

Advising Clients on Regional Center vs. Individual EB-5 Petitions

By H. Ronald Klasko*

The profiles of the individual EB-5 investor and the regional center EB-5 investor are generally rather different. The individual EB-5 investor generally has the following characteristics:

- He or she actually wants to start and/or manage a business.
- His or her business will be creating employment up front.
- The investment is the driving force behind his or her wanting to come to the US.
- He or she wants to have control over his or her investment.
- He or she wants to maximize profits from his or her investment.

On the other hand, the regional center often meets the needs of investors with a different set of characteristics:

- He or she is not interested in starting a business.
- He or she may be a retiree.
- Although he or she may want to start a business, it will not create sufficient employment for an individual EB-5.
- He or she wants to be geographically mobile.
- He or she wants to spend most of his or her time outside of the US.
- Immigration - - rather than US business - - is the driving force behind his or her investment.

Partly because regional center investments address the needs of the foreign nationals described above, and partly because the standards for individual EB-5 petitions are so restrictive, the number of EB-5 regional center petitions has increased substantially in recent years and now well exceeds the number of individual EB-5 petitions.

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Comparing Regional Center and Individual EB-5

A major advantage of the regional center as compared with an individual EB-5 investment is that the center - - but not necessarily any particular project developed by the Center - - has been pre-approved by USCIS with respect to the qualifying amount of the investment and with respect to the job creation requirement. 8 C.F.R. § 204.6 (m). Although issues such as tracing the funds from the investor to the regional center and proving the lawful source of the investor's funds remain, the regional center investor usually will not have to deal with the many complicated issues involved in an individual EB-5 petition, such as whether the investment entity qualifies as a "new commercial enterprise;" whether the investment is in a "targeted employment area;" whether the investment is in a "troubled business;" and whether the requisite "employment creation" has taken place.

In addition, the regional center option is advantageous because:

- Indirect employment creation is allowable; and
- The foreign national can work anywhere he or she wants; or not work, as he or she pleases.

The following analysis illustrates the similarities and differences between the individual EB-5 investment and the regional center investment with reference to some of the major elements involved in EB-5 adjudications:

Amount of Investment:

Most of the approved regional centers have been approved as "targeted employment area" investments, thus qualifying for the reduced \$500,000 investment requirement. 8 C.F.R. § 204.6 (e). Individual EB-5 investments are either \$500,000 or \$1,000,000 depending upon whether the investor can prove that the investment is in a "rural area" or in an area which has experienced unemployment of at least 150% of the national average rate. Otherwise, if the investor does not meet the burden of proof on these points, the required amount of investment is \$1,000,000.

Job Creation:

An individual EB-5 petition requires proof of "full-time employment" as direct employees (not independent contractors) of ten U.S. workers. 8 C.F.R. § 204.6 (j)(4). Although technically the requisite employment does not have to have been created at the time of approval of the I-526 petition, adjudication history reveals difficulty in getting cases approved based upon business plans showing that the requisite employment will be created within the two year period after approval of the EB-5 petition.

This problem is solved with the regional center petition. Pursuant to 8 CFR §204.6 (e), the regional center can qualify based upon indirect employment creation generated in the community through the regional center investment.

The choice of regional center in which the investment is made is critical. In order for the investor to have conditions removed after the end of the two year conditional period, USCIS will have to be satisfied that the direct or indirect employment creation has actually taken place and that the job creation has taken place in the targeted employment area. 8 C.F.R. § 204.6 (a)(4). Choosing a regional center with a track record of employment creation thus enhances the likelihood that the investor will, in fact, be able to remove conditions, and become a non-conditional permanent resident on track to citizenship (if desired). The investor should scrutinize how job creation is documented and calculated and the economic models of job creation methodologies utilized for determining indirect job creation.

Management:

As part of the pre-approval process, the regional center had to satisfy USCIS that the investors would be engaged in the “management” of the enterprise as opposed to maintaining a “purely passive role.” 8 C.F.R. § 204.6 (j)(5). This must be proven on a case-by-case basis by the individual EB-5 petitioner.

Many of the regional centers are limited partnerships. Pursuant to 8 CFR §204.6 (j)(5)(iii), if the petitioner is a limited partner and the limited partnership agreement provides the petitioner with the rights, powers and duties normally granted to limited partners under the Uniform Limited Partnership Act, the investor will be considered sufficiently engaged in the management of the enterprise. As a practical and legal matter, this requirement can be met by a limited partner without the necessity of the investor committing to any specific amount of time or engaging in any day-to-day management, since such activities are performed by the general partner.

Source of Funds:

The requirement for the investor to prove the lawful source of his or her investment funds is the same for individual and regional center EB-5 petitions. 8 C.F.R. § 204.6 (j)(3). In both cases, the documentation requirements are extensive.

