Dhar Law, LLP
Two Atlantic Avenue, 4th Floor
Boston, Massachusetts 02110
T: (617) 880-6155
F: (617) 880-6160
www.dharlawllp.com

The EB-5 Immigrant Investor Visa:

An Attorney and Service Provider's Overview of Requirements for Eligibility and Implications under Different Areas of Law

By: Wassem M. Amin, Esq., M.B.A.[1]

In 1990, the United States Congress created the employment-based fifth preference ("EB-5") immigrant visa category for immigrants who invest in and manage U.S. commercial enterprises that benefit the U.S. economy and create jobs. Allotted 10,000 immigrant visas annually, the EB-5 immigrant visa was designed to attract foreign direct investment into projects that would directly impact the economy (i.e., not merely passive investments).

Immigrant investors may apply for an EB-5 visa through two primary routes. The first is through a direct investment into a qualifying "new commercial enterprise." The second is through the Regional Center Pilot Program. Created by Congress in 1992, and recently extended by President Obama in the fall of 2012 an additional three years, the Pilot Program allows the United States Citizenship and Immigration Service ("USCIS") to designate so-called Regional

[1] *Wassem M. Amin, Esq., MBA is an Associate Attorney at Dhar Law, LLP in Boston, MA. He has extensive experience as a business advisor and consultant, domestically and abroad (in the Middle East region), having worked as a consultant for over 9 years. Wassem currently focuses his practice on Corporate Law, Business Immigration Law, and International Business Transactions; where he works with Firm Partners Vilas S. Dhar and Vikas S. Dhar to advise Regional Centers and individual investors on EB-5 Visa matters. He can be reached at wassem@dharlawllp.com. For more information, please visit http://www.dharlawllp.com.*

Centers to function as conduits or administrators of large or medium scale projects funded, at least in part, by EB-5 investors.

However, due to inconsistent administration by USCIS primarily caused by lack of proper training for its adjudicators, the Regional Center Pilot Program—as well as the EB-5 visa overall—was relatively under-utilized by practitioners, investors, and developers. For example, in Fiscal Year 2007, USCIS approved only 11 Regional Centers and issued 473 EB-5 Visas—out of the 10,000 available under the quota. In the following years, however, EB-5 visa issuances and Regional Center approvals exponentially increased in number. In FY 2012, EB-5 visas are projected to reach the visa cap for the first time in the program's history.[2] Furthermore, Regional Center approvals in the same period spiked to an all-time high of 209. The increased interest in EB-5 investments has been attributed to a combination of factors including: (1) the overhaul of the program by USCIS and the creation of a dedicated EB-5 adjudication department; (2) the decrease in domestic investment capital after the 2008 recession; and (3) the increased political instability in foreign countries leading many high-net worth immigrants to relocate to the United States.

Forecasts for FY 2013 estimate that EB-5 capital will account for over $2 Billion in foreign direct investment. Since 2005, the program has injected over $6 billion in capital to the U.S. economy and added over 95,000 U.S. jobs. There have been many EB-5 and Regional Center success stories. A particularly notable example is the Vermont EB-5 Regional Center. The Vermont EB-5 Regional Center is the only USCIS-designated Regional Center in the United

[2] USCIS EB-5 STATISTICS FOR FISCAL YEARS 2005-2012 (3RD QUARTER), USCIS Office of Performance and Quality (OPQ), Data Analysis and Reporting Branch (July 23, 2012), *available at*: http://www.uscis.gov/USCIS/Outreach/Upcoming%20National%20Engagements/Upcoming%20National%20Engagement%20Pages/2012%20Events/July%202012/EB5_Statistics_Q3_2012.pdf.

States that is owned, controlled, and supervised directly by a state government. In fact, Brent Raymond, the Director of the Regional Center as well as International Trade and Foreign Investment for the state, noted that the Vermont Regional Center has had a 100% success rate with immigration filings for affiliated alien investors and with investment returns on individual projects.

