

Savills Studley Insights

March 2015



EB-5 INVESTMENT AND THE IMPACT ON COMMERCIAL REAL ESTATE

EB-5 and Tenants

Understanding how developers and landlords make use of the EB-5 program as part of their capital structure can be important for tenants to understand, particularly with regard to the benefits (and additional requirements) it imposes on its users. (Note that many, but not all, EB-5 investments involve commercial real estate development.)

- EB-5 capital is generally cheaper than standard forms of bank lending or insurance company-issued debt; all things being equal, the greater the fraction of borrowing financed by EB-5 investors, the lower a developer's overall borrowing costs. Note that EB-5 capital may allow a developer to use a higher degree of leverage than a private lender would otherwise allow.
- EB-5 funds are often deposited into escrow and released to a developer conditional on the government's initial approval of the project. Should the project not be approved, EB-5 investment capital may evaporate, leaving a developer scrambling for last-minute financing and potentially delaying the construction process.
- Government delays in processing the different applications required by EB-5 investors during the visa approval process may limit a developer's exit strategy; tenants should be aware that the use of EB-5 capital may keep a developer involved in a project longer than he or she anticipated.

The Immigrant Investor Program—also known as the EB-5 program—was created by Congress in 1990 to stimulate economic growth through foreign investment. While certain EB (employment-based) visas are set aside for foreign workers based on their academic credentials or workplace skills, the EB-5 visa program affords foreign nationals and their spouses

and unmarried children under age 21 the ability to obtain a U.S. visa based solely upon a minimum investment in a for-profit enterprise that creates or retains a specified number of jobs.

How the Program Works

The EB-5 program is administered by the U.S. Citizenship and Immigration Services (USCIS), which was formerly known as Immigration and Naturalization Service. Non-U.S. residents can invest in a U.S. business in exchange for permanent residency, provided that certain investment and job creation criteria are met. All EB-5 investors must invest in a **new commercial enterprise** established after November 29, 1990,¹ defined as any for-profit activity formed for the ongoing conduct of lawful business. Such enterprises may take the form of any legal entity, such as a joint venture, corporation or sole proprietorship, although non-commercial activities such as owning and operating a personal residence are expressly excluded. Note that foreign investment capital can be borrowed for purposes of the EB-5 program, “provided that the alien entrepreneur [immigrant investor] is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.”² “Invested” capital must also be at risk; the EB-5 investor cannot contribute capital in exchange for a guaranteed note or bond between himself/herself and the new commercial enterprise.

Each investment must create at least 10 full-time jobs within two years of the immigrant investor’s admission to the United States as a Conditional

Permanent Resident.³ The investor, his/her spouse and/or children may not be counted as part of the 10 new full-time jobs. Evidence that proves that the EB-5 investor will be in a policy-making or managerial role at the EB-5 project must also be provided.

Investors may opt to invest individually or as part of a larger investor pool via a **Regional Center**, an entity that has been designated by USCIS to attract immigrant investors in specific geographic areas in order to promote economic growth. While Regional Centers were originally designed to foster growth of exports, subsequent legislation expanded their mandate to also include “improved regional productivity, job creation or increased domestic capital investment.”

An investor who invests individually must show evidence that the investment will create 10 direct jobs—i.e., jobs that result because the newly-created commercial enterprise directly employs those individuals. In contrast, the Regional Center Pilot Program, introduced in 1993, allows for applicants to pool their investments into a larger project assembled by a Regional Center, for which **indirect jobs** may be counted. Indirect jobs are jobs that support the newly created enterprise—for example, the producers of materials that the newly-formed commercial enterprise uses—and are “created collaterally or as a result of capital invested in a commercial enterprise affiliated with a

regional center by an EB-5 investor.”⁴ Indirect job counts may only be used in job creation estimates if an investor affiliates with a regional center.

The specific required investment amount under the EB-5 program depends on whether or not the investment is made in an economically depressed location that qualifies as a **targeted employment area (TEA)**. In order to qualify for the TEA designation, at the time of investment, the location must be in a rural area⁵ or experiencing unemployment of at least 150 percent of the national average rate. The minimum qualifying investment either within a high-unemployment area or rural area in the United States is \$500,000; otherwise a \$1 million investment is needed to satisfy the capital investment requirement.⁶

A glossary of additional terms related to the EB-5 program appears in Appendix I. Note that subject to the total and per country limits for the program, there are no per state or per project visa limits.

Benefits of the Regional Center

More than 95% of all EB-5 investments now come via Regional Center applications, largely because an investor in a Regional Center is free of the day-to-day active management of a business. An investor in a Regional Center is able to reside anywhere in the U.S.; the “managerial role” requirement in the investment is fulfilled by having voting rights in a project structured as either

a limited partnership or limited liability company. In contrast, an individual investor would likely need to reside near the newly-created commercial enterprise he/she is managing. In a Regional Center project, evidence of indirect job creation is accomplished through economic models; recall that the new enterprise itself does not necessarily need to create the requisite number of jobs directly on its own. Evidence of the direct jobs an individual investor must create usually requires copies of new workers’ W-2 and I-9 statements—a much more rigorous standard—and a challenge to make sure that the new enterprise supports the jobs over the minimum two-year time period. The downside of a Regional Center investment is that most opportunities are not designed to offer a competitive rate of return to investors; those seeking to run a business and maximize profits are usually better served by investing individually.

EB-5 Process

- 1) Identify and invest in a new commercial enterprise that will create the required number of jobs, either on a stand-alone basis or via a regional center.
- 2) Individuals and regional center investors submit an **I-526** petition that verifies a) that the invested funds have been obtained legally and b) that the immigrant investor has invested, or is in the process of investing, the required amount of capital in a new commercial enterprise in the United States that will create full-time positions for not fewer than ten qualifying employees. Evidence that proves that the EB-5 investor will be in a policy-making or managerial role at the EB-5 project must also be provided. Approval (or “adjudication”) of the I-526 petition currently takes about 15 months.

