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EB-5 VISA GUIDE

SCOTT LEGAL, P.C.
IMMIGRATION AND BUSINESS LAW



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OVERVIEW

If you want a green card and have ever thought about starting or purchasing a business in the United States, an EB-5 Investor Visa could be perfect for you. The EB-5 Immigrant Investor Visa (“EB-5 Visa”) requires that you invest either \$1,050,000 or \$800,000 (the amount depends on the location) and create 10 jobs. In return, the U.S. government will give you a Green Card. The government makes 10,000 of these visas available every year. The key advantage of this visa is that you get a green card out of it. The downside is that it is a very complex legal area, and the visa petition requires extensive documentation. The green card is initially issued for 2 years on a conditional basis and then the applicant must show that the jobs were created to remove the conditions.

1. THE EB-5 VISA REQUIREMENTS?

1.1 YOU MUST INVEST IN A REGIONAL CENTER OR DIRECT INVESTMENT

You must invest or be actively in the process of investing either \$1,050,000 or \$800,000. To invest the lower \$800,000 amount, the business must provide evidence that it is principally doing business in a targeted employment area (TEA). Under regulations effective Nov. 21, 2019, the United States Citizen and Immigration Services (USCIS), and not a state government entity, will determine whether an area is a TEA. You will find out more about the differences between the regional center and direct investment options below.

TARGETED EMPLOYMENT AREAS (TEA)

On November 21, 2019, the new EB-5 Modernization Rules were implemented. The rules increased the minimum investment amount from \$500,000 to \$800,000 for Targeted Employment Areas (rural areas or those designated as having an unemployment rate of at least 150% the national average). Under the previous rules, TEA designations were issued by each individual state, but now the federal government alone has this power. The new TEA rules apply for applications submitted after November 21, 2019.

The applicant must prove that the business location is a TEA at the time of the investment or when the Form I-526 (the EB-5 application) is submitted, whichever is first. If investments are made over time, the business must be located in a TEA at the time each investment was made. The business does not have to remain a TEA during the entire green card process (for example, when the I-829 is filed).

WHAT CONSTITUTES INVESTMENT FUND?

The investor must use their own capital to invest and the investment cannot be structured as a loan. Investment can be cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness to the NCE if secured by assets owned by the entrepreneur.

1.2 THE FUNDS MUST COME FROM A LEGITIMATE SOURCE AND BE TRACED TO THE BUSINESS OR REGIONAL CENTER

When filing an EB-5 petition, an investor must prove the money they are investing comes from a “legitimate source,” and that the money was “obtained through lawful means.” An investor must also provide a clear path of the funds traced from the origination point to the point where the funds are transferred to the regional center or company. The key theme to meet this requirement is documentation, and the documentation requirements are extensive.

That is, the application must answer the following questions:

- Where did the money come from?
- How was the money made?
- Who participated in making the profits?

Dollar for dollar accounting is not required, but in order to fulfil this requirement you must typically provide:

- Personal and business tax returns for five years that show you have made sufficient income to support your investment amount.
- Bank statements.
- Financial statements if the business already exists (audited statements are preferred).
- Registration material for a business that shows it was a legitimate business.
- Documentation to support the source of the money (for example, if you sold property like a home or stocks, you would need to provide all of the relevant details related to the sale).
- Copies of judgments or evidence of all pending actions against you from any court (whether the actions were commenced by the government or a private party).

There are a few additional points to consider:

- In practice, USCIS ventures well beyond the regulatory requirements and insists on more documentation than is outlined in the statute. You should be prepared to spend a significant amount of time on this requirement. Documenting lawful source of funds requires extreme attention to detail, and often requires that you provide documents for transactions that occurred over 5 years ago.

