

Dollars and Jobs for EB-5 Green Cards: A Challenging Route to U.S. Residency

By Angelo A. Paparelli and Ted J. Chiappari *

The EB-5 employment-creation immigrant visa category -- which promises a green card if a foreigner invests \$500,000 or \$1 million earmarked to create 10 U.S. jobs -- has at times appeared to be a bureaucratic mashup of *Let's Make a Deal* and *The Price is Right*.¹ The coveted green card looms as the showcased prize in the background, with government officials and cash-hungry private-sector developers playing Bob Barker and Monty Hall, asking the foreign investor "contestant" to put up big bucks in advance for the privilege of choosing one of numerous investment opportunities obscured behind closed "doors." Unfortunately, game shows have losers, and these foreign investors often find themselves poorer, no wiser and without legal immigration status in the United States.

As American legend Homer Simpson reminds us in remarking on the adage, a fool and his money are soon parted, "I would pay anyone a lot of money to explain that to me."² The authors are hopeful that this article, provided *gratis*, will shed light on recent developments that promise to make the EB-5 program less a game of chance and more an exercise in intelligent green-card procurement.

Investment in Job Creation

The investor visa category has gone through dramatic changes over the years. Until 1976, an immigration regulation, 8 C.F.R. § 212.8(b)(4), offered a green card to foreign citizens who invested or were actively in the process of investing into a commercial or agricultural enterprise a mere \$10,000 (\$40,330 in 2012 dollars). Today, however, U.S. immigration laws favor high-dollar investors who lay down at least \$500,000 or \$1 million to become job creators.

The new visas-for-dollars deal began with the Immigration Act of 1990. Despite claims that the EB-5 was a ploy allowing foreigners to "buy" U.S. citizenship, Congress decided that up to 10,000 foreign investors per year (including one's spouse and minor children) could gain a green card in a two-step sequence over at least two years. This process, which is still in place today, requires the noncitizen to invest or be actively proceeding to invest at least \$1,000,000 in lawfully attained funds to establish a "new commercial enterprise" or invest in a "troubled business" that directly

¹ For background on these time-honored American TV game shows, see:

[http://en.wikipedia.org/wiki/The_Price_Is_Right_\(1956_U.S._game_show\)](http://en.wikipedia.org/wiki/The_Price_Is_Right_(1956_U.S._game_show)) and

http://en.wikipedia.org/wiki/Let%27s_Make_a_Deal. (All links current as of August 15, 2012)

² John Frink and Don Payne, "Homer Simpson: What I've Learned," *Esquire Magazine*, Jan. 10, 2010, accessible at http://www.esquire.com/features/what-ive-learned/ESQ0102-JAN_HOMER.

employs ten U.S. citizens (none of whom may be close relatives of the investor) on a full time basis within two years or in a reasonable time thereafter. A lesser sum, \$500,000, can be invested if the job-creating business activity is located in “targeted employment areas” – locales suffering unemployment at 150% of the national average – or in rural areas.

If the petition is approved, the investor and the immediate family may then apply for an immigrant visa or adjustment of status in order to be granted “conditional” permanent residence. Before the two-year anniversary of conditional residence, however, the investor must submit a petition to remove conditions and show that the full amount of the required funds had in fact been invested (“sustained”) in the business and that the ten jobs had been created during the two-years of the investor’s conditional residency or will be created in a reasonable time thereafter. If the second petition is approved, then green card status becomes unassailable, or, so to speak, truly and undeniably permanent.

In the early 1990s, the employment creation category was rarely used, so the U.S. government took added steps to encourage participation. At the administrative level, the immigration agency informally loosened the requirements to make the program more user-friendly, and that caused fraud schemes to flourish. In 1998, the government clamped down with a heavy hand, and well-publicized denials followed by protracted litigation and uncertainty made the program unattractive again.

At the same time, Congress in 1993 created a pilot program – essentially a second, parallel program - allowing “regional centers” – entities authorized by the immigration authorities to accept investors’ funds in return for a qualified promise by the center to create the ten jobs per investor directly or indirectly. The most important difference with the pilot program is the less challenging job-creation standard wherein jobs created indirectly across one or more geographic areas and industries can be calculated in theory without the need to identify the actual jobs or workers in such jobs. Moreover, as a practical matter, virtually all regional centers are in targeted employment areas, so the *de facto* investment threshold is \$500,000, rather than \$1,000,000.

