I. OVERVIEW

Congress created the employment-based fifth preference (EB-5) immigrant visa category in 1990 for immigrants seeking to enter to engage in a commercial enterprise that will benefit the U.S. economy and create at least 10 full-time jobs.1[2] The basic amount required to invest is $1 million, although that amount may be $500,000 if the investment is made in a "targeted employment area." Of the approximately 10,000 numbers available for this preference each year, 3,000 are reserved for entrepreneurs who invest in targeted employment areas through a pilot program.

II. STATUTORY REQUIREMENTS

A. The Regular Program

Immigration and Nationality Act (INA) §203(b)(5)2[3] provides a yearly maximum of approximately 10,000 visas for applicants to invest in a new commercial enterprise employing at least 10 full-time U.S. workers. To qualify under the EB-5 category, the new enterprise must: (1) have been established by the alien; (2) be one in which the alien has invested (or is in the process of investing) at least $1 million (or at least $500,000 if investing in a "targeted employment area," discussed below) after November 29, 1990; and, (3) benefit the U.S. economy and create full-time employment for not fewer than 10 U.S. workers. Moreover, the investor must have at least a policy-making role in the enterprise.

B. The Pilot Program

To encourage immigration through the EB-5 category, Congress created a temporary pilot program in 1993.3[4] The pilot program directs the Attorney General and Secretary of State to set aside 3,000 visas each year for seven years for people who invest at least $500,000 in "designated regional centers." The pilot program is currently due to expire September 30, 2000.4[5]

The pilot program does not require that the immigrant investor enterprise itself employ 10 U.S. workers, as long as the investor can reasonably demonstrate that the regional center has indirectly created 10 or more jobs and improved regional productivity. This program also differs from the regular EB-5 provisions in that it permits private and governmental agencies to be certified as regional centers if they meet certain criteria.5[6] (See Exhibit, Designated Regional Centers).

C. Qualified Immigrants

Outside of the investment and employment requisites, the statute does not specifically address who may be a qualified applicant. The INS appears to preclude corporate or other non-individual investors from this category. However, two or more individuals may join to make an EB-5 investment. A single new commercial enterprise may be used for investor/employment-creation classification by more than one investor, provided that: (1) each petitioning investor has invested (or is actively in the process of investing) the required amount; and (2) each investment results in the creation of at least 10 full-time positions for qualifying employees. In fact, a new commercial enterprise may be used for investor/employment-creation classification even though there are several owners of the enterprise, including persons not seeking classification, if: (1) the source(s) of all capital invested is identified; and (2) all invested capital has been derived by lawful means.

D. The New Commercial Enterprise

A petitioner attempting to qualify for EB-5 classification generally may establish a new commercial enterprise in one of three ways: (1) creating an original business; (2) purchasing and restructuring an existing business; or (3) expanding, and thereby substantially changing the net worth or number of employees in a business so that there is a 40 percent increase in net worth or in the number of employees.6[7] Investing in a "troubled" business may also qualify an investor for EB-5 classification.7[8]

To qualify an enterprise as a "new commercial enterprise," a petitioner must have invested after November 29, 1990.8[9] Any for-profit entity formed for the ongoing conduct of lawful business may serve as a commercial enterprise. This includes sole proprietorships, partnerships (whether limited or general), holding companies, joint ventures, corporations, business trusts, or other entities publicly or privately owned.9[10] This definition would even include a holding company and its wholly-owned subsidiaries, if each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. However, the term "new commercial enterprise" does not include noncommercial activity, such as owning and operating a personal residence.10[11]

1. *Troubled Businesses*

Special rules govern investments in "troubled" businesses. These rules encourage investments in companies experiencing financial difficulties. A troubled business is one that has been in existence for at least two years, has incurred a net loss for accounting purposes during the 12 or 24-month period before the petition was filed, and the loss for such period is at least equal to 20 percent of the business's net worth before the loss.11[12] To establish investment in a troubled business, the petitioner must also show that the number of existing employees will be maintained at no less than the pre-investment level for at least two years. Thus, this provision includes a significant incentive in that it does not require the creation of 10 new jobs. Instead, it requires only that the business maintain the number of existing employees during the conditional status period.12[13] As a caveat, if the troubled business does not remain afloat for two years after the investment, the alien investor might lose his or her conditional residency status.