Advocacy groups have also had a strong positive impact in promoting the EB-5 Visa. The Association to Invest in the USA ("IIUSA") is non-profit trade association that lobbies on behalf of Regional Centers nationwide. Led by Director Peter Joseph, it was founded in 2005 and represents over 80 Regional Centers, accounting for approximately 95% of all EB-5 capital.

Unfortunately, due to the growing popularity of the program, unscrupulous individuals and entities in the United States, as well as so-called "visa consultants" abroad, have attempted to use the EB-5 visa to defraud foreign investors. Foreign investors must be diligent in their research and vetting process of such projects. Not surprisingly, counsel for the foreign investor or a Regional Center usually plays an integral role in this process. Unlike a traditional private offering, an attorney advising on an EB-5 visa, whether on behalf of the alien investor or the investment soliciting funds, must be well-versed in not only immigration law, but also corporate law, securities laws and regulations, tax law, international law, real estate law, and estate-planning—in addition to possessing a fundamental understanding of business and economic forecasting models. It is a unique intersection of several areas of the law, each with their own complex regulatory and statutory regime.

I. Eligibility for the EB-5 Visa – Qualification of Foreign Investors[3]

Out of the 10,000 annual EB-5 visas allotted, 3,000 are set aside for Regional Center affiliated EB-5 investments. The EB-5 visa covers two major types of investors: (1) those who invest in targeted employment areas; and (2) those who invest anywhere else. A Targeted Employment Area ("TEA") is (1) a rural area, as defined in statute; or (2) any area experiencing high unemployment of at least 150% of the national average rate.

a. Criteria for Qualification

To qualify, the investment must meet the following criteria: (i) at least $500,000 (if in a TEA) or $1,000,000 if any other area[4]; (ii) the required capital must be placed "at risk" for the purpose of generating a return on the capital (actual commitment of the capital is required)[5]; (iii) the enterprise must create full time employment for not less than 10 U.S. workers (who can be

[3] The statutory framework for the EB-5 program can be found at INA sections 203(b)(5) and 216A, which were modified by:

- Section 610 of Pub. L. 102-395, as amended by section 116(a)(l) of Pub. L. 105-119 and section 402(a) of Pub. L. 106-396;
- Section 4 of Pub. L. 108-156, relating to the Regional Center Pilot Program; and
- Sections 11031-11034 of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107-273, relating to certain aliens with conditional resident status who filed I-829 petitions before November 2, 2002.

The regulatory framework for the EB-5 program can be found at 8 CFR 204.6 and 8 CFR 216.6.

There are also four EB-5 precedent decisions:

- *Matter of Soffici*, 22 I&N Dec. 158 (BIA 1998);
- *Matter of Izummi*, 22 I&N Dec. 169 (BIA 1998). Note: Pub. L. 107-273 eliminated the requirement set forth in *Izummi* that, in order for a petitioner to be considered to have "created" an original business, he or she must have had a hand in its actual creation. Under the new law, an alien may invest in an existing business at any time following its creation, provided he or she meets all other requirements of the regulations;
- *Matter of Hsiung*, 22 I&N, Dec. 201 (BIA 1998); and
- *Matter of Ho*, 22 I&N Dec. 206 (BIA 1998).

[4] 8 U.S.C. § 1153(b)(5)(C)(i)-(ii).

[5] 8 C.F.R. § 204.6(j)(2).

citizens and permanent residents, but not immediate family members of the investor); (iv) the capital must be obtained through lawful means; and (v) the investor must be engaged in the management of the enterprise, through either day to day management or policy formulation (inapplicable if through a Regional Center).

