EB-5 IMMIGRANT INVESTORS

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OVERVIEW

Congress created the fifth employment-based preference (EB-5) immigrant visa category in 1990 for immigrants seeking to enter to engage in a commercial enterprise that will benefit the U.S. economy and create at least 10 full-time jobs. The basic amount required to invest is $1 million, although that amount may be $500,000 if the investment is made in a "targeted employment area." Of the approximately 10,000 numbers available for this preference each year, 3,000 are reserved for entrepreneurs who invest in targeted employment areas. A separate allocation of 3,000 visas is set aside for entrepreneurs who immigrate through a regional center pilot program discussed below.

The statutory requirements of the EB-5 visa category are onerous. At most only about 1,000 people a year have immigrated in this category, just one-tenth of the visas available. In FY 2005, only 346 people, including derivatives, immigrated in this category. In 2006, however, the number increased to 749.

The former Immigration and Naturalization Service (INS) (now U.S. Citizenship and Immigration Services (USCIS)) made it even harder to qualify in this category by issuing four precedent decisions in 1998 that significantly restricted eligibility for EB-5 status. Since then, the Administrative Appeals Office (AAO) has issued numerous nonprecedent decisions that further tighten the screws on EB-5 cases.

In 2002, Congress enacted a law designed to help certain stranded immigrant investors hurt by the 1998 decisions. Those provisions are discussed in detail below. As of the end of March 2008, regulations to implement the 2002 law have not been published.

In 2003, Congress asked the U.S. Government Accountability Office (GAO) to study the EB-5 program. The GAO report concluded that the program has been under-used for a variety of reasons, including the rigorous application process and the failure to issue regulations implementing the 2002 law. The report found that even though few people have used the EB-5 category, EB-5 participants have invested an estimated $1 billion in a variety of U.S. businesses.

STATUTORY REQUIREMENTS

The Regular Program

Immigration and Nationality Act (INA) §203(b)(5) provides a yearly maximum of approximately 10,000 visas for applicants to invest in a new commercial enterprise employing at least 10 full-time U.S. workers. To qualify under the EB-5 category, the new enterprise must: (1) be one in which the person has invested (or is in the process of investing) at least $1 million (or at least $500,000 if investing in a "targeted employment area," discussed below) after November 29, 1990; (2) benefit the U.S. economy; and (3) create full-time employment for at least 10 U.S. workers. Moreover, the investor must have at least a policy-making role in the enterprise.

The Pilot Program

To encourage immigration through the EB-5 category, Congress created a temporary pilot program in 1993. The Immigrant Investor Pilot Program ("pilot program") directs the Attorney General and Secretary of State to set aside 3,000 visas each year for people who invest in "designated regional centers." The pilot program has been renewed several times, and is currently due to expire September 30, 2008. Efforts are underway in Congress to renew the pilot program. It is unclear what will happen to pending cases if the pilot program is not renewed.

The pilot program does not require that the immigrant investor's enterprise itself employ 10 U.S. workers. Instead, it is enough if 10 or more jobs will be created directly or indirectly as a result of the investment. This program also differs from the regular EB-5 provisions in that it permits private and governmental agencies to be certified as regional centers if they meet certain criteria. (*See* Appendix, "Designated Regional Centers," *infra*).

See further discussion of the pilot program in "Regional Centers," *infra*.

Qualified Immigrants

Outside of the investment and employment requisites, the statute does not specifically address who may be a qualified applicant. USCIS appears to preclude corporate or other nonindividual investors from this category. However, two or more individuals may join to make an EB-5 investment. A single new commercial enterprise may be used for investor/employment-creation classification by more than one investor, provided that: (1) each petitioning investor has invested (or is actively in the process of investing) the required amount; and (2) the creation of at least 10 qualifying full-time jobs may be attributable to each investor. In fact, a new commercial enterprise may be used for investor/employment-creation classification even though there are several owners of the enterprise, including persons not seeking classification, if: (1) the source(s) of all capital invested is (are) identified; and (2) all invested capital has been derived by lawful means. The lawful source of funds issue is discussed in more detail in "Legal Acquisition of Capital," *infra*.

The New Commercial Enterprise

There are two basic requirements for showing a new commercial enterprise. First, the enterprise must be "new," *i.e.*, formed after November 29, 1990. However, an enterprise formed before this date may qualify if an investor "restructures" or "expands" an existing business. Second, it must be a "commercial" enterprise. Any for-profit entity formed for the ongoing conduct of lawful business may serve as a commercial enterprise. This includes sole proprietorships, partnerships (whether limited or general), holding companies, joint ventures, corporations, business trusts, or other entities publicly or privately owned. This definition would even include a holding company and its wholly owned subsidiaries, if each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. However, the term "new commercial enterprise" does not include noncommercial activity, such as owning and operating a personal residence or nonprofit enterprise.

Creating an Original Business—According to a 1998 precedent decision, an EB-5 petitioner had to have a hand in the creation of the enterprise and must be present at the enterprise's inception. This posed particular problems for people investing in partnerships. The partnership will usually be created and then the general partner will seek individuals to invest as limited partners. Under the legacy INS's interpretation, such investors could not qualify for EB-5 classification because they were not partners at the establishment of the original partnership. In 2002, Congress eliminated the "establishment" requirement for EB-5 investors. Instead of proving that they have "established" a commercial enterprise themselves, investors now need only show that they have "invested" in a commercial enterprise.

Restructuring? an Existing Business—By reorganizing or restructuring an existing business, an investor may create a "new commercial enterprise" and therefore qualify for a visa. The statute and regulations provide little insight into what degree of restructuring or reorganization must be done to establish a new enterprise. The AAO has held that simply changing the legal form of the enterprise does not satisfy this requirement. There is only one known case where the AAO agreed the business was sufficiently restructured or reorganized.

Regardless of the forms used to create a new enterprise, the focus of the law is on the creation of at least 10 new employment opportunities. Investments creating a new enterprise but failing to create 10 new jobs will also fail to qualify for EB-5 classification.

Expanding an Existing Business—An investor also can create a new enterprise by expanding an existing business. Only an expansion resulting in an increase of at least 40 percent in the net worth of the business or in the number of employees of the business will satisfy the visa requirements. This could require the investor to create more than 10 new jobs to qualify for a visa if the pre-expansion number of employees was more than 25. The larger the business that the investor expands, the more onerous his or her burden to qualify for a visa under this standard. However, an investor need not show that his or her investment alone caused the 40 percent increase. The AAO has insisted that proof of expansion of the company requires audited financial statements concerning the company's former net worth at the time of investment.

Pooling Arrangements—The regulations specifically allow immigrant investors to pool their investments with others seeking EB-5 status. Each investor must invest the applicable statutory amount. All of the new jobs created by the new commercial enterprise will be allocated among those within the pool seeking permanent investor visas.

The AAO has injected a restriction on pooling investments by requiring the petitioner to show that *every* investor in the partnership identify the source of their funds and prove that they were derived by lawful means.

"Engaging" in a New Commercial Enterprise

The statute requires an EB-5 applicant to enter the United States to engage in a new commercial enterprise. To qualify, an investor must maintain more than a purely passive role in the new enterprise upon which the petition is based. The regulations require an EB-5 immigrant to be involved in the management of the new commercial enterprise. The petitioner must either be involved in the day-to-day managerial control of the commercial enterprise or manage it through policy formulation. The regulations state that if the EB-5 petitioner is a corporate officer or board member, or, in the case of a limited partnership, is a limited partner under the provisions of the Uniform Limited Partnership Act (ULPA), he or she satisfies the requirement of engaging in the management of the new commercial enterprise. The AAO, however, has found that merely calling the investor a limited partner pursuant to the ULPA in a partnership agreement does not automatically mean that the person is involved in the management of the new commercial enterprise.

"Investing" or "Actively in the Process of Investing" "Capital"

The statute requires an EB-5 petitioner to have invested or be in the process of investing. Although the statute explicitly states that an EB-5 petitioner may be "in the process" of investing the required capital, USCIS effectively requires the entire capital amount to be already invested and at risk in the commercial enterprise at the time the I-526 petition is filed. This interpretation appears to contravene the statute, but shows USCIS's desire to have the full amount committed and immediately available for use in job-creation.

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 constitute an investment.

The regulations define "capital" as cash and cash equivalents, equipment, inventory, and other tangible property. According to USCIS, retained earnings cannot count as "capital."

Capital does not include loans by the petitioner or other parties. Indebtedness secured by assets owned by the entrepreneur may be considered capital, provided the investor is personally and primarily liable for the debts and the assets of the enterprise upon which the petition is based are not used to secure any of the indebtedness.