2. *Buying an Existing Business*

By reorganizing or restructuring an existing business, an investor may create a "new commercial enterprise" and therefore qualify for a visa. The statute and regulations provide little insight into what degree of restructuring or reorganization must be done to establish a new enterprise. The INS's Administrative Appeals Office (AAO) has held that simply changing the legal form of the enterprise does not satisfy this requirement.13[14] Regardless of the forms used to create a new enterprise, the focus of the law is on the creation of at least 10 new employment opportunities. Investments creating a new enterprise but failing to create 10 new jobs will also fail to qualify for the investor/employment-creation visa.

3. *Expanding an Existing Business*

An investor can also create a new enterprise by expanding an existing business. Only an expansion resulting in an increase of at least 40 percent in the net worth of the business or in the number of employees of the business will satisfy the visa requirements.14[15] This could require the investor to create more than 10 new jobs to qualify for a visa. The larger the business that the investor expands, the more onerous his or her burden to qualify for a visa under this standard.

4. *Pooling Arrangements*

The regulations specifically provide for investments to be pooled with investments of others seeking permanent investor visas.[15][16] Each investor is required to invest the applicable statutory amount. All of the new jobs created by the new commercial enterprise will be allocated among those within the pool seeking permanent investor visas.[16][17]

E. "Engaging" in a New Commercial Enterprise

The statute requires an EB-5 applicant seek to enter the United States to engage in a new commercial enterprise.[17][18] To qualify, an alien investor must maintain more than a passive role in the new enterprise upon which the petition is based. The regulations require an EB-5 immigrant to be involved in the management of the new commercial enterprise.[18][19] The petitioner must either be involved in the day-to-day managerial control of the commercial enterprise or manage it through policy formulation. The degree of involvement by an EB-5 investor in the enterprise may be less than that required to qualify for a nonimmigrant E-2 treaty investor visa. If the petitioner is a corporate officer or board member, or, in the case of a limited partnership, is a limited partner under the provisions of the Uniform Limited Partnership Act (ULPA), he or she satisfies the requirement of engaging in the management of the new commercial enterprise.[19][20]

F. "Investing" or "Actively in the Process of Investing" "Capital"

The statute requires an EB-5 petitioner to have invested or be in the process of investing. The term "invest" means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital and will not constitute an investment.[20][21]

The regulations define "capital" as cash and cash equivalents, equipment, inventory, and other tangible property.[21][22] Capital does not include loans by the

petitioner or other parties.[22][23] Indebtedness secured by assets owned by the alien entrepreneur may be considered capital, provided the investor is personally and primarily liable for the debts and the assets of the enterprise upon which the petition is based are not used to secure any of the indebtedness.[23][24]

Indebtedness typically consists of a promissory note signed by the petitioner that specifies a payment schedule to the new commercial enterprise. Absent fraud, a signed promissory note that is secured by the petitioner's personal assets constitutes a contribution of capital by the petitioner. The issuer of the promissory note, *i.e.,* the alien investor, is considered to be "at risk" if the petitioner is clearly obligated to make all the required payments on the note and there are no "escape" clauses. The investor cannot receive any bond, note, or other debt arrangement from the enterprise for the capital contributed to it. This includes any stock redeemable at the holder's request. All capital is valued at fair market value in U.S. dollars at the time they are given.[24][25]

Debt arrangements are extremely complicated. A prudent practitioner must do careful research and analysis to determine current INS positions and policies on this issue.[25][26]

G. Benefiting the U.S. Economy

The statute requires that investments "benefit the U.S. economy" to qualify the investor for an EB-5 visa or status.[26][27] The statute provides no guidance on which investments benefit the economy. This silence means INS adjudicators are left to their subjective interpretations of the investment and its relative benefits when reviewing the petition. Arguably, the petitioner has benefited the economy by merely meeting the employment and investment requirements of the visa classification. However, because the statute specifically identifies the "benefit" element as distinct from other components of the visa, it appears that the applicant must independently show that the enterprise, in the conduct of its business, will benefit the U.S. economy. Therefore, a consulting firm exclusively serving customers abroad with no return benefit to the U.S. economy (other than employing the requisite number of workers), might not support an EB-5 petition. In contrast, showing that the new enterprise provides goods or services to U.S. markets should satisfy this requirement.

Federal regulation of foreign investment is extensive. Some regulations restrict foreign investments in aviation, banking, shipping, communications, land

use, energy resources, and government contracting. Additionally, Congress has imposed several disclosure and data requirements on foreign investments.[27][28] An investment may not be deemed beneficial to the U.S. economy if it runs afoul of any statutory limitation on foreign investment.

