
THE EB-5 INVESTOR VISA PROGRAM: WHAT IS IT AND WHAT DOES IT MEAN FOR OREGON?

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With financing scarce and often difficult to obtain, it's little wonder that real estate developers across the Northwest are looking for new ways to fund their endeavors. Within the past three years, there has been an increasing amount of interest in the EB-5 Investor Visa Program as a potential source of capital as foreign nationals seek

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to invest in the U.S. According to a number of recent reports, there is a growing class of Chinese millionaires looking to invest in Oregon businesses and development projects through the EB-5 program. This article will provide an introduction to the EB-5 program, describe some of the common misperceptions and briefly discuss what the future of the program looks like for Oregon.

INTRODUCTION TO THE EB-5 INVESTOR VISA PROGRAM

The EB-5 program was created by Congress in 1990 as a mechanism to bring foreign capital to the U.S. and to create new jobs for U.S. workers, particularly in rural areas and areas of historically high unemployment. “EB-5” is an abbreviation of “Employment-Based Fifth Preference.” It simply means that of the six different visa categories available to foreign nationals seeking permanent residence in the U.S. through employment (as opposed to through family), the Investor Visa Program is the fifth. Under the EB-5 program, foreign nationals who invest at least \$1 million in a U.S. company (\$500,000 under certain circumstances described below), and who create jobs for at least 10 U.S. workers, can obtain permanent residence through their investment. Under the program, a total of 10,000 visas are available each fiscal year to foreign nationals seeking permanent residence through their qualifying investments.

Although the EB-5 program has been around for more than 20 years, it was underutilized for most of that time. For a variety of reasons, including the strong value of the U.S. dollar and unpredictable adjudications by the responsible federal agency, relatively few applications for permanent residence were filed by investors and even fewer were approved. Within just the past five years, the face of the EB-5 program has changed significantly. In just the last two years, the number of applications has more than quadrupled to 3,800 in Fiscal Year 2011. Previously, the investors came from a wide variety of countries including the UK, South Korea, and elsewhere. Today, the overwhelming majority come from China.

A number of factors have combined to create an environment that is particularly conducive to exponential growth in investment from China in particular: the continued depressed state of the U.S. economy, the number of bank-owned properties available at deep discounts, the relatively weak dollar, combined with a growing millionaire class in China which is looking to both protect its private assets from potential governmental interference as well strategically develop opportunities for themselves and their families.¹

The EB-5 program is administered by the U.S. Citizenship and Immigration Service (“USCIS”), the federal agency under the Department of Homeland Security (“DHS”) that replaced the legacy Immigration and Naturalization Service after DHS was created in 2003. There are two distinct EB-5 programs. Originally the program was only available to individual investors who purchased or created their own company

¹ “Might Davos Be a Layover for Chinese ‘Migratory Birds’?,” New York Times, January 24, 2012.

in which they invested the required capital. Two years later, Congress created a pilot program to pool investment in particular geographic regions through “Regional Centers” which are described in detail below.² First, it is helpful to understand the basic requirements of the individual investor visa program upon which the Regional Center model is based.

The primary requirements for permanent residence through an individual investment are:

- In most cases, the individual must invest at least US\$1 million in “capital” into the company. However, because the primary purpose of the investor visa program is to promote investment and job creation in geographic regions of greatest need, if the new entity “principally does business” in an area designated as a “Targeted Employment Area,³” the required investment may be reduced to \$500,000.
- The invested capital must be “at risk of entire loss.” That is, if the investor is *guaranteed* the return of a portion of his or her investment or a particular rate of return on the investment, that portion of the capital does not count towards the amount that must be invested and placed at risk. Similarly, capital that is governed by a redemption agreement that explicitly protects against the loss of the capital, does not count towards the qualifying investment because a promise to return the investor’s capital negates the required element of risk. Secured financing is permitted but the loan may be secured only by the personal assets of the investor and may not by the new commercial enterprise or its assets.
- The immigrant investor must be “engaged in the management of the new commercial enterprise” either through “day-to-day managerial responsibility or through policy formation.” Mere passive investment will not suffice. Rather, the individual investor must, at the very least, hold an executive/managerial position as a corporate officer and/or be an active member of the board of directors (if any). This is an area in which there appears to be much confusion both on the part of the foreign investors as well as their potential U.S. partners. Unless the investment is made in an enterprise that is

² Although the Regional Center program has been around since 1992, it is still officially a “pilot project” which requires reauthorization from Congress every two years. The program is currently set to expire again on September 30, 2012. However, it’s anticipated that Congress will again extend the program another two years and there’s talk about finally making it permanent.