- It is only necessary to prove where and how the investor obtained the specific amount being invested. As a result, it is not necessary to prove where the investor obtained every dollar that he or she now has or ever had.
- The USCIS's focus on lawful source of funds often varies greatly by the applicant's nationality. The requirement can be especially difficult to meet where the applicant is from a country where no tax returns are required to be filed, or where the country has recognized problems with corruption.
- It is important to trace the funds to the original source. As such, if the funds were the result of a gift, the lawful source of the person giving the gift must be documented. If the source of funds was a loan, the lawful source of the lender's funds must be documented. As such, if you obtain the money from someone else, you should be sure that they are willing to turn over their tax returns and/or other information to support this requirement.
- You should always provide a well written description of the invested funds that is supported by and indexed to the evidence that you provide. Often source of fund documentation can be confusing and voluminous. USCIS will not spend time sifting through a large number of documents in order to figure out if the funds that were invested came from a legitimate source. Unorganized documentation could result in a denial.
- In many EB-5 cases, documenting the lawful source of funds can be the most time consuming part of the process, and is a common reason for petitions to be denied.
- Note that, for EB-5 investments, the requirement to document source of funds is the same whether the investment is a direct investment or a regional center investment.

YOU MUST TRACE THE PATH OF FUNDS

Once the investor has secured the investment amount, the investor must show clear evidence of the path the funds have followed. This means that USCIS requires evidence showing that funds eventually invested into the enterprise must be the same as those for which the investor provided documentation showing the legitimacy of the source of funds. For example, if the investor's source of funds (SOF) is from a mortgage of a house, the investor must show the mortgage funds being released by the bank into the investor's account. The funds will then be transferred from the investor's account into the project's account. There cannot be a break in the path of funds. This means that the investor cannot receive the mortgage funds in one account and then make the investment from a different account. Money in one account is not the same as money in a different account, regardless of whether they are all the investor's personal funds.

EXAMPLE: EB-5 SOURCE OF FUNDS INFORMATION FOR A FAMILY GIFT

Let us consider the following example: The applicant's parents sold a business that they operated for 10 years for \$10,000,000 in 2014. The funds are in a bank account in France in the

name of both parents. The parents wish to help their French national son get a green card and have decided to gift the money to their son.

The following list provides documents that would be needed to satisfy both the source of funds and path of funds requirements. The source of funds documentation demonstrates that the funds were earned through lawful means; the path of funds documentation traces the transfer of funds from the investor to the U.S. enterprise (*whether a regional center or a direct investment in a business*).

Documentation showing the source of funds:

- A personal statement from the investor describing her employment history, education, salary history, title, and job duties. A personal statement from the family (since the money is family money). The point of this statement is to give the examiner a general overview of who the applicant and those involved in providing the funds are. All facts included in the personal statement should be supported with documentation.
- Resumes and educational credentials of the investor and individuals providing the funds.
- Evidence of legal ownership of the company before its sale. Such evidence would include articles of incorporation, stock holdings list, company tax returns, registration certificates, business licenses, etc.
- 3 years of company tax returns for the 3 years immediately preceding the sale of the company.
- Signed and executed purchase/sale agreement.
- Bank statement showing proceeds from the sale of the company arriving in the personal bank account of the person who eventually made the gift.
- Signed gift letter to the investor verifying:
 - The date of the gift,
 - The amount of the gift,
 - The relationship of the parties,
 - Any special conditions of the gift (if any), and
 - The address of the donors.
- Description of how the parents obtained the funds.
- The investor's personal tax returns for the prior 5 years.
- The parents' personal tax returns for the prior 5 years.
- Documentation showing the path of funds (the transfer of funds to the investor):
 - The personal bank statement of the person giving the gift, showing the date the funds were transferred to the investor, and the amount of the funds being withdrawn.
 - Wire transfer statement, stamped by the bank, showing that funds were wired to the investor's personal bank account in the U.S. The statement should include the names and bank account numbers for all parties.

- Investor’s personal bank statement showing receipt of funds.
- Wire transfer order, stamped by the bank, showing the transfer of funds from the investor’s account to the EB-5 escrow account or U.S. enterprise (Regional Center).
- Investor’s personal bank statement showing withdrawal of the funds by the regional center.
- Bank statement of the U.S. enterprise regional center confirming receipt of investor’s investment funds.
- Signed subscription agreement from regional center, if applicable.
- Acknowledgement from the regional center or company stating that money was transferred from the investor.

