

Employment Based Preference Categories

EMPLOYMENT-BASED PERMANENT RESIDENCE (Multinational Executives or Managers; Outstanding Researchers; Extraordinary Ability Individuals; National Interest Waivers; Investors)

In 1990, Congress created a priority system for granting permanent residence to aliens based on employment skills. Annually, 140,000 immigration visas are available for principal aliens who qualify under the following five employment-based (EB) preference categories:

FIRST "EB-1" priority workers; 40,000 visas per year

- Aliens of *extraordinary* ability in the sciences, arts, education, business and athletics
- Outstanding professors or researchers
- Managers and executives subject to international transfer to the United States (U.S.)

SECOND "EB-2"; 40,000 visas per year

- Aliens of *exceptional* ability in sciences, arts or business
- Advanced degree professionals

THIRD "EB-3" 40,000 visas per year

- Professionals with bachelor's degrees (not qualifying for a higher preference category)
- Skilled workers (minimum two years training and experience)
- Unskilled workers (maximum 10,000 visas available per year, of which 5,000 have been dedicated to adjusters under NACARA)

FOURTH "EB-4" special immigrants, *including but not limited to* 10,000 visas per year

- Religious workers - a maximum of 5000 visas is set aside for religious vocational activities in the U.S. of members of religious denominations that have bona fide nonprofit religious organizations in the U.S.

FIFTH "EB-5" immigrant investors 10,000 visas per year

- Alien entrepreneurs whose enterprises will *directly or indirectly* create 10 or more new jobs in the United States. The EB-5 category requires an investment of \$1,000,000 (or \$500,000 in a high-unemployment or rural area).

PROCEDURE

Step 1 Labor Certification

- For detailed summary, see Road to Green Card Through PERM.
<http://www.meyner.com/Business-Immigration/Road-to-the-Green-Card-through-PERM.shtml>

In cases where immigration to the U.S. will be based upon a U.S. job offer, the employer is the petitioner and the prospective immigrant is the beneficiary. ETA Form 9089 must be filed by the employer with the U.S. Department of Labor. The employer must document through a very regulated round of recruitment that qualified U.S. workers are not available, able or willing to fill the position on which the PERM application is based. The Labor Certification is the document issued by the U.S. Department of Labor to certify that the employer has met this standard. Once a Labor Certification is received, a priority date will be issued that will determine when an immigrant visa becomes available. NOTE: Labor Certification is not required for 1st, 4th, 5th and some 2nd EB categories (see discussion below).

Step 2 USCIS Petition

Once the Labor Certification is processed (if required), the employer or self-petitioning alien submits Form I-140 to the USCIS Service Center with jurisdiction over the geographical location where services will be rendered. Upon approval, provided that an immigrant visa is available, the beneficiary can apply for adjustment of status (if present in the U.S.) or apply to a U.S. consulate abroad for an immigrant visa.

Step 3 Consular Processing or Adjustment of Status

Aliens abroad who seek to enter the U.S. as EB immigrants will apply to consulates abroad with their supporting USCIS documentation. Aliens already present in the U.S. in nonimmigrant status may submit Forms I-485 (application for adjustment of status) and I-765 (application for work authorization) and I-131 (application for advanced parole or travel document) to the appropriate USCIS Service Center.

FIRST PREFERENCE PRIORITY WORKERS

(1) Aliens With E *xtraordinary* Ability

REQUIREMENTS

- The Alien's extraordinary achievements in the sciences, arts, education, business, or athletics have resulted in sustained national or international status in the alien's field
- The Alien intends to enter the U.S. to work in the field in which he or she has earned extraordinary status
- USCIS finds that alien's admission as a permanent resident will substantially benefit the U.S.

DOCUMENTATION

Aliens eligible for this category will have demonstrated a major achievement such as an internationally recognized award (e.g. Nobel Prize) or *three* of the following:

- Lesser national or international award for excellence in the field of the alien's intended U.S. employment;
- Membership in association(s) in the alien's field that require members to have demonstrated outstanding achievements as judged by acknowledged experts;
- Published material about the alien in major professional or trade publications;
- Selection of the alien to judge others in the same or allied field;
- Original contributions of importance in the alien's field;
- Publication under alien's name of scholarly articles in professional/trade publications or broadcast media;
- Display of alien's work in artistic exhibitions;
- Performance of leading roles for distinguished organizations or institutions;
- High salary or level of professional remuneration in relation to others in the alien's field;
- Commercial success in the performing arts (box-office receipts, recordings, videos, etc.).

