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**Coming to America:  
EB-5 Immigration Visas and Franchising**

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## Coming to America: EB-5 Immigration Visas and Franchising

### I. INTRODUCTION

The broadly-applicable federal law covering immigration is the Immigration and Nationality Act (the “INA”),<sup>1</sup> which was adopted by Congress in 1952 by overriding President Truman’s veto.<sup>2</sup> The INA was substantially amended in 1965<sup>3</sup> and in 1990. The 1990 amendments, in an effort to expand the number and categories of immigrants that might enter the U.S., took the form of the Immigration Act of 1990.<sup>4</sup> President George H.W. Bush signed the Immigration Act of 1990 into law on November 29, 1990.

The 1990 Act was a comprehensive effort that broadly impacted U.S. immigration law<sup>5</sup> and introduced, among other things, an investor visa that has been implemented as the “EB-5” program. President Bush hailed the new law, noting that it “dramatically increases the number of immigrants who may be admitted to the United States because of the skills they have and the needs of our economy ... encourage[s] the immigration of exceptionally talented people, such as scientists, engineers, and educators ... [and] promotes ... the investment of foreign capital in our economy.”<sup>6</sup>

In Washington (a city that loves its acronyms) the “investor visa” program is referred as “EB-5” – because “EB” is an abbreviation for “employment based” and “5” denotes that the

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<sup>1</sup> Pub. L. No. 82–414, 66 Stat. 163 (1952).

<sup>2</sup> See Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, Papers of President Harry Truman (Jun. 25, 1952) ([www.presidency.ucsb.edu/ws/?pid=14175](http://www.presidency.ucsb.edu/ws/?pid=14175)).

<sup>3</sup> Pub. L. No. 89–236, 79 Stat. 911 (1965).

<sup>4</sup> Pub. L. No. 101-649, 104 Stat. 4978 (1990).

<sup>5</sup> See Note, Miguel Lawson and Marianne Grin, *The Immigration Act of 1990*, 33 Harv. Int’l L.J. 255 (Winter 1992).

<sup>6</sup> Presidential Signing Statement, 1990 U.S.C.C.A.N. 6801-1 (1990). The bill passed with substantial bipartisan support (89-8 in the Senate and 264-118 in the House, with 76% of House Democrats and 60% of House Republicans supporting the measure (<http://clerk.house.gov/evs/1990/roll530.xml> and <https://www.congress.gov/bill/101st-congress/senate-bill/358/all-actions?overview=closed&q=%7B%22roll-call-vote%22%3A%22all%22%7D>). One House member who voted for the measure nevertheless voiced concern about the investor provisions which underlie the EB-5 program, observing that “although I come here today recommending passage of this legislation, I agree ... that the bill has a curious provisions which would allow 10,000 people to enter this country based upon the fact that they are millionaires. This borders on selling our citizenship, and I would hope this policy will be reconsidered early in the next session of Congress.” 136 Cong. Rec. E3696-01 (daily ed. Nov. 2, 1990) (statement of Rep. Ronald D. Coleman). That sentiment was more recently echoed by Sen. Dianne Feinstein, who was quoted as saying that “I don’t believe that America should be selling visas and eventually citizenship.” Ron Nixon, *Program That Lets Foreigners Write a Check, and Get a Visa, Draws Scrutiny*, N.Y. Times, Mar. 15, 2016, at A13.

program is the *fifth* employment-based preference. The EB-5 program is administered by the U.S. Citizenship and Immigration Services agency.<sup>7</sup>

Under the Immigration Act of 1990, “10,000 visas [are allotted] each year for foreign investors who invest between \$500,000 and \$3 million in an enterprise that provides employment for at least ten full-time U.S. workers. This employment-creation preference is unprecedented in U.S. immigration law.... The 1990 Act sets a threshold amount of \$1 million for most investments. However, to encourage investment in ‘targeted employment areas,’ the 1990 Act provides 3,000 visas for which the Attorney General may lower the minimum investment to \$500,000.”<sup>8</sup> These ‘targeted employment areas’ can be either: (1) an area of high unemployment that has at least 150% of the national unemployment rate or (2) a “rural area,” which is a city or town with a population of less than 20,000 that also is outside a metropolitan statistical area.<sup>9</sup>

The law did not specify or restrict the types of investment that would enable an applicant to apply for the visa. Senator Paul Simon spoke on the Senate floor about the Conference Report before the bill was adopted, and observed that:

[W]e want to attract entrepreneurs and job-creators into the U.S. economy, and as long as their investment is legitimate, we do not want or need excessive or arbitrary industrial policy tests about what constitutes a worthwhile investment. For example, the bill requires investor immigrants to start new firms. But this should not be intended to preclude an investor starting that new company from utilizing the existing assets of a failed enterprise. We should encourage and not cripple the creativity of these enterprising immigrants.

...

Neither the Senate nor the House bill established any sort of criteria about the type of business investment. The only guideline is that the investment minimums must be satisfied and the venture must employ at least 10 people for 2 years. This makes good sense. As long as the employment goal is met, it is unnecessary to needlessly regulate the type of business-manufacturing, service, retail or the like-nor the character of the investment.<sup>10</sup>

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<sup>7</sup> See *generally* US Citizenship and Immigration Services website, *EB-5 Immigrant Investor Program*, at <https://www.uscis.gov/eb-5>.

<sup>8</sup> Miguel Lawson and Marianne Grin, *The Immigration Act of 1990*, 33 Harv. Int’l L.J. 255 at 268-2 (Winter 1992).

<sup>9</sup> See 8 C.F.R. § 204.6(f)(2) (2016). Targeted employment areas (TEAs) that are appropriate for the lower investment thresholds are designated at the state level. See, e.g., *EB-5 Investor Visa Program*, California Governor’s Office of Business and Economic Development (<http://www.business.ca.gov/International/EB5Program.aspx>) and text accompanying n. 51, *infra*.

<sup>10</sup> 136 Cong. Rec. S17106-01 (daily ed., Oct. 26, 1990) (statement of Sen. Paul Simon on Immigration Act of 1990 Conference Report).

Thus, the EB-5 program was opened to various types of investment opportunities.<sup>11</sup> The lion's share of EB-5 investments run through private "regional centers," which are set up to match investors with businesses seeking capital. Congress must periodically pass reauthorization legislation for regional centers, with the current program set to expire on September 30, 2016.<sup>12</sup> Whether Congress will act before that date or afterward (on a retroactive basis) is unclear as of this writing.<sup>13</sup> However, whether investors act through regional centers or direct EB-5 investments, the EB-5 program has garnered significant attention and usage over the past few years; in 2015, all 10,000 visas were used by EB-5 investors and the same is expected in 2016.<sup>14</sup>

## II. EB-5 INVESTMENT AS A FUNDING VEHICLE FOR FRANCHISES

The Immigrant Investor Program, or EB-5 program, allows foreign nationals to receive permanent resident status ("green card") based on the investment of a requisite amount of capital and the creation of at least ten permanent, full-time jobs in the United States.<sup>15</sup> The minimum investment level is \$1,000,000, unless the investment is made in a business located in "targeted employment areas" (each, a "TEA" – an area with an unemployment rate of at least 150% of the national average, or a rural area"), in which case the minimum investment level is downwardly adjusted to \$500,000.<sup>16</sup>

There are two approaches to EB-5 investment:

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<sup>11</sup> As just one example, the developer of a soccer stadium in Orlando – who was himself an earlier EB-5 investor – sought investment from additional EB-5 investors. See Ken Belson, *Price for a Green Card: \$500,000 Stadium Stake*, N.Y. Times, May 17, 2016, at A1. Traditionally, real estate investments have garnered many EB-5 investments. See Eliot Brown, *Developer Seeks EB-5 Funding for Luxury New York Tower*, The Wall St. J., June 21, 2016 (available at [www.wsj.com/articles/developer-seeks-eb-5-funding-for-luxury-new-york-tower-1466536687](http://www.wsj.com/articles/developer-seeks-eb-5-funding-for-luxury-new-york-tower-1466536687)). See also James M. Carolan, *Foreign Investment in US Real Estate Increases*, 16 No. 2 IBA Real Est. 39 (Sept. 2012); Sally Ho, *Vegas, Asian Investors Betting on Sin City's Chinese Tourism*, N.Y. Times, Aug. 30, 2016 ([www.nytimes.com/aponline/2016/08/30/us/ap-us-travel-chinese-tourism-vegas.html](http://www.nytimes.com/aponline/2016/08/30/us/ap-us-travel-chinese-tourism-vegas.html)) (reporting on a new casino being built in Las Vegas to cater to Chinese visitors, using funds from Chinese EB-5 investors).

