Coming to America: EB-5 Immigration Visas and Franchising

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Agenda

1. The Underlying Law
2. What is the EB-5 Program?
3. I-526 Petitions for Alien Investors
   • Direct Investments (Non-Regional Center)
4. I-829 Petitions to Remove Conditions
   • Direct and Indirect Job Creation
5. EB-5 and Franchising
The Underlying Law

- **The Immigration and Nationality Act**
  - Passed 1952 Over Pres. Truman’s Veto
  - Amended:
    - 1965
Immigration Act of 1990

• Created new category of “investor visas” known as “EB-5”
  • **EB**: employment-based
  • **5**: fifth employment-based preference

• But … not without controversy
  • Original 1990 concern: “selling our citizenship”
  • 2016: Sen. Feinstein
  • 2016 extension of regional center auth. through Dec. 9, 2016 (part of Cong. budget process)
EB-5 Basics

• EB-5 category created in 1990 for foreign nationals who invest in a new commercial enterprise that will benefit the U.S. economy and create at least 10 full-time jobs.

• Congress set aside 10,000 immigrant visas annually for investors and their immediate family members.

• Immigrant Investor Pilot Program enacted in 1993, providing for regional centers – due to sunset on December 9, 2016. Job creation may be estimated using “reasonable methodologies.”

• Foreign nationals can get a green card if:
  • Invest $500,000 or $1,000,000 (depending on geographical area); and
  • Investment creates full-time jobs for 10 U.S. workers

• Green cards conditional for 2 years
  • Conditions removed if investment sustained and jobs created
Regional Center v. Individual EB-5

- **Individual EB-5 Petition**
  - Investor buys business or starts new business
  - Must be 10 direct full-time, W-2 employees who are USCs or LPRs
  - Fewer applications, but resurgence

- **Regional Center EB-5 Petition**
  - Investment into a business associated with a USCIS Approved Regional Center
  - Most applications
  - Main advantage
    - Indirect employment counts through the use of an economist report to predict project job creation.
Franchises: Why EB-5?

• Franchise usually need 10+ employees working 35 hours a week

• Franchisor provides background documents helpful for the EB-5:
  • Cost to open franchise, including equipment is verifiable by franchisor materials
  • Hiring and training materials from franchisor justify job creation numbers

• Many franchises allow foreign investors as owners/managers
Potential Franchise Structures for EB-5

Single Investor Model

- Investor
  - Equity
  - New commercial enterprise (LLC)
  - Franchise

- Investors
  - Equity
  - Franchise Holdco (New Commercial Enterprise)

- Franchise Holdco
  - 100%

- Franchise 1 LLC
  - 100%

- Franchise 2 LLC
  - 100%

- Franchise 3 LLC
  - 100%

- Each Franchise Store = Wholly Owned Sub
- Employees in stores are counted for job creation
- Investors make preferred equity investment in Holdco with limited voting rights
Successful EB-5 Franchises

• Restaurants:
  • Taco Bell
  • Wendy’s
  • Burger King

• Hotels:
  • Marriott
  • Wyndham
  • Kimpton
I-526 Petition – Basics

• General requirements – INA § 203(b)(5) and 8 CFR § 204.6
  • New commercial enterprise
  • $500,000 or $1 million from a lawful source
  • At risk investment
  • Investment will create at least 10 full-time jobs
  • Investor must be engaged in the management of the enterprise
I-526 – Individual Investors

• New Commercial Enterprise
  • Created after November 29, 1990
  OR
  • Substantial change from investment - 40% expansion of net worth or number of employees
  • For franchise: Holdco = NCE and all wholly owned subsidiaries below can create jobs for investors
I-526 – Individual Investors

• Actively in the process of investing $1 million or $500,000 if the investment is in a targeted employment area

• Targeted employment area
  • A rural area of less than 20,000 in population; or
  • An area which as unemployment of at least 150% of the national average
  • Evidenced by submitting a letter from the state’s agency confirming that the area has high unemployment and defining the statistical area

• Each franchise location must be a TEA
I-526 – Individual Investors

• Investment must be at risk

• Must be an equity investment
  • Debt instrument prohibited/no guaranteed repayment
  • Personal funds or loan secured by personal assets
  • Investor makes preferred equity investment into Holdco, obtains an LLC membership interest, and receives a preferred return
I-526 – Individual Investors

• Lawful source of Investment Funds
  • Matter of Soffici and Matter of Izummi
  • Examples
    • business earnings, salary, gifts, loan, etc.
  • Evidenced by personal tax returns, financial statements, etc.
• Office of Foreign Assets Control (OFAC) must be consulted if investor is from Iran or other country against which the U.S. has sanctions
I-526 – Individual Investors