³ Under 8 C.F.R. Sec. 204.6(e), a Targeted Employment Area or “TEA” is defined as either: 1) an area that has experienced unemployment of at least 150 percent of the national average, or 2) a “rural area” that is not within either a Metropolitan Statistical Area (as designated by the Office of Management and Budget) or the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the U.S.).

part of a qualifying “Regional Center” (described in detail below), the foreign national must be actively involved in the management of the company. For this reason alone, many investors from China, in particular, are instead choosing to invest through the Regional Center program.

- The investment must be in a “new” commercial enterprise. Normally, to qualify as “new,” the business must have been established after 1990. However, a commercial enterprise that was created before 1990 may also qualify if it is subsequently restructured or reorganized such that a new commercial enterprise results or if there is a “substantial change” resulting either in a 40 percent increase in the net worth or number of employees attributable to the investment. This is another common area of confusion. Again, unless the investor is applying under the Regional Center program, there must be a commercial enterprise that is an active and ongoing business concern that creates jobs for at least 10 U.S. workers. It is not enough for the foreign national to simply purchase residential or even commercial property valued at \$500,000 or \$1 million (depending on the location). While the investment may involve real estate, there must be an active and employing commercial entity involved in order to qualify (e.g., the investor could start up or join a mutual fund that purchases and develops commercial real estate but only if the enterprise created at least 10 full-time jobs for U.S. workers attributable to the foreign investment).
- The individual must thoroughly document the legitimate source of the funds to demonstrate that it was obtained through lawful means. This is an area that has always been closely scrutinized by USCIS. With recent rumors of Chinese (in particular) looking to get ill-gotten gains out of the country, it’s only a matter of time before both the officers at USCIS who adjudicate the initial investor visa applications, as well as U.S. Department of State officials who interview investors at the U.S. Consular posts abroad, make the documentation requirements more onerous for all. Because there are a couple of different federal agencies involved in the process, there are multiple opportunities to have an application go awry. Although it can be a difficult conversation to have, the legitimate source of the funds to be invested should be verified at the earliest possible opportunity to reduce the risk of problems down the road.
- In addition, the new commercial enterprise must create full-time jobs for at least 10 U.S. workers (defined as permanent resident/green card holders or U.S. citizens) not including the investor’s family members. Unlike the Regional Center program where the newly created jobs may be “indirect,” the individual investor program requires the newly created enterprise to directly employ all 10 new U.S. workers in positions that are demonstrably sustainable. In other words, they can’t be hired one day to obtain permanent residence for the investor and then all workers fired the next day. Importantly, while the employing entity may take any form permitted by law and may

have several owners/partners (including other foreign investors seeking permanent residence through the EB-5 program), the individual investor must be able to demonstrate that the 10 jobs were created as a result of his or her investment. This is another area of common confusion. Many potential investors mistakenly believe that they can pool their resources with other investors to reach the minimum required level (so that their combined investment reaches \$500,000/\$1 million). They also commonly but incorrectly assume that by pooling their required investment with other investors, the company need only hire a total of 10 workers. Instead, while pooling of qualifying investments is permitted, each investor seeking permanent residence under the program must be able to demonstrate that 10 new employees were hired as a result of his or her investment.

While the six eligibility criteria referred to above are not comprehensive, they are the basic primary requirements an individual investor must satisfy to obtain permanent residence through the EB-5 program. Historically, most applications for permanent residence submitted through the EB-5 program were submitted by individual investors who met the above requirements. One of the common problems faced by individual investors though (and one of the reasons the Regional Center program is growing in popularity), is that the application for permanent residence cannot be filed until after the new commercial enterprise is established, the funds are invested and placed at risk, and the employees are hired (or there is solid evidence that they will be within the next two years). Finding an existing business to purchase or deciding how to go starting a new business from scratch can be a daunting challenge, particularly for someone new to the U.S. marketplace.