CHOOSING A REGIONAL CENTER

Assuming that the above analysis leads to the conclusion that an EB-5 regional center investment may be a good or the best option for a particular foreign national, a critical decision still remains. Some of the approved regional centers have long and well-established track records; other are newly established and relatively untested. Because of the importance of the regional center’s continued existence throughout the condition removal process, and the importance of the predicted job creation - - direct or indirect- - actually occurring in order to accomplish condition removal, the choice of regional center is an especially important one.

For this reason, we have compiled a list of questions that may be relevant in enabling an investor to choose the optimal regional center both for immigration purposes and for purposes of

addressing his or her investment needs and desires. In reviewing this list with their clients, most attorneys will want to draw a clear line between providing immigration advice and providing business/tax/investment advice. Presumably, it is the immigration attorney's role to provide some guidance on the immigration ramifications of a decision to invest in any particular regional center. Equally clearly, the immigration attorney will likely want to steer clear of providing any non-immigration advice.

The following is a suggested due diligence list:

1. *When was the regional center approved by USCIS, and has it gone through recertification?*

Regional centers that have more recently been approved may have little or no track record of successful immigrant petitions or of job creation. Some regional centers have become inactive, and some have not been recertified.

2. *Has the regional center's program been reviewed by the AAO?*

If so, there is an added level of security.

3. *Is the regional center affiliated with any government entity?*

If so, an added level of credibility exists; and the government entity may have experience in job creation.

4. *How many years of experience does the general partner or principal in the investment project have in working with immigrant investor programs?*

Some of the general partners or regional center creators have little or no experience with immigrant investor programs. Others have extensive experience both in the United States and with investor immigrant programs in other countries.

5. *How many years of experience do the principals involved in the regional center have in job creation?*

In order for the condition removal to be successful, actual jobs will have to be created. Principals who have extensive experience in actually creating jobs should be a consideration.

6. *Does the regional center investment include direct job creation, indirect job creation, or both?*

Although indirect job creation is acceptable for regional centers, projects with at least some significant amount of direct job creation may be safer alternatives.

7. *How many I-526 petitions have been filed by investors in the regional center? How many have been approved? How many have been denied?*

The regional center's track record is of critical importance. A record of a substantial number of approvals and no denials is optimal.

8. *How many I-829 condition removal approvals have the regional center investors received? How many denials?*

This is ultimately one of the most important questions. Approval of the I-526 petition is not the ultimate goal; approval of the I-829 condition removal petition is the goal. From an immigration point of view, the safest regional center investments are those in regional centers with condition removal approvals.

9. *Does the investor have to make a deposit or pay any fee for the offering materials?*

If so, the investor needs to evaluate the benefits of investing in a regional center that has such requirement versus one that does not.

10. *What is the amount required to be paid by the investor?*

In most regional centers, the investment amount is \$500,000. Regional centers generally have additional costs and fees of \$25,000 to \$50,000.

11. *Is payment made into an escrow account? Is the investment amount refunded if the I-526 is not approved?*

The provision of an escrow account with the money remaining in escrow until the I-526 petition is approved is a critical security feature for the investor. This is perfectly appropriate for EB-5 cases.

12. *Can the investor redeem his or her investment following condition removal?*

The investor will certainly want to have an understanding of the likelihood of being able to redeem his or her investment after a specified period of time following condition removal. With some regional centers, this is fairly certain; with others it is not. However, guaranteed redemption provisions may not meet the regulatory "at risk" requirement.

13. *What provisions are made regarding the security of the investment?*

Needless to say, the investor wants to perform due diligence regarding the likely security of his or her investment.

14. *What use is made of the investor's funds? What is the type or types of projects?*

Regional center investments may involve commercial building projects, condominiums, hotels, film, studios or other projects.

15. *What is the form of the investment—limited partnership, LLC or other?*

Limited partnerships are most common; however, other forms of investment exist in different regional centers.

16. *What has been the rate of return to investors historically?*

As with other investments, investors may need to balance the importance of immigration track record, security of the investment and rate of return on the investment.

17. *Does the regional center provide regular reporting of the status of the investment to the investors, and at what intervals?*

Optimally, the investor should receive a regular report with an update on the investment project, job creation and new investment opportunities.

18. *What precautions are taken to monitor job creation? What steps are taken if the requisite job creation has not occurred?*

The investor should look for a project with detailed job reporting on a regular basis and with a provision that failure to create the required jobs establishes a basis for reinvestment of the proceeds in another project, so as to keep the investor's immigration and investment process on schedule.

19. *Who are the attorneys who regularly represent the regional center?*

Some regional centers require the investor to use the regional center's attorney to file the investor petition, and others do not. The regional center's immigration attorney may provide review and counseling to an investor's attorney.

20. *Does the regional center's attorney contact the foreign national directly, or can the referring attorney maintain all contact with the foreign national?*

With some regional centers, the attorney deals with the investor directly. With others, even if the regional center's attorney is handling the investor petition, the attorney may deal only with the referring attorney at the referring attorney's request.