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'Mile-High' overview of EB-5 Immigrant Investor program

As we begin to navigate our way out of the recent recession, hoping that it is actually over and that the market for commercial real estate is really on the rebound, the capital market investment profile for commercial real estate has changed and new and different forms of investment are emerging. With our economy becoming more and more tied to the global markets, foreign investments are increasing in amount, frequency and format. Combined with an increased interest in jobs, investments that result in job creation have had additional focus.

One vehicle that combines these trends is the EB-5 program. The EB-5 program allows foreign nationals to obtain permanent residence (i.e., green cards) if they place capital at risk in and manage a qualifying commercial enterprise that creates jobs.

How much capital? A foreign national must invest at least $1 million. The amount is $500,000 if the foreign national invests in a Targeted Employment Area. A TEA is an area with an unemployment rate of at least 150 percent of the national average or a rural area with a population of no more than 20,000.

■ **What kind of capital?** For EB-5 purposes, capital can include cash, cash equivalents, equipment, inventory and other tangible property. Capital also may include debt if secured by the foreign investor's personal assets. All capital is valued at fair-market value in U.S. dollars. Assets acquired by unlawful means are not considered.

■ **When is capital at risk?** Transferring funds into a commercial enterprise's account is

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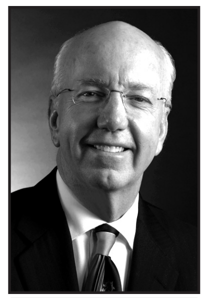
not sufficient. Foreign investors must demonstrate how capital will be used for job creation in a profit-generating activity. Also, the foreign investor cannot receive a bond, note, debt instrument or "buy-back" agreement from the commercial enterprise in exchange for capital contributions.

■ **What is management of the commercial enterprise?** A foreign national must have an active role in the commercial enterprise by either managing daily operations or participating in policy formation. If a foreign investor is a limited partner, he must have rights, powers and duties under the Uniform Limited Partnership Act.

■ **What is a qualifying commercial enterprise?** The enterprise may be any for-profit activity and can be structured as a sole proprietorship, limited or general partnership, holding company (including wholly owned subsidiaries), joint venture, corporation, business trust or other publicly or privately owned entity. The foreign investor must create a new, original business, restructure an existing business or expand an existing business. Different rules apply depending on whether a new business is created, restructured or expanded.

■ **What kind, how many and for whom must jobs be created?** Each foreign investor must



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create at least 10 full-time jobs for U.S. citizens, permanent and conditional residents, asylees and refugees. A foreign investor's U.S. spouse or children cannot be counted.

Also, U.S. Citizenship and Immigration Services recently indicated that jobs created under the "tenant-occupancy" methodology will not suffice. The USCIS focuses on who creates jobs for U.S. workers – the EB-5 enterprise that constructed an office building or tenants leasing the enterprise's building. Jobs created by the former will be counted, whereas jobs created by the latter will not.

■ **How to invest?** Foreign investors may independently form a commercial enterprise or invest through a "regional center." A regional center is any economic unit, public or private, involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation or increased domestic capital investment within a defined geographic area.

There are advantages and disadvantages to each investment method. When foreign nationals independently form commercial enterprises, they control the investment but may count only direct jobs created by the enterprise. When foreign nationals invest through a regional center, they may make high-level policy decisions as limited partners but can count indirect jobs created by the enterprise.

For example, foreign nationals could form an enterprise to build and operate a ski resort. In this scenario, the foreign nationals could control how their capital is used, but they could count only direct jobs to meet the job creation requirement. Direct jobs are actual, identifiable jobs within the enterprise wherein the investor invested capital. Thus, only U.S. workers employed by the ski resort could be counted.

Alternatively, foreign nationals could form or invest in an already existing commercial enterprise affiliated with a Regional Center. The Regional Center's projects approved by the USCIS might include building a ski resort. In this scenario, the foreign nationals could not control how their capital is used, but they could count both direct and indirect jobs to satisfy the job creation requirement. Indirect jobs are those created collaterally or as a result of capital invested in a commercial enterprise affiliated with a Regional Center. Thus, U.S. workers employed by the ski resort (direct jobs) as well as U.S. workers who built the ski resort (indirect jobs) could be counted.

As we hopefully emerge from the credit and financial crisis, new investment opportunities and formats are forming. Alternative vehicles such as the EB-5 program are examples of means to access foreign investments. This program is a win-win allowing foreign investors to obtain green cards while infusing capital and creating jobs in the local economy.▲