Simply obtaining a visa to visit the U.S. to identify potential business opportunities can be a challenging process, particularly for someone who has never received a U.S. visa before. However, on January 22, 2012, the Obama Administration announced plans to make it easier for Chinese citizens to obtain visas and visit the U.S., with a goal of increasing by 40 percent the number of visas issued every year. Also, U.S. Department of State recently added Taiwan and South Korea to its list of trusted countries with which the U.S. maintains a reciprocal 90-day visa waiver visitor program. Taiwan and South Korea join a list of 36 countries whose citizens may visit the U.S. for up to 90 days without having to first apply for a visa at a U.S. embassy abroad. Importantly, although it may soon be easier for many wealthy Chinese citizens to visit the U.S. to meet with business partners, investigate potential investment opportunities, and even form the new entity, like all visitors, they must be careful to not actually “do business” as a visitor or otherwise engage in activity that might look like unauthorized employment. Anyone who wants to work in the U.S. must obtain an appropriate immigration status first (other than visitor).

Once an investor has established the new enterprise and can meet all of the eligibility criteria, he or she must submit a petition to USCIS requesting classification as a permanent resident. As a result of recent changes to streamline the application process and make decisions more uniform, all investor visa applications are now submitted to a single USCIS office which has recently hired a team of economists and

business experts to assist in the adjudication process. The recent improvements to the adjudication process are significant and encouraging. Historically, USCIS adjudication of investor petitions have been unpredictable. In the mid to late 1990s, applications filed by investors often languished without resolution. Hundreds of investors spent years waiting for decisions on their applications only to have them arbitrarily denied by an agency that seemed ambivalent at best to the investor visa program and which seemed to go out of its way to find reasons to deny applications. Finally, after being subject to class-action litigation and a scathing report by the U.S. Government Accounting Office in 2005, USCIS began to turn the program around. However, it is still the case that regardless of whether they invest their capital in their own newly established enterprise or through a preexisting and certified Regional Center, foreign investors risk not only the loss of all their funds but also the possibility that after going through the required process, they could be denied the opportunity to immigrate to the U.S.

Assuming that USCIS approves the petition, the investor must then complete an interview and apply for an immigrant visa at a U.S. embassy abroad. Thus far, it appears that most of the investors whose applications are approved by USCIS also successfully complete the visa interview process and receive immigrant visas. However, U.S. Department of State is an independent federal agency and even the approval of the visa petition by USCIS is no guarantee that the Embassy will issue a visa. With the exponential growth in the number of applications filed under the EB-5 program, it's likely only a matter of time before the agencies react by tightening up adjudications, particularly with respect to the evidence required to prove the legitimate source of funds.

Assuming that the investor receives an immigrant visa, he or she must then travel to and apply for admission to the U.S. to manage the new commercial enterprise and ensure its success. Initially, the investor receives a conditional status as a permanent resident that is valid for only two years. Ninety days prior to the expiration of the conditional permanent resident status, the investor must submit another application to USCIS demonstrating that the investor invested or "is actively in the process of investing" and has in good faith "substantially" met the capital investment requirement. The investor must also demonstrate that all other eligibility criteria have been met. Although the regulations provide a little leeway, ideally the investment of the entire amount of required capital and the hiring of the 10 new employees should be complete within the first two years and verifiable by the time the investor files the petition to remove the condition on his or her permanent resident status. Failure to file the application to remove the condition on the investor's immigration status or failure to meet the investment and job creation requirements (including material changes to the geographic location, organizational structure, capital investment projects, etc.) can result in the investor losing his or her permanent resident status and deportation from the U.S. For this reason, it's critical that investors have a solid and realistic business plan to start with which must then be implemented successfully within the two-year trial period. After five years of perma-

nent residence, including two years of conditional permanent residence, the investor may apply to become a naturalized U.S. citizen.