In addition to these five requirements, the investment must be in a "new commercial enterprise," which, under USCIS regulations, is defined as: (1) creating an original business; (2) buying and reorganizing an existing business; or (3) investing in an existing "troubled business," created after November 29, 1990, if the capital infusion will result in at least 40% increase in net worth or number of employees.[6]

The new commercial enterprise must generate the requisite number of jobs for qualifying U.S. workers within two years of the alien investor's admission to the United States as a Conditional Permanent Resident ("CPR"), after which the alien may petition USCIS to remove the conditions.

b. Immigration Filing Requirements (Evidence Required)

Amount of Capital Invested – To show that the petitioner is in the process of investing $1million or $500,000 (if in a TEA), the petition must be accompanied with: (i) bank statements showing amounts deposited in the United States business accounts for the enterprise (or held in an irrevocable escrow account); (ii) evidence of all the assets purchased in the United States; (iii) evidence of all property transferred from abroad for use in the U.S. enterprise, including applicable commercial entry documents and fair market valuations; or (iv) evidence of monies

[6] 8 C.F.R. § 204.6(h)(3), *see also* 8 C.F.R. § 204.6(e).

transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred) or convertible debentures.[7]

Lawful Means Evidence - to prove the investor's funds are derived from a lawful source, the investor must show evidence such as: (i) foreign business registration records; (ii) corporate, partnership, and/or personal tax returns; (iii) evidence identifying any other source of capital; or (iv) certified copies of judgments or evidence of all pending civil or criminal actions involving monetary judgments against the petitioner.[8]

Job Creation Evidence – to show that the new commercial enterprise will create not less than 10 full time positions for qualifying employees, the petition must be accompanied by: (i) documentation consisting of photocopies of Form I-9, tax records, or other similar documents for 10 employees (if already hired); or (ii) a copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than 10 employees will result, including approximate dates, within the next two years, when such employees will be hired.[9]

Management of Enterprise Evidence – to show that a petitioner is or will be engaged in management (day to day or policy formulation), the petition must be accompanied by: (i) a statement of the position title that the petitioner has or will have in the new enterprise, and a complete description of his duties; (ii) evidence that the petitioner is a corporate officer or holds

[7] 8 C.F.R. § 204.6(e).
[8] 8 C.F.R. § 204.6(j)(3)(i)-(iv).
[9] *See* 8 C.F.R. §204.6(j).

a seat on a corporate board of directors; or (iii) if the new entity is a partnership, evidence that the petitioner is involved in management or policy-making.[10]

Targeted Employment Area Evidence – to meet the definition of a Targeted Employment Area, the location of the investment must meet one of the following: (i) evidence that the metropolitan statistical area, a specific county within such an area, or a county in which a city or town with a population of 20,000 or more is located, has experienced an average unemployment rate of 150% of the national average rate; or (ii) a letter from an authorized body of the government or political subdivision of the metro statistical area, or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business, has been designated a high unemployment area.[11]

II. Regional Center Pilot Program - Main Differences, Benefits, and Eligibility

The main difference, from a regulatory point of view, of investing in a new commercial enterprise affiliated with a USCIS-approved Regional Center is that an alien investor may satisfy the job creation requirements of the program through the creation of either 10 *direct* or *indirect* jobs.[12] If the alien investor instead opts to invest directly into a qualifying enterprise, the job creation requirement can only be met with the creation of 10 *direct* jobs.[13]

Direct jobs are those that create a traditional employer-employee relationship between the commercial enterprise and the persons employed. Indirect jobs, on the other hand, are the jobs

[10] 8 C.F.R. § 204.6(j)(5).
[11] 8 U.S.C. § 1153(b)(5)(B)(ii), (iii); 8 C.F.R. § 204.6.
[12] 8 C.F.R. § 204.6((j)(4)(iii)
[13] *See* USCIS MEMORANDUM, 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) (December 11, 2009).

held by those who work outside the commercial enterprise. As an example, an indirect job can include the employees of a third party employer used by the commercial enterprise, such as a construction company, service provider, or even producers of materials and equipment. In addition, there is a subcategory of indirect jobs called "induced jobs." Induced jobs are those jobs created when direct and indirect employees spend their increased income on consumer goods and services. Induced jobs are calculated using econometric forecasting models (such as IMPLAN). Under USCIS regulations, Regional Centers are allowed to count indirect jobs (and induced jobs) towards meeting the minimum job-creation requirement.