<sup>12</sup> See *EB-5 Regional Center Program Extended Until Sept. 30, 2016*, National L. R. (Sept. 3, 2016) (<http://www.natlawreview.com/article/eb-5-regional-center-program-extended-until-sept-30-2016>).

<sup>13</sup> There is, to be sure, significant opposition to the program in 2016. See, e.g., Ron Nixon, *Program That Lets Foreigners Write a Check, and Get a Visa, Draws Scrutiny*, N.Y. Times, Mar. 15, 2016, at A13 (citing opposition by key U.S. senators).

<sup>14</sup> See *Department of State Announces EB-5 Retrogression for Chinese Nationals Effective May 1, 2015* (Apr. 13, 2015) (<http://www.eb5insights.com/2015/04/13/department-of-state-announces-eb-5-retrogression-for-chinese-nationals-effective-may-1-2015/>).

<sup>15</sup> INA § 203(b)(5), 8 U.S.C. § 1153(b)(5).

<sup>16</sup> *Id.*; see also 8 C.F.R. § 204.6(f)(2)(2016) .

1. The Regional Center Program, which was created as a temporary program by Congress in 1993, under which foreign nationals can invest in “designated regional center projects;”<sup>17</sup> and
2. Direct EB-5 investments, under which foreign nationals invest in non-regional center projects, which is commonly referred to as “Direct EB-5.”

In recent years, the Regional Center Program has been the predominant approach to EB-5 investment, with more than 95% of the EB-5 immigrant investor based petitions filed with the United States Citizenship and Immigration Services (“USCIS”) being affiliated with regional centers.<sup>18</sup> One explanation is that Direct EB-5 involves a more burdensome requirement of direct job creation and a more active engagement in the management of the business, which could be challenging to foreign investors who are not familiar enough with the U.S. business environment. The Regional Center Program, on the other hand, allows for pooled investments into a fund that makes an investment into a project, which allows the investor to make a relatively passive investment and which also allows for “indirect” job creation.<sup>19</sup> This article discusses the advantages and disadvantages of the Regional Center Program and Direct EB-5 in further detail, and explores the benefits and limitations of utilizing the EB-5 program as an option for financing a franchise.

#### **A. Brief Overview of the EB-5 Program**

The Regional Center Program and Direct EB-5 Investment are both subject to the following same general requirements:

1. both require a minimum capital investment amount of \$1,000,000 (or \$500,000 if investing in a “targeted employment area” as described above);
2. both require that the investment must benefit the U.S. economy;
3. both require that the investment must be in a new commercial enterprise formed after November 29, 1990, or that the investment result in a 40% expansion of the net worth or number of employees of the business;<sup>20</sup>

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<sup>17</sup> Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, § 610, 106 Stat. 1828; S. Rep. No. 102-918 (1992).

<sup>18</sup> Robert Divine, *Direct EB-5: More than Meets the Eye*, AILA Midyear/Winter Conference Handbook (AILA 2014).

<sup>19</sup> See 8 C.F.R. § 204.6(m)(7)(ii) (2016).

<sup>20</sup> See 8 C.F.R. §§ 204.6(e), 204.6(h) (2016). See also *Matter of Soffici*, 22 I&N Dec. 158, 165-166 (1998); *Matter of Hsiung*, 22 I&N Dec. 201 (1998).

4. both require the that the investment must create at least ten permanent, full-time jobs for qualifying U.S. workers (including U.S. citizens, permanent residents and other immigrants lawfully authorized to work in the U.S.);<sup>21</sup>
5. both require that investors be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial control, or through policy formulation; and
6. the investment capital must come from a lawful source and must be placed at “at risk.”<sup>22</sup>

The same procedures apply to EB-5 investors obtaining lawful permanent resident status under both the Regional Center Program and Direct EB-5. To apply for lawful permanent resident status as an EB-5 immigrant investor, a foreign national must first submit an I-526 immigrant investor petition with USCIS that proves by a preponderance of the evidence that the required capital has been committed, that the investment is made from lawfully acquired funds, and, if applicable, that the investment is made in a TEA.<sup>23</sup> If ten full-time jobs have not been created at the time the I-526 petition is filed, the EB-5 investor also must submit a comprehensive business plan, which is compliant with the precedent decision *Matter of Ho* and that demonstrates the need for such jobs within two years.<sup>24</sup>

After the I-526 petition is approved, the EB-5 investor then must apply to either adjust their current nonimmigrant status to permanent resident in the United States with USCIS or apply for an immigrant visa (Form DS-260) with the U.S. Department of State (“DOS”).<sup>25</sup> Upon

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<sup>21</sup> INA § 203(b)(5), 8 U.S.C. § 1153(b)(5) (2016); May 30, 2013 USCIS Policy Memorandum, “EB-5 Adjudications Policy”

<sup>22</sup> *Matter of Ho*, 22 I&N Dec. 206, 19 Immigr. Rep. B2-99 (Assoc. Comm’r 1998); 8 C.F.R. § 204.6(j)(2) (2016); *Matter of Izummi*, 22 I&N Dec. at 180-88, 19 Immigr. Rep. B-2-32 (Assoc. Comm’r 1998).

<sup>23</sup> 8 C.F.R. § 204.6(a); 8 C.F.R. § 204.6(j); See *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010); See also USCIS Policy Memorandum “EB-5 Adjudication Policy” PM-602-0083 (May 30, 2013).

<sup>24</sup> *Id.*; *Matter of Ho*, 22 I&N Dec. 206, 19 Immigr. Rep. B2-99 (Assoc. Comm’r 1998). *Matter of Ho* requires that a “comprehensive” business plan must be sufficiently detailed to permit the immigration service to draw reasonable inferences about the job creation potential. As such, a comprehensive business plan must contain, at a minimum (1) a description of the business, its products and/or services, and its objectives; (2) a market analysis, including the names of competing businesses and their relative strengths and weakness; (3) a comparison of the competition’s products and pricing structures and; (4) a description of the target market/prospective customers of the new commercial enterprise. The plan must list the required permits and licenses obtained, and detail any contracts executed for the supply of materials and/or the distribution of products. It must discuss the marketing strategy of the business, and set forth the business’s organizational structure and its personnel’s experience. It must also explain the business’ staffing requirements and contain a timetable for hiring as well as job descriptions for all positions. Further, a comprehensive business plan must contain sales, costs and income projections and detail the bases for such calculation and projections. Most importantly, the business plan must be credible.

<sup>25</sup> USCIS, *Policy Manual*, Ch.2 Part A. Vol. 7.

approval of the adjustment of status application or admission to the U.S. on an immigrant visa, the EB-5 investor and qualifying dependent family members are granted two years of conditional permanent resident status (“CPR”).<sup>26</sup>

Within the 90 days before the end of the two-year conditional period of permanent residence, the EB-5 investor must file Form I-829, Petition by Entrepreneur to Remove Conditions with USCIS, where the foreign national must prove that the required amount of capital was invested, that the investment was sustained throughout the two year conditional period, and most importantly, that ten permanent, full-time jobs were created or are expected to be created within a reasonable period of time, which USCIS generally interprets as one year.<sup>27</sup> The EB-5 process is complete upon approval of the Form I-829, which removes the conditions on the EB-5 investor and dependent family members’ permanent resident status. The investor is thereafter a lawful permanent resident (“LPR”) of the United States. In the event of a Form I-829 denial, an EB-5 investor’s LPR status will be terminated and the investor will be issued a notice to appear before an Immigration Judge.<sup>28</sup> The investor may seek to renew the I-829 petition before an Immigration Judge, but the investor must satisfy the same criteria. If the I-829 petition is denied by the Immigration Judge, the Investor can appeal the decision to the Board of Immigration Appeals (“BIA”). If the denial is upheld by the BIA, the investor may file a petition for review (“PFR”) before the appropriate U.S. Circuit Court of Appeals within 30 days of the removal order.<sup>29</sup> In the event the denial decision is upheld by the U.S. Court of Appeals, the EB-5 investor will be removed from the U.S. However, if during any of the aforementioned stages of judicial review the investor could establish that the requirements for I-829 are met beyond a preponderance of evidence, the investor could obtain full LPR status on appeal.