1.3 THE INVESTMENT MUST BE AN AT-RISK INVESTMENT

The entire amount of the investment must be active or at risk. This means that you cannot just be thinking about buying a business – you must have actually put capital up that could be lost. The immigrant investor must have placed the required amount of capital at risk for the purpose of generating a return on that capital. There must be a risk of loss and a chance for gain. It is not enough to prove the transfer of EB-5 capital in full—the invested funds must also be demonstrated to be fully available to the job-creating entity. As such, you should provide contracts and commitments that show that the money is committed and will be used. You cannot just transfer funds to a business bank account. Also, the owner should not take money or distributions from the account.

For an EB-5 investment to be at risk, there must be a chance of financial loss. The financial resolution of the investment cannot be artificially determined before the investment. Contractual rights to repayment are not allowed, and the investor must acknowledge the potential of significant financial loss. Profit distributions are permitted, but only if they are not guaranteed and are not a portion of the investor’s minimum investment amount. However, EB-5 investments must, by EB-5 rules, offer the investor a chance of profit. As long as an EB-5 investment offers a chance of profit, there are no rules as to how good the investment must be. For an EB-5 investment to be considered at risk, the investor must provide evidence of the project actually undertaking the business activity. Without proof of actual business activity on the part of the project, USCIS cannot know whether the entity is bona fide and whether the investment will be used to stimulate the economy as intended. If a project cannot prove the commencement of business activities, its EB-5 capital is not considered at risk.

1.4 ELIGIBLE BUSINESS TYPES FOR INVESTMENT

You must make the investment in a “new” or “existing business enterprise” (*this allows you to create your own business or buy one*). A commercial enterprise is any for profit activity formed

for the ongoing conduct of lawful business. It may be a sole proprietorship, partnership (limited or general), holding company, joint venture, corporation, business trust, or other entity, and may be publicly or privately owned. A commercial enterprise does not include a non-commercial activity such as owning and operating a personal residence.

A new commercial enterprise (NCE) is any commercial enterprise established after November 29, 1990. Therefore, the immigrant investor can invest the required amount of capital in a commercial enterprise established after November 29, 1990, provided the remaining eligibility criteria are met.

1.5 THE JOB CREATION REQUIREMENT

You must demonstrate that the investment will result in the creation or preservation of at least ten full time jobs. Job creation is a main focus of the EB-5 program. Each investment (\$800,000 or \$1,050,000) must create at least 10 full time (at least 35 hours per week) jobs for qualifying U.S. workers. Proof that 10 or more qualified employees were employed must be provided at the end of the two-year conditional residency period in order to have the conditions on the green card removed. To receive approval on an I-526 petition, USCIS regulations generally require petitioners to include a business plan that proves that jobs will be created within the two-year period of conditional residence. Positions must be filled by “qualified employees,” which means they may not be filled by independent contractors or by multiple part-time positions combined to create one full-time position. Full-time is at least 35 hours of service per week. Qualifying U.S. workers also do not include the applicant or their immediate family.

INDIRECT JOB CREATION

Indirect jobs are created when the business buys goods and services from local firms as a result of the expansion. Indirect job creation can only be used by regional center investments. Direct investments can only count direct job creation.

DIRECT JOB CREATION

Direct jobs are those that exist through an employer-employee relationship between the company and the people it employs. Unlike with regional centers, for direct EB-5 investment, the jobs must be direct, full-time jobs; indirect jobs cannot be included. The jobs that are created must normally be “new” jobs. As such, if an applicant buys a business that already has 10 employees, the applicant would have to invest funds and create 10 additional jobs. There are exceptions to this rule, though, as when a company is doing very poorly or has been restructured.

1.6 WHAT ARE THE OWNERSHIP REQUIREMENTS?

There is no requirement regarding how much of the business the investor must own (*as there is for an E-2 visa, which requires at least 50% ownership by the treaty investor*). The ownership

amount can range from very small to 100% ownership. Partnership arrangements are also acceptable, and the investor could simply own limited partnership units. In some cases, owners will own just limited partnership units.