Indebtedness typically consists of a promissory note signed by the petitioner that specifies a payment schedule to the new commercial enterprise. Absent fraud, a signed promissory note that is secured by the petitioner's personal assets constitutes a contribution of capital by the petitioner. The issuer of the promissory note, *i.e.*, the investor, is considered to be "at risk" if the petitioner is clearly obligated to make all the required payments on the note and there are no "escape" clauses. The investor cannot receive any bond, note, or other debt arrangement from the enterprise for the capital contributed to it. This includes any stock redeemable at the holder's request. All capital is valued at fair market value in U.S. dollars at the time it is given.

Debt arrangements are extremely complicated. A prudent practitioner must do careful research and analysis to determine current USCIS positions and policies on this issue.

Benefiting the U.S. Economy

The statute requires that investments "benefit the U.S. economy" to qualify the investor for an EB-5 visa or status. The statute provides no guidance on which investments benefit the economy. This silence means USCIS adjudicators are left to their subjective interpretations of the investment and its relative benefits when reviewing the petition. Arguably, the petitioner has benefited the economy by merely meeting the employment and investment requirements of the visa classification. However, because the statute specifically identifies the "benefit" element as distinct from other components of the visa, it appears that the applicant must independently show that the enterprise, in the conduct of its business, will benefit the U.S. economy. Therefore, a consulting firm exclusively serving customers abroad with no return benefit to the

U.S. economy (other than employing the requisite number of workers) might not support an EB-5 petition. In contrast, showing that the new enterprise provides goods or services to U.S. markets should satisfy this requirement.

Federal regulation of foreign investments is extensive. Some regulations restrict foreign investments in aviation, banking, shipping, communications, land use, energy resources, and government contracting. Additionally, Congress has imposed several disclosure and data requirements on foreign investments. An investment may not be deemed beneficial to the U.S. economy if it runs afoul of any statutory limitation on foreign investment.

Creating or Saving Jobs

To qualify for EB-5 status, an investment normally must create full-time employment for at least 10 U.S. citizens, lawful permanent residents, or other immigrants lawfully authorized to be employed in the United States. Neither the investor nor the investor's spouse and children count toward the 10-employee minimum. Nonimmigrants are also excluded from the count. The "other immigrants" provision means that 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 regulations define an "employee" for EB-5 purposes as an individual who (1) provides services or labor for the new commercial enterprise and (2) receives wages or other remuneration directly from the new commercial enterprise. This definition excludes independent contractors.

The EB-5 pilot program does not require the investment to directly create 10 U.S. jobs. Instead, pilot program investments only require an indirect creation of jobs.

The Types of Jobs—The jobs created must be full-time. This means employment of a qualified employee in a position that requires a minimum of 35 working hours per week, regardless of who fills the position. Job-sharing arrangements, where two or more qualifying employees share a full-time position, will also serve as full-time employment if the hourly requirement per week is met. Job-sharing does not include combinations of part-time positions even if when combined such positions meet the hourly requirement per week.

When the Jobs Must Exist—The law is unclear about when new jobs must exist. The statutory language is prospective and therefore does not require jobs to exist at the time of initial investment or before the I-526 petition is filed. USCIS does not require retention of employees until a reasonable time after conditional visa issuance. In fact, a petitioner may support a petition with a comprehensive business plan demonstrating a need for at least 10 employees within the next two years. The business plan need only indicate the approximate dates during the following two years when the employees will be hired. The temporary vacancy of a position during the two-year conditional period does not disqualify an investor, as long as good-faith attempts to re-staff the position are made.

Where the Jobs Must be Located—When enacting the EB-5 program, Congress took an affirmative step toward creating jobs in the geographic areas that need them most. The statute sets aside 3,000 of the approximately 10,000 EB-5 visas available annually for foreign citizens who invest in "targeted employment areas." The statute defines a "targeted employment area" as a rural area or an area that has experienced high unemployment of at least 150 percent of the national average. An area not within a metropolitan statistical area (as designated by the Office of Management and Budget) or the outer boundary of any city or town having a population of 20,000 or more is considered a rural area. Each state notifies USCIS which state agency will apply these guidelines, and determines targeted employment areas for that state.

Troubled Businesses—Special rules govern investments in "troubled" businesses. A troubled business is one that has been in existence for at least two years, has incurred a net loss for accounting purposes during the 12- or 24-month period before the petition was filed, and the loss for such period is at least equal to 20 percent of the business's net worth before the loss. To establish an investment in a troubled business, the petitioner must show that the number of existing employees will be maintained at no less than the pre-investment level for at least two years. Thus, this provision includes a significant incentive in that it does not require the creation of 10 new jobs. Instead, it requires only that the business maintain the number of existing employees during the conditional status period. As a caveat, if the troubled business

does not remain afloat for two years after the investment, the investor might lose his or her conditional residency status.

EB-5 PROCEDURES: INITIAL EVIDENCE

The regular EB-5 program and the pilot program have similar requirements to begin the process. The distinction between the two processes is that the former requires the petitioner to submit all of the described evidence; the latter requires the designated regional center to certify that the investor has met its criteria.

In either case the investor files for EB-5 classification using Form I-526. The petition must be signed by the investor, not someone acting on his or her behalf. If the EB-5 commercial enterprise will primarily do business in a location within the ordinary jurisdiction of the Vermont or Texas Service Centers, the petition is filed with the Texas Service Center; otherwise it is filed with the California Service Center.

Initial Evidence for the Regular EB-5 Program

The following paragraphs detail the evidence that should be submitted with an I-526 petition for EB-5 classification under the regular program.

The New Commercial Enterprise**—**To qualify for EB-5 classification an investor must show that an investment has been made in a qualified commercial enterprise. The applicant should include:

An organizational document for the new enterprise, including articles of incorporation, certificates of merger and consolidation, or partnership agreements;

A business license or authorization to transact business in a state or city, if applicable; and

For investments in an existing business, proof that the required amount of capital was transferred to the business after November 29, 1990, and that the investment has increased the net worth or number of employees by 40 percent or more.

Capitalization**—**To show that the petitioner has invested (or is actively in the process of investing) the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital "at risk." A mere intention to invest will not demonstrate that the petitioner is actively in the process of investing. The investor must show actual commitment of the required amount of capital. Such evidence may include:

Bank statements showing deposits in the U.S. account of the enterprise;

Evidence of assets purchased for use in the enterprise;

Evidence of property transferred from abroad;

Evidence of funds invested in the enterprise in exchange for stock, except for stock redeemable at the holder's request; or

Evidence of debts secured by the investor's assets and for which the investor is personally and primarily liable.

The 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; otherwise that capital is not at risk of loss. Based on these statements, it is difficult to know what a petitioner must do to show that the money is truly at risk.

Legal Acquisition of Capital**—**The regulations require filing the following types of documentation to establish that capital used in the new enterprise was acquired by legitimate means:

Foreign business registration records;

Personal and business tax returns, or other tax returns of any kind filed anywhere in the world within the previous five years;

Documents identifying any other source of money; or

Certified copies of all pending governmental civil or criminal actions and proceedings, or any private civil actions involving money judgments against the investor within the past 15 years.

Although the regulations list these requirements in the disjunctive, meaning that submission of any one type of document should suffice, the AAO requires investors to submit tax returns for the previous five years. This interpretation makes it harder for investors to qualify for EB-5 status, and appears to violate the regulations.

The regulations further define "capital" as only those assets acquired through lawful means. The AAO has held that money earned or assets acquired while in the United States in an unlawful status are not considered lawful means to acquire capital. This interpretation goes far beyond Congress' original concern to prevent drug smugglers or other criminals to use their ill-gotten gains to be able to obtain permanent residents status in the United States through the EB-5 category.

Earned income is generally the most straightforward source of funds, but it is necessary to document exactly how the money was earned and to provide tax returns documenting that all due taxes were paid in full. An example of a more complex earned income scenario our office handled involves a French academic with 20 years of tax-exempt public sector service,. The French academic provided tax returns, an accountant's letter explaining the tax-exempt income, and income receipts accounting for five years of earned income.

Gift money usually requires more complex documentation of source of funds, as the donor must document lawful obtainment of funds, as well as providing tax returns. Additionally, all gift taxes due, as applicable, must be paid on the gift by the donor and/or investor.

"Old money" also present challenges in documenting how funds obtained by inheritance, were lawfully obtained.

The importance of tracing funds is present in all of the above scenarios. The sticky issues involving gifting, disposition of a trust, inheritance, and other complex fact patterns must be accompanied by full documentation of the history of the funds and objective confirmation that all taxes have been paid on the acquisition and disposition of the funds.