3) After the I-526 is approved:

- 3a) If the investor is already legally in the U.S., he/she applies for Adjustment of Status to Conditional Residence via Form **I-485** and awaits approval through USCIS, provided that visas are available. The investor, investor’s spouse and any dependents must each file this form (this is typically done by an immigration attorney). This step can take about 4 months.
- 3b) If the investor is not residing legally in the U.S. he/she files electronic form **DS-260** and awaits an interview with a home country U.S. Embassy or Consulate—a process overseen by the State Department. The National Visa Center (NVC) states that applicants should “allow 60 days for the NVC to review your forms and

Table 1. EB-5 Filing Applications

Application Name	Application Title	Purpose	Average Processing Time
I-526	Immigrant Petition By Alien Entrepreneur	For use by an entrepreneur who wishes to immigrate to the United States.	14.7 months*
I-485	Application to Register Permanent Residence or Adjust Status	May be used to adjust the status of an immigrant investor already in the U.S.	4 months (CA, NE)**
DS-260	Immigrant Visa and Alien Registration Application	Online filing for immigrant visas for those currently residing outside the U.S.	Several months
I-551	Alien Registration Card	Permanent resident/Green Card. Has 2-year expiry for EB-5 participants.	1-2 weeks for temporary stamp at USCIS local office; 2-4 weeks for receipt of Green Card in mail
I-829	Petition by Entrepreneur to Remove Conditions	Removal of lawful permanent resident conditions for immigrant investors.	8.6 months*
I-924	Application For Regional Center Under the Immigrant Investor Pilot Program	To establish a Regional Center in order to legally accept investments.	9.0 months*
I-924A	Supplement to I-924	To demonstrate a Regional Center’s continued eligibility for the Regional Center designation.	n/a; must be filed within 90 days after the end of the fiscal year of the calendar year in which the fiscal year ended.

Source: <https://egov.uscis.gov/cris/processTimesDisplay/init.do>

* Processing times as of October 31, 2014.

**VT and TX centers have processing delays; the last applications processed had May 2014 filing dates.

¹ If the enterprise was formed before November 29, 1990, then the existing business must be restructured or reorganized in such a way that a new commercial enterprise results, or expanded through the investment so that a 40% increase in the net worth or number of employees occurs. In the case of a troubled business, the immigrant investor must only show that the number of existing employees in the troubled business is being or will be maintained at no less than the pre-investment level for a period of at least two years, i.e., ten jobs must be either created or preserved (or some combination of the two).

² <http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20%28Approved%20as%20final%205-30-13%29.pdf>

³ “Because the law contemplates two years as the baseline expected period in which job creation will take place, jobs that will be created within a year of the two-year anniversary of the alien’s admission as a conditional permanent resident or adjustment to conditional permanent resident may generally be considered to be created within a reasonable period of time.” See: <http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20%28Approved%20as%20final%205-30-13%29.pdf>.

⁴ See: <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor>

⁵ A rural area is any area outside a metropolitan statistical area (as designated by the Office of Management and Budget) or outside the boundary of any city or town having a population of 20,000 or more according to the decennial census.

⁶ In an area with an unemployment rate “significantly below” the national average rate, the Attorney General may increase the required capital amount invested to as much as \$3 million. See: 8 USC 1153(b)(5).

documents,” and also advises that “there may be a wait of several months for an interview date to become available.”⁷ Note that upon approval of the immigrant visa, the investor has a full 6 months to enter the United States and becomes a conditional resident upon entry.

After the above step, an investor receives Conditional Permanent Resident Alien Status Approval (I-551)— a Green Card with a two-year expiry. (Further detail on the differences between a Green Card holder and a U.S. Citizen appears in Appendix II.)

4) 90 days prior to the two-year anniversary of the conditional Green Card, an investor files a Petition to Remove Conditions on Residence (I-829), as the conditional Green Card (granted in the step above) cannot be renewed. The applicant’s conditional residency will be extended while the I-829 is being processed, and an applicant remains in valid status during this period. The I-829 petition must be accompanied by information showing that the applicant has

fulfilled all requirements of the EB-5 program, including evidence that the minimum investment has been made and continuously maintained, that the investor has been “active” in the business management process, and that the required jobs have been created. If the I-829 application is approved, the investor, his/her spouse and any unmarried children under the age of 21 receive a ten-year green card, renewable indefinitely, which confers permanent resident status. I-829 adjudication currently takes about 8-9 months.

A full list of the relevant filing document appears on Table 1 on the previous page.

Program Size and Limits

Every U.S. fiscal year (which runs from Oct 1st of the prior calendar year to September 30th of the current calendar year), 140,000⁸ employment-based immigrant visas are made available. The EB-5 program, which is one of five employment-based preference programs, limits the total number of investor visas to 7.1 percent of the employment-based total for any fiscal year, or 9,940. Of this amount, 3,000 visas per fiscal year are set aside for

qualifying immigrants who invest in a TEA-designated locale, while an additional 3,000 visas per year are set aside for investors in a Regional Center project. Note that there is a second layer of restrictions on the total number of employment-based visas allocated—limits by country. The total number of immigrant visas to natives of any foreign state made available under the family-sponsored immigrant visa program and the employment-based immigrant visa program in any fiscal year may not exceed 7 percent.⁹

Employment-based immigrant visas are issued in the chronological order in which the petitions are filed up until the annual numerical limit for the fiscal year per category is reached. The filing date of an I-526 petition becomes the applicant’s **priority date**; visas cannot be issued until an applicant’s priority date has been reached. (Further explanation of the importance of the priority date is contained in Appendix II.)

Up until earlier this year, the overall EB-5 visa quota had never been met either in aggregate or on a per country basis. In late August 2014, however, the head of the Department of State Immigrant Visa Control and Reporting announced that the EB-5 preference category had

Table 2. EB-5 Issuance by Fiscal Year and Country of Chargeability

Fiscal Year Total	Portion from TEA Regional Centers	All Other	Total EB-5 Issuance	Total EB-5 Issuance, China Mainland Only	Fraction of Total Issuance from Mainland China
2008	1,055	388	1,443	360	24.9%
2009	3,519	699	4,218	1,979	46.9%
2010	1,321	564	1,885	772	41.0%
2011	3,076	387	3,463	2,408	69.5%
2012	7,312	329	7,641	6,124	80.1%
2013	8,087	477	8,564	6,895	80.5%
2014	10,375	317	10,692	9,128	85.4%

Source: <http://travel.state.gov/content/visas/english/law-and-policy/statistics/annual-reports>

⁷ See: <http://travel.state.gov/content/visas/english/immigrate/immigrant-process/petition.html>

⁸ See 8 U.S.C. §1151 (d). The actual number is 140,000 plus the difference for the prior year from the statutory limit for the worldwide level of **family-sponsored** immigrants that may be issued and the number of family-sponsored visas actually issued in the previous year. The estimated total number of employment-sponsored visas was 150,000 in FY2014 and is 144,000 in FY2015.

⁹ See 8 U.S.C. §1152 (a)(2).