2. REGIONAL CENTER VS. DIRECT INVESTMENT

2.1 WHAT IS “REGIONAL CENTER”?

A regional center is a private enterprise, corporation, or a regional agency with a targeted investment program within a defined geographic region. The best way to think of a regional center is that it is a business that focuses on the development or construction of projects (for example, a hotel, a railway, etc.), and allows investors to invest in them in order to obtain a green card. This differs from the more direct EB-5 investments in which an individual want to start his/her own business. Regional center EB-5 petitions now account for over 90% of all EB-5 petitions.

WHY SOME SLECT A REGIONAL CENTER OVER DIRECT INVESTMENT?

An individual who wants to get an EB-5 green card by starting his/her own business has a very different profile from a regional center EB-5 investor.

The active EB-5 investor generally has the following characteristics:

- Desire to start and/or manage a business and hire staff.
- Desire for control over the investment.
- Desire to maximize profits from the investment.

Regional centers, on the other hand, tend to attract the following individuals:

- Those with no real interest in starting a business or managing staff.
- Those whose sole desire is to acquire a green card.
- Retirees.
- Those who prefer to be geographically mobile.
- Those who desire to spend a significant amount of his or her time outside of the U.S.
- Those for whom lack of control over the investment is not an issue.

SOME IMPORTANT CONSIDERATIONS ABOUT REGIONAL CENTERS

1. Regional center investors are now required to invest the full \$800,000 or \$1,050,000 before submitting the I-526 petition. You should therefore check with the regional center to ensure that the money will be returned if the petition is denied.
2. Regional center fees are around \$50,000, which would likely make your “net” return on any investment negative. Also, with long processing times and retrogression, normal holding time for the investment in the regional center is usually more than 5 years.

3. Even though USCIS “approves” regional centers, this approval of an EB-5 regional center application **does not**:
 - Constitute USCIS endorsement of the activities of that regional center;
 - Guarantee compliance with U.S. securities laws; or
 - Minimize or eliminate risk to the investor.

This means that you could invest money, lose it, and not get a visa. It is very important to note that regional centers can go bankrupt or fail to comply with the terms that will allow you to get your visa.

4. Some regional centers have been the subject of SEC investigations where the organizers were charged with securities fraud. You must perform a significant amount of due diligence before you invest. Think about the investment as any other investment that is subject to complete loss. Also, you may want to get an experienced securities lawyer to perform due diligence and to assess whether or not the regional center is complying with U.S. law.
5. A regional center must still create the requisite number of jobs. That is, for every green card issued, the center must create 10 jobs. If the center does not create the 10 jobs, you will not get your visa.
6. For regional centers, indirect employment job creation is permissible. This is a significant benefit since direct investors, when they attempt to remove the conditions on their visa, often face issues proving that they created 10 full-time jobs.
7. You should hire the appropriate professionals to perform due diligence in order to properly select a regional center.
8. There are over 670 regional centers USCIS has approved, and the list is rapidly growing. Some of the approved centers have well-established track records while others are new and untested. If a regional center has not been in existence for 2 years, it means that no one has obtained an unconditional green card through that regional center yet.
9. When you select a regional center you must typically also pick a specific investment project since most regional centers have several projects. The fact that one project has been successful does not provide any assurance that the next one will be.

2.2 WHAT IS “DIRECT INVESTMENT”?

Direct investment EB-5 investments are made directly into the job creating entity. The business can be any type of for-profit business operation. You must provide evidence of actual business activity, which means it is not sufficient to simply deposit cash in a business entity. Case law and regulation make it clear that merely establishing a business, capitalizing it, and signing a commercial lease are insufficient. In a direct investment, it is permitted for an EB-5 investor to be either in active management of day-to-day operations of a business or in a policy-making role affecting major business decisions (such as changing the business purpose, liquidation, or

termination of the business) such as a limited partner in a partnership setting or a board member in a corporation.

The investment can be used to start up a new business or invest in an existing business. There are complications when one wants to buy an existing business. Specifically, the investor cannot normally just purchase shares of a business from an existing owner, as the payment goes to the former shareholder rather than the business. This could be accomplished, however, if the buyer invested additional funds to meet the investment requirements. The buyer, however, would also need to be cautious about what the money is spent on.