***Creating Employment*—**To show that a new commercial enterprise will create at least 10 full-time positions for qualified employees, the petition must be accompanied by:

Photocopies of relevant tax records, Forms I-9, or similar documents for 10 qualifying employees; or

A comprehensive business plan showing the need for at least 10 qualifying employees, and when the employees will be hired. The plan should include a description of the business; the business' objectives; a market analysis including names of competing businesses and their relative strengths and weaknesses; a comparison of the competition's products and pricing structures; a description of the target market and prospective customers; a description of any manufacturing or production processes, materials required and supply sources; details of any contracts executed; marketing strategy including pricing, advertising, and servicing; organizational structure; and sales, cost and income projections and details of the bases therefore. In addition, specifically with respect to employment, the business plan must set forth the company's personnel experience, staffing requirements, job descriptions for all positions, and a timetable for hiring.

***Troubled Business*—**To show that a new enterprise, established through capital investment in a troubled business, meets the statutory requirement, the petition must show that the number of existing employees will be maintained at no less than the pre-investment level for a period of at least two years. The applicant should include photocopies of the I-9 forms, tax records or payroll documents, and a comprehensive business plan.

***Managerial Capacity of the Investor*—**An EB-5 immigrant must be involved in the management of a new commercial enterprise to qualify for a visa. The petitioner must either be involved in the day-to-day managerial control of the enterprise, or manage it through policy formulation. These requirements may be evidenced by:

A comprehensive job description for the position occupied by the investor. The petitioner's title should also be indicated;

Evidence that the petitioner is a corporate officer or on the board of directors; or

Evidence that the petitioner is involved in direct management activities or policymaking activities of a general or limited partnership. A limited partner must also show that he has rights, powers and duties commensurate with those normally granted under the Uniform Limited Partnership Act (ULPA). The AAO, however, has found that merely calling the investor a limited partner pursuant to the ULPA in a partnership agreement does not automatically mean that the person is involved in the management of the new commercial enterprise.

***Designation of a High Unemployment Area*—**The state government may designate a particular geographic or political subdivision as an area of high unemployment (at least 150 percent of the national average rate). Evidence of such designation may be provided with Form I-526. Such evidence should include:

Boundaries of the subdivision;

The date of the designation; and

The methods by which the statistics were gathered.

***Creation of Employment in a Targeted Employment Area*—**To show that the new commercial enterprise has created, or will create, employment in a targeted employment area, the petition must be accompanied by:

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

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 percent of 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.

Regional Centers

An investment under the EB-5 pilot program must be made in a commercial enterprise located within a "regional center," 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, or increased domestic capital investment."

A center seeking USCIS approval must submit a proposal showing how it plans to focus on a geographical region within the United States and to achieve the required growth by the means specified.

The proposal must show "in verifiable detail how jobs will be created indirectly through increased exports," as well as the amount and source of capital committed and the promotional efforts made and planned. The Appendix at the end of this article contains a list of designated regional centers. However, only about 17 of the approved regional centers are actually functioning. Another dozen or more applications for regional center designation are pending.

The USCIS is backlogged in reviewing applications for regional center designation under the pilot program. Many applications for regional center designation have remained pending for over a year. In 2000, the INS issued five decisions on regional center applications, denying or remanding all of them. The decisions set forth restrictive new requirements to qualify as a regional center.

To counteract this trend, in 2002 Congress amended the EB-5 regional center designation provisions. Under the 2002 law, USCIS should approve applications for EB-5 regional center status as long as the applications are based on a general prediction concerning: (1) the kinds of commercial enterprises that will receive capital from investor; (2) the jobs that will be created directly or indirectly as a result of the investment of capital; and (3) the other positive economic impacts that will result from the investment of capital.

USCIS is currently stepping up its review of new regional center applications and increasing oversight of existing regional centers to ensure that the EB-5 program grows in a responsible way. For example, in June 2007, Maurice Berez, Program Manager for the USCIS Foreign Trader, Investor & Regional Center Program, sent an advisory letter to the Metropolitan Milwaukee Association of Commerce (MMAC), a

regional center in Wisconsin. The letter outlines 17 types of information that approved regional centers must track to keep their regional center designation.

The reporting requirements set forth in the MMAC letter mirror recent regional center decisions, which are growing ever longer and more detailed. In essence the USCIS is exercising greater oversight of regional centers in all aspects of the EB-5 process: (1) in granting or denying regional center status; (2) in maintaining regional center status; and (3) in monitoring compliance through immigrant investors' I-526 and I-829 petitions filed through regional centers.

Assuming a regional center application has been approved, an applicant seeking EB-5 status under the pilot program must make the qualifying investment (*i.e.*, the amount required under the regular program) within an approved regional center. However, the requirement of creating at least 10 new jobs is met by a showing that as a result of the new enterprise, such jobs will be created directly or indirectly.

To file an I-526 form under the pilot program, attach a copy of the INS or USCIS letter designating the regional center. The petitioner's new commercial enterprise must be within the area specified in that letter. If the commercial enterprise is involved directly or indirectly in lending money to job-creating businesses, it may only lend money to businesses located within targeted employment areas to take advantage of the lesser capital requirement ($500,000). The businesses receiving the loans must be within the geographic limits of the regional center if the enterprise is to qualify under the pilot program. Otherwise the enterprise is not promoting economic growth through "improved regional activity" as required by the regulations.

In 2003 Congress gave USCIS discretion to "give priority" to EB-5 petitions filed through a regional center. USCIS exercises this authority judiciously, and specific criteria must be met before USCIS will expedite an I-526 petition filed through a regional center.

EB-5 PROCEDURES: REMOVING THE CONDITIONS

Assuming USCIS approves an investor's I-526 petition under either the regular or pilot program, he or she becomes a conditional resident for two years following the approval of an adjustment application or admission under an immigrant visa. The procedure to remove the conditions is analogous to that followed by people who obtain conditional residence through marriage to a U.S. citizen or lawful permanent resident. An immigrant investor's petition to remove the conditions should be filed on Form I-829 with the relevant service center. It must be accompanied by evidence that the individual invested or was in the process of investing the required capital, and that the investment created or will create 10 full-time jobs. These jobs may be filled by eligible U.S. workers with payroll records, relevant tax documentation, and Forms I-9. The individual also must show that he or she "sustained the actions" required for removal of conditions during the person's residence in the United States. An entrepreneur will have met this requirement if he or she has "substantially met" the capital investment requirement and has continuously maintained this investment during the conditional period.

Failure to File Form I-829

An immigrant investor in conditional resident status must submit Form I-829 to the appropriate service center within the 90-day period immediately preceding the second anniversary of his or her admission to the United States as a conditional permanent resident. Failure to do so will result in automatic termination of the conditional resident's status and initiation of removal proceedings.

Working with a Regional Center to Prepare Form I-829

If an immigrant investor has an approved I-526 petition by investing in a regional center, it is important to work with the regional center well in advance to prepare the I-829 documentation. The regional center should provide each immigrant investor with verification of employment for the employees hired because of the immigrant investor's investment, as well as documentary proof of the immigrant investor's complete deposit of funds.

Adjudication of Form I-829 by a Service Center

Initial Review of Form I-829**—**An immigration service center may (1) approve an I-829 petition without review, (2) issue a request for further evidence, or (3) refer it for an adjudication (with or without the interview) by a district office.

Approval of Form I-829 by the USCIS Service Center**—**A service center may approve an I-829 petition if the petition establishes the requirements for removing the conditions outlined above. If approved, the service center director will remove the conditions on the conditional resident's status as of the second anniversary of his or her admission as a conditional resident. The approval notice will instruct the conditional resident to report to the appropriate district office for processing for a new permanent resident card (Form I-551). At the district office, the conditional resident will surrender any permanent resident card previously issued and receive interim documents valid for 12 months in the form of either a temporary I-551 stamp in his or her unexpired foreign passport, or a Form I-94 containing a temporary I-551 stamp and his or her photograph.

Request for Further Evidence**—**A service center may also issue a request for further evidence (RFE). An RFE must be based on a determination by the service center director that the conditional resident must provide further documentation or answer certain questions in writing. If the questions cannot be answered in writing, the petition must be referred for an interview. An RFE will not be issued if the petition is clearly deniable on grounds other than those for which the RFE might be issued. A conditional resident has up to 12 weeks to respond to an RFE. Upon receipt of the RFE, the service center director must either approve or refer the Form I-829 petition to the district office.

An RFE may be issued for many reasons. One issue that sometimes arises in I-829 adjudications is whether the proper number of jobs has been created. The regulations state that an investor must submit evidence that he or she created or can be expected to create 10 jobs "within a reasonable time." Asked to define that phrase, USCIS responded:

> "USCIS cannot articulate a bright line rule to define what constitutes a "reasonable period of time" as such period will depend on the factors of each individual case. USCIS will consider all appropriate evidence that would (a) clearly justify not having completed the job creation by the end of the two years of conditional residence (e.g., the nature of the investment, the industry involved, etc.) and (b) show that the full number of requisite new jobs will be created within a clear, defined and credible period of time."