## 1. Regional Center Program

The Regional Center Program, also known as the Immigrant Investor Program, was created by Congress in 1993 as a temporary program designed to encourage immigrant investment in a range of business and economic development opportunities within designated regional centers, which are defined as “any economic entity, public or private, which is involved with the promotion of economic growth, improved regional productivity, job creation and increased domestic capital investment.”<sup>30</sup> To participate under the Regional Center Program, a regional center must first submit a Form I-924, Application for Regional Center, with the USCIS

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<sup>26</sup> See USCIS Policy Memorandum “EB-5 Adjudication Policy” PM-602-0083 (May 30, 2013).

<sup>27</sup> 8 C.F.R. §§ 204.6(j)(4)(i)(B), 216.6(a)(4)(ii-iv) (2016).

<sup>28</sup> 8 C.F.R. §216.6(d)(2) (2016).

<sup>29</sup> *Background on Judicial Review of Immigration Decisions*, American Immigration Council (June 2013) ([https://www.americanimmigrationcouncil.org/sites/default/files/research/background\\_on\\_judicial\\_review\\_of\\_immigration\\_decisions.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/background_on_judicial_review_of_immigration_decisions.pdf)).

<sup>30</sup> *Id.*; 8 C.F.R. § 204.6(e); see also USCIS Policy Memorandum “EB-5 Adjudication Policy” PM-602-0083 (May 30, 2013).

and be designated as such.<sup>31</sup> The Program has been renewed several times since its inception and is currently authorized through September 30, 2016, after Congress extended the Program for almost one additional year on December 16, 2015.<sup>32</sup> As of August 1, 2016, there are 851 approved regional centers operating in all 50 states, as well as Guam and the Commonwealth of Northern Mariana Islands.<sup>33</sup> The vast majority of regional centers are set up by real estate developers or other businesses to facilitate investment into their own projects.

EB-5 investment in commercial enterprises affiliated with USCIS designated Regional Centers are subject to the same statutory requirements as well as the procedural steps noted above. Nevertheless, the Regional Center Program has several distinctions from Direct EB-5 investment, which may have contributed to its popularity in recent years.

**a. Advantages of the Regional Center Program**

The most notable and favorable distinction for EB-5 investment under the Regional Center Program is that permanent, full-time jobs created indirectly by the new commercial enterprise (“NCE”) can be used to satisfy the job creation requirement, whereas under Direct EB-5, only direct jobs at the NCE can count toward the total full-time jobs.<sup>34</sup>

- Direct jobs are actual, identifiable jobs for qualified US workers located within the commercial enterprise into which the EB-5 investor has directly invested capital.
- Indirect jobs, on the other hand, are those held *outside of the new commercial enterprise but created as a result of the new commercial enterprise*. Indirect jobs can be projected based on reasonable economic methodologies including multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and other economically or statistically valid devices, including the economic models RIMS II, IMPLAN, REDYN, REMI, which indicate the likelihood that the business will result in increased employment.<sup>35</sup> These models generally predict the job creation that will result from the EB-5 project itself, including the job creation impacts from construction and ongoing operations of the project. This includes “upstream” jobs created at suppliers, as well as jobs that may be created indirectly outside the boundaries of the regional center itself. In other words, jobs created in the EB-5 project can be attributed to the NCE and therefore allocated to EB-5 investors, even if they are created

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<sup>31</sup> *Id.*

<sup>32</sup> Consolidated Appropriations Act, 2016, HR 2029, 114th Congress, Sec. 575 (2015-2016).

<sup>33</sup> USCIS website. <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers>.

<sup>34</sup> 8 C.F.R. § 204.6(j)(4)(iii) (2016).

<sup>35</sup> 8 C.F.R. § 204.6(m)(7)(ii) (2016).

outside the geographic boundaries of a regional center and by other entities involved in the EB-5 project.<sup>36</sup>

Because jobs do not have to be created directly by the NCE under the Regional Center Program, this allows the Regional Center greater flexibility in its corporate structure, which can involve multiple entities. For example, so long as the investor has an equity interest in the NCE, the NCE may extend a loan to, or make an equity investment in, a Job Creating Entity (“JCE”). In contrast, as discussed below, under the Direct EB-5 model, the corporate structure is much more straightforward: the investor must directly own an equity interest in the NCE.

Under the Regional Center Program, a regional center project may submit an “exemplar” I-526 petition to give USCIS a chance to review its documents to determine if they are compliant with the established EB-5 eligibility requirements before actual I-526 investor petitions are filed for the project.<sup>37</sup> When the I-526 exemplar was first introduced in 2009, Congress intended it to streamline EB-5 case processing times.<sup>38</sup> The I-526 exemplar petition is filed along with an amended Form I-924 application and includes the NCE’s organizational documents, capital investment offering memoranda, and transfer of capital mechanism for the transfer of foreign investor’s capital into the job creating enterprise. A favorable determination of the I-526 exemplar petition by USCIS means that USCIS will accord deference to the documents in the subsequent I-526 petitions filed by investors in the NCE.<sup>39</sup> If a Regional Center affiliated project has an approved I-526 exemplar petition, USCIS has determined that the economic methodology in the documents satisfies the requirement of being a “reasonable methodology” to predict job creation, and USCIS has preapproved the business plan.<sup>40</sup> As a result, USCIS will not re-adjudicate prior USCIS determinations at the I-526 petition stage, such as whether the business plan is comprehensive and credible, and whether an economic methodology estimating job creation is reasonable, absent material misrepresentation or material changes.<sup>41</sup>

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<sup>36</sup> USCIS Policy Memorandum, *EB-5 Adjudications Policy* (May 30, 2013) PM-602-0083. In one case, a group of investors (on behalf of themselves and a putative class) challenged the USCIS’ retroactive application of changes in its policies as to whether certain investments were acceptable under the EB-5 program, and the plaintiffs and government settled the case with an agreement that the policy would not be retroactively applied. *Chang v. United States*, Case No. CV-2:99-10518-GHK (AJWx) (C.D. Cal.) (settlement filed Aug. 13, 2012).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*; USCIS Notice under former USCIS Director Alejandro N. Mayorkas, *USCIS Proposes Significant Enhancements to EB-5 Visa Processing to Help America win the Future* (May 19, 2011); USCIS Notice, *Message from Director Alejandro N. Mayorkas on Proposed Changes to EB-5 Processing* (May 19, 2011).

<sup>39</sup> USCIS Policy Memorandum, *EB-5 Adjudications Policy* (May 20, 2013), PM-602-0083; USCIS Memorandum, *Adjudication of EB-5 Regional Center Proposals and Affiliated Form I-526 and I-829 Petitions; Adjudications Field Manual (AFM) Update to Chapters 22.4 and 25.2 (AD09-38)* (Dec. 11, 2009).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* See also n. 58, *supra*.

As such, USCIS will only examine issues related to the investor's lawful source of funds,<sup>42</sup> which potentially can save time in the adjudication of each I-526 petition.