There must be a nexus between the investment and job creation. As such, the investor can invest directly into an existing business, and the existing company must use the money to create jobs.

3. THE EB-5 VISA APPLICATION PROCESS

There are a number of steps that investors must complete to get a green card through the EB-5 visa program. The process is complicated, but if you have the funds, this is an excellent way for someone and their family to get green cards and ultimately become U.S. citizens. Here are the five key steps to get an EB-5 visa:

3.1 FIND THE APPROPRIATE INVESTMENT “PROJECT”

The first step is for the EB-5 applicant to find a project to invest in. This generally takes the form of either a new commercial enterprise for individual investors, or “regional center” projects.

If the applicant chooses to invest as an individual investor then they must locate an investment project or business on their own. For example, the investor could start or buy a manufacturing company (and then invest in the company), or start a restaurant franchise. This is a great option for people who really want to come to the U.S. to run their own business, and is also the option where the investor may be able to realize significant returns. Investors can also choose to invest through a mechanism called “regional centers.” The government has set up a special program called the Regional Center Pilot Program where investors can act more as passive investors and contribute funds to government-recognized entities. Under this program, businesses involved in promoting growth in certain geographic areas are approved as regional centers and may meet the job creation requirements of the law using “indirect employment” based upon approved methodologies. With this option, you would simply invest the money with the regional center and get a very small return (usually about 1%-2% or less) on your investment. There are a range of risk profiles associated with the regional centers and they are a great choice if you do not mind a low return and do not want to manage a business.

3.2 MAKE A CAPITAL INVESTMENT, THEN FILE AN I-526 PETITION

The next step of the process is for the applicant to invest the required investment amount in the project that they have chosen (whether \$1,050,000 or \$800,000 for a TEA). These investments are often made into an escrow account. After the money has been put in escrow, your qualified immigration lawyer will file a petition (I-526) with the government. In order to file an I-526 petition, the applicants must also present evidence that their investment will lead to the creation of 10 full time jobs for U.S. workers, and this is usually supported by a comprehensive business plan. In addition, the applicant must also prove that the funds came from a legitimate source. The processing times given by USCIS for I-526 processing is around 35 months.

3.3 RESPOND TO ANY REQUEST FOR INFORMATION

An EB-5 visa petition is an extremely complex and document-intensive petition. Moreover, as some applicants may be starting up a new enterprise, it may not be apparent to immigration officials the exact nature or basis of the financial data or strategy. As such, the government often requests additional information from applicants after the I-526 has been filed. This is a normal part of the process and allows the government to inquire about areas that they may not be clear about. You should take any requests for information to your attorney as soon as you receive them so that he/she can respond to the government appropriately.

3.4 APPLY FOR A CONDITIONAL GREEN CARD

There are a number of requirements that must be met to apply for an EB-5 visa, one of which is hiring 10 full-time U.S. workers. Since you do not need to hire the workers immediately, the government will issue you a conditional green card for two years. At the end of the two years, you will be required to prove that you have met the conditions and hired the required employees. EB-5 investors are eligible for this conditional green card once their I-526 petition has been approved. The exact forms that must be filed depend on whether you are in the U.S. or not. If you are in the country when the I-526 is approved, you would file a change of status petition (I-485). If you are out of the country, you would file documents permitting your green card to be processed at a consulate.

3.5 FILE FOR I-829 TO REMOVE CONDITIONS ON THE GREEN CARD

The Board of Immigration Appeals case *Matter of Ho* sets out all of the key components that must be in an EB-5 business plan. If you review this case, you will see that there are no real surprises. That is, all of the factors that *Matter of Ho* says should be in your business plan are really things that any good business plan developer would include. According to the case, when you file a I-526 petition, the EB-5 investor must submit a credible and comprehensive business plan that contains the following: A description of the business, what the business produces, or the

services provided and the objectives of the business. In addition, where relevant or applicable, the plan should describe the manufacturing or production process, the inputs required, and the supply sources.