New Life for the Program

The regional centers have breathed new life into the EB-5 program. The USCIS Office of Performance and Quality, Data Analysis and Reporting Branch, reports that in recent years the approval rate for initial investor petitions (Form I-526) have ranged from approval of 53% of all I-526 applicants in FY 2005 to approval of 79% in FY 2012, and petitions to remove conditions on residence (Form I-829) have been approved at a rate of 62% of all I-829 petitioners (FY 2005) to 94% of all I-829 petitioners.³ This recent trend of increased approval rates is a direct result of the USCIS’s greater confidence in its ability to regulate regional centers and adjudicate petitions by investors in those centers.

³ See April 23, 2012 Report, updated July 19, 2012, U.S. Citizenship and Immigration Services, “Immigrant Petition by Alien Entrepreneur (I-526) and Petition by Entrepreneur to Remove Conditions (I-829) Service-wide Receipts, Approvals, Denials, Fiscal Year(s): 2005 - 2012 (3rd Quarter).” Copy on file with the authors.

Alas, the EB-5 regional center program has in some ways become a victim of its own success. As demand for employment creation visas has risen, both because of the perceived relative ease of obtaining the green card through investment and because of the substantial delays, particularly for persons born in China or India, in obtaining the green card through an employer-sponsored visa, once again abusive and fraudulent investment schemes have flourished. Perceived fraud and abuse have led USCIS to tighten up its adjudications once again, resulting in an increase in requests for evidence, denials and therefore uncertainty for foreign investors.

To its credit, USCIS is now “actively in the process” of introducing a number of quality enhancements to its oversight and administration of the visa category, as reported in this July 18, 2012 “Message from Alejandro N. Mayorkas,”⁴ its Director:

The EB-5 program has spurred the creation of tens of thousands of new jobs and the Injection of billions of dollars into the U.S. economy since Congress created the program in 1990. Interest in the EB-5 program has grown exponentially in recent years, both from domestic project developers seeking capital and foreign investors who have the capital that can fuel economic growth. USCIS has met this unprecedented growth and interest with a corresponding dedication of resources. ... Since 2009, we have quadrupled the size of the EB-5 adjudications team and brought on board eight expert economists dedicated to the EB-5 program to ensure that EB-5 cases are handled expeditiously and with appropriate expertise. In the next month, two full-time attorneys with substantial transactional experience will enter on duty as new additions to the USCIS EB-5 program team. And by the end of July, a special Review Board consisting of two Supervisory Immigration Services Officers and one economist will review every pending application for regional center designation for which a denial has been recommended, with applicants receiving the opportunity to discuss their cases in-person before any final adverse decision is rendered...

[In addition,] the new office will be led by a new Chief of Immigrant Investor Programs ... [who] will have significant experience in the business world and will assume responsibility for ensuring that the program is administered efficiently, with integrity, with predictability, and with an understanding of today's business realities.

The announcement of USCIS program enhancements, including the creation of a regional center Review Board, the employment of eight economists, the anticipated recruitment and appointment of a new Chief of Immigrant Investor Programs, and the hiring of attorneys with transactional experience, cannot come soon enough for would-be EB-5 applicants.⁵ There are now 226

⁴ Copy of “Message from Alejandro N. Mayorkas,” an email from the USCIS Office of Public Engagement, on file with the authors, also accessible at: <http://www.aila.org/content/default.aspx?docid=40574> .

⁵ This is somewhat of a “Back to the Future” moment. The new “Chief of Immigrant Investor Programs” sounds very familiar to the old “Foreign Trade, Investment and Regional Center Program” (FTIRCP) office

USCIS-approved Regional Centers⁶ in which to entrust invested capital, and countless more designation requests in process. Some investments have failed or gone belly up, and in a few recent regional center situations, unscrupulous scam artists, taking little heed of U.S. and foreign securities laws,⁷ have fleeced investors in both sunny and rainy times, as one commenter⁸ has noted:

[The EB-5] program is so rife with fraud and corruption that it could actually have the opposite impact [of creating jobs] and deter[ing] investment. To regain its credibility, the program must make a number of changes to enable more transparency and demand more competence from its operators. . . .

Many investments have failed to create the required 10 jobs and even gone bankrupt, leaving the investor without his money or his green card.

