

## **EB-5 Overview**

Congress created the fifth employment-based preference (EB-5) immigrant visa category in 1990 for immigrants seeking to enter the United States to engage in a commercial enterprise that will benefit the U.S. economy and create or save at least 10 full-time jobs per investor.

To encourage immigration through the EB-5 category, Congress created a pilot program in 1993. The Immigrant Investor Pilot Program (“pilot program”) directs the Attorney General and Secretary of State to set aside 3,000 visas each year for people who invest in designated regional centers.

An advantage of investing through a regional center is that direct, indirect and induced jobs can all be counted. By contrast, a foreign national investing outside a regional center can only count direct jobs for EB-5 purposes.

**EB-5**  
**Regional Centers Data (as of Q3 2011)**

- There are currently **173 approved Regional Centers** (RCs), operating in 40 states, including the District of Columbia and Guam.
- Approximately **90-95% of the individual Form I-526 petitions** filed each year are filed by Alien Investors who are investing in **RC-affiliated commercial enterprises**.
- **In Fiscal Year 2010**, 110 Initial RC Proposals and 42 Amended RC Proposals were filed. In Fiscal Year **2010**, **55% (36) Initial Proposals were approved and 45% (30) Initial Proposals were denied**. In Fiscal Year 2010, 71% (42) Amended Proposals were approved and 29% (11) Amended Proposals were denied.
- In Fiscal Year 2011 (Q1-Q3 (10/01/2010-6/30/2011)), 176 Initial RC Proposals and 73 Amended Proposals were filed. **67% (46) Initial Proposals were approved and 33% (23) Initial Proposals were denied**. Furthermore, 84% (32) Amended Proposals were approved and 16%(6) Amended Proposals were denied.

**MORENO DIAZ**  
LAW FIRM

**Individual Petitions Filed since Fiscal Year 2005**

Fiscal Year and/or Quarter	Form I-526 Petition	I-829 Petition
FY 2011 (Q1-Q3)	2,608	1,753
FY 2010	1,955	768
FY 2009	1,028	437
FY 2008	1,257	390
FY 2007	776	194
FY 2006	486	89
FY 2005	332	37

**MORENO DIAZ**  
LAW FIRM

**Final Actions Data on I-526 Petitions since Fiscal Year 2005**

Fiscal Year and/or Quarter	Form I-526 Approvals	Form I-526 Denials
FY 2011 (Q1-Q3)	999 (82%)	224 (18%)
FY 2010	1,369 (89%)	165 (11%)
FY 2009	1,269 (86%)	207 (14%)
FY 2008	640 (84%)	120 (16%)
FY 2007	473 (76%)	148 (24%)
FY 2006	336 (73%)	124 (27%)
FY 2005	179 (53%)	156 (47%)

**MORENO DIAZ**  
LAW FIRM

**Final Actions Data on I-829 Petitions since Fiscal Year 2005**

Fiscal Year and/or Quarter	Form I-526 Approvals	Form I-526 Denials
FY 2011 (Q1-Q3)	436 (93%)	34 (7%)
FY 2010	274 (83%)	56 (17%)
FY 2009	347 (86%)	56 (14%)
FY 2008	159 (70%)	68 (30%)
FY 2007	111 (69%)	49 (31%)
FY 2006	106 (64%)	59 (36%)
FY 2005	184 (62%)	112 (38%)

**MORENO DIAZ**  
LAW FIRM

**TARGET PROCESSING TIME FOR EB-5 CASES**

I-529	5 Months-9 Months
I-829	6 Months-12 Months
RC Initial Designation Proposal	6 Months-12 Months
RC Amended Designation Proposal	4 Months-6 Months

**Visa Usage**

FY 2011 (Q1-Q3)	3,706
FY 2010	1,885
FY 2009	4,218
FY 2008	1,360
FY 2007	806
FY 2006	744
FY 2005	158

There are 10,000 annual visas for Eb-5 investors. Of the 10,000 visas available, a minimum of 3,000 visa numbers are set-aside and designated for investors in a RC. The Eb-5 program has never suffered an oversubscription. The visas are available to every country applicant.