H. Creating Employment

To qualify for EB-5 status, an investment must create full-time employment for at least 10 U.S. citizens, lawful permanent residents or other immigrants lawfully authorized to be employed in the United States.[28][29] The investor, his or her spouse and children do not count toward the 10 employee minimum.[29][30] Nonimmigrants are also excluded from the count. The "other immigrants" provision means that conditional residents, temporary residents, asylees, refugees, and recipients of suspension of deportation or cancellation of removal may all be considered employees for EB-5 purposes.

The regulations define an "employee" for EB-5 purposes as an individual who (1) provides services or labor for the new commercial enterprise and (2) receives wages or other remuneration directly from the new commercial enterprise.[30][31] This definition excludes independent contractors.[31][32]

The EB-5 pilot program does not require the investment to directly create 10 U.S. jobs. Instead, pilot program investments only require an indirect creation of jobs and an improvement of the local economy.[32][33]

1. *The Types of Jobs*

The jobs created must be full-time. This means employment of a qualified employee in a position that requires a minimum of 35 working hours per week.[33][34] Job-sharing arrangements, where two or more qualifying employees share a full-time position, will also serve as full-time employment if the hourly requirement per week is met.[34][35] Job-sharing does not include

combinations of part-time positions even if when combined such positions meet the hourly requirement per week.[35][36]

2. *When the Jobs Must Exist*

The law is unclear about when new jobs must exist. The statutory language is prospective and therefore does not require jobs to exist at the time of initial investment or before the I-526 petition is filed. The INS does not require retention of employees until a reasonable time after conditional visa issuance. In fact, a petitioner may support a petition with a comprehensive business plan demonstrating a need for at least 10 employees within the next two years. The business plan need only indicate the approximate dates during the following two years when the employees will be hired. The temporary vacancy of a position during the two-year conditional period does not disqualify an investor, as long as good-faith attempts to re-staff the position are made.

3. *Where the Jobs Must be Located*

When enacting the EB-5 program, Congress took an affirmative step toward creating jobs in the geographic areas that need them most. The statute sets aside 3,000 of the approximately 10,000 EB-5 visas available annually for alien entrepreneurs who invest in "targeted employment areas."[36][37] The statute defines a "targeted employment area" as a rural area or an area that has experienced high unemployment of at least 150 percent of the national average.[37][38] An area not within a metropolitan statistical area (as designated by the Office of Management and Budget) or the outer boundary of any city or town having a population of 20,000 or more is considered a rural area.[38][39] Each state notifies the INS which state agency will apply these guidelines, and determines targeted employment areas for that state.

III. EB-5 PROCEDURES: INITIAL EVIDENCE

The regular EB-5 program and the pilot program have similar requirements to begin the process. The distinction between the two processes is that the former requires the petitioner to submit all of the described evidence; the latter requires the designated regional center to certify that the alien investor has met its criteria.

In either case the investor files for EB-5 classification using Form I-526. The petition must be signed by the investor, not someone acting on his or her behalf. If the EB-5

commercial enterprise will primarily do business in a location within the ordinary jurisdiction of the Vermont or Texas Service Centers, the petition is filed with the Texas Service Center; otherwise it is filed with the California Service Center.[39][40]

A. Initial Evidence for the Regular EB-5 Program

The following paragraphs detail the evidence that should be submitted with an I-526 petition for EB-5 classification under the regular program.

1. *The New Commercial Enterprise*

To qualify for EB-5 classification an investor must establish a "new commercial enterprise" in one of three ways:

a. Starting a new and original business;

b. Purchasing an existing business and restructuring its organization or operations enough to create a new business; or

c. Expanding a business already within the United States.

To show that an investment has been made in a qualified commercial enterprise, the applicant should include:

a. An organizational document for the new enterprise, including articles of incorporation, partnership agreements, certificates of merger and consolidation, or partnership agreements;

b. A business license or authorization to transact business in a state or city; and

c. For investments in an existing business, proof that the required amount of capital was transferred to the business after November 29, 1990, and that the investment has increased the net worth or number of employees by 40 percent or more.[40][41]

2. *Capitalization*

To show that the petitioner has invested (or is actively in the process of investing) the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk. A mere intention to invest will not demonstrate that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include:

a. Bank statements showing deposits in the U.S. account of the enterprise;

b. Evidence of assets purchased for use in the enterprise;

c. Evidence of property transferred from abroad;

d. Evidence of funds invested in the enterprise in exchange for stock, except for stock redeemable at the holder's request; or

e. Evidence of debts secured by the investor's assets and for which the investor is personally and primarily liable.