Although the most evident benefit of using a Regional Center is this "relaxed" job creation calculation method, there are many other, less obvious reasons. For example, developing a well-qualified and well-vetted Regional Center allows that entity to pool together hundreds of EB-5 investments for large-scale project developments. A Regional Center created by a project developer, with a proven track-record, also benefits from the experience and expertise of a credible professional—which, in turn, increases investor confidence, the ability to raise capital, as well as the likelihood of the project's success.

a. Qualifying as a Regional Center – An Overview

The intricacies of developing a Regional Center are beyond the scope of this article. However, an overview of obtaining USCIS designation as a Regional Center can shed some light on the complexities and steps involved. USCIS defines a Regional Center as "any economic unit, public or private, engaged in the promotion of economic growth, improved regional productivity, job creation and increased domestic investment."[14] An individual or an entity who

[14] 8 C.F.R. § 204.6(e)

wants to obtain this designation must file a proposal with USCIS providing a framework through which individual alien investors affiliated with the Regional Center can satisfy the eligibility requirements of the EB-5 visa.[15]

In addition, the proposal should include a complete set of offering documents, much similar to those in a private offering or business plan.[16] The proposal may include copies of the enterprise's organizational documents, capital investment offering memoranda, term sheets, transfer of capital mechanisms, business plans, marketing plans, econometric impact studies, feasibility studies, private placement memoranda, etc. Under the EB-5 Program, a project developer may apply to be designated as a Regional Center by USCIS. If approved, this allows the developer to raise capital from foreign nationals while at the same time enabling the foreign investors to obtain permanent residency. The benefit to the developer, or Regional Center, is usually minimal cost of capital (ROI on these projects are usually negligible) and the ability to charge the investor an "administrative fee" to offset the up-front expenses of creating a Regional Center. Most Regional Center investments are structured as Limited Partnerships, where the investor is sold a limited partnership interest and the developer is the general partner.

III. Implications Under Other Areas of the Law

As evident from the preceding discussion, an intricate understanding of Immigration Law is merely one of the prerequisites necessary to enable an attorney or service provider to successfully represent an EB-5 visa applicant. A complete analysis of the different implications of each other area of the law is well beyond the scope of this article—and this overview is by no

[15] 8 C.F.R. § 204.6(m)(3)(i)-(v).
[16] *Matter of Ho*, 22 I&N Dec. 206, 213 (Comm'r 1998).

means comprehensive. Rather, it is meant as a brief overview of the most common issues that arise—with a particular emphasis on Securities Law and Regulations.

a. Corporate Law

An understanding of corporate law is necessary for the proper formation and structuring of the entity to be used by the Regional Center or by the Investor. The attorney must be able to evaluate the risks and benefits of various entities, such as corporations, limited liability companies, or partnerships. Further, the attorney must be well-versed in the drafting of organizational documents for each particular type of entity. For example, the most popular entity chosen by Regional Centers is a Limited Partnership ("LP") model. An attorney advising the Regional Center on LP formation must be able to draft the Partnership Agreement, the Subscription Agreement, a Memorandum of Terms (Term Sheet), the allocation of membership interests and capital accounts, etc. Oftentimes, there are multiple entities involved, such as when the General Partner (the developer) is a separate entity (such as an LLC or S-Corp).

However, unlike a traditional LP, the attorney must also be aware of implications of the partnership's structure under Immigration Law. For example, if a new commercial enterprise's LP agreement contains a redemption clause guaranteeing the return of the alien investor's capital investment, then the investment will not be a qualifying "at-risk" investment for EB-5 purposes. Likewise, if the LP agreement requires the payment of fees from the alien investor's investment of $1,000,000 (or $500,000 in a TEA) to such extent that the investment will be eroded below the qualifying level, preventing the full infusion of sufficient capital into the job-creating enterprise, then the investment will not meet the required EB-5 minimum level of investment. These requirements may not be apparent to even the best Corporate Law practitioner. Such fatal

defects may cause the Regional Center to be unable to raise EB-5 capital and will, most likely, lead to its inevitable failure.