While the requirement that EB-5 investors must be "engaged in the management" of the NCE applies to all EB-5 investments,<sup>43</sup> there is a perception that investors who invest in regional center sponsored NCEs may have an easier time proving their involvement in the management of the NCE.<sup>44</sup> Under both the Regional Center Program and Direct EB-5, the rule is satisfied for investors who are limited partners in a limited partnership, as long as the limited partnership agreement specifies they are provided with certain rights, powers and duties normally granted to limited partners.<sup>45</sup> In Direct EB-5 projects, the investor also can be a limited partner and need not participate in the actual day-to-day management of the NCE; however, the investor generally has more expansive voting rights, as the NCE is an actual operating company with employees and ongoing business. In those cases, the investor generally faces a higher evidentiary burden for establishing this requirement. Generally franchisors have used the Direct EB-5 model because the franchisor can take one or several EB-5 investors as equity partners in a particular store to help offset start-up costs and create sufficient jobs directly through employees actually working at the store. Those EB-5 investors then have certain voting rights relating to the NCE owning that store only.

#### **b. Limitations of the Regional Center Program**

Aside from the aforementioned advantages of the Regional Center Program, it is not without limitations. Notably, the Regional Center Program has the following limitations when compared to EB-5 Direct Investment.

The first hurdle is to have a Regional Center designated by USCIS. In order to subscribe investors and raise EB-5 capital, the project must first submit an I-924 Regional Center designation application with USCIS.<sup>46</sup> The Form I-924 application must: (1) clearly describe how the Regional Center focuses on a geographical region of the United States, and how it will promote economic growth; (2) provide in verifiable detail how jobs will be created directly or indirectly; (3) provide a detailed statement regarding the amount and source of capital which has been committed to the Regional Center, as well as a description of the promotional efforts taken and planned by the sponsors of the Regional Center; (4) contain a detailed description regarding how the Regional Center can positively impact the economy; and (5) be supported by

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<sup>42</sup> *Id.*

<sup>43</sup> 8 C.F.R. 204.6(j)(5) (2016).

<sup>44</sup> In his article *Direct EB-5: More than Meets the Eye*, AILA Midyear/Winter Conference Handbook (AILA 2014), Robert Divine seems to suggest that the USCIS Administrative Appeals Office used a heightened standard/scrutiny for EB-5 Direct projects. However he did not cite specific cases.

<sup>45</sup> *Id.*

<sup>46</sup> 8 C.F.R. § 204.6(m)(3)(i)-(v) (2016).

an economically or statistically sound economic methodology analysis.<sup>47</sup> The preparation of an I-924 application requires the services of a team of experienced professionals, including securities counsel to draft the corporate documents and subscription documents, economists to prepare the economic report based on the reasonable economic methodology rule, business plan specialists to draft the comprehensive business in compliance with *Matter of Ho*,<sup>48</sup> and EB-5 immigration counsel to ensure compliance with EB-5 regulations and USCIS policies, among others. The fees for engaging the services of these various professionals plus the I-924 filing fees (currently \$6,230) can be very high. Additionally, EB-5 investors filing I-526 Petitions associated with the regional center cannot file I-526 petitions until the I-924 is approved. Due to lengthy I-924 processing times at USCIS, projects that choose the Regional Center route are faced with a delay in raising EB-5 capital. As of June 30, 2016, the average I-924 processing time is 10.2 months.<sup>49</sup>

As noted above, the Regional Center Program is currently authorized until September 30, 2016.<sup>50</sup> While many remain optimistic that the Regional Center Program will be re-authorized or temporarily extended again like it was in 2015, the possibility that the program will expire on September 30, 2016 remains realistic. In contrast, the EB-5 Direct Investment Program is a permanent program which is not affected by the impending Regional Center Program expiration date.

However, even if the Regional Center Program is reauthorized as of September 30, 2016, it is likely that more stringent requirements for foreign investors will be imposed in the near future. One of the most debated issues in the EB-5 reform is the definition and designation of TEAs, which are areas designated by state governments to have an unemployment rate of 150% above the national average that qualify for the lesser investment amount of \$500,000, or rural areas.<sup>51</sup> Under current legislation, state governments have broad discretion in setting TEA geographic borders and in allowing high-unemployment TEAs to extend across multiple census tracts, including distant census tracts in order to satisfy the rule.<sup>52</sup> As such, affluent metropolitan cities like New York can qualify for TEAs, and attract investment in the lower threshold investment level under the current legislation.

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<sup>47</sup> *Id.*

<sup>48</sup> *Supra* at n. 24.

<sup>49</sup> USCIS Processing Time Information, <https://egov.uscis.gov/cris/processingTimesDisplay.do?jsessionid=abcWyFfoumFlq6sgehHAv> (last visited Aug. 27, 2016).

<sup>50</sup> Consolidated Appropriations Act, 2016, HR 2029, 114th Congress, Sec. 575 (2015-2016).

<sup>51</sup> 8 C.F.R. § 204.6(i) (2016).

<sup>52</sup> *Id.*

One of the major proposed changes to the Regional Center Program included in the December 12 Draft,<sup>53</sup> under the title of American Job Creation and Investment Promotion Reform Act of 2015, is that the designation of TEAs would be restricted to:

- A. Priority Urban Investment Areas, a single census tract or bordering tracts, each within a Metropolitan Statistical Area, and using the most recent census data available, that each has any of the following characteristics: (1) an unemployment rate that is 150% of the national average rate, which may also include any census tract or tracts contiguous to one or more of the tracts that have the requisite unemployment rate; (2) a poverty rate of at least 20 percent; or (3) a medium family income that is no more than 80 percent of the applicable area medium income; and
- B. Special investment zones, which is defined as: (1) a city or county with an unemployment rate that is 150% of the national average; or (2) an area of no more than 12 contiguous census tracts bordering the primary physical location of the project, which has an unemployment rate of 150% of the national average.<sup>54</sup>

Professor Jeanne Calderon and Scholar-in-Residence Gary Friedland of Center for Real Estate Finance Research at New York University Stern School of Business conducted an in-depth analysis of the impact of this proposed TEA rule on the Regional Center Program and concluded that if the above proposed changes to TEA designations are enacted in the future, many urban projects that meet current high unemployment TEA requirements would no longer qualify as a TEA.<sup>55</sup> The practical implication for EB-5 investors is that they may no longer be able to invest the lower investment amount of \$500,000 in a major project that is located in an affluent urban area.

Even though EB-5 investments under the Direct EB-5 model are not affected by the looming Regional Center Program sunset date, it is important to note that both the Regional Center Program and Direct EB-5 are subject to the same TEA definitions and stipulations, or any changes that may be enacted in the future to these rules.

## **2. Direct EB-5**

In contrast to the Regional Center Program, where foreign investors invest in a NCE affiliated with a USCIS designated Regional Center, the Direct EB-5 investor either (1) starts a new business, (2) purchases an existing business, or (3) expands an existing business, which

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<sup>53</sup> Dec. 12, 2015 Draft, under the title of American Job Creation and Investment Promotion Reform Act of 2015, S. 1501, 114th Cong. (1st Sess.) (2015).

<sup>54</sup> *Id.*

<sup>55</sup> Calderon and Friedland, *What TEA Projects Might Look Like Under EB-5 2.0: Alternatives Illustrated with Maps and Data (working draft)*, Center for Real Estate Finance Research, NYU Stern (Dec. 23, 2015).

results in a 40% percent increase in the net worth, or number of employees.<sup>56</sup> As noted above, the Direct EB-5 investor is subject to the same statutory requirements and application procedures to obtain lawful permanent resident status as the Regional Center Program. Compared to the Regional Center Program, the Direct EB-5 model is much less frequently used. In fact, of all the EB-5 cases filed in FY 2015, less than 2% were “Direct” cases.<sup>57</sup> Nevertheless, with the increasing number of claims of alleged fraud and misuse of EB-5 funds against some noncompliant Regional Centers,<sup>58</sup> there is a recent resurgence of interest among investors in utilizing the Direct EB-5 model, where the investor can have more control over the NCE in which he or she invests. The discussion below outlines some of the key distinctions and limitations of the Direct EB-5 investment.