## HOW A DEVELOPER CREATES A REGIONAL CENTER?

- ✓ Form I-924 (Filing Fee \$6,230.00)
  - ✓ Business Plan
    - Include project timeframes for milestones: project commencement, key construction or implementation dates, completion date, and time line for the requisite job creation
    - Identify the amount and source of non-EB5 financing needed for the project
    - Attributes of the RC-affiliated capital investments, such as:
      - The geographic areas and industry categories receiving investment capital
      - The volume of regional center affiliated capital invested, and
      - The number of jobs created or maintained as a result of the capital investments.
- ✓ TEA (Targeted Employment Areas) Designation Letter
- ✓ Operating Agreement
- ✓ Offering Memorandum
- ✓ Subscription Agreement
- ✓ Econometric Report (Job Creation)
- ✓ Marketing Plan
- ✓ Exemplar I-526 for project preapproval

**Form I-924A, Yearly Report  
Requirement**

- ✓ The Form I-924A, Supplement to Form I-924, is the Form for approved regional centers to use for the yearly RC reporting requirement in 8 CFR 204.6(m)(6). Each approved RC is now required to file the I-924A to report RC-related activities for the preceding fiscal year within 90-days of the end of the fiscal year (on or before December 29th of the calendar year in which the fiscal year ended.)
- ✓ The filing of Form I-924A will be required for all approved RCs for Fiscal Year 2011 on or before December 29, 2011.
- ✓ The report includes information about investor's name, nationalities and investment amounts. Failure to report may result in a revocation of the RC.
- ✓ There is no filing fee for the Form I-924A.



**WHO IS REVIEWING THE RC APPLICATIONS?**

- ✓ All I-924 Applications are filed with USCIS California Service Center.
- ✓ On October 11, 2011, USCIS announced the “Entrepreneurs in Residence” Initiative to use industry expertise to strengthen USCIS policies and practices surrounding immigrant investors and entrepreneurs.
- ✓ Through these industry experts USCIS is conducting a review of the Eb-5 process, working with business analysts to enhance the Eb-5 adjudication process and implementing direct access for EB-5 RC applicants to reach adjudicators while cases are pending in an expedited manner.
- ✓ A proposal to implement premium process for I-924 and I-526 Applications is under review and still pending.

---

**WHO IS NORMALLY INVOLVED IN A REGIONAL CENTER?**

- ✓ Developer (Managers/Directors)
- ✓ Immigration Attorney (File I-526, I-829 and I-924)
- ✓ SEC Attorney (Private Placement Memorandum, Operating Agreement, Subscription Agreement and Escrow Agreement)
- ✓ Financial Advisor (Business Plan)
- ✓ Economist (Prepare Econometric Report to show creation of indirect and induced jobs)
- ✓ Marketing Specialist/ Affiliate (Market the project for prospective Investors at a national and international levels)
- ✓ Accountant
- ✓ Graphic Design/Web Design Organization
- ✓ Network of Referral Sources (brokers, agents)

## **PROSPECTIVE SPONSORS PROCEDURES TO HAVE A RC APPROVED**

- ✓ Select commercial project
- ✓ Meet with Immigration Attorney
- ✓ Ensure that the project can generate 10 full time US jobs, directly or indirectly, per investor
- ✓ Review population level in the geographic region of the project to classify the project as TEA
- ✓ Review unemployment rates in the geographic region of the project to classify the project as TEA
- ✓ Establish relationship with banking institution for escrow purposes
- ✓ Meet with SEC attorney
- ✓ Gather Financial and Marketing materials
- ✓ Obtain Letters of Support from different Governmental organizations (counties, Governor, Mayor, Senators, State Representatives, State Senators, County Commissioners), Economic Development Organizations, Chambers of Commerce (local, business, trade organizations)
- ✓ Establish the number of investors needed for the project
- ✓ Establish a good network of referral sources to attract investors including international or national real estate brokers, immigration attorney's, business brokers
- ✓ Preparation of Business Plan, economic analysis, marketing plan, and SEC documents required to request approval of RC
- ✓ Filing of Application for RC by Immigration Attorney

**MORENO DIAZ**  
LAW FIRM

**USES FOR REGIONAL CENTERS**

- ✓ International Traffic and Cargo
- ✓ Commercial Office Space
- ✓ Higher Education
- ✓ Health Centers
- ✓ Airport and Seaport Operations
- ✓ Film and Production
- ✓ Historical Sites
- ✓ Casinos
- ✓ Condominiums and Apartment Complex
- ✓ Manufacturing and Research

- ✓ Mixed Hotel, Office, Retail and Residential Space
- ✓ Construction and Renovation of Buildings
- ✓ Light and Heavy Manufacturing
- ✓ Tourism
- ✓ Banking
- ✓ Hotel, Leisure Resort
- ✓ Transportation
- ✓ Conference Centers
- ✓ Harbor Facilities
- ✓ Warehouse Distribution

**BUSINESS MODELS**

- ✓ **Limited Partnerships**
- ✓ **Real Estate Investment Trust**
- ✓ **Venture Capital Fund**
- ✓ **Limited Liability Company (Partnership)**

### Targeted Employment Area

For a developer to offer the investment to foreign nationals at the \$500,000.00 level, either a population or an unemployment level approach must be met.

