

# **U.S. IMMIGRATION VIA FAST-TRACK INVESTOR GREEN CARDS**

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## **INTRODUCTION**

Foreign individuals wishing to invest, live, work or study in the U.S., and companies wishing to hire and transfer employees to work in the U.S., increasingly need to be careful to select U.S. immigration visas that are fully appropriate for time actually spent and activities actually conducted in the U.S.

If this is not done, significant adverse U.S. immigration consequences may result, and other U.S. business planning objectives may be hard to implement.

Since 9/11, both in the U.S. and in other countries, non-immigrant visas have become harder to qualify for and maintain, on a predictable basis. Therefore, foreign individuals wishing to invest or conduct business activities in the U.S., and to be able to come and go regularly to and from the U.S., may now be well-advised to consider the pros and cons of obtaining a U.S. Green Card, instead of merely a short-term or terminable non-immigrant visa.

In the past, U.S. Green Cards often have been disfavored by international tax advisors because they generally result in U.S. taxpayer status. However, as tax rates and other regulations and restrictions have increased in other countries, U.S. taxpayer status may now be viewed as more desirable (or less undesirable), particularly for taxpayers having significant taxable business activities in the U.S.

Also, as non-immigrant visas have become more unpredictable, costly and time-consuming to obtain, a certain type of U.S. Green Card, which is available on a fast-track basis, has become more attractive.

In particular, the EB-5 Investor Green Card category (and, in particular within it, the U.S. Immigration approved Regional Center program -- which permits a U.S. Green Card to be issued via a \$500,000 investment in certain limited partnerships in targeted employment areas) can provide an attractive means for foreign individuals to be able to live and work in the U.S.

## **GENERAL U.S. IMMIGRANT AND NON-IMMIGRANT VISA REQUIREMENTS**

As a general rule, a foreigner (“non-resident alien”) wishing to live and/or work full-time or part-time in the U.S. may seek to qualify for status either as an “immigrant” (with a Green Card) or as a “non-immigrant” (with a long term temporary work or investor visa).

U.S. immigrant visas (Green Cards) typically require either a close family connection with a U.S. citizen or permanent resident (Green Card holder) or an employment-based connection via PERM labor certifications and intracompany transferee applications.

Non-immigrant visas generally can be applied for by foreign professionals (via H-1B or TN visas), by “treaty traders” or “treaty investors” from countries with applicable treaties with the U.S. (via E visas), by intra-corporate transferees (via L visas), or by trainees (via H-3 or J-1 visas).

More complete information regarding available U.S. permanent and temporary visas, and requirements to qualify for them, may be obtained via Mark Ivener's website at [www.usworkvisa.com](http://www.usworkvisa.com).

Not having the correct visa to cover actual time spent and actual activities to be carried out by a non-resident alien in the U.S. can result in significant problems for entrants to the U.S. For example, business or tourist visas, i.e. B-1/B-2 visas, are intended solely for short-term stays and generally do not permit visitors to stay and work or earn money in the U.S. If these limitations are abused, the result can be deportation and/or barring from reentry to the U.S. for 3 or 10 years.

Similarly, E visas are limited to nationals of countries which have qualifying treaties with the U.S. (see list of treaty countries at [www.usworkvisa.com](http://www.usworkvisa.com)). E visas also require substantial trade (E-1) between the U.S. and the treaty country or a substantial at risk investment (E-2), as well as time and risk to identify, acquire, operate and manage a qualifying active job-creating business.

L visas are limited to executives, managers or specialized knowledge personnel who have been employed continuously abroad by a parent, branch, affiliate or subsidiary of a U.S. company for at least one of the three years preceding an application for admission to the U.S.

Even student visas may be hard to obtain, on a timely basis or at all, and such visas generally do not permit gainful employment in the U.S., nor remaining in the U.S. after the visa expires (except for a timely filed application for post graduation practical training for one year or a H-1B visa, if obtainable).

Additionally, many non-immigrant visas have significant time-consuming processing requirements and/or backlogs (for example, the quota for new H-1B visas for professionals currently is full and no new visas will be available until October 1, 2008). Furthermore, most non-immigrant visas are limited in duration and generally are not readily convertible later to immigrant visas (except for L-1A managers or executives).