Determination that Referral to District Office is Appropriate**—**A service center will refer the petition to a district director if the initial review of the petition or the response to a request for additional evidence reveals that (1) the requirements for removal of conditions have not been met and the case should be denied without an interview, or (2) an interview is necessary to approve or deny the petition.

Adjudication of Form I-829 by the District Office

Approval of Form I-829 by the District Director**—**A district office may approve an I-829 petition if it is satisfied that the petition satisfies the requirements for removing the condition outlined above.

Denial of Form I-829 by the District Director**—**A district director must deny an I-829 petition if the petition does not establish the requirements for removing the condition. There is no appeal from this decision. The conditional resident may seek review of the district director's decision in removal proceedings.

Status of Conditional Residents
While I-829 is Pending

Immigrant investors remain in valid status while their I-829 petition is pending. Their status is supposed to be extended automatically in one-year increments until USCIS acts on the petition. During that time they are authorized to travel. Practitioners have complained, however, that many offices are unaware of this procedure. Extending conditional resident status, obtaining re-entry permits, and proving authorization to travel can be particularly difficult for spouses and children of EB-5 investors.

USCIS issued a memo in January 2005 intended to help conditional residents with pending or denied I-829 petitions that might benefit from the 2002 law discussed below. The memo instructs USCIS adjudicators to extend conditional resident status for affected EB-5 petitioners. The memo also instructs agency officials to assist pending I-829 petitioners with travel and parole requests.

Conditional permanent residents with pending I-829 petitions should travel with an attorney "pocket letter" describing their status with a copy of the January 2005 memo validating their claims.

TERMINATION OF EB-5 STATUS

The statute provides three separate grounds for terminating an EB-5 investor's status during the two-year conditional period. Immigrant status will be terminated if USCIS determines that:

The investment in the new commercial enterprise was to evade the immigration laws of the United States. This provision requires termination only if the investment of the enterprise was "solely" to evade immigration laws. This suggests that if the investment was made with legitimate intentions, in addition to an intention to fraudulently procure permanent resident status, termination would not be proper under this ground;

The investor failed to invest (or was not in the process of investing) the requisite capital, or failed to sustain the investments during the two-year conditional period; or

The individual was otherwise not conforming to the requirements of the employment-creation status provisions of INA §203(b)(5). This catch-all provision is dangerous because it does not define the conduct giving rise to termination of status. USCIS could potentially apply this provision broadly to terminate the investor status of an applicant for any infraction of the section. Fortunately, however, it does not appear that USCIS has ever invoked this provision to terminate the status of an immigrant investor.

An EB-5 investor admitted under the pilot program is also subject to the same conditions and restrictions.

DETERRING FRAUDULENT INVESTMENTS

In enacting the EB-5 program, Congress expressed concern about the possibility of fraudulent investments. To deter such fraud, establishing a commercial enterprise for the purpose of "evading any provision of the immigration laws" is a felony punishable by up to five years imprisonment. One reason Congress provided for two-year conditional permanent residency status for EB-5 investors is to aid in this deterrence. This two-year continuum for business activity and investment requires a significant investment and is a strong deterrent to fraud. Nonetheless, should fraud be discovered by USCIS before the two-year conditional period ends, the investor's status will be terminated. So far it appears that USCIS has not prosecuted any EB-5 investors for fraud.

EB-5 PETITIONS: THEORY vs. REALITY

The statutory and regulatory provisions discussed above are onerous. For this reason, immigration through the EB-5 category has never approached the maximum of about 10,000 a year. Yet the legacy INS radically restricted the EB-5 program even further in 1998 by issuing four precedent AAO decisions that made it even harder to obtain EB-5 status.

A complete discussion of the four precedent decisions is beyond the scope of this article. Below is a summary of the changes created by the four decisions. The post-1998 requirements are listed first; prior law or policy is listed in italics.

Post-1998: Promissory note valued at fair market value.
Pre-1998: Promissory note valued at face value.

Post-1998: Promissory note must generally be paid after two years.
Pre-1998: No limit on term of promissory note.

Post-1998: Security for promissory note needs to be perfected under the UCC.
Pre-1998: Security does not need to meet UCC perfected security interest requirements.

Post-1998: Bank accounts cannot be used as security.
Pre-1998: Bank accounts can be used as security.

Post-1998: Reduce the fair market value of promissory note by "considerable expense and effort" to execute on foreign assets.
Pre-1998: Promissory note valued at face value.

Post-1998: No redemption provisions can be agreed to before end of conditional residence and before conclusion of payments on promissory note.
Pre-1998: Redemption provisions can be agreed to so long as redemption does not occur until after promissory note has been paid in full.

Post-1998: Third party guarantees to investor prohibited.
Pre-1998: Third party guarantee allowed unless backed by government obligation.

Post-1998: Amounts attributable to expenses to start new commercial enterprise must be deducted from capital contribution.
Pre-1998: Start-up costs and expenses included in amount of capital contribution.

Post-1998: New ownership and new corporation are not sufficient to establish new commercial enterprise.
Pre-1998: Restructuring or reorganization sufficient to establish new commercial enterprise.

Post-1998: All of the activities must benefit the targeted geographical area to count indirect employment.
Pre-1998: The qualifying investment must be within the approved regional center; there is no separate requirement to prove benefit solely to the regional center.

Below is a summary of additional restrictive interpretations created by the AAO in nonprecedent decisions:

Post-1998: Money earned or assets acquired while in the United States in an unlawful status are not considered lawful means to acquire capital.
Pre-1998: Drug smugglers or other criminals cannot use their ill-gotten gains to obtain permanent resident status in the United States through the EB-5 category; nothing specified about others illegally in the United States.

Post-1998: All investors in the partnership must identify the source of their funds to prove that they were derived by lawful means.
Pre-1998: Only the petitioning investor must identify the source of his or her funds in the partnership to prove that they were derived by lawful means.

Post-1998: Merely injecting cash into the corporate account of a business does not show that the capital is "at risk" for the purpose of generating a return.
Pre-1998: Injecting cash into a corporate account could show that the capital is "at risk" for the purpose of generating a return.

2002 AMENDMENTS

Investors who were hurt by the changes the immigration agency made in 1998 lobbied Congress for relief. Eventually, in 2002 Congress enacted changes to the EB-5 program as part of a Justice Department authorization bill. To qualify under the new law, an investor must have filed a petition for EB-5 classification (Form I-526) and had it approved between January 1, 1995 and August 31, 1998. The law took effect November 2, 2002.

Section 11031(c) of the 2002 law sets forth procedures to determine whether investors can have their conditions removed. The government must decide three things: whether (1) the I-829 petition contains any material misrepresentations; (2) the investment created or saved 10 jobs; and (3) the investor has substantially complied with the investment requirement ($1 million or $500,000). Investments in regional centers or in troubled businesses count. The law gives investors a choice of three dates by which to measure their compliance: (1) the date the I-829 petition was filed; (2) six months after the I-829 petition was filed; or (3) the date the government makes its determination under the new law.

If the investor meets the jobs and investment requirements and has not made a material misrepresentation, the government will remove the conditional resident status and the investor and family members will become permanent residents as of the second anniversary of the date they became conditional residents. If the government finds against an investor on any of the three grounds, the government must notify the investor, and provide the investor with an opportunity to submit evidence to rebut the adverse determination. If the investor loses on the jobs or investment requirement, the government will continue

the investor's conditional resident status for additional two years. During that time the investor can try to meet those requirements.

If the government finds that the investor made a material misrepresentation, the government will terminate the investor's conditional resident status. The investor can appeal to the Board of Immigration Appeals and then seek judicial review. During administrative or judicial review proceedings the investor and his or her family members remain in conditional resident status.

Most investors are unlikely to persuade the government that they fully met the capital investment and jobs creation requirement. The new law gives them an additional two years to make another investment. During that time they can combine investments made earlier with new investments to show that altogether they invested the total amount required. This includes investments in limited partnerships.

An investor must file another I-829 during the 90 days preceding the new two-year anniversary. Failure to file will normally terminate a conditional resident's status. There is a good cause exception.

Assuming an investor files another I-829 petition, the government has 90 days to decide three things: whether (1) the I-829 petition has any material misrepresentations; (2) the investment created or saved 10 jobs; and (3) the investor has substantially complied with the investment requirement ($1 million or $500,000). The investor can aggregate money invested before and jobs created or saved from the initial investment. Investments in regional centers or in troubled businesses count.