1. A comprehensive market analysis that includes an assessment of competitors (names and why you can compete with them) along with the strengths and weaknesses of these competitors. This has to be a detailed analysis that includes financial data and looks at the competitors' products, services and pricing structures.
2. A description of the target market, including who you expect will buy your product or service and why. In addition, you should also detail any business that you have already secured and describe executed contracts. To the extent contracts have been executed, the specific terms and details should be included in the plan.
3. Where applicable, outline in the plan that the company has received or will receive project specific permits and/ or licenses.
4. A comprehensive overview of the marketing strategy of the business, including pricing, advertising, and how you will provide your products or services. You should detail the exact forms of marketing (e.g. Google Ads, newspapers, etc.) as well as the strategy.
5. A detailed personnel plan that outlines the business's organizational structure and personnel. You should detail both current and future hires along with pay, job descriptions, and benefits.
6. A significant amount of financial data, including sales, cost/expenses, balance sheet, cash flow, and income projections. You should also include all relevant assumptions.

Developing a good business plan takes a particular expertise and you should hire a qualified professional to develop your plan. This is particularly the case if you are seeking bank financing and/or applying for an immigration petition.

3.6 WHAT ARE SOME INADMISSIBILITY ISSUES?

If an applicant is found to be inadmissible, they will not be able to get the green card unless they qualify for a waiver. There are a number of reasons applicants can be found inadmissible, including criminal violations, past unauthorized entry to the U.S., fraud, misrepresentation of immigration facts, and health and other reasons. Even relatively minor crimes (e.g. shoplifting) can make someone inadmissible if the crime is considered a crime of moral turpitude.

While inadmissibility issues can present problems, they are not always fatal to the application. Where an applicant is found inadmissible, there is an option to file a waiver. However, this is a very complex area that often has a high bar to overcome. It is imperative that any inadmissibility issues be raised with a qualified immigration attorney as quickly as possible.

4. THE EB-5 VISA INTERVIEW

The main purpose of the EB-5 interview is to verify supporting documentation in the underlying petition and to make sure that the investor is not subject to any grounds of inadmissibility. While USCIS has already adjudicated the petition, the interviewer could ask anything about the petition that he/she wishes. That being said, the officer will usually focus on your general familiarity with the project, any grounds of inadmissibility, and your civil documents. While applicants that have chosen to apply at a consulate (or “consular process”) will always have an interview, individuals who choose to adjust status in the U.S. do not always have an interview. USCIS determines whether an adjustment of status application should have an interview on a case-by-case basis.

HOW FAMILIAR SHOULD I BE WITH MY EB-5 PROJECT FOR THE INTERVIEW?

Generally, an officer will not re-adjudicate an application since USCIS has already made a determination that the applicant has invested money and has satisfied the source of funds requirement. An officer will, however, expect the applicant to be familiar with the project they invested in. A review of the business plan is essential, and the applicant should also obtain a comprehensive update of the current status of the project.

You are not required to be an expert, but you should have familiarity with the project details. Details you should be expected to know include the nature of the project, how many jobs it has created and is projected to create, the total project amount, and the total EB-5 loan amount. Occasionally, officers will ask if you know what your funds were used for.

WHAT KEY DOCUMENTS TO BRING TO THE INTERVIEW?

Please note that you must bring original documentation to the interview (not copies). This applies to all documents including police reports and civil documents.

You should also bring the following to the interview:

- The cover letter for your I-526 petition
- The business plan for the project
- A copy of the I-526 petition that was filed
- All original documents submitted to NVC, including original birth / marriage certificates, etc.
- Bank statements (or other proof such as a letter from the bank) to show that funds were transferred out of escrow to the EB-5 project
- Information provided by the regional center project (*certificate, K-1, and project updates*)

WHAT SHOULD I BE PREPARED TO DISCUSS ON THE INTERVIEW?