- ✓ Developer must reach the census tracts as determined by the Department of Labor in the State to confirm if the **population is less than 20,000** to classify as TEA under population trend guidelines
- ✓ A second method is determined by the unemployment levels in the area in to which the developer seeks to locate the project. If the **unemployment level surpasses 150% of the national average** as determined by the Department of Labor statistics, then the territory can be designated as TEA.

**JOB CREATION**  
**Direct vs. Indirect Employment**

Direct Employment: U.S. employees who are employed by the sponsor at the subject project and receive a salary and W-2

Indirect Employment: Are those deemed to have been created in the community as a positive result of the original investment.

Use of Professional Employer Organizations is valid as direct employment, if an agreement is annexed to the filing of the removal of the investor's conditional status. It must be demonstrated that there is an employer-employee relationship between the sponsor and the employee and the professional employer organization is just acting as intermediary to issue checks, conducting tax withholdings and other tax and accounting benefits.

✓ There is no requirement for how long a qualifying job must last. A June 2009 memo instructed USCIS officers to "ensure that the business plan filed with the Form I-526 reasonably demonstrates that the requisite number of jobs will be created *by the end of the two year period.*" A June 2009 memo states: "Although employment in some industries such as construction or tourism can be intermittent, temporary, seasonal or transient, officers should not exclude jobs simply because they fall into such industries."

**JOB CREATION**  
**Econometric Report**

Econometric Report to be prepared by Economist for each requested industry category:

Different Economic Impact Methodologies to show creation of indirect and induced jobs:

- ✓ **RIMS II** (Regional Input-Output Modeling System)
- ✓ **IMPLAN** (Impact Analysis for Planning, a complete economic assessment package including data, software, and an external hard drive, providing economic resolution from the National level down to the ZIP Code level)
- ✓ **Redyn** (Regional Dynamics Economic Analysis Model, it provides economic and demographic forecasting, as well as impact analysis for policy changes and events. It is a multi-year, multi-regional, New Economic Geography trade flow analysis engine)
- ✓ **Remi** (Regional Economic Models, Inc.)



**EXIT OPTIONS FOR INVESTORS**

- ✓ Investors Retaining the Investment
- ✓ Investors Option to Sale the Investment after 5 years
- ✓ Convert into direct Ownership of Units
- ✓ Public Offering to Sale
- ✓ Sale of LLC by Members
- ✓ Fractionalize the Interest

**MORENO DIAZ**  
LAW FIRM

---

**KEY FACTORS**

- ✓ Only a small percent of designated R.C.s are operational and have approved I-526 immigrant petitions by alien entrepreneur
- ✓ USCIS is not required to conduct background checks on R.C. managers or directors
- ✓ USCIS has not published yet a list of operational R.C.s and those with approved I-526 and I-829 petitions
- ✓ If the RC never gets off the ground the initial I-526 alien entrepreneur petition may be approved based on the business plan and supporting documents, but the I-829, petition to remove conditions on residence, will be denied. The funds may be returned to the investor based on the agreement between the investor and the R.C. as some RC hold funds in escrow pending approval of the I-526. Others do not. The R.C. cannot provide any guarantee of the return of the invested funds if the I-829 is denied.

**MORENO DIAZ**  
LAW FIRM

---

- ✓ If the I-526 is approved and the N.C.E. is ongoing, but the completion of the project is delayed, has yet to receive sufficient capital for completion, or is adversely impacted by a natural disaster, the Investor can file a new petition which will require review by USCIS and the issuance of a new two year conditional residence period.
- ✓ USCIS has assumed that the jobs for U.S. workers must be the same jobs and pursuant to the same business plan envisioned at the time of filing the I-526. USCIS has assumed that indirect jobs created outside the regional center will not qualify, and the requirement that jobs must be created within 2 ½ years from approval of the I-526 petition.
- ✓ Regardless of its location, a new commercial enterprise that is engaged directly or indirectly in lending money to job-creating businesses may only lend money to businesses located within targeted areas in order for a petitioner to be eligible for the reduced minimum capital requirement.
- ✓ Under the Immigrant Investor Pilot Program, if a new commercial enterprise is engaged directly or indirectly in lending money to job-creating businesses, such job-creating businesses must all be located within the geographic limits of the regional center. The location of the new commercial enterprise is not controlling.