(2) Outstanding Professors and Researchers

REQUIREMENTS

- International recognition in area of academic specialty
- Three years experience in teaching or research (includes graduate or postdoctoral work, if qualifying)
- Seeks entry for a tenure track teaching or comparable research position (of unlimited duration) at an institution of higher education or private research position for employer of demonstrated research accomplishments that employs more than three full-time researchers

DOCUMENTATION

International recognition can be demonstrated via evidence of *two* of the following:

- Receipt of major prizes/awards for outstanding achievement
- Membership in an association requiring outstanding achievement
- Published material in professional publications written by others about the applicant's work
- Participation as a judge of the work of others
- Original scientific research
- Authorship of scholarly articles/books in the specialty area

(3) Multinational Executives and Managers

REQUIREMENTS

- Meets *qualifying employee* standard under the L-1 nonimmigrant classification
- Seeks to commence or continue U.S. employment as a manager or executive with the foreign employer or U.S. affiliate

SECOND PREFERENCE

Professionals with advanced degrees or *exceptional* ability in arts, science or business

SPECIAL FEATURES

- Labor certification is required unless specialty occupation is precertified under the Labor Department's Schedule A
- A petition submitted with Form ETA-750B and evidence supporting a *national interest waiver* will exempt the petition from the requirements of a job offer and labor certification

REQUIREMENTS

Aliens holding advanced degrees

For a petition to qualify under the second preference as an *advanced degree professional*, the position to be filled by the beneficiary must require an advanced degree or the equivalent. Adjudication of EB-2 petitions based on advanced degrees will first examine the requirements of the position (i.e. whether an advanced degree is required) and then to the beneficiary's credentials vis a vis that position. Although the position may require an advanced degree, the beneficiary may be considered qualified if he or she has a bachelor's degree plus five years of progressive experience relevant to the position.

Aliens of exceptional ability

To demonstrate *exceptional ability* in the arts, sciences or business, a petition must include a minimum of *three* of the following types of documentation relating to the field of exceptional ability:

- Official academic record demonstrating that alien has earned degree(s)
- Statement(s) from employer(s) demonstrating at least 10 years of full-time experience
- License or certification for professional practice
- Salary or history of remuneration for services commensurate with that of a professional
- Membership in professional association(s)
- Recognition by peers or government/professional entities for achievements and contributions

THIRD PREFERENCE

Skilled workers, professionals and other workers

REQUIREMENT

Third preference petitions must be submitted by employers, based on job offers, and include labor certifications.

FOURTH PREFERENCE

"Special Immigrants" including religious workers

REQUIREMENTS FOR RELIGIOUS WORKERS

- Membership for at least two years immediately preceding the application for permanent residence in a *religious denomination* having a *bona fide*, nonprofit, *religious organization* in the U.S., *and*
- Seeking admission to the U.S. to carry out vocation as a *minister*.

FIFTH PREFERENCE

The immigrant investor, or EB-5, program is a highly beneficial permanent residence option for individuals who have a substantial amount of money to invest in the United States. Since there is no quota waiting list in this preference category, it enables a foreign national to obtain permanent residence status more expeditiously than with most other options.

The EB-5 category requires an investment of \$1 million (or \$500,000 in a high unemployment or rural area) in a commercial enterprise that will employ 10 full-time U.S. workers. Although the investor's role cannot be completely passive, he or she does not have to be involved in any way in the day-to-day management of the business unless he or she wants to do so. It is critically important that the investor be able to document the lawful source of investment funds, whether his or her own or funds given to him or her as a gift. The permanent residence obtained by the investor is conditional for two years and can be made permanent upon satisfying USCIS at the end of the two years that the investment proceeds have not been withdrawn and the requisite jobs have been created.

The investor may invest in his or her own commercial enterprise or in a commercial enterprise owned by other parties. The investor may also choose to invest in a pre-approved "regional center." Regional centers are geographical areas for which USCIS has determined that investments will create the necessary 10 jobs per investor, whether directly or indirectly, in the geographical area. Virtually, all of the regional centers are in geographical areas where \$500,000 is the required amount of investment. Most of the regional centers involve limited partnership investments for which having the rights of a limited partner is considered sufficient to make the investor not completely passive.