If the investor meets the job creation and investment requirements and has not made a material misrepresentation, the government will remove the conditional resident status of the investor and family members. They will become permanent residents as of the second anniversary of the date their conditional resident status was continued. If the government finds against an investor on any of the three grounds, the government must notify the investor, who may attempt to rebut the adverse facts. If the investor loses, the government will terminate the investor's conditional resident status.

Section 11032 of the 2002 law provides similar procedures for EB-5 investors whose I-526 petitions were approved, but who never became conditional residents because the INS never acted on their adjustment of status applications or because they remained overseas. This section defines an eligible individual as an investor who filed an I-526 petition that was approved between January 1, 1995, and August 31, 1998, and who then timely filed an adjustment of status application or applied for an immigrant visa overseas. Investors are not eligible if they are inadmissible or deportable on any ground.

If INS revoked the I-526 petition on the ground that the investor failed to meet the capital investment requirement, that revocation is to be disregarded. If the adjustment of status application or immigrant visa application overseas was not pending on November 2, 2002, the date of enactment, it is to be treated as reopened if: (i) it is not pending because the government claims the investor never complied with the capital investment requirement; or (ii) the investor left the United States without advance parole. If an investor applied for adjustment of status in the United States but is now overseas, the government will establish a process to let them return to the United States if necessary to obtain adjustment.

The government was supposed to approve adjustment of status applications for eligible investors by May 1, 2003, 180 days after enactment. However, that has not happened yet, because USCIS has not yet published regulations to implement the 2002 law. The investors will eventually be in conditional resident status. Such investors must file an I-829 petition within two years of becoming a conditional resident. The determinations and process are similar for both §11031 and §11032 investors. For example, the government must credit the investor with funds invested and jobs created or saved both before and after November 2, 2002, the date of enactment. This section gives investors a choice of two dates by which to measure their compliance: (1) the date they filed their adjustment of status application; or (2) the date the government decides the I-829 petition.

Finally, the new law states that a noncitizen who was admitted on a conditional basis by virtue of being the child of an EB-5 investor shall still be considered a child for purposes of the new law, even if they turn 21 or marry.

ETHICAL CONSIDERATIONS

It is important for an attorney to consider the ethical considerations before beginning to represent a client in the complex EB-5 category. The American Bar Association's (ABA's) Model Rules of Professional Conduct's first rule states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Therefore, representing an immigrant investor client without a good base of EB-5 knowledge could be considered a breach of ethical rules.

If an attorney feels inadequate to represent a client in an EB-5 matter, she may comply with competence rules by consulting with an EB-5 expert or by bifurcating representation between EB-5 and non-EB-5 related counsel, such as adjustment. In a joint counsel scenario, most jurisdictions require that the client be made aware of any joint representation and that the fees be split to reflect the proportional amount of work that each law firm is providing.

Finally, there is an ethical consideration concerning the referral fees that many regional centers offer to someone who recommends an investor to the regional center. Accepting such fees may involve a conflict of interest, since an attorney's representation of a client may be materially impaired by the prospect of a pecuniary gain from a regional center. An attorney has a duty of undivided loyalty to a client.

CONCLUSION

Qualifying a person for EB-5 status is one of the most complicated subspecialties in immigration law. A sophisticated knowledge of corporate, tax, investment, and immigration law are all required. Moreover, the four 1998 precedent AAO decisions and subsequent nonprecedent decisions have made it even harder to obtain approvals of EB-5 petitions. Investors must discard normal investment opportunities in favor of investments structured to meet the unrealistic requirements of the precedent decisions. Attorneys, in turn, must proceed at their peril in advising clients. In many cases it may be more practicable for investors to come to the United States through other visa categories such as the E-2 investor, L-1 intracompany transferee, or EB-1-3 multinational executive or manager routes.

Nevertheless, things may be looking up for the EB-5 category. In January 2005 USCIS established a new Investor and Regional Center Unit (IRCU) at USCIS headquarters. The IRCU, since renamed the Foreign Trader, Investor and Regional Center Program, provides oversight for EB-5 policy and regulatory development, field guidance, and training. According to USCIS, establishing the IRCU will "strengthen and protect the integrity of the [EB-5] program while promoting the intent of Congress to encourage investment and increase employment within the United States." Indeed, while only 129 individuals were admitted as EB-5 conditional residents in FY 2004, 749 individuals obtained conditional resident status in FY 2006.

These changes may mark a major leap forward in USCIS policy toward the EB-5 visa category. The changes hold the promise of making the EB-5 process more user-friendly in terms of processing times and responsiveness to investors' concerns. USCIS officials now say that they want to meet the needs of the business community so that the EB-5 category can be more effectively used. Many issues are still not resolved, however, and the sunset of the Pilot Program is quickly approaching. Hopefully, it will be renewed. Time will tell whether the EB-5 program continues with its current success.

Appendix: Designated Regional Centers

Approved and Active Regional Centers

Alabama:
Alabama Center for Foreign Investment, LLC
100 North Union Street, Suite 682
Montgomery, AL 36104
HYPERLINK "http://www.acfi-alabama.com/alabama.html" www.acfi-alabama.com/alabama.html

California:

California Consortium for Agricultural Export
333 S. Grand Ave., 25th Floor
Los Angeles, CA 90071
HYPERLINK "http://www.ccax.com/" www.ccax.com/

CMB Export LLC
Corona Professional Center
400 S. Ramona Avenue, Suite 212AA
Corona, CA 91719
HYPERLINK "http://www.cmbeb5visa.com/" www.cmbeb5visa.com/

Southeast Los Angeles Regional Center
David B. Brearley, Esq.
c/o Lincoln Stone
Stone & Grzegorek LLP
800 Wilshire Boulevard, Suite 900
Los Angeles, CA 90017

Los Angeles Film Regional Center
c/o Thomas Rosenfeld
CanAm Enterprises, LLC
32 Court Street, Suite 1501
Brooklyn, NY 11201

Regional Center Properties

c/o Nelson Mamey, Angelo Paparelli, and Stephen Yale-Loehr
5160 Birch Street, Suite 200

Newport Beach, CA 92660

District of Columbia:
Capitol Area Regional Center
1801 K Street, NW, Suite 201-L
Washington, DC 20006
HYPERLINK "http://www.eb5dc.com/" www.eb5dc.com/

Iowa:
Iowa Department of Economic Development
200 East Grand Avenue
Des Moines, IA 50309
HYPERLINK "http://www.extension.iastate.edu/ag/staff/info/ianewfarmfamily.pdf" www.extension.iastate.edu/ag/staff/info/ianewfarmfamily.pdf

Kansas:
Kansas Biofuel Regional Center, LLC
3250 Wilshire Blvd., Suite #1700
Los Angeles, CA 90010

Louisiana:
City of New Orleans Office of Planning and Development
40 Poldras Street, Suite 1000
New Orleans, LA 70112
HYPERLINK "http://www.nobleoutreach.com/" www.nobleoutreach.com/

Pennsylvania:
Philadelphia Industrial Development Corporation
2600 Centre Square West
1500 Market Street
Philadelphia, PA 19102-2126
HYPERLINK "http://www.canamenterprises.com" www.canamenterprises.com

Pennsylvania Department of Community & Economic Development Regional Center
Harrisburg, PA 17120
HYPERLINK "http://www.newPA.com" www.newPA.com

South Dakota:
South Dakota International Business Institute
711 East Wells Avenue
Pierre, SD 57501-3369
www.sd-exports.org/eb-5/

Texas (& Texas/Oklahoma):
Global Century Development Group I, LP
11205 Bellaire Blvd., Suite B-33
Houston, TX 77072-2545

Southwest Biofuels Regional Center, LLC
3250 Wilshire Blvd., Suite #1700
Los Angeles, CA 90010

Vermont:
Vermont Agency of Commerce and Community Development
National Life Building
Montpellier, VT 05620-0501
HYPERLINK "http://www.eb5greencard.com/" www.eb5greencard.com/

Washington:
The Gateway Freedom Fund
(a/k/a Golden Rainbow Freedom Fund)
c/o American Life Inc, 3223 3rd Ave South
Seattle, WA 98134
HYPERLINK "http://www.amlife.us/visa.html" www.amlife.us/visa.html

Whatcom Opportunities Regional Center
1305 11th Street, Suite 304
Bellingham, WA 98825
HYPERLINK "http://www.worc.biz/" www.worc.biz/

Wisconsin:
Metropolitan Milwaukee Association of Commerce
756 N. Milwaukee Street
Milwaukee, WI 53202
HYPERLINK "http://www.mmac.org" www.mmac.org

Seeking Redesignation

Hawaii:

State of Hawaii, Department of Business,
Economic Development & Tourism
P.O. Box 2359
Honolulu, HI 96804

