

## Immigration Opportunities for Foreign Investors

Prior to the Immigration Act of 1990, a foreign national could not qualify for permanent immigration to the United States based upon an investment, no matter how large. Investors had to qualify, if at all, as employees of U.S. companies, family members of U.S. citizens or permanent residents or, in the alternative, obtain nonimmigrant (temporary) visas. As a result of this policy, many foreign investors immigrated to countries such as Canada and Australia, which have provided substantial incentives to foreign investors.

Presently, 10,000 immigrant (permanent) visas per year are available to foreign investors and their family members who meet certain, very specific criteria. These criteria are interpreted very strictly by the U.S. Citizenship and Immigration Services (USCIS). This Update, in a question and answer format, will address how foreign investors can now obtain permanent resident status in the United States

### **What is the minimum amount of investment required?**

For investments in areas other than “targeted employment areas,” the minimum amount of investment is \$1 million. Investments in “targeted employment areas,” including approved regional centers, can qualify with a minimum of \$500,000.

### **What is a “targeted employment area?”**

A targeted employment area is a rural area or a geographical area that has experienced unemployment at a rate of at least 150% of the national average rate. Individual states are authorized to designate geographical areas within the state that qualify as targeted employment areas. Of the 10,000 visas available for investors, 3,000 are reserved for investments in targeted employment areas.

### **What is included in calculating the investment amount?**

The entire amount of the investment need not be in cash. Assets transferred to the U.S. investment can be included at fair market value. Debt can be included in the required minimum investment amount but only to the extent that the debt is secured by assets owned by the investor, and the investor is personally and primarily liable. The assets of the business in the United States in which the investment is made cannot be used to secure any of the indebtedness.

### **Must the entire amount of the investment be made at the time of applying for an immigrant visa?**

The entire amount of the investment need not have been made at the time of applying for an immigrant visa. However, the investor must prove availability of the funds

and an actual commitment of the required amount of capital. A mere intention to invest or plans for a future investment where there is no present commitment of the funds will not qualify.

**Are there any restrictions on the types of businesses in which the investment must be made?**

The investment must be in a “new commercial enterprise” in the United States. “New” means that the investment must have been made after November 29, 1990. “Commercial” is to be distinguished from a passive, speculative investment, such as a purchase of real estate for use as a personal residence or for potential appreciation in value (as opposed to an active real estate development project).

The U.S. investment can be in any one of four forms: (1) the creation of a new business; (2) the purchase of an existing business, which is reorganized to form a new enterprise; (3) the expansion of an existing business; or (4) the saving of a failing business.

**Are there any specific rules regarding an investment in an existing business that enable the existing business to expand?**

The investment must result in a 40% increase either in the net worth or the number of employees of the business. For example, if a business has a \$5 million net worth and employs 50 people, the investment would qualify either if it increases net worth by \$2 million or if it results in an expansion of 20 employees.

**Must the investor have any specific relationship with the U.S. business in which the investment is made?**

The investor need not own any specific percentage of the business, be an officer of the business or be an employee of the business. However, the investor must be engaged in some way in the business, whether through actual day-to-day managerial control, by being a member of the board of directors, by being a limited partner, or the like.

**Must the investment result in the creation of employment for U.S. workers?**

The investment must create full-time employment for at least 10 U.S. citizens or immigrants (permanent resident aliens and other specified immigrant categories). The required 10 positions cannot include the investor or the investor’s spouse or children. The 10 jobs must be for employees of the enterprise in which the investment is made and cannot include independent contractors. However, for approved regional centers, the creation of employment is pre-approved and can include indirect employment.

**When must the employment be created?**

The required 10 jobs must be created within the two- year period immediately following the investor becoming a permanent resident.

**May an investor qualify based upon an investment in a failing business where the investment results in saving the business and saving the jobs of the business’s employees?**

An investment in a “troubled business” may qualify without a requirement of showing the addition of new jobs to the business. In order to qualify, the business must have been in existence for at least two years and

must have suffered a loss of at least 20% of its net worth during the past two years. The number of existing employees of the troubled business must at least remain the same for a period of two years.

**May two or more investors qualify for immigration based upon a pooled investment in a single business?**

There is no limit to the number of investors who may qualify for immigration based upon an investment in a single business. However, each investor must invest the required minimum amount, and the number of jobs created must be equal to ten times the number of qualifying investors. For example, if five investors each invest \$1 million in a business, they can each qualify for immigration if 50 jobs are created in the business.

**Is the immigration status granted to the investor valid indefinitely?**

The permanent resident status granted to the investor is actually a “conditional permanent resident status” that is valid for a period of up to two years. The investor and family members are required to remove the condition by filing an application during the 90 day period preceding the second anniversary of obtaining this status. The petition will be required to demonstrate the establishment of the business, the investment of the requisite amount of capital and the creation of the required number of jobs.

**Is the investor free to travel after obtaining conditional permanent resident status?**

The investor is free to travel in and out of the United States subject to the rules generally applicable to permanent residents. Specifically, the investor must actually have

a residence in the United States and must not be outside the United States for a continuous period of one year or more.

**What is the procedure for an investor to qualify as an immigrant based upon the investment?**

Form I-526, “Immigrant Petition by Alien Entrepreneur,” must be filed with USCIS. The petition must be supported by a substantial amount of documentation proving that the investor meets all of the requirements. Once the petition is approved, the investor may either apply for an immigrant visa at a U.S. Consul or, if the investor is in the United States, apply for adjustment of status to permanent residence.

**What documents must be filed with the petition?**

The basic rule is that there must be documentation to establish each of the requirements set forth above. Specifically, documentation must prove the actual transfer or commitment of funds; the lawful source of the investor’s funds; the location of the investment in a targeted employment area (if the investment is less than \$1 million); the establishment of the new commercial enterprise; the involvement of the investor; the business; and the actual creation of 10 full-time positions or a comprehensive business plan showing the need for the 10 employees and the approximate dates when they will be hired. Specific additional documents will be required depending upon the details of the investor and the investment being made.

**What documentation must be presented to prove that the investor's funds came from a lawful source?**

Generally, the investor will present some combination of individual and/or business tax returns, employment records, documentation regarding sale of a business, documentation regarding gifts or inheritance, and documentation regarding securities or real estate transactions.

**What is a regional center?**

USCIS has approved a number of regional centers. If an investor invests in one of these approved regional centers, the \$500,000 investment amount will be sufficient. In addition, the investor will not need to prove the creation of jobs for 10 U.S. workers.

**How can I obtain information on approved regional centers?**

Please contact H. Ronald Klasko ([rklasko@klaskolaw.com](mailto:rklasko@klaskolaw.com)). He will be able to send up to date information on all approved regional centers or on regional centers with the longest and best history of immigration approvals.