INVESTMENT THROUGH REGIONAL CENTERS

In addition to the process described above that is available to individual investors, there is a separate but related investor visa program which has been receiving growing amounts of interest and attention. Prior to 2005, the majority of all investors applied for permanent residence as individuals based upon their own newly created commercial enterprise. Today, the overwhelming majority of investors instead apply under the “Regional Center” program. Regional Centers are private, public or joint private/public economic units that are “established to promote economic growth, including increased export, sales, improved regional productivity, job creation, and increased domestic capital investment.” The goal of the Regional Center program is to focus investment, development and job creation within a particular geographic region. Often they are established by public entities such as cities and counties to promote investment within particular areas. Occasionally they are public/private partnerships. More commonly, they are established by private entities looking to attract investment from abroad to finance development projects within the boundaries of the Regional Center.

The Regional Center model offers a number of significant advantages both to the foreign investor as well as potential partners in the U.S. Specifically:

- Regional Centers make it easier for foreign investors to identify investment opportunities and begin the investment process because much of the groundwork is often already completed by the entity that created and operates the Regional Center. Regional Centers are generally established by U.S. entities that prepare and submit the application to USCIS requesting certification as a Regional Center. Once the Regional Center is certified by Immigration, foreign investors can work with the Center’s sponsor to either create a new commercial enterprise within the boundaries of the approved Regional Center or else make an investment in an existing and qualifying commercial enterprise. Many (though not all) operators of Regional Centers establish new enterprises within the boundaries of the Regional Center with the intent that foreign investors can simply buy into the company with the required investment amount, create the required number of new jobs, and readily qualify for permanent residence. Many companies within existing Regional Centers have been around for years and have a demonstrated track record of foreign nationals who have obtained permanent residence through investment in their businesses. U.S. developers seeking investment dollars from abroad could either create a new project within an existing Regional Center or else apply for certification of a new Regional Center to cover the geographic region in which the business is or will be based (with the onus that it normally takes 6 to 12 months to obtain approval of a new Regional Center application).

- Foreign nationals who invest in Regional Centers are not required to be directly engaged in the day-to-day management of the commercial enterprises in which they invest. Unlike individual investments, they may passively invest in the qualifying entity but then go live and work elsewhere in the country. This feature is a strong attraction to many investors who are merely looking for a place to invest their capital and would like the added benefit of the freedom that permanent residence in the U.S. affords, but don't want to be directly and actively involved in the day-to-day management of the company.
- The required investment is normally (but not always) the reduced amount of \$500,000. This is because although a Regional Center may be established anywhere in the U.S., most are created within a Targeted Employment Area or "TEA." As a result, investors need only contribute \$500,000 rather than the full \$1 million. Generally speaking, Regional Centers established within a TEA are more likely to attract foreign investors because of the reduced entry cost. Again, a TEA is a geographic region, big or small, located anywhere within a state which the State government has designated as a TEA either because it qualifies as "rural" or because there is a high rate of unemployment (150 percent of the national average). In an effort to drive investments into certain areas, New York has reportedly gone out of its way to certify questionable areas of Manhattan as TEAs, much to the chagrin of competing Regional Centers and States.⁴ According to the latest designation provided by Business Oregon, the State office authorized to designate TEAs, 25 out of Oregon's 36 counties qualify, as rural TEAs. In addition, significant portions of the remaining counties, including Multnomah County and even much of Portland, qualify as TEAs based upon historically high unemployment. Developers that are considering establishing a Regional Center to attract foreign investment or who hope to partner with foreign investors in a new commercial enterprise would do well to consider establishing the business within an existing TEA. Business Oregon, the responsible agency in this State, updates its list of designated TEAs once a year after completing analysis of state and federal unemployment figures. The current TEA map was published in June 2011 and is available at <http://www.oregon4biz.com/The-Oregon-Advantage/EB-5/EB5-maps.php>. A second map that charts the designated TEAs within the Portland metro area is available on the Portland Development Commission's ("PDC") website at <http://pdc.us/pdf/rfps/2010/REI-EB5-Visa-Investment-Program.pdf>. Business Oregon plans to publish a new map in June 2012 based on benchmarked data published in March 2012. It is also possible to request an individual TEA designation from Business Oregon for an area that is not currently listed on the TEA map (as the purveyors of the Regional Centers in the New York Times article have done). With the economy slowly improving, it's possible that areas currently designated as TEAs will no longer qualify in June. For more information about Oregon's TEAs

⁴ "Rules Stretched as Green Cards Go to Investors," New York Times, December 18, 2011.

and how to go about requesting a TEA designation, contact Business Oregon or visit www.businessoregon.com.

