstances, USCIS will explore whether there are reasonable and/or accepted temporal assumptions that can be attributed to the particular economic model and consider such assumptions in determining compliance with the two-year requirement.

Where economic models rely on certain assumptions or variables are used to demonstrate the requisite job creation, for example, a model might demonstrate that the requisite jobs will be created if a Regional Center infuses \$10 million into a particular industry, or similarly, a model might demonstrate that, using accepted multipliers, the creation of 100 direct jobs will result in a certain number of indirect jobs, under such circumstances, the I-526 petition should demonstrate that the required infusion of capital or the creation of the direct jobs will occur within two years.

b. In Regional Center cases, job-creating business (usually the new commercial enterprise) should be located in the Region. This means a new commercial enterprise that helps to create jobs should be located in the Region, unless such new commercial enterprise engages in a lending activity, in which case only those businesses which create actual jobs must be located within the Region. See Matter of Izummi.

c. For the purpose of the Regional Center EB-5 Program, the direct, indirect and induced jobs that should count are only those shown to be created within the Region. 8 CFR 204.6(j)(6) requires that the employment be created "in a targeted employment area". The purpose of TEA or Regional Center is to create jobs in the Region. Even the RIMS II assumes that the indirect jobs created are in the Region.

(4) Special rules for purchasing existing business

Purchase an existing business and expand it through the investment of the required amount, so that a substantial change in the net worth **or** number of employees results from the investment of capital. The term "substantial change" is defined to mean a 40% increase in either the net worth or number of employees so that the new net worth or

number of employees equals at least 140% of the business' pre-expansion net worth or number of employees. Balance sheets for the employment-creating business **before and after the sale** or payroll documentation before and after the sale should be used to demonstrate it expanded the net worth of or employment at the business by 40 percent.

(5) Special rules for troubled business

Special rules also allow for making a qualifying investment where the investment serves to maintain jobs that might otherwise be lost in a troubled business (i.e., an existing business over two years old that has incurred a net loss exceeding 20 percent of its net worth during the 12 or 24 month period preceding a Form I-526 petition filing). 8 C.F.R. §§ 204.6(e), 204.6(j)(4)(i)(B)(ii) (2008).

III. Case Processing Procedures

To acquire an EB-5-based green card, an investor must first make a qualifying investment, and then file a Form I-526 petition (and supporting documents) with USCIS. Once the Form I-526 is approved, an investor who is in the United States in lawful nonimmigrant status may file a Form I-485 (Application to Register Permanent Residence or Adjust Status). The spouse and minor children of the investor may also file for green card status by filing separate Form I-485 applications. Upon approval of the Form I-485, the investor is afforded conditional lawful permanent resident status, which is valid for two years. If the investor is outside the United States when the Form I-526 petition is approved, the U.S. Department of State's National Visa Center will process the EB-5 immigrant visa through the local U.S. consular post with jurisdiction over the investor's place of residence. The EB-5 immigrant visa is used to enter the United States, which commences the two-year conditional lawful permanent resident status.

A. I-526 filing requires a comprehensive business plan

Petitioners who are filing a Form I-526 must submit "a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two-years, and when each employee will be hired." 8 C.F.R. § 204.6(j)(4)(i)(B)

The requirement for a business plan that shows jobs will be created in two years applies to all Form I-526 petitions, including those filed under the Regional Center Program, that will rely on indirect job creation to satisfy the statutory employment creation requirement.

B. Conditional permanent residence and I-829 filing

In order to deter fraud, immigrant investors, their spouses and dependent children are subject to conditional permanent residence for a two-year period. INA § 216A places conditions upon the permanent resident status of aliens admitted in the EB-5 classification that must be removed at the end of a two-year period of conditional

residency. In order to have the conditions removed, EB-5 visa holders must file a Form I-829 that demonstrates that the petitioner is, among other requirements, “conforming to the requirements of INA § 203(b)(5).” INA § 216A(d)(1)(B). The alien must file a petition to remove the conditions (using Form I-829) during a 90-day period prior to the second anniversary of the alien's lawful admission as a permanent resident. USCIS will examine the business at the end of the two year period to determine whether or not the alien has complied with all of the requirements.

USCIS will review the I-829 petitions to ensure that all measurable variables and assumptions that underlie the indirect job creation methodology have, in fact, been met. For example, an investor may make a proposal to create a shopping center that would be leased to various businesses. At the I-526 stage, the investor may claim that this proposal would result in the hiring of a certain number of employees by the tenant-businesses and that a certain number of indirect jobs would be created as well. USCIS must ensure that the tenant jobs have substantially been filled to support the indirect job count. In the alternative, if the job creation was based on total expenditure of capital to create the shopping center, USCIS must make sure that the full amount has, in fact, been invested in the job creating enterprise to support the job count.

(1) When the two-year period for job creation starting?

The regulations do not clearly state when the two-year period commences for purposes of adjudicating the Form I-526. USCIS has determined that the average processing times for EB-5 petitioners filing for immigrant visas via consular processing and EB-5 petitioners filing for adjustment of status is approximately six months. Accordingly, for purposes of the Form I-526 adjudication and the job creation requirements, USCIS will deem the two-year period described in 8 C.F.R. § 204.6(j)(4)(i)(B) to commence six months after the adjudication of the Form I-526. If, in the future, processing times significantly change, this paragraph may be amended.

(2) How to prove that the required jobs will be created within a reasonable period of time?

USCIS regulations relating to the removal conditions from the lawful permanent resident status of alien entrepreneurs status provide that a petitioner must demonstrate that “the alien has created or can be expected to create within a reasonable period of time” the required jobs. 8 C.F.R. § 216.6(c)(1)(iv).

Form I-829 petition is intended to examine whether the alien entrepreneur has satisfied the conditions of his admission to the United States. Primarily, USCIS is determining whether the alien has invested the requisite capital and created the requisite jobs through that investment. Recognizing that circumstances may change after an alien secures admission to the United States, USCIS chose to implement INA § 216A with some “flexibility.” Consistent with this flexibility, USCIS provides that Form I-829 must contain evidence that the petitioning alien “has created or can be expected to create within a reasonable time ten full-time jobs for qualifying employees.” 8 C.F.R. § 216.6(a)(4)(iv). In making the “reasonable time” determination, USCIS will consider the

evidence submitted along with the petition that demonstrates when the jobs are expected to be created, the reasons that the jobs were not created as predicted in Form I-526, the nature of the industry or industries in which the jobs are to be created, and any other evidence submitted by the petitioner. If after considering the evidence, the officer determines that the jobs are more likely than not going to be created within a reasonable time, Form I-829 will be approved consistent with 8 C.F.R. § 216.6(d)(1) if the petitioner is otherwise eligible to have his or her conditions removed. If, however, the officer determines that the jobs will not be created within a reasonable period of time, Form I-829 will get denied consistent with 8 C.F.R. § 216.6(d)(2).

IV. Conclusion

Through the foregoing review of the EB-5 background and history and discussion about the various complex legal issues, it is evident that foreign investors should consult immigration lawyers on the relevant immigration law and procedures. Also it is highly desirable for foreign investors to consult business lawyers and certified public accountants on corporate law and tax issues concerning his or her investment in various regional centers.