Table 3. I-526 Petitions by Entrepreneur, by Fiscal Year and Status

Fiscal Year Total	Petitions Received	Petitions Approved	Petitions Denied/Withdrawn	Petitions Pending
2008	1,258	642	120	853
2009	1,031	1,265	208	514
2010	1,953	1,369	165	1,125
2011	3,805	1,571	372	3,347
2012	6,041	3,677	957	5,018
2013	6,346	3,699	943	7,131
2014	10,923	4,925	1,169	12,453
Oct-Dec 2014 (Q1 FY2015)	2,941	1,652	133	13,526

Source: U.S. State Department.

become “unavailable” for Chinese applicants, implying that the maximum allocation of EB-5 visas for Chinese applicants had been reached for the current fiscal year.

While the State Department’s announcement over the summer had few practical implications (those who had been scheduled for EB-5 visa interviews in August or September remained on the consulates’ calendars, and visas were once again allocated once the new fiscal year started at the beginning of October) given the visa backlog and number of pending applications, the 2015 allotment of EB-5 visas for Mainland China applicants is likely to be reached before the end of the current fiscal year in September 2015, particularly if recent Chinese appetite for the visas (Table 2 on the previous page) is any indication.

The first step of the EB-5 process is the completion of the I-526 application, which is filed only by the foreign investor to USCIS with the required evidence of investment and job creation, among other things, alongside a \$1,500 filing fee. **There is no limit on the number of I-526 filings that may be made in any year, and importantly, there are no limits on the number of I-526 approvals in any year.** As USCIS states in the I-526 instructions, “if you have established that you qualify for investor status, the petition will be approved... approval...does not guarantee the U.S.

Embassy or U.S. Consulate will issue the immigrant visa.” The list of pending I-526 petitions is quite extensive: At the end of December 2014, there were over 13,000 petitions pending, even after a record-setting 4,125 approvals in the last fiscal year (Table 3), further indication of the program’s robust demand.

Following I-526 is approval by USCIS, each investor (along with his/ her spouse and his/her unmarried children under the age of 21) is eligible to apply for a Green Card, either via an adjustment of status through form I-485 (for those in the U.S.) or through an immigrant visa at a U.S. consul or embassy (for those living

Table 4. EB-5 Estimated Numerical Limits
(Assumes All Countries Use Maximum Visa Allotment)

Fiscal Year Total	China	All Other Individual Countries	Worldwide Cap Total
2014	45*	745	10,650
2015	15*	715	10,224

Source: http://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/Web_Annual_Numerical_Limits.pdf

* The Chinese Student Protection Act reduces the number of visas for Chinese applicants by 700 in the EB-5 category.

Table 5. EB-5 Waiting List for Overseas Applicants and Those Entitled to Derivative Preference Status,* As of 11/1/14
(Represents Approximately 14% of Total Applicants)

Country	Level	Fraction Represented
China (Mainland born)	5,169	80.5%
Vietnam	185	2.9%
Hong Kong S.A.R.	101	1.6%
China (Taiwan born)	97	1.5%
India	95	1.5%
Russia	70	1.1%
All Others	701	10.9%
Worldwide Total	6,418	100%

Source: <http://www.travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingListItem.pdf>

* Includes spouses and children under age 21.

abroad.) As a result, the 13,526 I-526 petitions pending likely imply at least two times the number of visas desired, assuming that each applicant brings, at minimum, a spouse or child.

Increasing Interest from China

The increase in the number of applicants to the EB-5 program has stemmed from an increase in interest from mainland Chinese, whose collective wealth has increased over the past few years. (According to a Boston Consulting Group study,¹⁰ the number of millionaire households in China rose from 1.5 million in 2012 to 2.4 million in 2013, and now surpasses Japan.) Many applicants see the EB-5 program as a means of providing for their children—first, with a U.S. education and later, by securing a job in the U.S. upon graduation. Note that if applicants from every country took the maximum number of EB-5 visas allotted (an extremely unlikely event) Chinese applicants would have only 15 new EB-5 visas available to them for the current fiscal year (Table 4 on the

previous page). Assuming a similar level of interest in EB-5 visas this year as last, however, it is likely that visas for Chinese investors will become unavailable for all applicants during Q2 2015 as demand for EB-5 visas surpasses annual supply.

According to the State Department, during FY 2014, 86 percent of all employment preference immigrants were processed as adjustment of status cases at USCIS offices—representing applicants who were already located in the U.S. For the roughly 14 percent of cases submitted by applicants based abroad—i.e., for whom processing occurs overseas at a U.S. consul office—the current waiting list for EB-5 visas is dominated by mainland Chinese. As shown in Table 5 on the previous page, the waiting list for EB-5 applicants outside the U.S. shows a total of 6,418 people (up 35% from the prior year)—approximately 81% of whom are from China.

As the number of I-526 applications move from “pending” to “approved,” it is likely that the number of I-485

applications—the next step in the visa application process for immigrant investors applying from within the U.S.—will increase. Even though the current visa bulletin¹¹ shows that EB-5 visas are “current” for applicants from all countries, visas likely will not be available to those Chinese with more recent priority dates toward the middle of next year.

USCIS produces a quarterly “Pending Employment-Based Form I-485 Report,” which displays the total number of pending adjustment of status applications per preference classification. Table 6 shows that the number of pending EB-5 visas rose by 40% between July and October of last year, before falling by half through mid-January 2015. The larger the number of pending applicants, the longer the waiting line for a Green Card, and the more likely it becomes that an investor who begins the EB-5 process by initiating a I-526 application today will have to wait to receive a visa. If a pending visa was part of the October table but not the January table (see the reduction in the number of pending visas for Mainland Chinese

investors with a 2012 priority date), we can assume that the removal from the wait-list likely represents visa approval (or, less likely, a withdrawal.) At the same time that pending cases are moving through to completion, however, new filings for cases with “current” priority dates are being added to the I-485 inventory (see the increase in the number of pending visas outside of China with a 2013 priority date.) Pending cases can represent a backlog and make it more likely that **retrogression** will occur. If one’s priority date is “current,” meaning that 1) a visa is available and 2) an applicant with an approved I-526 form files for adjustment of status via the I-485 form, the risk is that the backlog becomes so great that the “allowable” cut-off priority date for visas then moves backward (retrogresses). In this situation, even though one may have had a current priority date at filing, if one’s priority date is no longer current, the case must be held in abeyance until a visa once again becomes available.¹²

According to visa usage trends, the State Department has predicted that in May 2015 EB-5 visas will retrogress to a priority date of June 2013. If this occurs, beginning in May 2015 (and potentially for the balance of the fiscal year) only those EB-5 investors and their derivative beneficiaries with a Priority Date in June 2013 or earlier will be able to apply for an EB-5 immigrant visa.