REGIONAL CENTERS V. INDIVIDUAL EB-5	
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The profiles of the individual EB-5 investor and the regional center EB-5 investor are generally rather different. The individual EB-5 investor generally has the following characteristics:

- He or she actually wants to start and/or manage a business
- His or her business will be creating employment up front
- The investment is the driving force behind his or her wanting to come to the U.S.
- He or she wants to have control over his or her investment
- He or she wants to maximize profits from his or her investment

On the other hand, the regional center often meets the needs of investors with a different set of characteristics:

- He or she is not interested in starting a business
- He or she may be a retiree
- Although he or she may want to start a business, it will not create sufficient employment for an individual EB-5
- He or she wants to be geographically mobile
- He or she wants to spend most of his or her time outside of the U.S.
- Immigration - rather than U.S. business - is the driving force behind his or her investment

Partly because regional center investments address the needs of the foreign nationals described above, and partly because the standards for individual EB-5 petitions are so restrictive, the number of EB-5 regional center petitions has increased substantially in recent years and now well exceeds the number of individual EB-5 petitions.

SOME BACKGROUND

Established in 1992, the U.S. Immigrant Investor Pilot Program has had a troubled past. The program was suspended in 1997 because of two major problems:

- a. Failure by investors to complete their total investments; and
- b. Failure of the investment projects to create jobs.

Under the new guidelines of the program, issued in 2002, regional center investors are now required to invest the full \$500,000 before submitting the I-526 petition, thereby resolving the first problem. As will be discussed in more detail below, the second problem has been resolved to a greater extent by some regional centers and to a lesser extent by others. For this reason, choosing the optimal regional center is a critical decision.

The Immigrant Investor Pilot Program remains a "pilot program" with continuing extensions through the present date.

COMPARING REGIONAL CENTER AND INDIVIDUAL EB-5

The major advantage of the regional center as compared with an individual EB-5 investment is that the investment has been pre-approved by USCIS with respect to the qualifying amount of the investment and with respect to the job creation requirement. 8 C.F.R. sec. 204.6 (m). As a result, for purposes of approval of the I-526 investor petition, the remaining issues are tracing the funds from the investor to the regional center and proving the lawful source of the investor's funds. This eliminates the need to deal with the many complicated issues involved in an individual EB-5 petition for which the investment enterprise has not been pre-approved, such as whether the investment entity qualifies as a "new commercial enterprise;" whether the investment is in a "targeted

employment area;" whether the investment is in a "troubled business;" whether the requisite "employment creation" has taken place; and whether the investment meets the "establishment" of a new commercial enterprise standard.

In addition, the regional center option is advantageous because:

- Indirect employment creation is allowable;
- There is presently no quota waiting list;
- The government generally expedites adjudication of the investor petition;
- The foreign national can work anywhere he or she wants; or not work, as he or she pleases;
- The foreign national's children may stay in the U.S. and study in the U.S.; and
- The foreign national can travel in and out of the U.S. as frequently as he or she desires.

The following analysis illustrates the similarities and differences between the individual EB-5 investment and the regional center investment with reference to some of the major elements involved in EB-5 adjudications:

AMOUNT OF INVESTMENT:

Virtually all of the approved regional centers have been approved as "targeted employment area" investments, thus qualifying for the reduced \$500,000 investment requirement. 8 C.F.R. sec. 204.6 (e). Individual EB-5 investments are either \$500,000 or \$1,000,000 depending upon whether the investor can prove that the investment is in a "rural area" or in an area which has experienced unemployment of at least 150 percent of the national average rate. Otherwise, if the investor does not meet her burden of proof on these points, the required amount of investment is \$1,000,000.

JOB CREATION:

An individual EB-5 petition requires proof of "full-time employment" as direct employees (not independent contractors) of 10 U.S. workers. 8 C.F.R. sec. 204.6 (j)(4). Although technically the requisite employment does not have to have been created at the time of approval of the I-526 petition, adjudication history reveals great difficulty in getting cases approved based upon business plans showing that the requisite employment will be created within the two year period before the necessity of filing a condition removal petition.