## **TAX CONSIDERATIONS**

Visa applicants wishing to invest or spend significant time in the U.S., without becoming U.S. tax residents, must generally limit stays in the U.S. to not more than 121 days per calendar year. This continuing requirement can be inconvenient and a trap for the unwary, particularly if U.S. business or investment activities require unexpectedly long stays or schedule changes. Also, new non-immigrant work visas for re-entry purposes may not always be promptly available when needed.

However, as overseas tax regimes have become more stringent, and tax rates and other regulatory requirements in other countries more onerous, U.S. tax resident status may no longer be materially disadvantageous. In any event, U.S. income tax rates generally apply to U.S. earned income and U.S. situs asset transfers, i.e. even for non-residents. Additionally, treaties may be utilized to avoid or reduce double taxation of the same items in more than one country. Effective pre-immigration tax and business planning may limit or avoid the need to subject pre-owned foreign assets or income to future adverse U.S. taxation. Moreover, family members who do not have substantial foreign assets or foreign income (e.g. students, young professionals, spouses, adult children, etc.), may be applicants for U.S. immigrant visas (Green Cards) without adverse U.S. tax consequences.

Furthermore, tax considerations may be only one of a number of relevant factors and should not therefore automatically determine all planning choices. For example, visa availability, lifestyle

preferences, location of primary business activities, and freedom of movement for individual family members and capital, may be of equal or greater importance to many would-be immigrants.

### **ADVANTAGES OF EB-5 GREEN CARDS**

For all of the above reasons, ability to obtain a fast-track immigrant visa (e.g. via the EB-5 Investor Green Card program) may now be viewed as an attractive potential alternative to a non-immigrant visa.

EB-5 Green Cards (and, in particular, approved Regional Center programs) may provide the following advantages over other types of immigrant and non-immigrant visas:

- In Regular EB-5 cases, only a minimum of \$500,000 or \$1 million needs to be invested (which can come from the investor's own funds, including but not limited to via a loan not secured by the EB-5 investment or a gift);
- For the Regular EB-5 program, a job-creating business with at least 10 full-time employees is needed; however, for Regional Center programs, a separate active job-creating business with at least 10 full-time employees is not needed (i.e. a combination of 10 direct and/or indirect employees who are new to the Regional Center is acceptable);
- Fast-track Green Card status is available for EB-5 Regional Center cases (typically resulting in conditional Green Card approval in about one year);
- 5+ year quota backlogs, applicable to most employment-based Green Card/Labor Certification applications, may be avoided;
- 5-20 year quota backlogs, applicable to all family-based Green Card categories except those involving a spouse, single minor children or parents of a U.S. citizen, may be avoided;
- Day-to-day management of an active business is not required for a Regional Center EB-5 case (contrary to a Regular EB-5 case and an owner E visa); instead, an EB-5 Regional Center program applicant may have limited liability (and authority) as a limited partner in a limited partnership, so long as limited partners have an acceptable "policy-making" role in the enterprise, as most limited partnership programs provide;
- In a Regional Center EB-5 case, there is no requirement to live in the area where an investment is made, which means that the applicant can work, go to school or retire anywhere in the U.S. (by contrast, in other types of visas, where a job or active business investment is the required basis for the visa, a significant local presence generally is needed to work at the job or manage the investment); and
- Many typical non-immigrant visa restrictions may be avoided (e.g. professional job requirements, prior overseas employment, restrictions on ability to work and earn money in non-employment related visa situations, lengthy consular waiting periods, and limitation of parent visas to single children under 21, resulting in loss of visa status for a single child turning 21).

## **EB-5 GREEN CARDS— COMPARISON OF REGULAR AND REGIONAL CENTER PROGRAMS**

As noted above, there are two types of EB-5 programs, i.e. the Regular program and the Regional Center program.

In order for an applicant to qualify under the Regular program, the following three basic requirements must be met: (1) investment in a new commercial enterprise; (2) investment of at least \$1 million (or \$500,000 in certain cases) into the business; and (3) creation of full-time employment for at least 10 legal/U.S. citizen workers.

By contrast, the Regional Center program has reduced requirements and may be ideal for the retiree or inactive investor. The Regional Center program removes the 10 direct employee requirement of the Regular program and substitutes the less-restrictive “indirect employment creation” requirement. Therefore, the investor can qualify for an EB-5 Green Card without being required to hire and be responsible for 10 employees in the company in which the investor invests. Instead, an investor in an Immigration approved Regional Center program can qualify by presenting evidence that a combination of 10 direct and/or indirect new jobs will be created throughout the Regional Center, e.g. via an economist’s report obtained by (and at the expense of) the Regional Center program entity, prior to investment by the applicant.