How Does the Per Country EB-5 Visa Cap Affect Applicants from China?

Given an annual fiscal year cap for total EB-5 visa issuance as well as a per country limit, how was it that Mainland Chinese were able to obtain more than 85% of the visas available last year? The answer lies in the fact that the program remains relatively unpopular away from a few countries, such as China. Current immigration law specifies that if the total number of EB-5 visas for a given

Non-Current Priority Dates: An Example

How does an EB-5 investor with an approved I-526 know whether visas are still available? The State Department’s monthly Visa Bulletin, published around the 10th of each month for the following month, shows the status of visas by preference category and country of chargeability. A “C,” as shown on the table from the Bulletin below, means that visas are **current**—everyone may file for an immigrant visa abroad or submit an I-485 application. But what if visas aren’t current? If a specific date appears, rather than a “C,” the date shown is the **cut-off date**, which means that there is a quota backlog. Only individuals with a priority date earlier than the cut-off date may move forward with the visa process. Depending on the availability of immigrant visas and the actual usage of visas during the prior month, the priority dates in each category for each country can change each month or stay the same. While cut-off dates will normally move forward with the passage of time, cut-off dates may also move backward—a process known as retrogression. A third option is that no visas are available for the month: in this case, the Visa Bulletin may show “U” for a given application category rather than a cut-off date, which means that visas are **unavailable**. If one’s priority date becomes non-current after filing, one’s case will remain pending, but USCIS will only grant visa approval after the Priority Date becomes current once again.

Example: March 2015 Visa Bulletin, U.S. Department of State

Employment-Based	All Chargeability Areas Except Those Listed	CHINA-Mainland Born	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C
2nd	C	01SEP10	01JAN07	C	C
3rd	01JUN14	22OCT11	01JAN04	01JUN14	01JUN14
Other Workers	01JUN14	15AUG05	01JAN04	01JUN14	01JUN14
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th Targeted Employment Areas/Regional Centers and Pilot Programs	C	C	C	C	C

Table 6. Pending EB-5 Form I-485 Report, Waiting List for U.S.-Based Applicants and Those Entitled to Derivative Preference Status

(As of July 21, 2014, October 3, 2014 and January 12, 2015)

Priority Date Year	As of 7/21/2014			As of 10/3/2014			As of 1/12/2015		
	# from China	All Other	Total	# from China	All Other	Total	# from China	All Other	Total
2005	0	1	1	0	1	1	0	1	1
2006	0	0	0	0	0	0	0	0	0
2007	0	0	0	0	0	0	0	0	0
2008	0	2	2	0	2	2	2	1	3
2009	0	0	0	2	0	2	0	1	1
2010	0	2	2	0	1	1	1	4	5
2011	2	3	5	1	5	6	5	2	7
2012	8	15	23	5	12	17	7	16	23
2013	6	7	13	6	7	13	4	16	20
2014	91	43	134	131	79	210	47	17	64
2015	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0
Total	107	73	180	145	107	252	66	58	124

Source: <http://www.uscis.gov/green-card/green-card-through-job/previous-pending-employment-based-i-485-inventory/pending-employment-based-i-485-inventory>

¹⁰ https://www.bcgperspectives.com/content/articles/financial_institutions_business_unit_strategy_global_wealth_2014_riding_wave_growth/?chapter=2

¹¹ <http://travel.state.gov/content/visas/english/law-and-policy/bulletin.html>

¹² If one has been interviewed at a USCIS office and a visa is no longer available, then employment-based visa-retrogressed cases are held at the Texas Service Center (TSC) until a visa becomes available. Note that the last I-485 form that the TSC completed had a filing date of May 1, 2014, suggesting that the office is experiencing a significant processing delay.

¹³ See: 8 USC 1152.

EB-5: What’s in It for Developers?

calendar quarter “exceeds the number of qualified immigrants who may otherwise be issued such visas, the visas made available ... shall be issued without regard to the numerical limitation” that caps immigrant visas made available to natives of any single foreign state.¹³

In the wake of the real estate market downturn in 2008-2009, sources of domestic capital essentially disappeared; U.S. CMBS issuance, which had totaled \$230 billion in 2007, for example, was just \$3 billion two years later.¹⁴ Because

investments pledged via the EB-5 program cannot have any guaranteed rate of return (otherwise the capital invested is not considered “at risk”), from a developer’s perspective, terms are greatly preferable to more traditional bank financing and are less dilutive than equity financing.

Even though the EB-5 program does not favor real estate investment over any other type of investment, many EB-5 investors target commercial real estate, given the resulting job growth from construction work—and in the case of a hotel, restaurant, resort or stadium development—service-

related staffing. Projects typically cannot count the jobs created by tenants leasing the space in a property under the required job creation mandate—one reason that EB-5 investments often support hotel and multi-use developments.¹⁵ Hilton Worldwide and Hyatt Hotels have turned to EB-5 financing; Marriott has also used EB-5 funding to build Courtyard hotels in downtown Seattle and Midtown Manhattan as well as a \$168 million 377-room hotel near the Staples Center in Los Angeles. EB-5 investors funded part of Starwood’s W Hotel in Hollywood, California; foreign investors seeking visas are similarly being solicited for the SLS Hotel & Casino in Las

Vegas. Major developers have also formed their own regional centers for the purposes of soliciting EB-5 investments; Silverstein Properties’ regional center website (<http://silversteinrc.com/>) is marketing their Four Seasons Hotel New York, Downtown as an “EB-5 investment opportunity,” while Related Companies’ website (<http://www.relatedusa.com/>) explains the EB-5 program in both English and Mandarin and has raised significant funding for its Hudson Yards project to date.¹⁶

Not surprisingly, the number of Regional Centers requesting designation also has been steadily increasing. Whereas there

were just 11 Regional Centers at the end of FY 2007,¹⁷ as of February 2, 2015, USCIS had approved approximately 630 regional centers, many of which operate in multiple states. (In New York State alone, for example, there were 52 regional centers at the start of Q4 2014.)

Away from hotels, many less-traditional investments also have been successfully made under the EB-5 program; Manhattan’s George Washington Bridge Bus Terminal (181st Street and Broadway) and Battery Park’s Pier A have received EB-5 funding, as have two Vermont ski resorts—Jay Peak and Sugarbush—which received investment funds from the state’s Vermont Regional Center. Other “less traditional” projects also have included funding of a Riverside, CA solar panel delivery and installation company (SolarMax—via the Inland Empire Renewable Energy Regional Center) and North Dakota’s first new ethanol facility (Dakota Spirit AgEnergy—via CMB Export, LLC Regional Center).