While many EB-5 regional centers have solid records, a disturbing number have directed investor money to risky projects and companies that pay little to no return, overseen by brokers who get a commission regardless of how the investment plays out.

Aside from accusations of outright fraud, there is also a clear lack of understanding among government administrators about how to manage an investment program.

that was working relatively well until it was unceremoniously abolished in December 2009. The main innovation of the “Chief of Immigrant Investor Programs” appears to be the creation of the “special Review Board,” an idea first floated over a year ago when USCIS disclosed it was considering implementing “Premium Processing” (expedited adjudication) of EB-5 matters. The “Premium Processing” initiative seems to have faded away, but the “special Review Board” idea has survived. See, January 19, 2005 Memorandum of William Yates, USCIS Associate Director of Operations, “Establishment of an Investor and Regional Center Unit,” HQPRD 70/6.2.8, accessible at: <http://1.usa.gov/MgbmHS>, and December 11, 2009, Memorandum of Donald Neufeld, USCIS Associate Director of Operations, “Adjudication of EB-5 Regional Center Proposals and Affiliated Form I-526 and Form I-829 Petitions; Adjudicators Field Manual (AFM) Update to Chapters 22.4 and 25.2 (AD09-38),” HQ 70/6.2, AD 09-38, accessible at: <http://1.usa.gov/OZMze4>.

⁶ The USCIS makes the list available online at: <http://1.usa.gov/O70FtT>.

⁷ For background on securities law issues in the EB-5 context, see Jennifer Mercier Moseley, Angelo A. Paparelli, Ladd W. Mark and Carolyn Lee, “The Relevance Of U.S. Securities Laws To Immigrant Investors, EB-5 Regional Centers And Their Advisors,” 14 *Bender's Immigration Bulletin* 938 (Aug. 1, 2009), accessible at: <http://bit.ly/OPgEgj>.

⁸ Ann Lee, “Making Visas-for-Dollars Work,” *New York Times*, April 16, 2012, p. A19, accessible at: <http://nyti.ms/HLLrdx>. Similarly, see, James Kelleher, Karin Matz and Melanie Lee, “Special report: Overselling the American dream overseas,” Reuters, Dec. 22, 2010, available at: <http://reut.rs/gFpylv>.

Looking Ahead

Although the regional center program has strengthened the EB-5 category, the program faces a sunset on September 30, 2012 -- one of several since its creation in 1993. Fortunately, a bill to reauthorize the EB-5 regional center program, S. 3245,⁹ recently passed the Senate, and prospects for House passage are promising.¹⁰

Still, reauthorization of the regional center program by itself is insufficient. The government immigration agencies, especially USCIS, must do more than follow Director Mayorkas's mandate for the new EB-5 program chief. It is not enough merely to ensure "that the program is administered efficiently, with integrity, with predictability, and with an understanding of today's business realities." USCIS must publish proposed EB-5 regulations for public comment and then issue final rules that "maintain the integrity of the category yet are faithful to its legislative text, history and purpose, and are applied with consistent standards of interpretation."¹¹

Prospective immigrant investors should of course also take heed of a foundational principle of Anglo-American law, *caveat emptor* (buyer beware) when considering investment opportunities and the wisdom of entrusting one's future to the vagaries of an inconsistently adjudicated process. Clearly, the employment-creation immigrant visa program should be administered in such a way that prospective immigrants will likewise trust in another bedrock precept of Anglo-American jurisprudence, the rule of law.¹²

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⁹ S. 3245 -- which also extends other expiring immigration laws affecting E-Verify (the government's online employment verification database), foreign medical graduates and religious workers -- passed the Senate on August 2, 2012. See: <http://www.govtrack.us/congress/bills/112/s3245>.

¹⁰ Statement of Rep. Lamar Smith (R. TX), Chairman, House Judiciary Committee, at a July 30, 2012 EB-5 Investors Conference, hosted by EB5Investors.com, Newport Beach, California. Notes on file with the authors.

¹¹ Angelo A. Paparelli, "Immigration Quibbles and Bites: The Fortnight in Review," *NationOfImmigrants Blog*, June 30, 2012, accessible at: <http://bit.ly/NGXqK2>.

¹² Maurice Berez, a retired federal official who formerly headed the USCIS Investor and Regional Center Unit, Business and Trade Branch, Office of Program and Regulations Development, and Brandon Meyer, an immigration lawyer practicing in San Diego, provided assistance with this article.