This problem is solved with the regional center petition since the employment creation has been pre-approved. In addition, pursuant to 8 CFR sec.204.6 (e), the regional center can qualify based upon indirect employment creation generated in the community through the regional center investment.

Although an investment in the regional center should not raise the issue of employment creation for purposes of the I-526 approval, the choice of regional center in which the investment is made is critical. In order for the investor to have conditions removed after the end of the two year conditional period, USCIS will have to be satisfied that the direct or indirect employment creation has actually taken place and that the job creation has taken place in the targeted employment area. 8 C.F.R. sec. 204.6 (a)(4). Choosing a regional center with a track record of employment creation thus enhances the likelihood that the investor will, in fact, be able to remove conditions, and become a non-conditional permanent resident on track to citizenship (if desired). The investor

should scrutinize how job creation is documented and calculated and the economic models of job creation methodologies utilized for determining indirect job creation.

MANAGEMENT:

As part of the pre-approval process, the regional center had to satisfy USCIS that the investors would be engaged in the "management" of the enterprise as opposed to maintaining a "purely passive role." 8 C.F.R. sec. 204.6 (j)(5). This must be proven on a case-by-case basis by the individual EB-5 petitioner.

Most of the regional centers are limited partnerships. Pursuant to 8 CFR sec.204.6 (j)(5)(iii), if the petitioner is a limited partner and the limited partnership agreement provides the petitioner with the rights, powers and duties normally granted to limited partners under the Uniform Limited Partnership Act, the investor will be considered sufficiently engaged in the management of the enterprise. As a practical and legal matter, this requirement can be met by a limited partner without the necessity of the investor committing to any specific amount of time or engaging in any day-to-day management, since such activities are performed by the general partner.

SOURCE OF FUNDS:

The requirements for the investor to prove the lawful source of his or her investment funds is the same for individual and regional center EB-5 petitions. 8 C.F.R. sec. 204.6 (j)(3). In both cases, the documentation requirements are extensive.

TIMING:

<p>USCIS has committed to expedited processing of regional center petitions. In most cases, this results in I-526 approval within two to five months of filing. Since the quota is current for this category of immigrants, within two to five months of filing of the I-526, the investor and his or her family who are in the U.S. are able to file applications for permanent residence, employment authorization and advance parole travel documents. The timeframe is generally slower for individual EB-5 petitions.</p>	
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ABOUT EB-5 VISAS: FAQs

Immigration Opportunities for Foreign Investors

Prior to the Immigration Act of 1990, a foreign national could not qualify for permanent immigration to the United States based upon an investment, no matter how large. Investors had to qualify, if at all, as employees of U.S. companies, family members of U.S. citizens or permanent residents or, in the alternative, obtain nonimmigrant (temporary) visas. As a result of this policy, many foreign investors immigrated to countries such as Canada and Australia, which have provided substantial incentives to foreign investors.

Presently, 10,000 immigrant (permanent) visas per year are available to foreign investors and their family members who meet certain, very specific criteria. These criteria are interpreted very strictly by the U.S. Citizenship and Immigration Services (USCIS). This Update, in a question and answer format, will address how foreign investors can now obtain permanent resident status in the United States.

What is the minimum amount of investment required?

For investments in areas other than "targeted employment areas," the minimum amount of investment is \$1 million. Investments in "targeted employment areas," including approved regional centers, can qualify with a minimum of \$500,000.

What is a "targeted employment area?"

A targeted employment area is a rural area or a geographical area that has experienced unemployment at a rate of at least 150 percent of the national average rate. Individual states are authorized to designate geographical areas within the state that qualify as targeted employment areas. Of the 10,000 visas available for investors, 3,000 are reserved for investments in targeted employment areas.

What is included in calculating the investment amount?

The entire amount of the investment need not be in cash. Assets transferred to the U.S. investment can be included at fair market value. Debt can be included in the required minimum investment amount but only to the extent that the debt is secured by assets owned by the investor, and the investor is personally and primarily liable. The assets of the business in the United States in which the investment is made cannot be used to secure any of the indebtedness.

Must the entire amount of the investment be made at the time of applying for an immigrant visa?

The entire amount of the investment need not have been made at the time of applying for an immigrant visa. However, the investor must prove availability of the funds and an actual commitment of the required amount of capital. A mere intention to invest or plans for a future investment where there is no present commitment of the funds will not qualify.