A select sample of other EB-5 projects is shown in Table 7 on the previous page.

The EB-5 program has become an important source of capital for developers, particularly given the growth of foreign investment overall, and specifically from China (Table 8). While the lower funding costs associated with the EB-5 program are attractive for developers, the processing times associated with the approval process may limit a developer’s flexibility. Typically, investor funds are held in escrow until I-526 approvals are received, which can translate to funding delays of more than a year—one reason why the program works well for developers with an alternative means of bridge financing. Additionally, as there is no assurance that a project will receive approval, additional longer-term funding sources are almost always required. Developers

Table 8. Cross-Border Commercial Real Estate Transactions: From China to the U.S.

Year	Total # Properties	Total Investment (\$M)	Total Investment in Manhattan	Of Which: Manhattan Office
2009	3	\$63.7	n/a	n/a
2010	27	\$708.6	\$150.0	\$150.0
2011	13	\$1,091.4	\$890.3	\$881.8
2012	24	\$364.9	\$126.0	n/a
2013	44	\$3,199.5	\$2,095.8	\$2,085.0
2014*	47	\$5,697.5	\$3,131.7	\$728.0

Source: RCA.

All analysis based on properties & portfolios \$2.5m and greater. Not all property deals are included in aggregate statistics (such as entity-level transactions). Estimated prices are not posted, but are used in aggregate volume.

* Year-to-date, through December 10, 2014.

should be aware of the reputation that a given regional center has based on prior projects, particularly in light of several notable EB-5 investment scams over the past several years. Visa-seekers are unlikely to invest unless a Regional Center can prove that investments in prior projects yielded permanent Green Cards (and not just I-526 approvals).

Similar Programs

Many countries have programs similar to the U.S.’s EB-5 program, although one of the most popular programs was recently eliminated in Canada. The (former) Federal Immigrant Investor Program (IIP), which required applicants worth a minimum of C\$1.6 million (US\$1.4 million) to loan C\$800,000 interest-free to a Canadian province for five years, was halted in February 2014, leaving a backlog of tens of thousands of largely Chinese applicants. While a new program has yet to be announced, the thought is that it could be significantly smaller (120 applicants per year or less) with higher investment amounts that would be deployed into venture capital projects, leaving investors bearing the risk of loss.¹⁸ Note that other countries, such as the UK, offer investor visas that expressly prohibit investment in

real estate; the UK’s Tier 1 Investor Visa, which requires a £2,000,000 investment, allows for investment in “UK government bonds, share capital or loan capital in active and trading UK registered companies” but excludes investment “in companies mainly engaged in property investment, property management or property development.” Several other investor visa programs similar to the EB-5 program are shown in Table 9 on the following page.

EB-5: What’s In Store?

Looking ahead, it’s likely that the maximum number of allowable visas under the 2015 EB-5 program will be reached in Q2 2015. Given fears over a slowdown in China (and in particular, in China’s property market) it is likely that foreign appetite for U.S. investment will remain strong. We expect the list of EB-5 projects to continue to grow, particularly given demographic changes in the U.S. (Healthcare projects, such as hospices, long-term care facilities, medical centers and public housing for seniors could all see increased EB-5 investment.)

Both potential investors and tenants should be aware that the Regional Center program (which comprises the majority

Table 7. Select Projects that Have Received EB-5 Funding

Area	Project Name/Target Investment	Project Type	Regional Center	Details
New York City	Hudson Yards	Multi-use (office, retail and residential)	Related New York City Metro Regional Center, LLC	Approximately \$600M has been raised from 1,200 Chinese investors.
New York City	Atlantic Yards	Multi-use (Barclays Center Arena, office, retail and residential)	New York City Regional Center, LLC	Phases I and II have accepted approximately \$475M from EB-5 investors; Atlantic Yards III is in progress.
New York City	International Gem Tower	Office condo	Extell New York Regional Center	Pooled investment vehicles International Gem Tower Fund LLC (\$50M) and International Gem Tower Fund II (\$25M) provided debt financing to Extell.
New York City	Knickerbocker Hotel	Hotel	New York Immigration Fund Regional Center	Fel-Cor Lodging Trust raised \$45 million through the sale of 3.5% preferred equity toward hotel construction.
New York City	Steiner Studios	Film production	New York City Regional Center, LLC	Phase I (\$65M--completed) and Phase II (\$80M) were used to increase production capacity via construction of commercial soundstages and production support space.
New York City	New York Wheel	625-foot “Observation” Wheel	New York Metropolitan Regional Center	\$150M from 300 investors raised toward \$400M total estimated cost.
Los Angeles	Time Warner	Film production	Los Angeles Film Regional Center (now Los Angeles County Regional Center)	First loan amount of \$47.5M has been fully repaid; current EB-5 investments include \$225 outstanding in additional loans.
Pennsylvania	Lionsgate Entertainment	Film/TV production	Pennsylvania DCED Regional Center (Department of Community and Economic Development)	\$65.5M loan from 131 investors has been repaid.
Pennsylvania	The Navy Yard	Mixed use redevelopment of Philadelphia Naval Shipyard	PIDC Regional Center	\$18.5M total to-date in EB-5 investment of \$101.7M projected.

Source: Company websites and articles

¹⁴ See: http://www.crefc.org/CMSA_Resources/Research/Compendium_of_Statistics/CMBS_Issuance/

¹⁵ Note that in certain circumstances, the jobs attributable to prospective tenants are able to represent newly-created jobs that would meet the criteria for the EB-5 program to the extent that such jobs are not merely relocated. In a 2012 Guidance Memorandum, USCIS noted that “facilitation-based tenant job credit will depend on the extent to which applicants or petitioners can demonstrate that the economic benefits provided by a specific space project will remove a significant market-based constraint. One way applicants and petitioners can make this showing is to indicate how a specific space project will correct market imperfections and generate net new labor demand and income that will result in a specified prospective number of tenant jobs that will locate in that space. In high unemployment areas in which new projects are not likely to significantly displace other income or labor, applicants and petitioners should generally indicate how a specific project will fill an existing investment void in that area to generate new demand for the tenant business. Prospective tenant jobs demonstrated by reasonable methods and supported by verifiable evidence pursuant to the above approaches may be used as direct inputs into appropriate regional growth models to generate the number of indirect and induced jobs that result from the credited tenant jobs.”