b. Tax Law

As a disclaimer, this Article is not intended to provide a comprehensive treatment of tax implications. In fact, when a tax issue arises in connection with a client matter, the client is always strongly advised to seek a competent tax attorney. However, to be able to even identify a tax issue, an understanding of tax law and its implication within the EB-5 context is necessary. There are a plethora of tax issues that may arise during the course of an EB-5 representation. For example, in the initial stages of a Regional Center's formation, an attorney must be able to advise the parties as to the different tax treatment of the various business entities and the impact on the entity as well as its individual members. In the case of a partnership, for example, the attorney must be able to understand taxation of partnership distributions, the impact of an election to adjust the basis of a partnership's assets, taxation of a withdrawing member's capital account, among others.

In addition to the myriad possible tax issues in the case of a Regional Center, there are several implications for the alien immigrant investor as well. Chief among those is the new Foreign Account Tax Compliance Act ("FATCA") which became effective on January 1, 2013 as part of the provisions of the Hiring Incentives to Restore Employment Act. FATCA adds a new chapter to the Internal Revenue Code aimed at addressing tax abuse by U.S. persons through the use of offshore bank accounts. The new rules require foreign financial institutions ("FFIs") to provide the Internal Revenue Service ("IRS") with information on certain U.S. persons invested in accounts outside of the U.S. and for certain non-U.S. entities to provide information

about any U.S. owners. In addition, alien investors who obtain permanent residency are subject to taxation on their worldwide income. This fact is often overlooked by many attorneys and can have costly ramifications for alien investors who, by their very nature, often have significant offshore holdings in their country of origin or elsewhere.

c. International Law

Many countries have strict foreign currency transfer restrictions to prevent the flight of capital from their economies. For example, China—who is also the largest source of EB-5 investors—imposes a $50,000 annual limit on outgoing international wire transfers to the United States per individual. If a Chinese citizen wants to make an overseas transfer they must purchase the funds with RMB, China's local currency. Further, when converting the RMB to a foreign currency, the bank is required to review whether the wire transfer is for an investment or for a regular payment. Wire transfers for the purposes of an investment are often-times rejected. Depending on the alien investor's country of origin, special attention must be given to such laws in order to prevent any last-minute complications.

d. Federal Securities Law and Regulation

On April 3, 2013, USCIS and the Securities Exchange Commission ("SEC") held a joint conference call to discuss what aspects of federal securities law are implicated by EB-5 Investments, as it relates to both the issuer and the investor. The SEC noted that the principle issue that may arise for EB-5 Regional Centers is whether they trigger regulation under federal securities laws. The answer will, in virtually all cases, be yes. A threshold issue is whether the Regional Center is "transacting in securities." The definition of securities is very broad and

includes any investment interest. The second factor, offering or selling securities in interstate commerce, is also very easily triggered–particularly considering the target investor.

What happens if an issuer of securities is "transacting in securities"? That triggers the SEC's federal registration requirements – a complex penumbra of laws that is most commonly known as "going public" or filing an IPO. There are exemptions from registration which are often used by Regional Centers–Private Placement exemptions, Regulation D, and Regulation S, etc. Generally speaking, these various regulations are designed for relatively small offerings or offerings made overseas.

This allows most Regional Centers exemption from *registering* with the SEC, but does not exempt them from *regulation* by the SEC. Therefore, offerings of investments through Regional Centers are still subject to the anti-fraud provisions of federal securities laws. Additionally, they are subject to the prohibition against general solicitation and advertising. That prohibition is so broad that it may include anything from an internet post, local newspaper articles, unsolicited emails, to everything in between.[17]

Within the SEC, there are individual divisions responsible for the implementation and regulation of different areas of federal securities law. The main divisions implicated herein are the Trading and Markets Division and the Investment Management Division. Running afoul of either one will subject the perpetrator to legal action by the Enforcement Division.