• Tracing
  • USCIS requires the petitioner to demonstrate that the personal funds derived from the lawful source and were ultimately invested in the EB-5 enterprise
  • Numerous transactions between investor and the EB-5 enterprise investment would require the investor to provide documentation from each transaction
I-526 – Individual Investors

• Job creation
  • The investment must result in the enterprise creating or saving 10 full time jobs (35 hours per week) for US workers (USC citizen, LPR, work authorized immigrant)
  • Must be direct job creation in a non Regional Center case, i.e. W-2 employees evidence by submitting I-9 forms of employees and for US workers (supporting docs copy of passport, I-551 card with the I-9 forms)
  • If franchise is set up as a holdco with multiple franchises as wholly owned subsidiaries, jobs created at the wholly-owned subsidiaries are split among EB-5 investors
I-526 – Individual Investors

- **Job creation**
  - Defined in terms of the position, not the person. The position must be created and filled by a US worker
  - Investor and family members do not count

- **Troubled business**
  - Where investment sustains current employees (saves jobs), the investor must show that the enterprise is a troubled business which experienced a net loss for one or two years exceeding 20% of net worth
  - Must save all jobs, and must be at least 10 per immigrant investor.
I-526 – Individual Investors

- Engage in business on day to day basis or through policy formation
  - Title of description of job duties
  - Evidence of corporate officer or director position
  - Board position (policy formation)
  - Purely passive investor not permitted, but LLC Member receiving limited rights in the Holdco is OK
I-829 Petitions

• Within 90-day period preceding CLPR expiration, investor must file Form I-829 and supporting documentation with USCIS —California Service Center to remove conditions from status. Filing fee is $3,750 (plus $85 per dependent for biometrics).
  • Spouse and children included if CPR

• Failure to file I-829 petition timely may result in termination of conditional resident status and initiation of removal proceedings.
  • Late petitions may be accepted with “good cause and extenuating circumstances”

• If I-829 petition denied, investor may not appeal decision. However, if placed in removal proceedings, investor-petitioner may seek review of USCIS’s decision before an immigration judge. Government bears burden of proof that decision was correctly made.
I-829 Requirements

• INA § 216A and 8 CFR § 216.6
• Requirement of regulations
  • Petitioner invested or is in process of investing required capital;
  • Investment and commercial enterprise have been sustained throughout two-year conditional residence period; and
  • Investor created —or can be expected to create within a reasonable period of time – 10 full-time jobs.
I-829 Documentary Requirements

• 8 CFR § 216.6(a)(4): May include but not limited to:
  • Federal, State annual or quarterly tax filings
  • Audited financial statements
  • Bank statements
  • Invoices, receipts, contracts, business licenses
  • Payroll records, Forms I-9
  • Also, evidence of execution of business plan found in I-526 petition
What Is Not Re-adjudicated from I-526 Petition?

• 12/11/2009 Neufeld Memorandum amending Adjudicator’s Field Manual:
  • “generally give deference to ... I-526 approval... if the facts presented in the earlier proceedings remain unchanged to include:”
    • Capital investment structure
    • Whether enterprise is “new”
    • Direct and indirect job creation methodology
    • Whether lawful source of capital
    • Whether within TEA
I-829 Issues

• Sustaining the Investment
  • Return of Investment v. Return on Investment
  • Distributions on Schedule K-1s
  • Operating Losses on Schedule K-1s

• Job Creation Issues
  • Documenting Direct Jobs
  • Material changes to the business plan
Documenting Direct Job Creation

- W-2 employees of NCE
- Payroll Records (35+ hours per week)
- Forms I-9

- Proof of LPR or citizenship status (beyond the I-9)
  - Discrimination Issues in the Hiring Process
  - DOJ Office of Special Counsel Opinion
  - How to protect against discrimination in the hiring process
EB-5 and Franchising

How do investors come to the franchisor?

• Direct EB-5

• Regional Centers

WSJ, Feb. 3, 2014
Various parties:

- Immigration broker
- Franchise broker
- Management company
- Investment advisor
- Any conflicts of interest in the various roles?
- Requires discipline
Disclosure Issues

- Must an FDD be given?
- Translations?
  - FDD?
  - F/A?
- FTC Franchise Rule
- FTC 1998 Enforcement Statement on foreign language disclosure (16 CFR § 14.9):
  - Likely does not apply to voluntary statements
  - But is translation otherwise advisable?
Disclosure Issues

• Special disclosure needed re broker’s role?
• Register special disclosures as franchise “advertising?”
• Does broker provide written material?
  • If so, on whose behalf?
    • Registration?
    • FPRs?

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**Disclosure**

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Queremos ter certeza de que você tem algumas informações antes de decidir investir.

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Management Issues

Who will manage the franchised business?

• The investor?
• Hired professionals?
• Does the broker play a role?
Exposure

• Two suits – no ruling on merits
• SEC charges vs. immigrant investor program
• Damages:
  • not only business
  • possibly deportation
Thank you!

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