¹⁶ See: <http://www.wsj.com/articles/hot-source-of-real-estate-financing-green-card-seekers-1418146394>

¹⁷ Source: http://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/Upcoming%20National%20Engagement%20Pages/2012%20Events/July%202012/EB5_Statistics_Q3_2012.pdf

¹⁸ Quebec has its own provincial immigrant investor program, which accepted a maximum of 1,750 applications through January 31, 2015. Some of Canada’s other provinces also have provincial investment programs.

Table 9. Select Foreign Investor Immigrant Programs Outside of the U.S.

Country	Minimum Investment Amount	Real Estate Investment Required?	Other Requirements	Notes
U.S.	\$500,000	No	Must create at least 10 jobs.	Lengthy processing time
Australia	\$ 1,500,000	No	Business Innovation and Investment ('188 Visa') with A\$1.5 million minimum requires nomination and has age cap. Provisional visa only.	"Significant" investor visas offer permanent residency in 4 years with a A\$5 million investment. "Premium" investor visas (coming 7/1/15) will offer residency after 12 months, but will require A\$15 million investment in higher-risk infrastructure projects ('457 Visa').
Cyprus	€300,000	Yes	Three-year bank deposit required; must not work or be engaged in business.	No minimum residency requirement.
Greece	€250,000	No	Does not confer right to work.	Real estate investment = 5-year residency permit (not visa); Strategic investment = 10-year permit. Each is renewable.
Portugal	€500,000	No	5-year investment requirement.	Alternatives to real estate investment include funds transfer above €1 million or creation of 10 jobs.
Spain	€500,000	No	5-year investment requirement.	Alternatives to real estate investment include €1 million in shares or bank deposits or € 2 million in public debt.

Source: <http://www.moi.gov.cy/moi/crmd/crmd.nsf/All/3C7DAE434B8C3953C2257D2A0039F247?OpenDocument><http://www.sef.pt/documentos/56/ARIEN2.pdf>; http://www.exteriores.gob.es/Embajadas/CANBERRA/en/Noticias/Pages/Articulos/20140218_NOT1.aspx; http://www.mfa.gr/missionsabroad/images/stories/missions/uae/docs/permit_ependytes_en.pdf; <http://www.immi.gov.au/visas/pages/188.aspx>; <http://www.immi.gov.au/visas/pages/188.aspx>

of EB-5 investment) is set to expire at the end of September. Although the program has already been extended and renewed several times (most recently from September 2012–September 2015), the program's continuity may be a bit more of a wildcard in the current political cycle given discussion of broader immigration reform. It's possible that opponents of the EB-5 program will be more vocal; Senate Judiciary Committee Chair Chuck Grassley, has criticized the program on the basis that visas may be going to people of "questionable background" from a national security and safety perspective.¹⁹ Other adjustments may also come under consideration, ranging from the number of visa approvals (note that the approximately 10,000 EB-5 visas per year includes the spouses and children of investors) to the definition of a "Targeted Employment Area" and the associated reduction in invested capital such a project requires versus projects located elsewhere.

If an increase in EB-5 visa applications causes priority dates to retrogress, the impact for participants could

be substantial. Based on the reading of USCIS' May 2013 policy memorandum,²⁰ developers should be aware of investment horizons longer than initially anticipated.

"If, two years after obtaining conditional permanent resident status, the immigrant investor has sustained the investment, created or can be expected to create within a reasonable period of time ten full-time jobs to qualifying employees, and is otherwise conforming to the EB-5 Program's requirements, the conditions generally will be removed and the immigrant investor will be an unconditional lawful permanent resident...the regulations require the submission of documentary evidence that establishes that it is more likely than not that the investor is in 'substantial' compliance with the capital requirements and that the jobs will be created 'within a reasonable time.' The 'within a reasonable time' requirement permits a degree of flexibility to account for the realities and unpredictability of starting a business venture, but it is not an open-ended allowance. The regulations require that the business plan

submitted with Form I-526 establish a likelihood of job creation "within the next two years," 8 C.F.R. § 204.6(j)(4)(i)(B), demonstrating an expectation that EB-5 projects will generally create jobs within such a timeframe. Whether a lengthier timeframe for job creation presented in a Form I-829 is 'reasonable' is to be decided based on the totality of the circumstances presented, and USCIS has latitude under the law to request additional evidence concerning those circumstances. Because the law contemplates two years as the baseline expected period in which job creation will take place, jobs that will be created within a year of the two-year anniversary of the alien's admission as a conditional permanent resident or adjustment to conditional permanent resident may generally be considered to be created within a reasonable period of time. Jobs projected to be created beyond that time horizon usually will not be considered to be created within a reasonable time, unless extreme circumstances, such as force majeure, are presented."

The "new commercial enterprise" that is the basis of the EB-5 applicant's

investment may not necessarily be the job-creating entity responsible for ten new full-time jobs. Projects may be structured so that foreign nationals invest in a limited partnership or LLC that provides a loan or takes an equity stake in a qualifying real estate development. As a result, it is the development, not the LLC, that is the job-creating entity. (In this case, the LLC would be the "new commercial enterprise".) If the limited partnership agreement or operating agreement between the new commercial enterprise and immigrant investor provides that the investor may demand return of or redeem some portion of capital after obtaining conditional lawful permanent resident status (i.e., following

approval of the investor's Form I-526 and subsequent visa issuance or approval of the investor's adjustment of status via Form I-485), that portion of capital is not at risk and conditions for a Permanent Green Card will not have been met. As a result, a developer may be "stuck" holding on to applicants' investment funds should there be delays in the visa process—including, but not limited to, retrogression. Such a delay can impede a developer's opportunity to recapitalize and/or exit a project during the process.

Aside from lengthier waiting times—both for visas and for a potential return of (and on) investment—concerns for investors are smaller, although those

investors seeking visas for their families, including children, should watch for the delays that can result in a child "aging-out." (Recall that only children under age 21 may qualify for an EB-5 visa with an investment from a parent; please see the FAQ in Appendix II for more detail.) Note that lengthier processing times will favor investment via Regional Centers (versus individual investment) for foreign nationals residing outside the U.S.; an individual investor is unlikely to invest in the U.S. and "actively" manage his or her investment from abroad. Aside from these issues, however, continued interest from U.S.-based developers and foreigners alike is likely to remain robust.

