

EB-5 Immigrant-Investor Programs Are Rife With Risks

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February 03, 2014, 12:00 AM

The federal government designed the EB-5 immigrant-investor program to stimulate the U.S. economy by enabling foreign-sourced capital investments, which in turn lead to job creation in the United States. Developers obtain access to low-interest capital, and foreign investors receive, in addition to the potential for some monetary return on their investment, the nonmonetary return of lawful permanent residency in the United States.

However, given the potentially distorting mix of immigration regulations and competing interests, the needs of the developer and the foreign investor don't always align. Attorneys representing immigrant investors, developers and dealmakers considering the use of an EB-5 regional program as a way to raise capital should be aware of the many risks posed, including recent regional center terminations.

Lawyers must be astute about the representations that they, or any agent/brokers, are permitted to make to foreign investors and the variety of expectations that surround such programs. In the current regional center environment, it is unlikely that the average immigrant investor will recoup his or her initial investment and fees paid, so every case involves the likelihood of some financial loss and the significant possibility that the immigration benefit will not be forthcoming.

One risk arises simply because of the long-term nature of the projects. Inevitable changes over time may interfere with the long-term viability of a regional center project and ultimately may lead to failure. Under current immigration procedures and timelines, investors and regional center developers should expect a relationship of no fewer than five years and more likely seven to 10 years. The national economic picture, industry performance and even family relationships can evolve dramatically in half a decade.

Another risk stems from the need for government involvement. Significant amendments to a previously approved project or business plan require approval from U.S. Citizenship and Immigration Services (USCIS). As a result, regional centers may lack the adaptability for projects that require modification at some point in the project's lifespan.

Given these potential issues, lawyers should spell out contractually the parties' expectations, rights and legal recourses. Developers and investors should understand and memorialize them. Also, if an immigrant investor lacks economic sophistication, lawyers involved may need to satisfy an even higher standard of care and due diligence.

In extreme cases, miscommunication or mismanagement of investor expectations can lead to disaster; the resulting vortex of multimillion dollar losses and allegations of conflict of interest may consume attorneys as well as their firms.

The USCIS has various rationales for revoking regional centers over the last several years. But the reasons often relate to project viability and economic growth. For example, USCIS may revoke a regional center's designation due to lack of job creation. When undertaking a project, the regional center can't count the jobs created before the investor's investment toward the estimated job creation. To count the jobs from a project that existed before the investor's investment, the regional center must show that investors were investing in a troubled business and that the project preserved jobs.

If the regional center isn't promoting economic growth, then the USCIS may revoke the designation, potentially stranding any foreign investors whose immigration cases are in progress. Furthermore, USCIS may reopen cases it previously approved and deny them if the agency determines that it based previous approvals on false statements.

If USCIS denies an immigrant's case, the immigrant may lose not only some or all of the \$500,000 or more that she or he invested—and the often additional \$100,000 or more of fees paid—but also receive a notice to appear before an immigration judge to show cause why she or he shouldn't be removed (deported) from the country.

Risk of Fraud

Lawyers should be aware of the penumbra of fraud and embezzlement that surrounds the program. Include sufficient, verifiable details in presentations to investors and adjudicators to establish the project's viability and authenticity. Criminal and civil fraud cases currently are proceeding on regional centers, with a strong probability of many more to come.

Many factors contribute to the Wild West atmosphere surrounding the program: buzz on the street, high-pressure agents making unknowable representations to would-be immigrants from their home countries, green cards issued based on regional centers before investors can cash out of their investment, and indicia of governmental approval

of the centers (such approval only validates a project's immigration qualifications, not its viability, but this distinction is incomprehensible to many immigrants).

When an EB-5 case appears to contain fraudulent or material misrepresentation, USCIS refers the case to the Fraud Detection and National Security Directorate (FDNS). Members of the public, disgruntled investors, former employees and competitors may also report cases of suspected fraud to USCIS.

Lawyers can learn a lot from the failures of regional centers. In particular:

- The financial projections must make sense.
- Counsel should disclose and memorialize the financial arrangements, including all fees, parties, and agents participating and receiving fees.
- Developers cannot allow a regional center designation to lie fallow. They must attract investors and begin activity or the approval may be revoked.
- USCIS can gather contradictory or negative financial information from a variety of public, private, and intra- and inter-agency sources. This may trigger revocation.
- The experience and track record of the regional center managers and the project developers are relevant to the long term success of the investments.
- The economic projections need to be realistic—and perhaps conservative—to survive the five or more years when a developer could be dependent on USCIS review and approval.
- Just because a regional center can project significant job creation, doesn't mean it should rely on the most optimistic projections and take in as many investors as that optimistic projection would support.
- Exhaustively document every aspect of the regional center and its projects.
- Do not skimp on professional guidance, since every investor is a potential litigant.

Robert F. Loughran is a partner in FosterQuan in Austin. He is board certified in immigration and nationality law by the Texas Board of Legal Specialization. He has advised hundreds of individual investors on the EB-5 process and alternative immigration categories. Loughran also has successfully represented immigrant investors put into deportation proceedings based on USCIS challenges to the qualifications of their investments.