- Perhaps most importantly, the job creation rules are more flexible for investments made within a Regional Center. Rather than having to prove that the new commercial enterprise has directly hired at least 10 U.S. workers, businesses that are established within a Regional Center need only demonstrate (through extensive documentation) that at least 10 full-time jobs *will be* created either “directly” by the new commercial enterprise (e.g., employees of the new enterprise) or “indirectly” *as a result of* the new enterprise (jobs held by employees of other companies that are created as a result of the new enterprise, such as producers of materials, equipment, or services used by the new enterprise). The ability to satisfy the employment requirement through evidence of indirect job creation is one of the most attractive features of the Regional Center program because according to the governing statute and regulations, the jobs need not necessarily even be based within the geographic region of the Regional Center (though USCIS adjudications on this particular issue have varied).

WHAT THE FUTURE OF THE EB-5 PROGRAM MEANS FOR OREGON

Although the Regional Center program has been around for years and has been utilized extensively in other states, prior to 2011 there were no designated Regional Centers in Oregon. Everything changed in June 2010 when the PDC, inspired by Seattle’s success with the EB-5 Regional Center Program which has brought in millions in investment, issued a Request for Expression of Interest seeking entities willing to work with the City of Portland and the PDC to create an EB-5 Regional Center within the City’s boundaries. The PDC and the City offered to endorse and collaborate with the applying entity and to help develop the EB-5 Regional Center application’s business plan and geographic boundary selection that would attract investment, as well as further the goals and policies of the City.⁵

Today there are two certified Regional Centers in Oregon. In June 2011, USCIS certified the “Oregon Regional Center,” the first Regional Center in the state. The Oregon Regional Center was established by the American United Development Group, a multinational private development company with ties in Canada and China.⁶ According to the Center’s website, its local management includes John Carroll and Karen Williams of the Carroll family of companies as well as Mianshing Wang, Managing Director of the U.S. Secretariat of the China-U.S. Center for Sustainable Development. Later, the Los Angeles-based American Dream Fund received approval of its “Portland Regional Center.” According to a recent report, Pearl District developer

⁵ “Request for Expressions of Interest (REI): EB-5 Regional Center Formation,” Portland Development Commission.

⁶ “USCIS Grants Approval to Oregon’s First EB-5 Regional Center,” Press Release, Business Oregon, June 23, 2011.

and Portland business leader, Homer Williams, is currently partnering with the American Dream Fund to finance, in part, the development of the 225-room Residence Inn by Marriott in the Pearl District.⁷ According to the Portland Business Journal article, Mr. Williams is also working with another EB-5 Regional Center on a project in Los Angeles and now plans to form his own EB-5 company.⁸ In addition to the two existing Regional Centers, there are apparently at least five other applications for certification currently pending, including one submitted by Wilson Chen's company, American Pacific International Capital.⁹ Mr. Chen and his company gained renown after purchasing Portland's iconic KOIN Center in 2009, when the building was foreclosed on by New York Life Insurance, Inc.¹⁰

The sudden increase in the number of Regional Centers in Oregon is reflective of what's going on nationwide. In FY2007 there were only 11 certified Regional Centers. Today, there are 194 operating in 40 states. In just the first quarter of FY2012, 41 new applications for Regional Center Certification were filed with USCIS (as opposed to 110 in all of FY2010).¹¹ Similarly, 1,293 applications for permanent residence were filed by investors in the first quarter of FY2012 (most through Regional Centers) versus 1,955 in all of FY2010 and 776 in FY2007. However, the statistics provided by USCIS also suggest that with the sudden rush to create and certify new Regional Centers, many applicants have filed deficient applications. During the first quarter of FY2012, 61 percent of all new applications for Regional Centers were denied by USCIS versus 45 percent in FY2010. Denial rates in other areas of the program have also increased, but it's still a far cry from the period between 1995 and 2005 when applications filed by investors languished for years only to be denied arbitrarily. If nothing else, the investor visa program is a growing revenue source for USCIS which recently increased filing fees considerably to \$6,230 for the Regional Center certification application and \$1,500 for the application filed by the investor to request permanent residence.