Heidi Learner
Chief Economist
hlearner@savills-studley.com
212.326.8648

Savills Studley is the leading commercial real estate services firm specialising in tenant representation. Founded in 1954, the firm pioneered the conflict-free business model of representing only tenants in their commercial real estate transactions. Today, supported by high quality market research and in-depth analysis, Savills Studley provides strategic real estate solutions to organizations across all industries. The firm's comprehensive commercial real estate platform includes brokerage, project management, capital markets, consulting and corporate services. With 25 offices in the U.S. and a heritage of innovation, Savills Studley is well known for tenacious client advocacy and exceptional service. The firm is part of London-headquartered Savills plc, the premier global real estate service provider with over 27,000 professionals and over 600 locations around the world.

¹⁹ See <http://abcnews.go.com/US/whistleblowers-us-gave-visas-suspected-forgers-fraudsters-criminals/story?id=28671577> and <http://www.theblaze.com/blog/2015/02/05/top-republican-vows-to-reform-corrupted-visa-program/>.

²⁰ <http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20%28Approved%20as%20final%205-30-13%29.pdf>

Appendix I: EB-5 Visa Terminology

Capital Investment means cash, equipment, inventory, other tangible property, cash equivalents and indebtedness secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital is valued at fair-market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) are not considered capital. Capital is considered “invested” when the EB-5 investor’s capital is actually transferred into the new commercial enterprise. Funds held in escrow are not counted as capital invested for the purposes of completing Form I-924.

Chargeability refers to the independent country to which an immigrant entering under the preference system is accredited. No more than 7 percent of the family-sponsored and employment-based visas may be issued to natives of any one independent country in a fiscal year. No one dependency of any independent country may receive more than 2 percent of the family-sponsored and employment-based visas issued. These limits are based on visa issuance rather than visa entries into the U.S. Chargeability is usually determined by country of birth. Exceptions are made to prevent the separation of family members when the limitation for the country of birth has been met.

Full-Time Employment means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week employing a U.S. citizen, permanent resident or other authorized immigrant worker. In the case of the Immigrant Investor Pilot Program, “full-time employment” also means employment of a qualifying employee in a position that has been created indirectly from investments associated with the Pilot Program.

A **Job-Sharing Arrangement** whereby two or more qualifying employees share a full-time position will count as full-time employment provided the hourly requirement per week is met. This definition does not include combinations of part-time positions or full-time equivalents even if, when combined, the positions meet the hourly requirement per week. The position must be permanent, full-time and constant. The two qualified employees sharing the job must be permanent and share the associated benefits normally related to any permanent, full-time position, including payment of both workman’s compensation and unemployment premiums for the position by the employer.

A **Qualified Employee** is a U.S. citizen, permanent resident or other immigrant authorized to work in the United States. The individual may be a conditional resident, an asylee, a refugee, or a person residing in the United States under suspension of deportation. This definition does not include the immigrant investor; his or her spouse, sons, or daughters; or any foreign national in any nonimmigrant status (such as an H-1B visa holder) or who is not authorized to work in the United States.

A **Troubled Business** is an enterprise that has been in existence for at least two years and has incurred a net loss during the 12- or 24-month period prior to the priority date on the immigrant investor’s Form I-526. The loss for this period must be at least 20 percent of the troubled business’ net worth prior to the loss. For purposes of determining whether the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

Appendix II: FAQ

1) How do quotas affect the timing of visa processing? What is the difference between a backlog and retrogression?

An applicant’s priority date is “**current**” if visa numbers are currently available for I-485 applicants (or those seeking a visa at a U.S. consular office) following I-526 approval. If there is no visa backlog, an applicant’s priority date will be current. When a visa backlog exists, a date will be noted; in order for an applicant to move forward with visa processing, his/her priority date must be before the date listed. (The date listed is the “**cut-off date**.”) Only those applicants with a priority date earlier than the cut-off date can proceed with visa processing, either at a consulate or embassy abroad, or through approval of an application for adjustment of status (I-485) if in the United States via USCIS.

In an effort to hold the number of visas issued in a given month to remain within the allowable limits of visas that will be made available in a given fiscal year, the State Department publishes cut-off dates (where applicable) in their monthly bulletin: <http://travel.state.gov/content/visas/english/law-and-policy/bulletin.html>. These bulletins indicate immigrant visa availability for the upcoming month (e.g., March 2015 immigrant visa cut-off numbers were published around February 10th, 2014).

Usually the cut-off dates on the Visa Bulletin move forward in time, but not always. Demand for visa numbers by applicants with a variety of priority dates can fluctuate from one month, which affects subsequent cut-off dates. If a cut-off date moves backward, **retrogression** is said to have occurred, which happens when more people apply for a visa in a particular category or country than there are visas available for that month. As with backlogs, the principal applicant and his or her derivative(s) must maintain their eligibility while waiting for the priority date to again become current and the immigrant visas to be issued. Retrogression typically occurs toward the end of the fiscal year as visa issuance approaches the annual category, or per-country limitations. When the new fiscal year begins on October 1st, a new supply of visas is made available and cut-off dates usually return to where they were before retrogression.

2) What if the investment fails to meet USCIS’ job creation criterion?

Assuming that the sole motivation for an EB-5 investment is to acquire residency status, USCIS allows an investor’s money to be held in escrow until the investor has obtained conditional lawful permanent resident status, if:

“The immediate and irrevocable release of the escrowed funds is contingent only upon approval of the investor’s Form I-526 and subsequent visa issuance and admission to the United States as a conditional permanent resident or, in the case of adjustment of status, approval of the investor’s Form I-485. An investor’s funds may be held in escrow within the United States to avoid any evidentiary issues that may arise with respect to issues such as significant currency fluctuations and foreign capital export restrictions. Use of foreign escrow accounts however is not prohibited as long as the petition establishes that it is more likely than not that the minimum qualifying capital investment will be transferred to the new commercial enterprise in the United States upon the investor obtaining conditional lawful permanent resident status. At the Form I-829 stage, USCIS will require evidence verifying that the escrowed funds were released and that the investment was sustained in the new commercial enterprise.”²¹

3) What happens if a child is under 21 when a parent files as an EB-5 investor, but the application isn’t adjudicated until after the child turns 21?

U.S. law restricts benefits for children of immigrant visa applicants to an applicant’s unmarried children under the age of 21. Lengthy processing times can affect the ability of a child to receive a Green Card due to a parent’s successful EB-5 application; the Child Status Protection Act (CSPA) provides relief for children who would have maintained eligibility if not for the time USCIS took to adjudicate the immigrant visa petition. Provided that the child’s **CSPA-adjusted** age is under 21 at the time the immigrant visa is issued to the principal, the child will be eligible to receive a visa based on age, even if the child’s true age is 21 or over.