**a. Limitations of Direct EB-5**

According to the May 20, 2013 USCIS Policy Memorandum on “EB-5 Adjudications Policy,”<sup>59</sup> for investments in a NCE that are not affiliated with a Regional Center, only the jobs created directly by the NCE, or its wholly owned subsidiaries, can be counted toward the 10 full-time job requirement.<sup>60</sup> This means that the NCE (or its wholly-owned subsidiaries) must itself be the W-2 employer of the qualified employees who fill the new full-time positions. Therefore, unlike the Regional Center Program that estimates job creation using an economic model, investors in Direct EB-5 projects cannot use indirect jobs projected by economic methodologies such as RIMS II, IMPLAN, or REDYN to satisfy the job creation requirement. Thus, under the Direct EB-5 model, job creation must be shown at the I-526 stage with proof of actual employment or with a *Matter of Ho*<sup>61</sup> compliant business plan that outlines a timeline for actual employment. At the I-829 stage, employment creation must be demonstrated with each of the

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<sup>56</sup> 8 C.F.R. § 204.6(h) (2016).

<sup>57</sup> Dep’t of Homeland Security, *EB-5 Visa Program, Fiscal Year 2015 Report to Congress* (Nov. 19, 2015) (<https://www.dhs.gov/sites/default/files/publications/U.S.%20Citizenship%20and%20Immigration%20Service%20-%20EB-5%20Visa%20program%20-%20First%20Semiannual%20-%20FY%202015.pdf>).

<sup>58</sup> See, e.g., Press Release, Securities & Exch’g Comm’n, *SEC Halts EB-5 Scheme Stealing Investments in Cancer Center* (June 2, 2016) (<https://www.sec.gov/news/pressrelease/2016-105.html>); Press Release, Securities & Exch’g Comm’n, *SEC Case Freezes Assets of Ski Resort Steeped in Fraudulent EB-5 Offerings* (Apr. 14, 2016) (<https://www.sec.gov/news/pressrelease/2016-69.html>); Press Release, Securities & Exch’g Comm’n, *SEC: Lawyers Offered EB-5 Investments as Unregistered Brokers* (Dec. 7, 2015) (<https://www.sec.gov/news/pressrelease/2015-274.html>); Press Release, Securities & Exch’g Comm’n, *SEC Charges Oil Company and CEO in Scheme Targeting Chinese-Americans and EB-5 Investors* (July 6, 2015) (<https://www.sec.gov/news/pressrelease/2015-141.html>). See also the USCIS website list of terminated regional centers (at <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor-process/regional-center-terminations>) (noting that as of Aug. 31, 2016, USCIS had terminated 62 regional centers).

<sup>59</sup> *Supra* at n. 23.

<sup>60</sup> USCIS Policy Memorandum, *EB-5 Adjudications Policy*, PM-602-0083 (May 30, 2013).

<sup>61</sup> *Matter of Ho*, 22 I&N Dec. 206 (AAO 1998). See n. 24, *supra*, for a description of the *Matter of Ho* decision.

ten or more employees' W-2, Form I-9, payroll and tax records, as well as passport and green card.<sup>62</sup>

As only jobs directly created by the NCE can be counted towards the job creation requirement, the NCE and JCE must be the same enterprise, and therefore, the investment arrangement can only be equity in the NCE/JCE, or in the NCE, which is a 100% holding company of the JCE. While this may seem like a simple burden to satisfy, it can be challenging to document direct hires at the NCE. Some employees may fall below the minimum hour requirement of 35 hours per week.<sup>63</sup> Others may refuse to show a copy of their birth certificate or passport to demonstrate status as a U.S. citizen.<sup>64</sup> However, by limiting the number of investors in one NCE, this burden can be eased because the number of qualifying employees required decreases.

As is noted above, while the requirement that EB-5 investors be “engaged in the management” of the NCE applies to both Regional Center Program and Direct EB-5 investors,<sup>65</sup> there is a perception that investors who participate in the Direct EB-5 model may need to have a more active engagement in the management of the NCE. One possible reason for this perception is that while most investors under the Regional Center Program are limited partners, who can satisfy the “engaged in the management” requirement by merely being limited partners, a higher percentage of investors of Direct EB-5 projects may be sole proprietors or single member LLCs, who may thus face a higher burden of proving their management duties in the NCE.

**a. Advantages of Direct EB-5**

It is worth noting that Direct EB-5 also has its set of advantages:

- No hurdle of going through Regional Center Approval. Unlike the Regional Center Program, there is no need to for projects to obtain pre-approval before subscribing investors or raising capital in the NCE under the Direct EB-5 model. The project also saves on the costs associated with preparing the I-924 application, and avoids the waiting period before EB-5 capital can be invested. Additionally, there is no need to worry about the Regional Center designation being terminated by USCIS for noncompliance.

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<sup>62</sup> 8 C.F.R. § 216.6(a)(4)(ii-iv) (2016).

<sup>63</sup> 8 C.F.R. 204.6(e) (2016).

<sup>64</sup> While generally Form I-9 must be completed to demonstrate authorization to work in the United States, an employee may satisfy Form I-9 by showing an unrestricted social security card along with a state-issued Identity Document. Generally, this is insufficient to show status as a U.S. worker. However, requiring a new hire to show a passport or birth certificate can be considered “document abuse” under the Immigration & Nationality Act. Accordingly, the NCE must be very careful in collecting records to satisfy the I-829 petition requirements.

<sup>65</sup> 8 C.F.R. § 204.6(j)(5) (2016).

- No need for economic methodology analysis. Since only jobs directly created by the NCE can be used for satisfaction of the job creation requirement, there is no need for preparing an economic study. This is beneficial to the extent that the job creation is within the control of the NCE itself. The investor has to provide the relevant employment records such as W-2s and I-9 forms, but is not subject to the discretion exercised by USCIS in determining whether the economic report is reasonable.<sup>66</sup>
- Geographic diversity. Unlike the Regional Center Program which must focus on a geographic region, the projects under Direct EB-5 have no such limitations, which may be attractive for geographically dispersed projects.<sup>67</sup>

### III. FRANCHISE AND EB-5 PROGRAMS

There has been a recent growing interest among investors in investing in franchise businesses as a vehicle for their EB-5 investment. Similarly, EB-5 funds can also be a helpful and low-cost vehicle for franchises looking to expand.

There are some characteristics of a franchise that make it a good vehicle for utilizing the EB-5 program.

- First, a franchise usually needs more than 10 employees working in excess of 35 hours per week, which is respectively the minimum job creation requirement per investor and the definition of full-time employment in the EB-5 requirements.<sup>68</sup>
- Second, a franchisor, usually a successful business, has a working business model that can be followed and relied on. The franchisor can provide background documents that are helpful to grow the business successfully making it easier to create the required jobs to meet EB-5 requirement. Franchised businesses leave much of the uncertainty behind in comparison to investing in a start-up business, where the foreign investor is faced with a daunting challenge of starting a successful business that would create the job requirements in an unfamiliar country where the foreign investor does not understand the business environment or culture.
- Third, the cost of opening a franchise is often more predictable than for a start-up. Based on documentation and data from the franchisor, which is

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<sup>66</sup> Robert Divine, *Direct EB-5: More than Meets the Eye*, AILA Midyear/Winter Conference Handbook (AILA 2014).

<sup>67</sup> 8 C.F.R. § 204.6(m)(3) (2016).

<sup>68</sup> 8 C.F.R. § 204.6(e) (2016).

based on the past experience of the franchise system, the foreign investor can create a more predictable budget for the necessary investment. For individual start-ups, the investors may end up investing significantly more than the required EB-5 capital investment. In the same vein, the training materials that a franchisor provides can better justify the job creation numbers (as there has been a proven successful business) than the business plan of a start-up business where the job creation numbers are more speculative in nature. Finally, many franchises allow foreign investors as owners/managers, which is an added bonus for foreign investors who are looking to taking more control in the business.