Also, the project management requirement for a Regional Center investor may be minimal, since the investor can be a limited partner with only a policy-making role. Thus, for those who are not interested in bearing the burdens of day-to-day management and running an active business, Regional Center programs offer a more acceptable form of investment than most Regular program investments.

Another advantage of Regional Center programs, which further distinguishes this type of program from the Regular program (as well as other types of visas based on a qualifying active and/or job-creating investment) is that the investor is not required to live in the location of the investment. For example, the investor may invest in a Regional Center in the State of Washington, but choose to live in New York.

Additionally, by mandate of Congress, Regional Center EB-5 petitions are given priority by the U.S. Citizen and Immigration Service (CIS) (formerly named INS). Among other benefits, this typically results in a significantly faster path to approval.

It is important to recognize that each Regional Center program must be pre-approved by CIS/INS in order to be eligible for the grant of EB-5 Green Cards. In fact, to date, there are only a few approved active programs. It is also important to recognize that each program is different in nature, targeting different types of businesses and generally coming with differing levels of longevity, risk and reward.

For example, among a total of about 5 active Immigration approved EB-5 programs, the following two primary programs may be noted, with operating histories of 4 and 10 years:

- A real estate limited partnership program that offers an investment in commercial properties in Seattle for both accredited immigrant and U.S. investors. This program, which was granted INS designation as a Regional Center in 1996, generally involves acquisition and redevelopment of low-yielding industrial properties, and renovating them into commercial properties, including a hotel, office space, retail shops, storage space, etc. Investors participate as limited partners of a

limited partnership, and earn a monthly return from tenant rentals after property renovation, as well as a share of future appreciation from the project when sold. Investment periods vary, but cannot end before receipt of the permanent Green Card by the investor. The minimum investment amount for this program is \$525,000.

- A limited partnership program that makes low interest loans to businesses in Philadelphia available only to accredited immigrant investors. Business investment and development in this program, which has been a CIS Regional Center designee since 2003, targets industry sectors that demonstrate strong indications of expansion, growing employment needs, and returns on investments. This Regional Center directs its efforts at financing projects and developing enterprises within targeted sectors, including hospitality and tourism, trade, technology, education, and transportation. The minimum investment period for this program is 5 years. The minimum required amount of investment for this program is \$530,000.

As indicated above, each EB-5 Regional Center program is different. Different investors may prefer different types of programs, depending on preferences as to type of investment, location, risks and projected rates of return, among other factors. For example, real estate-oriented foreign investors may gravitate towards the Regional Center real-estate related program, where rates of return, shares of profit from future appreciation and limited risk are familiar.

It is important to note that not only immigration-related, but also customary business-related due diligence should to be carried out with regard to each prospective investment. Among other things, relative rates of risk and return, track record and location of each program should be considered and compared. Also, the sufficiency of applicable legal documentation should be reviewed by competent counsel for the applicant, as typically is required for other transactions in the U.S. Therefore, a professional team approach is advisable, in order to achieve best results for the investor.

If properly handled, a qualifying EB-5 Regional Center program is not to be viewed solely – or, indeed, at all - as a cost of obtaining an EB-5 Green Card, but rather as an acceptable capital investment, in its own right, since capital invested in a suitable program will generally be returnable in the future, together with reasonable returns and potential additional profits, if and when the project is sold during the term of the investment. Therefore, by comparison with direct, active business investments required for E visa or EB-5 Regular program purposes, EB-5 Regional Center programs may be not only less time-consuming, but also less risky to identify, acquire and maintain, and such programs also do not interfere with the applicant's ability to engage in other desirable activities during the period of the investment.

### **EB-5 GREEN CARDS— PROCEDURAL REQUIREMENTS**

The procedure for obtaining an EB-5 Investor Green Card is relatively straightforward.

The applicant generally must produce five years of tax returns to substantiate the source of investment funds. The funds can be the investor's own money, or proceeds of a loan or gift (so, for example, a parent can gift the investment funds to a son or daughter, provided that gift taxes, if any, required in the investor's home country are paid). The applicant also must present evidence that traces the capital, through bank transfers and other documentation, from the investor directly to the target investment. This demonstrates that funds were procured by legal means. Local banks that are experienced in

dealing with foreign investors can be helpful in providing local liquidity and financing, if sufficient verifiable and collateralizable foreign assets exist.