CSPA subtracts the time the petition was pending from the child’s age to produce a child’s “CSPA age.” If the child’s CSPA age is under 21 at the time the priority date becomes current, and the child takes a step toward pursuing that immigrant visa within one year of becoming current (such as filing an I-485) then the child’s age is “locked-in,” and he or she will be protected from aging-out. In this case, prolonging the period of I-526 adjudication to close the gap between the adjudication period and the time the visa becomes available will increase the likelihood that the child derivative’s age at the time of visa availability is under 21 for CSPA purposes.

²¹ <http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20%28Approved%20as%20final%205-30-13%29.pdf>

Appendix II: FAQ (Continued)

Example 1:

- Child's birthday: December 1, 1993
- Date I-526 petition **filed**: October 1, 2014 (priority date)
- Date I-526 petition **approved**: December 3, 2014
- Length of time I-526 petition was pending: 9 weeks or 63 days (December 3– October 1)
- Are visa numbers available for all qualified applicants? **YES**—EB-5 visas are listed as “current” in the State Department's monthly bulletin.
- Date visa is available: December 3, 2014
- Actual age of child on date visa became available: 21 years, 2 days
- CSPA age: 21 years, 2 days - 63 days < 21 years, so child has not aged out

Example 2:

- Child's birthday: December 1, 1993
- Date I-526 petition **filed**: October 1, 2014 (priority date)
- Date I-526 petition **approved**: December 3, 2014
- Length of time I-526 petition was pending: 9 weeks or 63 days (December 3– October 1)
- Are visa numbers available for all qualified applicants? **No**—EB-5 visas have a cut-off date of September 1, 2014. (Because the priority date is after the cut-off date, applicant must wait to apply for a visa.)
- Date visa becomes available: March 1, 2015
- Actual age of child on date visa became available: 21 years, 12 weeks
- CSPA age: 21 years, 12 weeks – 9 weeks > 21 years, so child has aged out

4) Green Card Holder vs. U.S. Citizen—What's the Difference?

A “Green Card” holder, also known as a legal permanent resident, has many of the same rights as U.S. citizens. A Green Card or Form I-551 confers the right to live and work in the United States and to travel to and from the U.S. In general, as long as one obeys U.S. laws, files taxes as a resident, and maintains residence in the U.S., one can remain a permanent resident. Deportation is rare, but can occur if one commits a criminal act (including acts of espionage or terrorism).

Unlike U.S. citizens, Green Card holders cannot vote in U.S. elections. They cannot remain outside the U.S. for unlimited amounts of time or make their home elsewhere, and must advise USCIS of changes to their address. Green Card holders cannot always get the same social assistance and welfare benefits from the federal government that U.S. citizens can; federal benefits such as supplemental security income (SSI), for example, aren't made available to otherwise eligible Green Card holders until they have lived in the U.S. for five years. U.S. citizens can petition for a longer list of foreign national family members to join them in the U.S. than permanent residents can; whereas a U.S. citizen can file an immigrant visa petition for a 1) spouse, 2) son or daughter, 3) parent or 4) brother or sister, a U.S. lawful permanent resident (Green Card holder) can file an immigrant visa petition only for a 1) spouse or 2) unmarried son or daughter.

There are two forms of Form I-551: permanent and conditional. EB-5 participants who have had their I-485 adjustment of status form adjudicated OR who have passed a consular interview overseas following the electronic filing of form DS-260 will receive conditional permanent resident status—status that is only valid for two years. Conditional permanent residents must file form I-829 in order to have their two-year status made permanent.

Form I-551 is the first step towards U.S. citizenship, as well. In order to become a U.S. citizen, a resident must first achieve Green Card status and only then is able to apply for citizenship through the naturalization process. Generally speaking, 90 days before the fifth anniversary of permanent resident status (including the two conditional years), an investor may apply for U.S. citizenship (provided that they meet all other requirements for naturalization). However, citizenship is not a requirement; many Green Card holders choose to live in the United States permanently but retain their original home country passport.

Appendix II: FAQ

5) Can construction jobs be counted toward the job creation requirement?

Historically, construction jobs have not been counted toward job creation because they are seen as intermittent, temporary, seasonal and transient rather than permanent. According to USCIS' Adjudication Field Manual, they now interpret that direct construction jobs may now count as permanent jobs if they: 1) are created by the petitioner's investment; and 2) are expected to last at least two years, inclusive of when the petitioner's Form I-829 is filed.

6) May an investor split his/her investment across projects?

In certain cases, yes. If an investor needs to invest \$1,000,000 (and create 10 jobs), the investor can satisfy the EB-5 requirement by investing in a commercial enterprise that deploys \$600,000 of the investment toward one business that it wholly owns, and \$400,000 of the investment toward another business that it wholly owns, as an example. In this instance, the two wholly-owned businesses would have to create an aggregate of ten new jobs between them. An investor cannot qualify, on the other hand, by investing \$600,000 in one commercial enterprise and \$400,000 in a separate commercial enterprise.

7) What role does the SEC have in monitoring EB-5 investments?

While brokers, dealers and their representatives as well as investment advisers and their agents must be registered with the U.S. Securities and Exchange Commission (SEC) and with their appropriate U.S. state securities' office, many regional centers are not established as SEC-registered broker/dealers and do not fall under the SEC's purview. As such, the SEC has provided a list of questions that EB-5 investors should ask of any regional center before making an investment. Please see: http://www.sec.gov/investor/alerts/ia_immigrant.htm

8) What happens if an I-829 is refused?

Generally, there is no right to appeal; because one's two-year conditional approval is at or close to expiration, the next step is usually a deportation hearing.

9) How can one expedite Regional Center designation?

The process for receiving approval as a Regional Center, which can take roughly 9 months, can be expedited in certain circumstances. (Michigan's state-run Regional Center, approved in April 2014, was approved in less than 80 days.²²) Public Law No. 102-395 (amended 2003) provides for priority to be given to Regional Center-affiliated individual petitions. However, the statute does not provide criteria for USCIS to use to determine how petitions filed under the Regional Center program should be given priority over one another. In general, USCIS evaluates the following criteria to decide the priority order for regional center approvals:

- Severe financial loss to company or individual
- Extreme emergent situation
- Humanitarian situation
- Non-profit status of requesting organization in furtherance of the cultural and social interests of the United States
- Department of Defense or National Interest Situation (Note: Request must come from official United States Government entity and state that delay will be detrimental to our Government)
- USCIS error
- Compelling interest of USCIS

²² <http://michigan.gov/snyder/0,4668,7-277--325824--00.html>