- Fourth, Steve Qi's article in *EB-5 Investors Magazine* noted the following additional reasons why a franchise may be more successful than a start-up business: (1) corporate reputation – as the well-recognized reputation, image and brand name has been established, it makes the products/services easier to sell; (2) stable and predictable business growth and fair rate of return – low inventory risk and recognized job creation level.<sup>69</sup>

EB-5 funds can be utilized in the franchise industry either by having an investor invest in the franchise (or its 100% holding company) directly or by going through the Regional Center Program (by applying for a regional center designation with USCIS first or obtaining sponsorship from an existing regional center). The respective benefits and pitfalls by utilizing either approach are noted below.

#### **A. Franchise and EB-5 Regional Center Program**

The franchise industry can utilize EB-5 funds through the Regional Center Program. As discussed previously, to be able to utilize EB-5 funds, the franchisor must first seek USCIS designation as a Regional Center by filing an I-924 application.<sup>70</sup> Additionally, as discussed above in the *Limitations of the Regional Center Program* portion of this paper, in filing an I-924 application, a relatively large sum of fees (including the \$6,230 filing fee) and various professional fees are required to put the application together.<sup>71</sup>

Additionally, the EB-5 investors cannot file I-526 petitions until the Regional Center is designated by USCIS, which means a delay in time to raise investments. Alternatively, the franchisor may choose to seek affiliation with an existing Regional Center instead of Regional Center designation, which means there can be negotiation costs and the sharing of profits with

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<sup>69</sup> Steve Qi, *Franchise and EB-5*, EB-5 Investors Magazine (Aug. 12, 2015).

<sup>70</sup> USCIS Policy Memorandum, *EB-5 Adjudications Policy*, PM-602-0083 (May 30, 2013).

<sup>71</sup> USCIS Processing Time Information for the Immigrant Investor Program Office, <https://egov.uscis.gov/cris/processingTimesDisplay.do?jsessionid=abcNTfiZDEjAs4uM8AFA> (last visited Aug. 27, 2016); USCIS Application for Regional Center Under the Immigrant Investor Pilot Program, <https://www.uscis.gov/i-924> (last visited Aug. 27, 2016).

the Regional Center. Finally, the investment in franchise through the Regional Center Program is also subject to the risk that the Regional Center designation may be terminated by USCIS. In the event a Regional Center is terminated by USCIS, the Regional Center may appeal the decision or file a motion or reopen or reconsider the decision.<sup>72</sup> The termination of a Regional Center does not automatically terminate an EB-5 investor's conditional permanent residence status, if already obtained, if that investor invested in a NCE associated with the terminated regional center. Instead, the investor may still have the opportunity to have the conditions on his/her residence removed if the investor can demonstrate compliance with EB-5 requirements.<sup>73</sup> However, USCIS has issued little guidance in this area and it is not clear as of the date of this article whether USCIS will approve an I-829 petition that is no longer associated with any regional center.

Of course, there are benefits associated with utilizing EB-5 funds under the Regional Center model. Most notably, the regional center can utilize the pooled investment vehicle/fund model to pool together the investments of many EB-5 investors, and then make loans to or equity investments into many different franchise locations. This allows the franchisor to raise start-up costs for many locations at one time assuming the locations are predetermined and are located within a TEA, if investors seek to invest only \$500,000.

Additionally, the project may choose to file an amended Form I-924 application with a Form I-526 exemplar in order to obtain a favorable determination which will be accorded deference in subsequent I-526 petitions filed by investors. As emphatically stated in the May 30, 2013 Policy Memorandum, USCIS should not re-adjudicate prior USCIS determinations that are subjective, such as whether the business plan is comprehensive and credible or whether an economic methodology estimating job creation is reasonable.<sup>74</sup> This could also mean more predictability and consistency of approval for subsequent I-526 petitions. In addition, as discussed previously, by pursuing EB-5 investment under the Regional Center Program, the franchise can count indirect and induced jobs to satisfy the job creation requirement through the economic methodology, rather than providing payroll records, W-2s and I-9 forms to prove the required ten actual jobs per investor. The use of an economic model potentially makes proving job creation must easier.

## **B. Franchise and Direct EB-5**

In addition to the Regional Center Program, franchisors and franchisees can also pursue direct EB-5 investment. As discussed at length above, ten direct jobs must be created for each EB-5 investor's qualifying investment – and such job creation requirement cannot be met using economic methodologies. In utilizing the direct EB-5 investment model, the structure of a franchise business would either be a single owned investor model or the formation of a holding

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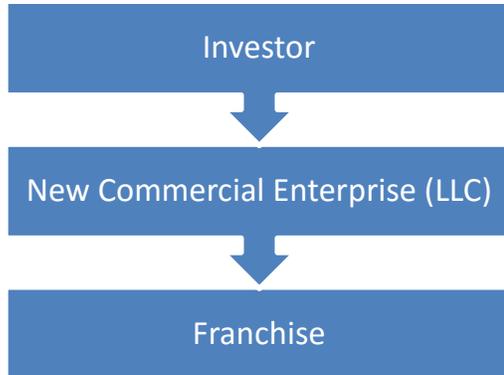
<sup>72</sup> 8 CFR 103.3; 8 CFR 103.5 (2016).

<sup>73</sup> USCIS Regional Center Terminations, <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor-process/regional-center-terminations> (last visited Sept. 6, 2016).

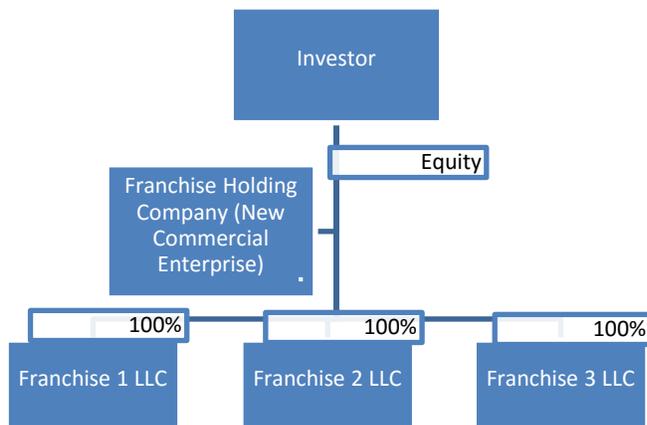
<sup>74</sup> May 30, 2013, USCIS Policy Memorandum, "EB-5 Adjudications Policy."

company that wholly own the subsidiary franchise entities. In a structure involving a holding company, an EB-5 investor can invest preferred equity in the holding company, which would have a 100% interest in all of its subsidiary entities.<sup>75</sup> Furthermore, according to USCIS guidelines, all jobs that the wholly-owned subsidiary franchises create will be counted towards the 10-job creation, and jobs created by non-EB-5 capital will also count towards the EB-5 job creation requirement.<sup>76</sup> The following charts illustrate potential franchise organizational structures for an EB-5 investment:

Single owned investor model:



Holding company model:



<sup>75</sup> 8 C.F.R. § 204.6(e) (2016).

<sup>76</sup> 8 C.F.R. § 204.6(g)(2) (2016).

## **1. The Advantages in Using Direct EB-5 for Franchise Expansion**

Similar to the previously noted unique benefits of the Direct EB-5 model, there are advantages associated with using Direct EB-5 for franchise expansion.

- First, it is unnecessary to go through a Regional Center. The Direct EB-5 model allows the investors to invest in the project directly without a Regional Center pre-approval. Thus by utilizing the direct EB-5 model, the franchisor can avoid the substantial costs with filing an I-924 petition, and can raise EB-5 funds without delay since there is no need to wait for USCIS Regional Center adjudication. Additionally, there would be no concern about the potential possibility of the Regional Center being terminated by USCIS or by the regional center program expiring if Congress fails to extend the program either on September 30, 2016 (or at some point in the future).
- Second, under the Direct EB-5, there is no need for an economic methodology analysis because the job creation requirement can be entirely demonstrated by the direct jobs created. Thus, the NCE will only need to provide W-2 and I-9 forms and payroll records for its employees in order to prove the creation of jobs.
- Third, another benefit to utilize EB-5 funds through direct investment is that there are no geographic restrictions. Whereas regional centers need to focus on a particular geographic region, there is no such requirement for Direct EB-5 projects. As such, Direct EB-5 model is particularly attractive for geographically dispersed projects, such as franchise businesses.