After an appropriate business and financial due diligence, and when the investment is made, an I-526 petition can be filed by the foreign investor with CIS, requiring CIS to certify that the applicant and the investment are eligible for EB-5 status. Approval of this petition takes, on average, only 2-3 months for Regional Center cases (somewhat longer for Regular program cases).

If the investor is already in the U.S. on a valid visa, he or she can immediately apply for a Green Card through CIS. No interview customarily is required, and approval for most cases has been taking approximately 9 months. If the investor resides abroad, an application for a Green Card is generally made at the U.S. Embassy or Consulate in the investor's home country. However, in the latter case, for Consular processing purposes, an interview is necessary. In these cases, approval of the Green Card also takes, on average, about 9 months in most countries.

In most Regional Center cases, in either of the above scenarios, the entire process generally takes about one year for most applicants, based on April 2007 CIS and State Department Consular processing times. Actual timing in some cases may be longer, depending on particular circumstances. During the one year application process in the U.S., an applicant must be in legal status (generally on a work visa). If outside the U.S. when applying, he/she can generally travel freely in and out of the U.S. as a visitor.

Once CIS approves the investor's Green Card, it is conditional for a period of two years. Conditional Green Card status confers the same rights as the permanent unconditional Green Card. Between 21 and 24 months after the conditional Green Card has been approved, the investor must apply for Removal of the conditions if the investor is able to confirm that the investment has been made or is still in place and that the direct and/or indirect employment requirement has been fulfilled or maintained.

In the case of a Regional Center program, this information can be obtained from the EB-5 program entity. In the case of a Regular program, the investor is required to confirm that the requirements have been satisfied and bear all of the responsibility of doing so. Also, in the case of a Regular Program, if the business is not profitable and employment falls below 10 employees, or the business is on the verge of failure, there is a high probability of loss of the initially granted conditional Green Card. In such a case, it may be possible to switch from a Regular program to a Regional Center program investment, but only with investment of additional funds. Once the condition has been removed, a permanent Green Card is granted for indefinite resident status and work permission in the United States.

From the time of application for an I-526 petition and issuance of a conditional Green Card until approval of removal of the condition, 3 ½ - 4 years is required, in most cases. After approval of the permanent Green Card in Regular programs, and also in Regional Center programs (subject to the terms of their particular project agreements), the investment may be sold with the investor still maintaining a permanent Green Card.

U.S. citizenship is possible five years after approval of the conditional Green Card, subject to satisfaction of residence and other criteria.

## GENERAL PLANNING CONSIDERATIONS

For all would-be U.S. immigrants and non-immigrants, the following planning considerations are recommended:

1. Compare pros and cons of different types of visas, including applicable visa limitations and restrictions, in the context of not only present, but also future individual and family business and lifestyle objectives.
2. Conduct a prudent level of legal and financial due diligence prior to commitment to any visa-related investment;
3. Seek pre-immigration tax and estate planning advice (particularly, for incoming immigrants with significant non-U.S. assets and/or income), so as to optimize crossborder tax planning effects and limit unnecessary exposure to U.S. taxation of non-U.S. assets and/or income;
4. For employment-related visas, consider U.S./foreign compensation and labor law related issues;
5. For married (and unmarried) couples, consider applicable U.S. family law considerations (particularly, if children or separately owned assets are involved); for example, EB-5 Regional Center visas do not require an “active” U.S. business investment, which may help to preserve the enforceability of foreign separate property agreements and marriage contracts and minimize complications in community property jurisdictions;
6. For particular limited term non-immigrants (e.g. students, employees, diplomats, etc.), consider future planning needs, e.g. if there is any potential desire to remain in the U.S. after non-immigrant visa status expires;
7. Consider particular business factors, such as eligibility of incoming foreign persons to invest in or operate certain U.S. businesses, local requirements to conduct a licensed profession, importance of local access to U.S. credit and financing options, health, casualty, life and other types of insurance, etc. (including favorable U.S. life insurance products available for estate planning purposes); and
8. Select appropriate family members to be initial U.S. visa applicants, based on all above factors.

When all applicable factors are properly taken into account, foreign individuals desiring to invest, live, work (or study) long-term in the United States may find the EB-5 Immigrant Investor Green Card—and, in particular, the Regional Center EB-5 program—an unexpectedly effective means to achieve these goals.

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