What are risks involved while getting US EB-5 visa program and how to manage them?

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If an individual is unable to get US-H1B1 Visa, then he/she has a way to get US Visa. via US EB-5 visa program. This visa program asks applicant to make a business investment which leads to creation of jobs in the U.S. However, there ae certain risks involved while applying for US EB-5 visa program.

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The U.S. EB-5 Investor Visa Program has become a popular tool for wealthy Indian families looking to migrate overseas. The visa program provides an opportunity for qualified investors to obtain permanent residency in the U.S. by investing in a local project that creates at least 10 full-time American jobs. The current investment amount for projects that are in a rural or targeted employment area (TEA) is $800,000. As on January 18, 2023, USD 800,000 translates into approximately Rs 6.5 crore.

The main attraction of the program is that it is one of the fastest ways to obtain the US Green Card. It levels the playing field for immigrants from other countries in the US. A green card eliminates the need for employer visa sponsorship, does away with the onerous H1-B lottery system, enables one to join start-ups/smaller organisations and even to pursue entrepreneurial opportunities in the US. The US green card also provides a direct path to US citizenship after 5 years.

However, an EB-5 investment is complex and has several moving parts. There are risks one should watch out for. If these risks are not understood or managed well, it could lead to a denial of the green card by the US authorities, loss of capital invested to get the U.S. EB-5 visa, or in the worst case, both.

How individuals can apply for U.S. EB-5 visa

Investors can either make a direct equity investment in a specific US-based business that creates 10 local jobs or work with a U.S. Citizenship & Immigration Services (USCIS) - approved Regional Center, a licensed body that pools funds from EB-5 investors to invest and create jobs on their behalf. The latter mode is called the EB-5 Regional Center Program.

Once you file the EB-5 visa application under either route, the immigration process runs alongside the investment process. Though parallel, they are still separate. This means it is completely possible to receive your US green card but not get back the money invested in the investment project or vice versa.

To make sure you secure your US green card as well as get your money back safely, it is important to understand the immigration as well as the financial risks involved in the U.S. EB-5 Investor Visa Program.

Immigration risks in U.S. EB-5 visa program

A conditional green card is generally issued to investors within 2-3 years of submitting an EB-5 application (for Indian born applicants, based on current processing timelines). The conditional green card helps an individual to live, study and work or even start their own business in the US. Two years after being issued a conditional green card, investors can apply for converting it to a permanent green card. At this point, they can also seek their capital back from the project.

The main immigration risk is denial of the Conditional Green Card or failure to convert it to a Permanent Green Card. This can happen due to the following reasons:

1) Investor's Source of Funds is not documented sufficiently to satisfy the USCIS authorities

EB-5 regulations require investors to prove that they have lawfully obtained their investment funds and submit the relevant documents regarding the source of these funds - right from when they were first earned/acquired by the investor until the funds are credited to the project's escrow account.

As every investor accumulates funds uniquely and USCIS officers impose a high level of scrutiny on the source of funds, it is important to work with an experienced immigration attorney who will prepare a thorough analysis of the source of your funds. If this analysis is unclear to USCIS adjudicators, you may receive a Request for Evidence (RFE) or even a denial of the conditional green card. For instance, if your source of fund is by selling a real estate property, then you are required to submit documents related to sale as well as original purchase. The documents vary depending on the source of funds of an applicant.

For Indians, this process has the added complexity of having to adhere to the Indian regulations related to overseas investments. Indian residents need to comply with various laws such as LRS, FEMA etc. while making investments abroad.

As a risk mitigation measure, good projects in the industry often provide Green Card denial guarantees and refund the invested capital back to the investors within 90-180 days of a denial.

2) The project you invested in fails to create 10 jobs on your behalf AND/OR fails to comply with the EB-5 regulations

The project must create 10 jobs for every EB-5 applicant family that has invested in it. Ideally, the project should be able to keep going, and creating jobs without being overly dependent on the EB-5 capital.

An EB-5 applicant, before making the investment, should ask questions about the construction/project completion track record and prior EB-5 experience of the project sponsor to understand how competent they are. Many good EB-5 projects start creating jobs even before the EB-5 capital is fully raised and/or they have a buffer of 2x or more jobs per investor, mitigating this risk to a large extent.

If you directly invest in a business, then you are eligible to get the conditional green card only if the investment creates direct, full-time positions. However, if an individual invests via Regional Centre projects, then both direct and indirect jobs can be counted to get the immigration benefit.

The project and /or the regional centres you invest with should be fully compliant with the latest EB-5 Reform & Integrity Act that was signed into law in March 2022. Failure by the project to comply with the regulations could lead to a denial of your Green Card.

3) You fail to satisfy basic residency/travel conditions

Once the conditional Green Card is obtained, the principal applicant must fulfil basic travel or residency conditions of the Conditional Residency. The process usually requires Conditional Green Card holders to not be outside of the US for more than 180 days at a stretch. This means that applicant is required to visit at least once in every 5-6 months.

There are ways to request for an exemption in certain cases, which are best discussed with your attorneys.

Financial risks

EB-5 visa regulations dictate that the investor's capital needs to be "at risk" and no guarantees are allowed to be offered to the investor on any return on, or of capital. In layman terms, this means that in the process of getting a green card, if not careful, you could potentially lose the entire amount invested. However, this does not mean your capital needs to be in a risky investment. You can protect your capital with adequate risk management measures.

Good projects under EB-5 regulations are structured conservatively, and the focus is usually on capital preservation and job creation. Some projects may yield low returns but may have excellent capital protection mechanisms built in. Others may offer higher returns but have slightly more elevated default risk, meaning the risk of losing capital could be higher. One must also take into consideration the liquidity risk, as the capital invested is essentially locked in for a period of 5-7 years.

The business receiving your investment must present a viable business plan. In addition to having a project structure that brings confidence that the project will be completed on time, and jobs will be created, one must understand how the project plans to return your money (exit strategy) as well. Investments that are structured as loans are usually more secure than equity investments. A clear, healthy capital structure, sponsor capital and other reputed lenders on the cap stack should give you comfort. Get to know the other stakeholders in the project such as the developers and fund managers as they will be responsible for creating the necessary jobs, managing the project, and returning the capital.

Due to the typically higher job cushion, and the hassles involved in the "D-I-Y" approach of direct investment, around 95% of EB-5 investors have historically preferred the Regional Center route. This comes at the price of giving up on potentially higher returns in the direct program, like any other risk-return trade off. This is not to say that Direct projects need to be avoided, just that they should suit your risk profile and be made only after careful evaluation.

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