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The EB-5 Program: What will the future bring for hotel owners?

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When traditional sources of financing dried up in 2007, many CRE owners turned to an existing but relatively under-utilized source of financing - the Immigrant Investor Program (commonly known as the EB-5 Program). Created in 1990 to help bring the U.S. economy out of recession, the EB-5 Program, which is administered by U.S. Citizenship and Immigration Services (USCIS), allows wealthy foreigner investors to obtain a green card and become a Conditional Permanent Resident of the United States in exchange for a significant investment in a qualified, for-profit U.S. business that creates or preserves at least 10 full-time jobs. Although some have argued that the Program is unfair to immigrants without the capital necessary to leapfrog to the front of the U.S. immigration waiting line, proponents of the Program believe it to be a "win-win" - with foreign investors gaining "expedited" entrance to the U.S., and American businesses and workers benefitting from much needed foreign capital.

Over 90% of all EB-5 investments are made through Regional Centers, which are public or private entities specially created to assist in the implementation of the EB-5 Program. Regional Centers promote the EB-5 Program in specific geographic areas and act much like deal brokers who bring investors and target businesses together for a fee. Most hotel owners looking for financing through the EB-5 Program start with their local Regional Center. However, a small number of foreign investors who prefer to play a more active role in their investments may elect to be an "individual investor", which requires the investor to find their own investment project, without the assistance of a Regional Center.

Regardless of whether investments are made individually or through a Regional Center, there are many requirements that must be met in order for the investor to receive their green card. First, individuals must invest a minimum of $1 million (or $500,000 in a "Targeted Employment Area" defined as a high unemployment or rural area) and create or preserve at least ten jobs for U.S. workers, excluding the investor and their immediate family, within no more than two years after being admitted to the country as a "Conditional Permanent Resident." In addition, each investment must be made in a "new commercial enterprise," i.e., a for-profit, lawful venture established (or significantly restructured or expanded) after November 29th, 1990.

The program also requires that ten "full time" (i.e., minimum of 35 hours per week) jobs be created or preserved within two years of the investor's admission to the U.S. Such jobs may be directly or indirectly created by the investment. For example, in a hotel development project, the jobs created at the hotel would obviously be counted, as would certain construction jobs and/or jobs in a restaurant down the street that might be frequently patronized by hotel employees or guests. In some cases, where the investment is made in a "troubled business" that has been in existence for at least two years and has incurred a net loss during 12 of the 24 months prior to the date of the investment, the mere "preservation" of ten existing jobs will be sufficient to meet the jobs requirement for the EB-5 Program.

There can be no question that the EB-5 Program has undergone a dramatic and rapid expansion since 2007. Over that period, the number of applicants to the program has increased from 776 to 3,500, and the number of Regional Centers has increased from 11 to 220. In 2013, the EB-5 Program is expected to create 42,000 jobs and attract $2.1 billion of foreign investment to the American economy, much of which will affect the hospitality industry. While these numbers are remarkable, USCIS allocates approximately 10,000 visas to the EB-5 program each year, an amount that the program will probably never use.

Between 2007 and 2012, there were many high profile EB-5 success stories in the northeastern U.S., many of which involved the hospitality industry. Jay Peak Resorts in Vermont used over $200 million of EB-5 investment to help transform itself into a year-round resort destination with a new hotel and golf course. The owners of the Sugarbush Resort in Vermont also raised over $20 million through the program for an expansion of their resort, and it is widely known that approximately $228 million dollars of EB-5 financing was used to construct the Barclay's Center, the home of the Brooklyn Nets.

However, the program has also given rise to many notable failures, with no shortage of fraud, embezzlement, arrests and lawsuits along the way. One recent high profile scandal involved Anshoo Sethi, who, according to the SEC, orchestrated a scheme to dupe and defraud investors into investing over $145 million into a new convention center in Chicago with 5 new hotels over a period of 18 months. According to the SEC, Sethi violated securities laws, made false claims (such as that he had all of the necessary permits required to begin construction of the project), committed fraud and materially misrepresented unsupported claims to personally collect over $11 million in fees. Unfortunately, charges of fraud and deception (sometimes with the alleged complicity of a Regional Center and/or a foreign broker) have been all too common, and have had an unfortunate chilling effect on foreign investors' interest in the program.

In the U.S., the many alleged abuses of the program have caused the USCIS and the SEC to bring the already slow approval process to a crawl, which has in turn resulted in many legitimate owners and investors simply giving up. Unfortunately, such delays will likely only be exacerbated by "sequestration", which is expected to lead to staff shortages and, in turn, even greater delays.

In conclusion, while the EB-5 Program has had incredible success over the past several years, it remains to be seen whether the attraction of a green card and the opportunity to invest in the U.S. will be a powerful enough draw to overcome the many challenges facing the EB-5 Program.

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