Nevada:
Unibex Global Corporation
1201 Eleanor Avenue
Las Vegas, NV 89106

Washington:
Aero-Space Port International Group
512 Strander Boulevard
Tukwila, WA 98188
HYPERLINK "http://www.aspigroup.com/" www.aspigroup.com/

Not Active or Seeking Voluntary Termination

Arizona:
GV Development
7525 W. Highway 68
P.O. Box 10430
Golden Valley, AZ 86413-2430

California:
Alameda Trade Center
c/o Lowe Enterprises Commercial Group
1818 East 7th Street, Suite 200
Los Angeles, CA 90021

CKS Western Inc. World Trade Center
620 W. Graham Drive
Lake Elsinore, CA 92530

Empirical Entertainment
6255 Sunset Boulevard, Suite 2000
Hollywood, CA 90028

Redevelopment Agency of the City of Vernon
4305 Santa Fe Avenue
Vernon, CA 90058

Trading Partners International of California LLC
2677 N. Main Street, Suite 930
Santa Ana, CA 92705

West Rand Gold Trust
P.O. Box 2222
Ridgecrest, CA 93556

Colorado:
Pueblo Economic Development Corporation
P.O. Box 5807
Pueblo, CO 81002

Florida:
Miami Chinese Community Center, Ltd.
331 NE 18th Street
Miami, FL 33132

Georgia:
Atlanta International Center for Academic [sic] and Athletics
1131 Alpharetta Street
Roswell, GA 30075

Legacy Project
1100 Spring Street, Suite 600
Atlanta, GA 30309

Michigan:
Danou Enterprises
World Trade Center Detroit/Windsor
1251 Fort Street
Trenton, MI 48183

New York:
North Country Alliance
One Lincoln Boulevard
Rouses Point, NY 12979

South Carolina:
American Export Partners
180 East Bay Street, Suite 300
Charleston, SC 29401-2123
World Trade Center/Greenville-Spartenburg Inc.
315 Old Boiling Springs Road
Greer, SC 29650

Texas:
North Texas Commission
P.O. Box 610246
DFW Airport, TX 75261

Washington:
Beacon U.S. Studios Inc.
5610 Sanderling Way
Blaine, WA 98230

Matrix International, LLC
P.O. Box 22891
Seattle, WA 98122

Washington, DC:
Abacus, LLC
740 6thh St., NW, Suite 302
Washington, DC 20001-3798

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INA §203(b)(5), 8 USC §1153(b)(5). For a detailed treatment of the EB-5 immigrant investor category, see 3 C. Gordon, S. Mailman, & S. Yale-Loehr, *Immigration Law and Procedure* §39.07 (rev. ed. 2008).

INA §203(b)(5)(C)(ii), 8 USC §1153(b)(5)(C)(ii).

INA §203(b)(5)(B)(i), 8 USC §1153(b)(5)(B)(i).

Office of Immigration Statistics, U.S. Dep't of Homeland Security, 2006 Yearbook of Immigration Statistics 20 (2007) (Table 6), *at www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/OIS_2006_Yearbook.pdf HYPERLINK "http://"* (last visited Feb. 21, 2008) [hereinafter 2006 Yearbook of Immigration Statistics].

Id.

Id.

Matter of Soffici, 22 I&N Dec. 158, 19 Immigr. Rep. B2-25 (Assoc. Comm'r, Examinations 1998); *Matter of Izummi*, 22 I&N Dec. 169, 19 Immigr. Rep. B2-32 (Assoc. Comm'r, Examinations 1998); *Matter of Hsiung*, 22 I&N Dec. 201, 19 Immigr. Rep. B2-106 (Assoc. Comm'r, Examinations 1998); *Matter of Ho*, 22 I&N Dec. 206, 19 Immigr. Rep. B2-99 (Assoc. Comm'r, Examinations 1998).

See generally H. Joe, R. Oh, S. Smalley, & S. Yale-Loehr, "More AAO EB-5 Decisions," 7 *Bender's Immigration Bulletin* 251 (Mar. 1, 2002); 6 *Bender's Immigration Bulletin* 945 (Sept. 15, 2001) (summaries of four AAO EB-5 decisions); L. Stone, W. Mason, B. Stern Wasser, & S. Yale-Loehr, "Immigrant Investors Strike Out Again at AAO," 6 *Bender's Immigration Bulletin* 709 (July 15, 2001); S. Park & S. Yale-Loehr, "More Bad News from the AAO for Immigrant Investors," 6 *Bender's Immigration Bulletin* 309 (Mar. 15, 2001); L. Stone, R. Oh, & S. Yale-Loehr, "Recent AAO Decisions Continue Trend of Limiting Immigrant Investor Visas," 5 *Bender's Immigration Bulletin* 1031 (Dec. 15, 2000); B. Palmer, "Recent EB-5 Denials," 4 *Bender's Immigration Bulletin* 1139 (Dec. 1, 1999); 4 *Bender's Immigration Bulletin* 810 (Aug. 15, 1999) (summaries of four AAO EB-5 denials). Some AAO EB-5 decisions are available at *www.uscis.gov/uscis-ext-templating/uscis/jspoverride/*
errFrameset.jsp (last visited Feb. 26, 2008).

21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002). The immigrant investor provisions are in §§11031–37. The conference committee report is H.R. Conf. Rep. No. 107-685 (2002).

USCIS has published interim field guidance pending publication of the regulations. Memorandum from William R. Yates, BCIS Acting Assoc. Dir. for Operations, to all BCIS offices, "Amendments Affecting Adjudication of Petitions for Alien Entrepreneur (EB-5)," File No. HQ40/6.1.3 (June 10, 2003), *reprinted in* 8 *Bender's Immigration Bulletin* 1179 (July 1, 2003), *published on* AILA InfoNet at Doc. No. 03061744 (*posted* June 17, 2003) [hereinafter Yates Memo].

Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, §5, 117 Stat. 1944.

U.S. Government Accountability Office, No. GAO-05-256, "Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors" (Apr. 2005), *available at* *www.gao.gov/new.items/d05256.pdf* (last visited Feb. 29, 2008).

Id. at 1.

8 USC §1153(b)(5).

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, §610, 106 Stat. 1828; S. Rep. No. 102-918 (1992).

Basic Pilot Program Extension and Expansion Act of 2003, *supra* note 11, §4(b) (extending EB-5 pilot program five years to Sept. 30, 2008).

21st Century Department of Justice Appropriations Authorization Act, *supra* note 9, §11037(a)(3).

8 CFR §204.6(m)(3).

8 CFR §204.6(g)(1).

Id.

See, e.g., *Matter of [name not provided]*, EAC-91-184-50136, 12 Immigr. Rep. B2-51 (AAU Aug. 12, 1993) (denying petition as investment made before Nov. 29, 1990; investor's documentation of "expanded business" deemed insufficient). *See also* Yates Memo, *supra* note 10, at ¶2.

8 CFR §204.6(h)(2).

8 CFR §204.6(h)(3).

The 21st Century Department of Justice Appropriations Authorization Act, *supra* note 9, clarifies that a "commercial enterprise" may include a limited partnership. *Id*. §11036(b)(3).

8 CFR §204.6(e) (definition of commercial enterprise).

Id.

Matter of Izummi, 22 I&N Dec. 169, 198, 19 Immigr. Rep. B2-32 (Assoc. Comm'r, Examinations 1998).

21st Century Department of Justice Appropriations Authorization Act, *supra* note 9, §11036(a)(2). *See also* Yates Memo, *supra* note 10, at ¶1.

Matter of Soffici, 22 I&N Dec. 158, 166, 19 Immigr. Rep. B2-25 (Assoc. Comm'r, Examinations 1998) ("A few cosmetic changes to the decor and a new marketing strategy for success do not constitute the kind of restructuring contemplated by the regulations, nor does a simple change in ownership.").

Matter of [name redacted] (AAO July 11, 2001) (approved case involved the "restructuring" of a horse breeding business into a new business for horse breeding and training).

8 CFR §204.6(h)(3). *See also* Yates Memo, *supra* note 10, at ¶2.

Memorandum from T. Alexander Aleinikoff, INS General Counsel, to Louis D. Crochetti, Jr., Acting Assoc. Comm'r for Examinations, "Whether a Pool of Alien Immigrant Investors Can Create a New Commercial Enterprise by Expanding an Existing Business by at Least 40%," HQ 204.27-C (Jan. 31, 1995), *reprinted in* 73 *Interpreter Releases* 1625 (Nov. 18, 1996).

Matter of [name not provided], WAC-99-010-50117 (AAO Dec. 15, 2000).