In short, interest in the EB-5 program, and in the Regional Center program in particular, is growing exponentially. "EB-5" is becoming a household word among many wealthy Chinese (even if they are unaware of all of the program's requirements). Although many immigration lawyers and their clients have known about the program for years, with the economy struggling and financing difficult to obtain, the business and real estate communities have taken a keen interest in the program as have City and State governments around the country. However, it's not yet clear whether the burgeoning list of investment opportunities that are now available through newly certified Regional Centers will translate into the thousands of new

⁷ "Williams Hotel Seeks Immigrant Investors," Portland Business Journal, December 16, 2011.

⁸ Ibid.

⁹ "EB-5 Millions From Abroad," Portland Business Journal, June 24, 2011.

¹⁰ "Foreign Capital: Chinese Investors Put their Money-And Hopes for Green Cards-In Oregon," Oregon Business, April 2011.

¹¹ All statistics come from the presentation materials provided by USCIS at its most recent quarterly EB-5 Stakeholder Meeting, January 23, 2012.

jobs and tens of millions of dollars that have been predicted. The record number of people who applied for green cards through the EB-5 program last year is significantly higher than it was even three years ago (3,805 in FY2011 versus 1,028 in FY2009), but it is still far short of the total number of investor visas that are available each fiscal year (10,000). In fact, because of the discrepancy, Congress recently proposed creating a new investor visa program to utilize the unused numbers from the EB-5 program. Even if the record number of new applications filed thus far in FY2012 continues at its current pace, still only half of the available visas would be used up by year's end.

There is a clear upward trend in the number of applications for permanent residence filed by investors (the majority of which are filed through Regional Centers). However, the rate of increase is far outpaced by the number of entities filing applications for Regional Center certification. Between FY2007 and FY2012, the number of approved Regional Centers grew by 1600 percent while the number of approved applications for permanent residence filed by investors grew by only 127 percent during the same period. Significantly, the number of people who actually fulfilled the requirement of two years of conditional permanent residence and went on to obtain full permanent residence grew by only 29 percent, which suggests that many investors either ended up walking away from their investments within the first two years, failed to meet the eligibility criteria necessary to remove the condition on their status or simply decided not to seek full permanent residence in the U.S.¹² In other words, there are now more entities than ever competing for the limited (even if growing) pool of potential investors. Does that mean that the predicted wave of Chinese looking to spend tens of millions in the U.S. within the next five years won't come to fruition? Not at all, but anyone considering establishing a new Regional Center to attract foreign investment should complete thorough due diligence, market research and develop an EB-5 specific business plan development with the assistance of an expert before embarking on a new enterprise which must include a sound and realistic plan and strategy for identifying, screening and landing potential investors.

Every potential investor who has contacted me about the EB-5 program, without exception, has asked the same two questions in common:

- How much experience do you have/what is your success rate with EB-5 cases?
- Are you able to provide comprehensive, one-stop services?

While those questions have been posed to me as legal counsel, the concerns they represent I believe also translate to what they are looking for from business partners and Regional Center operators in the U.S. Having a website available in Chinese by itself is not enough. Being able to effectively communicate with potential investors in their own language and in a culturally sensitive way isn't a marketing advantage, it's a baseline necessity. The secret to success will be to demonstrate competency

¹² USCIS EB-5 materials.

(and ideally, past success) with respect to the EB-5 program in particular to assure the investor that he or she is likely to obtain permanent residence through the program and a return on the investment, while avoiding the temptation to make guarantees about either.

With a growing number of wealthy people from China now seeking to emigrate,¹³ the current economic conditions in the U.S., the Obama Administration, USCIS and State and local governments in Oregon all fully behind the EB-5 program, it appears that the stars have aligned for savvy developers in Oregon seeking to attract investment from abroad. ■

¹³ "Might Davos Be a Layover for Chinese 'Migratory Birds'?", New York Times, January 24, 2012.