## **2. The Limitations in Using Direct EB-5 for Franchise Expansion**

Among the limitations of Direct EB-5, as noted above, are the restriction that the investment arrangement must be straight equity, and that only direct jobs can count towards the job creation requirement similarly applies when Direct EB-5 is utilized in raising funds for franchises.

## **IV. MECHANICS OF OFFERING AN EB-5 PROGRAM**

Offering a franchise to an international investor through the EB-5 program presents special challenges. Among these are delivering a franchise disclosure document (FDD) to an international party, obtaining a receipt, presenting and signing a franchise agreement, and providing any additional disclosures that may be appropriate under the circumstances.

In FY2014, of 9,228 EB-5 visas awarded, 8,308 (or just over 90%) were awarded to Chinese investors.<sup>77</sup> A similar distribution was found in FY2015, when roughly 88% of EB-5 visas were granted to Chinese investors.<sup>78</sup> With distance and language differences being what they are, EB-5 investors may not be as readily disclosed and transactions may not be as straight-forward as is typical of more conventional domestic franchise dealings.

#### **A. Offering the Franchise.**

In order to offer a franchise to operate in the U.S., it is axiomatic that a franchisor must provide its FDD<sup>79</sup> and satisfy the registration requirements of any applicable state franchise law (absent an exemption).<sup>80</sup> These rules apply even if the prospective franchisee is an EB-5 investor, as the FTC Rule makes clear that the regulation applies whenever the franchise is to be *operated* in the 50 states or a U.S. territory.<sup>81</sup> Not all state laws will apply, however, because the scope of some states' laws apply differently. For example, in New York, if the offer is not made in the state or from the state, the law will apply to a business operated in the state *if* the prospective franchisee is also domiciled in the state – which would be unlikely if the EB-5 investor resides in China.<sup>82</sup>

As a practical matter, giving disclosure to a prospective franchisee who is outside the U.S. can be accomplished by various means. These include sending the FDD by electronic means (e.g., e-mail)<sup>83</sup> or physically delivering a copy of the FDD (e.g., by overnight delivery service). Additionally, the franchisor may have a representative (e.g., a broker) deliver the FDD.

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<sup>77</sup> U.S. Dep't of State, Bureau of Consular Affairs, *Report of the Visa Office 2014*, <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2014AnnualReport/FY14AnnualReport-TableVI-PartIV.pdf>.

<sup>78</sup> U.S. Dep't of State, Bureau of Consular Affairs, *Report of the Visa Office 2015*, <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2015AnnualReport/FY15AnnualReport-TableVI-PartIV.pdf>.

<sup>79</sup> 16 C.F.R. § 436.2(a).

<sup>80</sup> See Leslie Curran and Karen Satterlee, *Exemption-Based Franchising: Are You Playing in a Minefield*, 28 Franchise L.J. No. 4, at 199 (Spring 2009). A new ABA Forum on Franchising book on the topic of exemptions is scheduled to be published in time for release at the 2016 Forum on Franchising and should also serve as an excellent resource.

<sup>81</sup> 16 C.F.R. § 436.2 (2016) (“In connection with the offer or sale of a franchise to be located in the United States of America or its territories, unless the transaction is exempted under Subpart E of this part, it is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act ... [f]or any franchisor to fail to furnish a prospective franchisee with a copy of the franchisor's current disclosure document ....”) (emphasis added).

<sup>82</sup> N.Y. Gen. Bus. Law § 681(12)(a).

<sup>83</sup> 16 C.F.R. § 436.6(b) (2016); see also 16 C.F.R. §§ 436.1(u), 436.2(c)(3), 436.6(d) (2016).

While many prospective EB-5 investors are undoubtedly fluent in English, that is not universally so. There is no requirement, however, that the FDD be translated into any other language, although that may not be the case for sales literature.<sup>84</sup>

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<sup>84</sup> In 2012, when the Federal Trade Commission concluded its periodic review of the Used Car Rule, the agency declined to expand the translation requirement. The Commission retained its original requirement that a Spanish-language version of the mandatory Used Car Rule window sticker be used in appropriate circumstances, and rejected a commenter's suggestion that the requirement be expanded to cover whatever language was used to conduct the sales transaction:

“During the original 1984 rulemaking, the Commission chose to translate the Buyers Guide only into Spanish. At that time, the Commission considered whether to require a translation of the Buyers Guide into the language used to conduct a used car sale. The Commission concluded that such a requirement could result in translations of the Buyers Guides of varying linguistic quality and accuracy unless the Commission published official translations of the Buyers Guide into the various languages used in the United States. The Commission decided to limit the translation of the Buyers Guide to Spanish because, besides English, Spanish is the language most frequently used in the United States during used car transactions. The Commission sees no reason to revisit its earlier decision and declines to propose requiring translations of the Buyers Guide into languages other than English and Spanish.”

77 Fed. Reg. 72912, 73913 (2012) (citations omitted; emphasis added).

The Commission's perspective in reissuing its Used Car Rule must be considered against the backdrop of prior and subsequent FTC statements on the issue.

In 2007, when the Commission issued its amended Franchise Rule, 71 Fed. Reg. 15444 (2007), the FTC did not address whether it is necessary to translate disclosures into other languages. However, the agency had already addressed that subject in 1998 in connection with advertising. At that time, the Commission issued a revised enforcement policy concerning “clear and conspicuous disclosures” where the underlying advertising was conducted in a foreign language. 63 Fed. Reg. 34807-08 (1998). The FTC's 1998 enforcement statement provides in pertinent part that “disclosure shall appear in the predominant language of the publication in which the advertisement or sales material appears. In the case of any other advertisement or sales material, the disclosure shall appear in the language of the target audience (ordinarily the language principally used in the advertisement or sales material).” 16 C.F.R. § 14.9 (2016).

When the FTC amended the Franchise Rule in 2007, it also proposed issuing a stand-alone regulation to address business opportunities (see 72 Fed. Reg. 15444, 15563 (2007)). In 2011, when the Commission formally promulgated its new Business Opportunity Rule, its Statement of Basis and Purpose noted that “the long-held policy of the Commission [is] that disclosures required by Commission orders, rules, or guides should be made in the predominant language used in the related advertisement or sales material.” 76 Fed. Reg. 76816, 76825 (2011). That requirement is codified at 16 C.F.R. § 437.2(a) (2016), which provides that “if the offer for sale, sale, or promotion of a business opportunity is conducted in a language other than English or Spanish, using the form and an accurate translation of the [required disclosure under the Business Opportunity Rule].” (emphasis added).

See also *Mohebbi v. Khazen*, No. 13-CV-03044-BLF, 2014 WL 6845477, at \*6 (N.D. Cal. Dec. 4, 2014) (the plaintiff “cannot attempt to avoid the terms of a clear and conspicuous arbitration clause merely because he did not speak the language in which the contract was written.”); and *Teng Moua v. Jani-King of Minnesota, Inc.*, 810 F. Supp. 2d 882, 890 (D. Minn. 2011) (court declined to find that an immigrant franchisee was unable to recognize “obvious puffery,” because “[i]mmigrants, even those with limited English skills and no business experience, are not a group so gullible that they cannot recognize obvious puffery.”).

If the broker will be the party to furnish the FDD to the prospective franchisee, then the broker must be certain to properly obtain the signed receipt from the prospective franchisee, and provide that receipt to the franchisor.

