

Three Options for Developers Seeking Capital under the EB-5 Program

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The EB-5 program has proven to be a popular vehicle for developers seeking capital. However, a misconception has evolved in the developer community that creating a new regional center is the best or only option for the developer to raise capital from foreign nationals. In fact, there are three options under the EB-5 program. The best option is dependent upon the particular needs and plans of the individual developer.

A summary of the three options, including some of the advantages and disadvantages of each, follows:

1. Creating a New Regional Center

Advantages

- Developers can count indirect and induced employment opportunities, and not just direct jobs, in meeting the ten jobs per investor requirement.
- A particular project within the regional center may be pre-approved by USCIS.
- Regional center certification provides an aura of legitimacy or endorsement that may help in marketing to foreign investors.

Disadvantages

- Regional center certification may take a lengthy period of time – four months to one year is not unusual.
- Regional center certification may entail a significant expense, including hiring an economist, hiring a business plan writer, hiring an attorney and other expenses.
- Regional center certification is not the same as approval of any particular regional center project.
- Regional center certification is no longer a small, privileged group. Over 80 regional centers have now been certified.
- Many regional centers have not been able to attract any investors. Newer regional centers find it difficult to compete in their marketing efforts with long-existing regional centers with a track record of many immigration approvals, some with both I-526 and I-829 approvals.
- Regional centers have ongoing administrative and filing requirements with USCIS in order to avoid de-certification.

2. Having a Project “Adopted” by an Existing Certified Regional Center

Advantages

- All of the time and expense involved in developing a new regional center are eliminated.
- The existing regional center may have a marketing plan in place, and may even have existing investors ready to invest.
- Project pre-approval is available.

Disadvantages

- If the regional center is a profit-making enterprise, some of the developer’s profit may be siphoned off to the regional center operators.
- The developer needs to do serious due diligence with respect to the regional center. If the regional center operators are less than scrupulous, or provide less than complete information, the developer may be affiliating with a regional center with which, in retrospect, it wishes it had not been in association.
- The developer is ceding some control of its project to the regional center operator.
- The developer assumes the risk that the regional center operator may become de-certified.
- The regional center may need to amend its certification with USCIS in order to incorporate the new project, thus entailing delay.

3. Pooled Investments with Individual EB-5 Petitions

Advantages

- There is none of the expense involved with obtaining regional center certification or ongoing administration.
- No delays – as soon as investors are identified, the EB-5 petitions can be filed.
- Ongoing reporting requirements to USCIS are eliminated.

Disadvantages

- This is only an option if 10 direct employee positions will be created for each investor.
- The option of project pre-approval is not currently available.
- Marketing to foreign national investors may be more difficult without the aura of regional center designation.
- USCIS EB-5 adjudications are often quite restrictive if the 10 full time employees are not already employed.
- Ultimate removal of conditions for investors is dependent upon 10 full time employees being employed at time of condition removal, or within a reasonable time thereafter.

A Klasko, Rulon, Stock & Seltzer lawyer on the EB-5 team is available to consult with developers to determine the best option available to them.