- The name and description of the new commercial enterprise that they invested in
- Relevant dates related to the filing and approval of the petition

- The current status of the project
- The source of funds for the investment (where did the money come from?)
- Documentation that funds were released from escrow
- Any responses to any of the security questions in the DS-260
- Any factor that may make the applicant inadmissible

5. GREEN CARD WAIT TIMES, AND UNDERSTANDING RETROGRESSION

Under current U.S. immigration law, the wait for an immigrant visa (green card) is based on your place of birth. Retrogression happens because of the per-country limit of visas that was imposed by Congress. The Immigration and Nationality Act (INA) specifies that a single country can only be allotted 7% of the combined total number of visas allocated (whether family- or employment-based). In 2017, this meant that no more than 25,260 immigrant visas were given to any single country. New visas become available at the beginning of every fiscal year. The 10,000 EB-5 visas available each year are similarly allocated, and there are limits to the number allocated for each country.

If the number of applicants from a specific country is lower than the total number of visas allotted, then all the applicants will have a visa available to them. If the number of applicants from a specific country is continuously higher than the number of visas year after year, this creates retrogression, or an increasingly long waitlist of people who have to wait year after year until a sufficient number of visas becomes available. As such, an engineer from Iceland might wait less than a year for a green card, while an engineer from India can endure a wait of a decade or much longer.

The EB-5 program is currently retrogressed for China and Vietnam where nationals will have to wait years for a green card to become current. India is also expected to become retrogressed. As such, some have searched for other options. One of these options is for nationals to try to use an E-2 visa.

While an E-2 visa is available for some, it is not available for nationals from China or India. As such, nationals from these countries have looked at obtaining citizenship in Grenada (an E-2 treaty country) so that they can obtain an E-2 visa and come to the U.S. For nationals from China who could have a wait close to 10 years for an EB-5 visa in the upcoming years, an E-2 visa obtained based on Grenadian citizenship allows them to wait in the United States for their EB-5 green card category to become current.

To qualify for the E-2 visa, the applicant must demonstrate that he / she is in a position to “**solely direct and develop**” the E-2 enterprise. Put simply, the government requires that you own and actively participate in the running of the E-2 company. To show that you are “**in a position**” to develop and direct the business, you should be able to demonstrate that you own at least 50% of the company such that you have the authority to make decisions. It is also helpful to be able to demonstrate prior experience in running a business or experience in the same industry.

Activity that falls under the “**develop and direct**” category typically involves business management activities such as the daily management of personnel and business operations, the training and hiring of employees, and the management of the company’s finances. Business development activity, such as direction of marketing activities, pursuing and closing client leads, and meeting with prospective clients, also qualify as directing and developing the business. In some cases, it may be possible to substitute prior experience for proper training to do the job. Note that passive investments are not E-2 eligible.

6. THE EB-5 VISA FAQ

Scott Legal, P.C. has processed hundreds of EB-5 visas. Below, in no particular order, we have compiled the top 10 most common questions about the EB-5 visa.

Q: I heard that in order to get an EB-5 visa I have to create jobs for 10 people. If I buy a business that already has 10 employees, have I met the 10 employee hiring requirement?

Generally, no. In order to qualify for an EB-5 visa, an investor must create (rather than preserve) at least 10 full-time jobs for U.S. workers within two years of receiving the green card and entering the country. The key here is that the jobs must be created. Generally, existing jobs do not count towards the total. In a simple example, if a company has 10 full-time employees on day 1, and 20 full-time employees after 2 years have passed, this will satisfy the government’s requirement. More often than not, though, the calculation regarding employees is complicated since people resign, are terminated, and retire, and this must all be factored into the calculation. Your lawyer will work with you to best position your application and make sure that you are aware of how employees are counted. The answer is “generally, no” since, in certain situations, you may be able to prove that you “preserved jobs” instead of creating them. However, in order to do this you must meet very specific criteria that demonstrate that the business you purchased is a troubled business and those jobs would have been lost if you did not step in.

Q: Do I have time to create 10 full-time jobs or do I have to hire the employees on day 1?

When you obtain a green card under the EB-5 program, you are initially given a “conditional” green card with conditions that are removed in two years after you show that you have created

10 full-time jobs. You do not have to create the jobs on day one and, generally speaking, you have 2 years to create the 10 full-time jobs. The job creation estimate should be clearly delineated in your business plan, which should specify when you plan to hire the employees. In certain circumstances, you may even be able to hire employees within a reasonable time after the two-year period.