8 CFR §204.6(g).

See generally 8 CFR §204.6(g); H.R. Klasko, "Pooled Investment Arrangements: Unraveling the Controversy," 2 *Immigration & Nationality Law Handbook* 107 (1998–99 ed.) [hereinafter Klasko]; A.J. Vasquez-Aspiri, "The Role of Commercial Organizations in the EB-5 Employment Process," 2 *Bender's Immigration Bulletin* 813 (Oct. 15, 1997).

See, e.g., *Matter of [name not provided]*, WAC-98-106-51072, slip op. at 20 (AAO July 6, 2000); *Matter of [name not provided]*, WAC-98-106-51583, slip. op. at 22 (AAO Sept. 11, 2000). This requirement is discussed further *infra*.

INA §203(b)(5)(A), 8 USC §1153(b)(5)(A).

8 CFR §204.6(j)(5).

Id. See also 73 *Interpreter Releases* 48, 55 (Jan. 10, 1996).

See, e.g., *Matter of [name not provided]*, WAC-98-111-53508, slip op. at 23 (AAO Mar. 20, 2000) ("Despite the superficial language in the limited partnership agreement referring to the ULPA and to 8 CFR §204.6(j)(5)(iii), it is clear that the petitioner here does not in fact have the rights normally granted to limited partners under the ULPA.").

INA §203(b)(5)(A)(i), 8 USC §1153(b)(5)(A)(i). *See also* 8 CFR §204.6(j)(2) (allowing an investor to be "actively in the process of investing the required amount of capital"). Indeed, even the regulations governing removal of an EB-5 investor's conditional resident status two years later acknowledge that an investor may not have invested all of his or her money by then. The regulations simply require an investor to provide evidence that the alien "invested or was actively in the process of investing the requisite capital." 8 CFR §216.6(a)(4)(ii).

See 8 CFR §204.6(e) (definition of "invest").

Id. (definition of "capital").

Letter from Efren Hernandez, Chief, USCIS Business and Trade Branch, to Stephen Yale-Loehr, File No. HOOPRD 70/6.2.8 (June 4, 2004), *available at* www.usa-immigration.com/litigation.htm (last visited Feb. 29, 2008). *See also Kenkhuis v. INS*, No. 3:01-CV-2224-N, 2003 U.S. Dist. LEXIS 3334, at *6 (N.D. Tex. Mar. 6, 2003) ("[t]he definition of 'invest' . . . requires an infusion of new capital, not merely a retention of profits of the enterprise"); *De Jong v. INS*, No. 6:94 CV 850 (E.D. Tex. Jan. 17, 1997).

Matter of Soffici, 22 I&N Dec. 158, 19 Immigr. Rep. B2-25 (Assoc. Comm'r, Examinations 1998).

8 CFR §204.6(e) (definition of "capital").

Matter of Hsiung, 22 I&N Dec. 201, 19 Immigr. Rep. B2-106 (Assoc. Comm'r, Examinations 1998).

Matter of Izummi, 22 I&N Dec. 169, 192–93, 19 Immigr. Rep. B2-32 (Assoc. Comm'r, Examinations 1998) (finding that investor failed to show how bank accounts in Japan were in trust or otherwise secured the note, as required by 8 CFR §204.6(e), and that the note was not readily enforceable and was in any event not now worth its face value payable over six years).

See generally W. Cook, "Somewhere, Over the Rainbow . . . Lies the EB-5 Pot of Gold," 3 *Bender's Immigration Bulletin* 1205 (Dec. 1, 1998); Klasko, *supra* note 35.

INA §203(b)(5)(A)(ii), 8 USC §1153(b)(5)(A)(ii).

For a comprehensive summary of the regulations, see Marans, Williams, Griffin, & Pattison, *Manual of Foreign Investment in the United States* (3d ed. 2004); *United States Law of Trade and Investment* (B. Kozolchyk & J. Molloy eds., 2000).

INA §203(b)(5)(A)(ii), 8 USC §1153(b)(5)(A)(ii).

Id.

8 CFR §204.6(e) (definition of " qualifying employee").

Id.

See 8 CFR §204.6(m)(7)(ii).

21st Century Department of Justice Appropriations Authorization Act, *supra* note 9, §11031(f). *See also* Yates Memo, *supra* note 10, at ¶ 4.

8 CFR §204.6(e) (definition of "full-time employment").

Id.

INA §203(b)(5)(B), 8 USC §1153(b)(5)(B).

INA §203(b)(5)(B)(ii), 8 USC §1153(b)(5)(B)(ii).

INA §203(b)(5)(B)(iii), 8 USC §1153(b)(5)(B)(iii).

Several states have websites that can help determine whether a particular area in the state qualifies as a "targeted employment area" for EB-5 purposes. *See, e.g.*, www.labor.ca.gov/
calBIS/cbfederalvisaprog.pdf (last updated May 2007) (last visited Feb. 29, 2008). t

8 CFR §204.6(e) (definition of "troubled business").

8 CFR §§204.6(h)(3), 204.6(j)(4)(ii).

See 63 Fed. Reg. 67,135 (Dec. 4, 1998).

8 CFR §204.6(j)(1).

8 CFR §204.6(j)(2).

See Matter of [name not provided], file no. redacted (AAO July 7, 2000).

See, e.g., *Matter of [name redacted]*, WAC-98-194-50913 (AAO Aug. 16, 2002). For a good discussion of the immigration agency's overly restrictive interpretation of the "at risk" requirement, see L. Stone, "Immigrant Investment in Local Clusters: Part II," 80 *Interpreter Releases* 937, 941–45 (July 14, 2003) [hereinafter Stone].

For an in-depth discussion of the requirement that an investor's capital be from a lawful source, see Stone, *supra* note 70, at 946–50; S. Yale-Loehr & Christopher Repole, "Show Me the Money: Proving Lawful Source of Funds for EB-5 Immigrant Investors," at *HYPERLINK "http://www.millermayer.com/new/eb5funds.html"* www.millermayer.com/new/eb5funds.html (last visited Feb. 29, 2008); L. Stone & S. Yale-Loehr, "Evidence of Source of Capital in Immigrant Investor Cases," 6 *Bender's Immigration Bulletin* 972 (Oct. 1, 2001).

8 CFR §204.6(j)(3).

See, e.g., *Matter of [name not provided]*, file no. redacted, slip op. at 12 (AAO July 7, 2000) ("In addition, the petitioner has not submitted his corporate and personal tax records for at least the five years preceding filing the petition as required by 8 CFR §204.6(j)(3).").

See 8 CFR §204.6(e) (definition of "capital).

See, e.g., *Matter of [name not provided]*, file no. redacted, slip. op. at 12 (AAO July 7, 2000); *Matter of [name not provided]*, file no. redacted, slip. op. at 12 (AAO July 11, 2000); *Matter of [name not provided]*, WAC-98-106-51583, slip. op. at 22 (AAO Sept. 11, 2000).

See, e.g., *Matter of [name not provided]*, file no. WAC-00-070-52366, slip. op. at 3-6 (AAO Apr. 21, 2005) (petitioner failed to adequately document transfer of money from family trust to her).

8 CFR §204.6(j)(4)(i).

Matter of Ho, 22 I&N Dec. 206, 19 Immigr. Rep. B2-99 (Assoc. Comm'r, Examinations 1998).

8 CFR §204.6(j)(4)(ii).

8 CFR §204.6(j)(5).

See 8 CFR §204.6(j)(5); *Matter of [name not provided]*, WAC-98-111-53508, slip op. at 23 (AAO Mar. 20, 2000) ("Despite the superficial language in the limited partnership agreement referring to the ULPA and to 8 C.F.R. §204.6(j)(5)(iii), it is clear that the petitioner here does not in fact have the rights normally granted to limited partners under the ULPA.").

8 CFR §204.6(i).

8 CFR §204.6(j)(6).

21st Century Department of Justice Appropriations Authorization Act, *supra* note 9, §11037(a)(2); 8 CFR §204.6(e) (definition of "regional center").

8 CFR §204.6(m)(3).

Id.

See generally L. Stone, "INS Decisions Cloud Future of Investor Pilot Program," 6 *Bender's Immigration Bulletin* 233 (Mar. 1, 2001).

Id.

21st Century Department of Justice Appropriations Authorization Act, *supra* note 9, §11037.

Id. §11037(a)(3). For a good analysis of the kinds of economic benefits EB-5 regional centers could potentially create, see L. Stone, "Immigrant Investment in Local Clusters: Part I," 80 *Interpreter Releases* 837 (June 16, 2003).

See Stephen Yale-Loehr & Lindsay Schoonmaker, "USCIS Increases Oversight of EB-5 Regional Centers," 12 *Bender's Immigration Bulletin* 1713 (Dec. 1, 2007), *reprinted at* www.millermayer.com/new/eb5_reg_ctrs.html (last visited Feb. 28, 2008).