In some cases, the franchisor may want to provide additional information to the prospective franchisee with respect to the transaction, the role of the broker, the role of the prospective franchisee's agent, and operation of the business. Consideration should be given to whether there are advantages to having that disclosure prepared in English as well as the prospective franchisee's native language (e.g., Mandarin) – and while such additional disclosure is not required, it may be useful to all parties concerned.<sup>85</sup> In some registration states, an additional disclosure may be deemed to be “advertising,” which may need to be registered with the state.<sup>86</sup>

## **B. Formation of the Franchisee Entity.**

As noted earlier, in the case of a Direct EB-5 investment, the investor (that is, the franchisee) will be involved in a closely-held entity and will likely assume a more active role in managing the business than in an EB-5 investment through a regional center (where the role of the investor is often that of a limited partner). While some EB-5 franchisees operate under a management agreement appointing a third party to handle day-to-day operation of the business, such arrangements should be carefully scrutinized by the franchisor to see whether the investor and its manager have their short- and long-term interests aligned as to how the franchised business will be operated.

A failed transaction with an investor/franchisee may result not just in the disappointment of a failed franchised business, but also claims being asserted against as many parties as possible (including for example the franchisor). Therefore, it is usually in the franchisor's best interest to know that the EB-5 transaction is being properly managed from inception. To that end, the investor/franchisee should have experienced U.S. immigration counsel to assist with the necessary planning for structuring the transaction, as well as implementing plans such as filing the necessary applications with the USCIS. Additionally, professional EB-5 brokers to

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<sup>85</sup> Cf. the FTC's 1998 enforcement statement, discussed at n. 84, *supra*. The policy statement (16 C.F.R. § 14.9 (2016)) ostensibly would not apply because the added disclosure is voluntary rather than mandatory – and therefore the “clean and conspicuous” requirement that underpins the enforcement policy would not be present. However, the notion underlying the translation requirement nonetheless may be applicable here as well: disclosures that explain or provide meaning, warnings, or context may best be delivered in the same language as the broader statement that is being provided.

<sup>86</sup> See, e.g., Cal. Corp. Code § 31156 (requiring that advertising be submitted before publication). The requirement begs the question of whether issuance of a specially-targeted disclosure to Chinese investors is “publication” within the meaning of the definition of that term in Cal. Corp. Code § 31016 (“publicly to issue or circulate by newspaper, mail, radio or television, or otherwise to disseminate to the public”).

handle the investment portion of the transaction are obviously necessary. The SEC has been active in bringing claims against unscrupulous or unregistered brokers.<sup>87</sup>

### **C. Operational Issues.**

With an EB-5 franchisee, even more may be at stake than the investment. While a franchisor's best interests are typically consistent with those of a franchisee, that is especially so where the franchisee's principals may also have their immigration status (and that of their family) tied up in the franchise. As discussed earlier, the franchisee must demonstrate that it has invested in a business that created (and maintains) at least ten new jobs in the U.S. in order to remove the conditions on the EB-5 investor's immigration status through the I-829 petition.<sup>88</sup> If the business fails, that will likely jeopardize the investor's status – and an investor/franchisee whose immigration status is called into question may seek to claim that the franchisor was responsible for its failure to qualify.<sup>89</sup>

To the extent that the party that represents the investor/franchisee is the same as the franchisor's broker, those dual roles may also present a complicating factor. In those instances, the roles that the broker plays may create some uncertainty – and while the ambiguity may be ameliorated with proper contract terms and pre-transaction disclosure, it may be more prudent to avoid such dual roles altogether. The broker itself in those cases may also take on a much higher risk profile, necessitating careful and disciplined execution of a clear and unambiguous strategy.

## **V. CONCLUSION**

Against the backdrop of an increasing level of interest among investors in franchise, the expansion need of franchise businesses, as well as the seemingly compatibility between EB-5 requirements and the unique characteristics of franchise, EB-5 investment, either through the Regional Center Program or Direct EB-5, could be an ideal vehicle for the network expansion. Careful attention should be paid by the franchisor and investor to the structure of the offering, the vehicle used to implement the EB-5 investment strategy, and the operation of the franchise.

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<sup>87</sup> See, e.g., Securities & Exch'g Comm'n, *SEC Charges Unregistered Brokers in EB-5 Immigrant Investor Program* (Press Release), June 23, 2015 (available at <http://www.sec.gov/news/pressrelease/2015-127.html>).

<sup>88</sup> Failure to prove that the investor has invested in a business that created ten new jobs may can result in the denial of the investor's application for permanent resident status. See *Abghari v. Gonzales*, 596 F. Supp. 2d 1336, 1340 (C.D. Cal. 2009).

<sup>89</sup> That was the case in *Creative Am. Educ., LLC v. Learning Experience Sys., LLC*, No. 9:14-CV-80900, 2015 WL 2218847 (S.D. Fla. May 11, 2015), in which the EB-5 investor/franchisee alleged, *inter alia*, that its failure to properly operate the franchised business was the result of actions taken by the franchisor. The court disagreed and granted the franchisor's motion for summary judgment dismissing the claim (although it did not rule on the merits of the EB-5 claim asserted by the franchisee). See also *Mohebbi v. Khazen*, No. 13-CV-03044-BLF, 2014 WL 6845477 (N.D. Cal. Dec. 4, 2014) (court enforced arbitration clause in case where gravamen of the claim centered on alleged fraud in connection with an EB-5 investment).

Additionally, if there is an immigration broker, that party's role should be carefully considered and understood.

As discussed above, both the Regional Center Program and Direct EB-5 carry their own set of advantages and limitations when utilized in franchise expansion. Franchise transactions lend themselves to either Regional Center Program or Direct EB-5 investments, but – perhaps more so than other investments – the nature of a franchise transaction is especially well-suited to the Direct EB-5 investment. We expect to see more EB-5 investment as franchisors and the business community focus new attention on the job-creation aspects of small business entrepreneurs coming to the U.S. to take advantage of the opportunity afforded by the EB-5 program.

At all times, however, franchisors need to be careful in dealing with immigration brokers, EB-5 brokers, and other parties – to be sure that they are not also singed in the fire if a franchisee is victimized by unscrupulous conduct.

## **Kate Kalmykov**

Kate Kalmykov focuses her practice on business immigration and compliance. She represents clients in a wide-range of employment based immigrant and non-immigrant visa matters including students, trainees, professionals, managers and executives, artists and entertainers, treaty investors and traders, persons of extraordinary ability and immigrant investors.

Kate has extensive experience working on EB-5 immigrant investor matters. She regularly works with developers across a variety of industries, as well as private equity funds on developing new projects that qualify for EB-5 investments. This includes creation of new Regional Centers, having projects adopted by existing Regional Centers or through pooled individual EB-5 petitions. For existing Regional Centers, Kate regularly helps to prepare amendment filings, file exemplar petitions, address removal of conditions issues and ensure that they develop an internal program for ongoing compliance with applicable immigration regulations and guidance. She also counsels foreign nationals on obtaining greencards through either individual or Regional Center EB-5 investments, as well as issues related to I-829 Removal of Conditions.

Moreover, Kate also works with various human resources departments on I-9 employment verification matters as well as H-1B and LCA compliance. She regularly counsels employers on due diligence issues including internal audits and reviews, as well as minimization of exposure and liabilities in government investigations.

## **Lee Plave**

Lee Plave is a co-founding partner of Plave Koch PLC, an entrepreneurial law firm in Reston, Virginia. He counsels franchisors and distributors, drafts and negotiates agreements for international and domestic transactions, and advises clients on all aspects of franchise and distribution law.

Lee also works with clients on how to apply technology in franchise and distribution systems, including cybersecurity, social networking and media issues, and e-business policies, cybersquatting and domain name disputes, as well as cybersmear/complaint sites. He also represents clients before the Federal Trade Commission, where he began his career.

Lee served as the Director of the International Division of the American Bar Association's Forum on Franchising from 2012-14. He is currently the Co-Editor of the International Journal of Franchising Law.

London-based *Chambers & Partners*, which publishes an internationally-respected client guide, ranks Lee as one of the leading franchise lawyers in the United States. Another London-based publication, *Who's Who Legal*, has consistently listed Lee as one of the global Top 10 franchise lawyers in The International Who's Who of Franchise Lawyers and, in 2015 and 2016, named Lee the top franchise lawyer in North America, as ranked by his peers.