Q: I have heard that I can invest \$800,000 in a regional center that has been approved by the government. As the regional center has been “government approved” does that mean that I will get my green card for sure?

No. In order to attract foreign investors as a regional center, regional centers must submit an application and be approved by the government. This approval does not mean that your green card will be approved, though, since the regional center must still meet the stringent criteria of creating jobs. If the regional center does not do this, you will not get your green card.

Q: Since the regional centers must be approved by the government, is my investment safe?

No. When you invest in a regional center your investment is like any other at-risk investment, and you could lose all of it. You should evaluate the risk-reward profile related to the investment. Many applicants hire a professional (for example, a C.P.A.) to evaluate the investment. Regional centers have been known to go bankrupt – if this were to happen, you would likely lose your money and not get a green card. Like any other investment, regional center investments have an element of risk.

Q: How long does the EB-5 investor visa take to get and how much does it cost?

Processing times vary depending on the volume of applications USCIS receives. Estimated processing times are 35 months for the I-526 petition, and a couple months longer for processing of the applications through consular processing or adjustment of status. Those applying from countries that do not have waitlists should be able to receive their conditional green card in around 3 years. The timing could be longer if there are issues with the application or security concerns, or if the number of applications has significantly increased over the last year.

Legal fees usually start at around \$15,000 for the I-526 petition, and this amount will rise for complex cases. In addition, this amount does not include the hefty filing fees for the various petitions that must be filed. EB-5 visa investors also need to budget for regional center administration costs which vary considerably from center to center; currently the range is \$25,000 at the lower end to above \$60,000 at the higher end. Additionally, some regional centers charge an upfront deposit for a copy of their prospectus. You may also incur costs for investment evaluation and business plan development.

Q: Are there other good investor visa options?

The E-2 visa is also a great visa for an investor if you are from one of the treaty countries. Some opt for the E-2 visa because the investment requirement is significantly less and there is no specific job creation requirement. This visa is particularly attractive for those who have foreign source income that they may not want taxed in the U.S. The drawback of the E-2 visa is that it does not lead to a green card.

DO YOU HAVE MORE QUESTIONS?

If your question was not addressed in this guide, we encourage you to [schedule a consultation](#) with our firm. Our experts are here to provide personalized advice tailored to your unique circumstances, ensuring you have the clarity and guidance you need for your EB-5 visa application. Don't hesitate to reach out – we're here to help!

[**SCHEDULE A CONSULTATION**](#)

ABOUT SCOTT LEGAL, P.C.

Our law firm was established in 2012 by Ian E. Scott, an accomplished attorney and Harvard Law School graduate. Scott Legal, P.C. was founded on an E-2 investor visa, so we intimately and personally know the application process. In fact, our founder has personally held TN, H-1B, F-1, B-2, and E-2 visas. Scott Legal, P.C. currently has 11 full-time lawyers and professional staff to serve you, with a commitment to meeting all your immigration and business needs. Our lawyers or firm have been featured in The New York Times, Bloomberg, Forbes, NBC News, Business Insider, Super Lawyers, the American Bar Association, New York Bar Association, Martindale-Hubbell, and has accreditation and rating of **A+ by the Better Business Bureau**.

WHY CHOOSE US

Our clientele often includes ambitious investors looking to establish businesses in the United States, requiring expert guidance on obtaining investor visas and comprehensive business support. Our track record boasts over 2,436 visa and green card approvals, in addition to **400+ five-star reviews**, a testament to the satisfaction of those we have served.

KEY BENEFITS

Unlike many law firms who immediately assign clients to paralegals, at Scott Legal, P.C. you will almost always deal with an attorney. What sets us apart from other firms is our focus on finding solutions that will address both your short- and long-term needs. We are firmly committed to providing you with the highest level of customer service and we will always work diligently on your case.

SCHEDULE A CONSULTATION

You can schedule a consultation by filling up the form [here](#).