The SEC's Trading and Markets Division is primarily responsible for administering the Securities Exchange Act of 1934 (the "34 Act"). Within the context of EB-5 investments, it is

[17] NOTE: the JOBS ACT, enacted last year, changes the law to allow general solicitation and advertising for exempt issuers. However, although the SEC has drafted proposed regulations, none have been implemented as of the beginning of April 2013.

focused on the status of individuals involved in the sale and offering of these investments, commonly known as Broker-Dealers. The bottom line here is that, if an entity, such as a Regional Center's third-party affiliate, is engaged in the activity of soliciting foreign investors, it is highly likely that they are engaging in brokerage activities, therefore triggering the requirements of Broker-Dealers. The SEC noted that the commission has "approached registration on a territorial basis." Therefore, the seller or solicitor of investors will be subject to the 34 Act even if they exclusively solicit foreign investors.

What are the activities that trigger Broker-Dealer registration? There are two main tests: (1) if the person is directly soliciting the investment; or (2) if the person is indirectly advertising the investment. The question in the latter situation focuses on the remuneration or compensation of the individual. If that person's compensation is tied to the number of investments, then that will be sufficient to trigger registration. The only exception here applies to natural persons (not an entity) associated with the issuer (which, in EB-5 context, is usually the Regional Center). Even then, that person may not solicit investments if they have been a broker-dealer in the recent past or are subject to various statutory disqualifications.

The SEC's Investment Management Division regulates two main federal statutory laws: the Investment Advisors Act, and the Investment Company Act. Whether an EB-5 Investment triggers either Act depends on how the investment is structured. Most critically, these two sets of laws usually work as a residual catch-all for federal regulation by the SEC. In other words, if an entity or natural person is not a Broker-Dealer, they will most likely be an investment adviser or an investment company.

Investment companies are those commonly known as mutual funds — they pool securities and sell ownership interests in the pool to investors. Investment advisors are just what they sound like: one who is in the business of providing investment advice for compensation, unless they are a Broker-Dealer.

This comprehensive federal regulatory scheme virtually guarantees that an EB-5 investment will be subject to the authority and oversight of the SEC. A Regional Center, for example, may be considered an Investment Company if they meet this definition: An Issuer that holds, invests, or trades in securities. If the EB-5 investment is structured in a way where multiple investors hold a share in the investment pool of funds, which is then used to finance an underlying project that the Regional Center also owns a share in, then they are an Investment Company. Triggering the provisions of either, the Investment Company Act or the Investment Advisors Act, requires that the adviser or company to register with the SEC. Additionally, there is a fiduciary duty owed by the investment advisor – i.e., they must disclose conflicts of interests, any self interest in the project, and avoid self-dealing.

There are limited exclusions from registration with SEC, but not from regulation by the SEC. The major exclusionary category is the so-called Professional Exclusion. This exclusion covers most attorneys, accountants, and teachers – if the advice is incidental to the services provided. The SEC also alluded to an exemption available to pooled investment vehicles that either holds direct interests in real estate or real-estate related assets. This exemption can be found in Section 3(c)(5)(C) of the Investment Company Act and deals, in part, with fully secured real estate loans. "Fully secured" under the statute means that the fair market value of the real estate collateral is no less than the outstanding principal balance of the loan.

The implications of federal securities laws in any EB-5 investment are far-reaching and the repercussions of violating them could be significant for not only the Regional Center or the alien investor, but also the advising attorney in the form of a malpractice action.

IV. Conclusion

The growing popularity of the EB-5 immigrant investor visa could have an important economic impact on the United States, especially in struggling areas. However, this growth has also led to increased scrutiny by various government regulatory agencies. The first seminal SEC action against a fraudulent Regional Center was commenced in March of 2013. To promote sustainable growth of this relatively new industry, it is critical that attorneys and service providers act as a first line of defense against such fraud, which begins by understanding the scope of implications under various areas of law. It is important to be reminded that the issues examined in this Article are by no means exhaustive. Each EB-5 case may present unique implications and should be treated accordingly.