See letter from Maurice R. Berez, Program Manager, USCIS Foreign Trader, Investor & Regional Center Program, to Metropolitan Milwaukee Association of Commerce (June 12, 2007), *published on* AILA InfoNet at Doc. No. 07061360) (*posted* June 13, 2007).

8 CFR §§204.6(j)(4)(iii), 204.6(m)(7).

Matter of Izummi, 22 I&N Dec. 169, 19 Immigr. Rep. B2-32 (Assoc. Comm'r, Examinations 1998).

Id.

Basic Pilot Program Extension and Expansion Act of 2003, *supra* note 11, §4(a)(2).

See INA §216A, 8 USC §1186b; 8 CFR §216.6.

See INA §216, 8 USC §1186a.

8 CFR §§216.6, 1216.6.

See 8 CFR §216.6(a)(4)(iv).

8 CFR §§216.6(a)(4), 1216.6(a)(4).

8 CFR §§216.6(a)(1), 1216.6(a)(1).

8 CFR §§216.6(a)(5), 1216.6(a)(5); Memorandum from Michael A. Pearson, INS Executive Associate Comm'r, to all INS field offices, "EB-5 Field Memorandum No. 9: Form I-829 Processing" (Mar. 3, 2000), *published on* AILA InfoNet at Doc. No. 00060702 (*posted* June 7, 2000) (amending INS Adjudicators Field Manual §25.2) [hereinafter I-829 Memo]. *See also* L. Stone, "Removal of the Conditions on Permanent Residence for Immigrant Investors," *in* AILA 2005–06 *Immigration & Nationality Law Handbook* 329 (Stephanie L. Browning et al. eds., 2005).

Id.

8 CFR §§216.6(d)(1), 1216.6(d)(1).

I-829 Memo, *supra* note 103.

Id.

8 CFR §103.2(b)(8).

I-829 Memo, *supra* note 103.

8 CFR §216.6(a)(4)(iv).

AILA-USCIS liaison meeting minutes (Apr. 2, 2008), at 10, *published on* AILA InfoNet at Doc. No. 08040235 (*posted* Apr. 2, 2008).

I-829 Memo, *supra* note 103.

Id.

8 CFR §§216.6(d)(2), 1216.6(d)(2); I-829 Memo, *supra* note 103.

I-829 Memo, *supra* note 103.

Memorandum from William R. Yates, USCIS Assoc. Director for Operations, to all USCIS offices, "Extension of Status for Conditional Residents with Pending or Denied Form I-829 Petitions Subject to Public Law 107-273 (Jan. 18, 2005), *published on* AILA InfoNet at Doc. No. 05012167 (*posted* Jan. 21, 2005), *reprinted in* 10 *Bender's Immigration Bulletin* 236 (Feb. 15, 2005).

Id.

INA §216A(b), 8 USC §1186b(b).

INA §216A(b)(1)(A), 8 USC §1186b(b)(1)(A).

INA §216A(b)(1)(B), 8 USC §1186b(b)(1)(B).

INA §216A(b)(1)(C), 8 USC §1186b(b)(1)(C).

INA §275(d), 8 USC §1325(d).

INA §216A(b)(1), 8 USC §1186b(b)(1).

For an interesting case, rife with intrigue, fraud, and shady dealings surrounding two EB-5 promoters, see *United States v. O'Connor*, 158 F. Supp. 2d 697 (E.D. Va. 2001). Individual EB-5 investors appear to have been victims, not perpetrators, of the fraud. *See also* Serova v. Teplen, No. 05 CIV.6748 (HB), 2006 U.S. Dist. LEXIS 5781 (S.D.N.Y. Feb. 16, 2006) (EB-5 investor claims her attorney failed to represent her adequately, in part by failing to disclose that he also represented the company in which she invested).

For current information on litigation and other developments surrounding EB-5 provisions, see the EB-5 Litigation Document Web page at www.usa*-immigration.com/*
litigation.htm (last visited Feb. 29, 2008).

Matter of Soffici, 22 I&N Dec. 158, 19 Immigr. Rep. B2-25 (Assoc. Comm'r, Examinations 1998); *Matter of Izummi*, 22 I&N Dec. 169, 19 Immigr. Rep. B2-32 (Assoc. Comm'r, Examinations 1998); *Matter of Hsiung*, 22 I&N Dec. 201, 19 Immigr. Rep. B2-106 (Assoc. Comm'r, Examinations 1998); *Matter of Ho*, 22 I&N Dec. 206, 19 Immigr. Rep. B2-99 (Assoc. Comm'r, Examinations 1998). *See generally* W. Cook, "Somewhere, Over the Rainbow…Lies the EB-5 Pot of Gold," 3 *Bender's Immigration Bulletin* 1205 (Dec. 1, 1998).

Note that the requirements established by these cases may be applied retroactively, even if they contravene practices established by earlier unpublished decisions or other guidance. *See Golden Rainbow Freedom Fund v. Ashcroft*, 24 Fed. Appx. 698, 2001 U.S. App. LEXIS 25482 (9th Cir. Nov. 26, 2001). *See also R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9th Cir. 2001). *But see Chang v. United States*, 327 F.3d 911 (9th Cir. 2003) (ruling that retroactive application of the newly established requirements is impermissible if the applicant was granted conditional residency before the new requirements came into effect); *Sang Geun An v. United States*, No. C03-3184P (W.D. Wash. Feb. 16, 2005) (following *Chang*).

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21st Century Department of Justice Appropriations Authorization Act, *supra* note 9, §§11031–37. *See generally* S. Yale-Loehr, "Congress Helps Stranded Immigrant Investors," 7 *Bender's Immigration Bulletin* 1306 (Nov. 1, 2002), and at *www.millermayer.com/new/bibeb5bill.html* (last visited Feb. 29, 2008).

21st Century Department of Justice Appropriations Authorization Act, *supra* note 9, §§11031(b)(1), 11032(b).

Id. §11031(c)(1)(A).

Id. §11031(c)(1)(B), (C).

Id. §11031(c)(1)(D).

Id. §11031(c)(1)(E).

Id. §11031(c)(1)(F)(i).

Id. §11031(c)(1)(F)(ii).

Id. §11031(c)(1)(F)(iii).

Id. §11031(c)(1)(F)(iv).

Id.

Id. §11031(c)(2)(A).

Id.

Id. §11031(c)(2)(C)(i).

Id. §11031(c)(2)(D).

Id. §11031(c)(2)(C)(ii).

Id. §11031(c)(2)(E).

Id.

Id.

Id. §11031(c)(2)(F).

Id. §11031(c)(2)(G)(i).

Id. §11031(c)(2)(G)(ii).

Id. §11032(b).

Id. §11032(c)(1).

Id. §11032(c)(2)(A).

Id. §11032(c)(2)(B).

Id. §11032(a).

Id. §11032(e).

Id. §11032(e)(2).

Id. §11032(e)(3).

Id. §§11031(e), 11032(f).

See C. Lee, "Ethical and Practical Considerations in EB-5 Representation," *at* *www.ilw.com/articles/2007,1120-lee.shtm*, and *at* *www.millermayer.com/new/eb5ethics.html*, *reprinted in* 13 Bender's Immigration Bulletin 332 (Mar. 15, 2008).

See generally Model Rules of Professional Conduct R. 1.1. The New York Disciplinary Rules of the Code of Professional Responsibility, the California Rules of Professional Conduct, and the Maine Code of Professional Responsibility are not based on the ABA Model Rules of Professional Conduct.

USCIS Memorandum, William R. Yates, USCIS Assoc. Dir. for Operations, to all USCIS offices, "Establishment of an Investor and Regional Center Unit," File No. HQPRD 70/6.2.8 (Jan. 19, 2005), *published on* AILA InfoNet at Doc. No. 05012663 (*posted* Jan. 26, 2005), *reprinted in* 10 *Bender's Immigration Bulletin* 195 (Feb. 15, 2005).

See 2006 Yearbook of Immigration Statistics, *supra* note 4, at 20 (Table 6).

See generally S. Mailman & S. Yale-Loehr, "Immigrant Investor Green Cards: Rise of the Phoenix?," *N.Y.L.J.*, Apr. 25, 2005, at 3, *reprinted in* 10 Bender's Immigration Bulletin 801 (May 15, 2005), and at *www.millermayer.com/EB5NYLJ0405.html* (last visited Feb. 28, 2008).

Memorandum from Jacquelyn A. Bednarz, Acting INS Ass't Comm'r for Programs, "Designation of Regional Centers Under the Immigrant Investor Pilot Program," HQ 7C/6.2.5 (July 31, 1998); USCIS memorandum, "Active Approved EB-5 Regional Centers" (Oct. 2007), *published on* AILA InfoNet at Doc. No. 07110870 (posted Nov. 8, 2007).

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