**MORENO DIAZ**  
LAW FIRM

---

- ✓ If the new commercial enterprise is a holding company, the full requisite amount of capital must be made available to the business most closely responsible for creating the employment on which the petition is based.
- ✓ An alien may not receive guaranteed payments from a new commercial enterprise while he owes money to the new commercial enterprise.
- ✓ An alien may not enter into a redemption agreement with the new commercial enterprise at any time prior to completing all of his cash payments under a promissory note. In no event may the alien enter into a redemption agreement prior to the end of the two-year period of conditional residence.
- ✓ Reserve funds that are not made available for purposes of job creation cannot be considered capital placed at risk for the purpose of generating a return on the capital being placed at risk.
- ✓ The Service does not pre-adjudicate immigrant-investor petitions; each petition must be adjudicated on its own merits.
- ✓ Under certain circumstances, a promissory note that does not itself constitute capital may constitute evidence that the alien is “in the process of investing” other capital, such as cash.

**MORENO DIAZ**  
LAW FIRM

---

In such a case, the petitioner must substantially complete payments on the promissory note prior to the end of the two-year conditional period.

- ✓ Whether the promissory note constitutes capital or is simply evidence that the alien is in the process of investing other capital, nearly all of the money due under the promissory note must be payable within two years, without provisions for extensions.
- ✓ If using a direct effect model for job creation, evidence should be in the form of I-9's, W-2's, and employment tax reports. If using the expenditure model, invoices, bills, or receipts showing proof of all project expenditures may suffice. If jobs are not yet created as required at the I-829 stage, an investor may submit evidence of impending job creation within a reasonable period of time. However, an EB-5 investor should be wary of relying on this provision, as it is possible that USCIS may deem a project delay, and thus job creation delay, to be a material change requiring submission of a new I-526 petition.

## **DUE DILIGENCE BY INVESTOR**

Investors should take into consideration several aspects before investing in a regional center including:

- Visit the investment project and meet with directors and principals in person
- Review reputation and experience of developers and principals in the project
- Retain a tax attorney and financial advisor to review the profitability of the EB-5 investment and its tax consequences
- Understand the projected return on investment and exit strategies and when and how the return is paid
- Review business model followed by the RC
- Review econometric methodology used for job creation
- Whether direct rather than indirect or induced jobs are part of the job creation project
- Letters of recommendation issued by Governmental agencies, economic development organizations or chamber of commerce in the region
- Exit strategies
- Number of I-526 and I-829 Petitions that have been filed and approved
- Review if subscription agreement or purchase contract has a provision to return the money if I-526 or I-829 are denied
- Number of investors needed for the project

**MORENO DIAZ**  
LAW FIRM

---

- Is the Investor the first or the last in the project?
- Children turning 21
- Sunset of the Immigrant Investor Pilot Program by September 20, 2012
- USCIS wants to see the money going toward new job creation. Fees paid to lawyers, accountants, consultants, etc., do not count
- Workers submitting I-9 forms may not be authorized to work and maybe in fact be undocumented workers and therefore cannot be counted as a U.S. workers

**MORENO DIAZ**  
LAW FIRM

---

**Requirements by Investors**

- ✓ All nationalities may apply
- ✓ Net Worth greater than US\$1 Million or income of at least \$200,000.00 for the last two years.
- ✓ No Criminal Record
- ✓ Identifiable and legal source of funds
- ✓ Availability of funds within 60 days after first deposit
- ✓ Five Years of tax returns available for disclosure
- ✓ Inadmissible for previous immigration violation or criminal conviction
- ✓ Decide about consular processing or adjustment of status
- ✓ Questionnaire with list of family members including spouse and children under 21
- ✓ No same sex marriage accepted by Immigration
- ✓ Investment secured by personal savings, inheritance, or loans secured by personal assets
- ✓ Monetary Judgments for the last 15 years
- ✓ Disclosure of bank information, source of funds, wire transactions to fulfill the investment



**MORENO DIAZ**  

---

**LAW FIRM**

---

**DISCLAIMER**

The information contained herein has been provided with the understanding that the Moreno Diaz Law Firm's provision is not intended to substitute for legal advice from a licensed attorney and is only provided for information purposes. Your use of this information does not create any attorney-client relationship between you and the Moreno Diaz Law Firm.

Reproduction, distribution, republication and retransmission of any material contained herein is prohibited without the express written consent of Moreno Diaz Law Firm.