Are there any restrictions on the types of businesses in which the investment must be made?

The investment must be in a "new commercial enterprise" in the United States. "New" means that the investment must have been made after November 29, 1990. "Commercial" is to be distinguished from a passive, speculative investment, such as a purchase of real estate for use as a personal residence or for potential appreciation in value (as opposed to an active real estate development project).

The U.S. investment can be in any one of four forms: (1) the creation of a new business; (2) the purchase of an existing business, which is reorganized to form a new enterprise; (3) the expansion of an existing business; or (4) the saving of a failing business.

Are there any specific rules regarding an investment in an existing business that enable the existing business to expand?

The investment must result in a 40 percent increase either in the net worth or the number of employees of the business. For example, if a business has a \$5 million net worth and employs 50 people, the investment would qualify either if it increases net worth by \$2 million or if it results in an expansion of 20 employees.

Must the investor have any specific relationship with the U.S. business in which the investment is made?

The investor need not own any specific percentage of the business, be an officer of the business or be an employee of the business. However, the investor must be engaged in some way in the business, whether through actual day-to-day managerial control, by being a member of the board of directors, by being a limited partner, or the like.

Must the investment result in the creation of employment for U.S. workers?

The investment must create full-time employment for at least 10 U.S. citizens or immigrants (permanent resident aliens and other specified immigrant categories). The required 10 positions cannot include the investor or the investor's spouse or children. The 10 jobs must be for employees of the enterprise in which the investment is made and cannot include independent contractors. However, for approved regional centers, the creation of employment is pre-approved and can include indirect employment.

When must the employment be created?

The required 10 jobs must be created within the two-year period immediately following the investor becoming a permanent resident.

May an investor qualify based upon an investment in a failing business where the investment results in saving the business and saving the jobs of the business's employees?

An investment in a "troubled business" may qualify without a requirement of showing the addition of new jobs to the business. In order to qualify, the business must have been in existence for at least two years and must have suffered a loss of at least 20 percent of its net worth during the past two years. The number of existing employees of the troubled business must at least remain the same for a period of two years.

May two or more investors qualify for immigration based upon a pooled investment in a single business?

There is no limit to the number of investors who may qualify for immigration based upon an investment in a single business. However, each investor must invest the required minimum amount, and the number of jobs created must be equal to 10 times the number of qualifying investors. For example, if five investors each invest \$1 million in a business, they can each qualify for immigration if 50 jobs are created in the business.

Is the immigration status granted to the investor valid indefinitely?

The permanent resident status granted to the investor is actually a "conditional permanent resident status" that is valid for a period of up to two years. The investor and family members are required to remove the condition by filing an application during the 90 day period preceding the second anniversary of obtaining this status. The petition will be required to demonstrate the establishment of the business, the investment of the requisite amount of capital and the creation of the required number of jobs.

Is the investor free to travel after obtaining conditional permanent resident status?

The investor is free to travel in and out of the United States subject to the rules generally applicable to permanent residents. Specifically, the investor must actually have a residence in the United States and must not be outside the United States for a continuous period of one year or more.

What is the procedure for an investor to qualify as an immigrant based upon the investment?

Form I-526, "Immigrant Petition by Alien Entrepreneur," must be filed with USCIS. The petition must be supported by a substantial amount of documentation proving that the investor meets all of the requirements. Once the petition is approved, the investor may either apply for an immigrant visa at a U.S. Consulate or, if the investor is in the United States, apply for adjustment of status to permanent residence.

What documents must be filed with the petition?

The basic rule is that there must be documentation to establish each of the requirements set forth above. Specifically, documentation must prove the actual transfer or commitment of funds; the lawful source of the investor's funds; the location of the investment in a targeted employment area (if the investment is less than \$1 million); the establishment of the new commercial enterprise; the involvement of the investor; the business; and the actual creation of 10 full-time positions or a comprehensive business plan showing the need for the 10 employees and the approximate dates when they will be hired. Specific additional documents will be required depending upon the details of the investor and the investment being made.

What documentation must be presented to prove that the investor's funds came from a lawful source?

Generally, the investor will present some combination of individual and/or business tax returns, employment records, documentation regarding sale of a business, documentation regarding gifts or inheritance, and documentation regarding securities or real estate transactions