



The Immigrant Investor Visa (EB-5)

In 1990 Congress created the fifth employment-based preference (EB-5) immigrant visa category for immigrants seeking to enter to engage in a new 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.”

Qualifying Investors

Any person, regardless of nationality may qualify for the EB-5 visa. Qualifying investors must, however, be actual persons and not corporations, although the investment must be made through a corporation. Two or more persons may join together to make an EB-5 investment. A single new commercial enterprise may be used by an unlimited number of investors, provided that: (1) each petitioning investor has invested (or is actively in the process of investing) the required amount; and (2) each investment results in the creation of at least 10 full-time positions for qualifying employees.

Defining a “New” Enterprise

The enterprise must be “new,” i.e., formed after November 29, 1990. 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 as long as each 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 a nonprofit enterprise. An investor may create a “new commercial enterprise” by reorganizing or restructuring an existing business. An investor can also create a new enterprise by expanding an existing business. To qualify the expansion must result in an increase of at least 40 percent in the net worth of the business or in the number of employees of the business.

Management of the Enterprise by the Investor

An EB-5 applicant must be involved in the management of the new commercial enterprise. The investor must be either 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 applicant 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.

Must Have Invested Or Be In The Process Of Investing

The statute requires an EB-5 applicant 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, the reality is that the entire capital amount must be already invested and at risk in the commercial enterprise at the time the EB-5 petition is filed.

Definition Of Capital

The regulations define “capital” as cash and cash equivalents, equipment, inventory, and other tangible property.

Indebtedness secured by assets owned by the investor may be considered capital as long as the investor is personally and primarily liable for the debts. The assets of the investment enterprise upon which the petition is based may not be used to secure any of the indebtedness.

Employment Creation

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 a person who (1) provides services or labor for the new commercial enterprise and (2) receives wages or other remuneration directly from the new commercial enterprise. The definition excludes independent contractors. 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 such positions meet the hourly requirement per week. The jobs do not have to exist at the time of initial investment or before the EB-5 petition is filed. A petition may be filed 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.

Status Acquired

If the petition is approved the investor and his or her immediate family (spouse and unmarried children under 21) will be granted Conditional Residency. This Conditional residency will be valid for two years. Prior to the end of the two years the investor must file a second petition with Immigration to remove the conditions. In the petition the investor must show that the investment enterprise is still commercially active and has the required ten (10) employees. If this petition is approved the investor and his family become Permanent Residents of the United States. Once an investor becomes a Permanent resident the investor may sell or liquidate part or all of the investment enterprise.