

The Rise of Citizenship By Investment, E-2, & EB-5 Programs as a Hybrid Immigration & Investment Vehicle to the U.S



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Introduction

In the past few years, the EB-5 industry has begun to explore the intersection of global Citizenship By Investment Programs (“CBI”) and U.S. investment programs, such as E-2 and EB-5, to create a new hybrid investment and immigration vehicle to the U.S. This approach has gained traction recently due to longer USCIS processing times and EB-5 visa backlog because it provides a short-term and long-term immigration strategy. This article addresses background information on the programs, explores sample case studies of a CBI/E-2/EB-5 conversion, and finishes with closing thoughts and insights that should be considered as part of the investment structuring and immigration planning process.

A New Investment & Immigration Vehicle

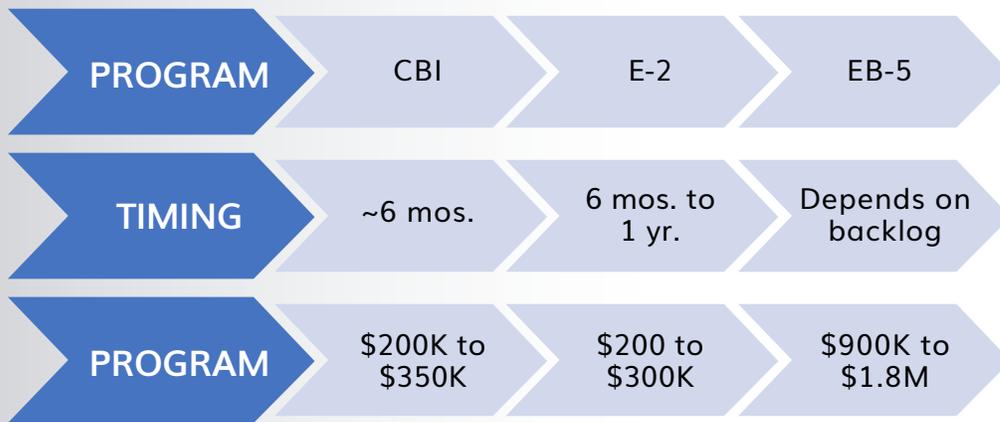
Anyone attending investment seminars

or conferences during recent years will have undoubtedly noticed other countries vying for the same investors and High Net Worth Individuals (“HNWI”) as the E-2 and EB-5 programs, including Grenada, Turkey, Malta, Australia, Portugal, and Canada.

As some savvy agents and professionals have discovered, some CBI programs may actually work in conjunction with the E-2/EB-5 programs. Namely, investors from backlogged countries can invest in a country with a qualifying Trade (E-1) or Investor (E-2) Treaty to acquire a second citizenship and subsequently use that citizenship as a bridge to enter the U.S. on an E-2 visa. The holy grail of course, is being able to successfully convert the E-2 investment into a qualifying EB-5 visa to permanent residency in the U.S. The interplay between E-2 and EB-5 programs is especially relevant given the increasing popularity of other countries raising

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capital through their own CBI programs. Thus, we now have a new roadmap to the U.S. which is illustrated above¹.

Although it sounds good in theory, in our experience, most migration agents or professionals have focused on the CBI portion of the process, instead of laying out a possible 5-to-7-year roadmap that incorporates the E-2 and EB-5 investment portions of the investor’s journey, including potentially requiring investors to not just fund the initial E-2 investment, but potentially \$900K to \$1.8M to qualify for EB-5².

As we discuss in more detail below, a major roadblock is after the passport for the qualifying E-2 country is acquired, not many migration agents or professionals have identified or structured a business investment that will satisfy both E-2 and EB-5 components (after all, as beautiful as Grenada may be, most journeys do not end there). Done correctly, it is possible to engineer an alternative (and possibly quicker) path to the U.S. and ultimately attain a green card by combining CBI and E-2/EB-5 programs, but it requires careful planning from the beginning.

Case Studies: Planning & Structuring Considerations for Using E-2 Businesses to Qualify as EB-5 Investments

Part of this critical planning relates to the investment opportunities being offered, the individual investor’s circumstances, and their

¹ All amounts are estimated and can vary depending on timing and ultimate nature of investment.

² Please note that due to the ongoing COVID-19 pandemic, consulate processing times are inherently unpredictable at the moment and will likely take longer due to an unprecedented backlog.

primary goal surrounding U.S. immigration. Immigration counsel’s role can vary dramatically depending on their given role in a deal, and whether they are representing the individual investor, the U.S. business, or the migration agent.

Hybrid Vehicles for Individual Immigration/Investment

For example, say an immigration firm is currently handling an E-2 case for a foreign national that acquired citizenship through his or her investment in Grenada. This client now wants to enter the U.S. on an E-2 visa to open an interior design firm that includes import/exporting of furniture and home furnishings. The first question that should be asked in that situation is whether his or her ultimate goal is permanent residency. If so, counsel should chart out a 5- or 7-year business plan (or longer) to ensure that they can qualify through the E-2 program, the business is capable of converting to an EB-5 investment, and ultimately, whether it can create the 10 jobs necessary to support the EB-5 petition. On the other hand, even if the client is unsure of their exact future immigration plans at the moment, it may be helpful for counsel to advise on a flexible corporate structure with a holding company that is able to add additional future businesses along the way to allow the client to hedge their future immigration and business plans.

Moreover, a competent and reliable business plan writer is critical for this endeavor, as they must understand both the firm’s legal analysis as well as the goals of the U.S. business. Ideally, the business plan writer will work closely with counsel as they chart out employment projections, expansion plans, and financial targets that will take into account when the remaining

capital is needed. For example, one basic foreseeable issue that should be tackled from the outset is the determination of what the remaining investment capital will be used for. Although easy to claim the remaining funds are for working capital, it is advisable to demonstrate the specific areas the funds will likely be earmarked for (and why it is needed for the business’ operations) to increase the credibility of the business plan. For the client above, one could point to a boom in demand for online home shopping, future orders (especially pre-paid ones from their suppliers), and the possible lease or acquisition of a larger showroom/warehouse. Employment and staffing needs would similarly scale.

Another important consideration regarding timing is when does the investor want to complete the investment to lock in TEA eligibility, including the timing in which the investor wants to release the funds directly into the NCE/business. The obvious question asked is whether the entire qualifying EB-5 investment should be invested upfront or if the client can file with partial funding and a commitment to invest. The optimal answer must take into account the investor’s risk tolerance and need for capital. The cleanest situation is if the entire \$900K (or \$1.8M) is invested wholly upfront to ideally preempt a Request for Evidence (“RFE”). However, for funding flexibility purposes, if the investor decides a partial investment is desired, it would be advisable to lay out a realistic timeline to complete funding so that either an interfiling or a ready response to a future RFE is available.

Moreover, is the investor also looking to invest in a new franchise opportunity or looking to acquire or expand a U.S. business? This is especially critical given COVID-19’s depression of employment rates which may create acquisition/expansion opportunities where none existed before. Other factors to consider are the corporate structure of the U.S. business, how best to hedge/retain maximum flexibility for business and immigration purposes (as stated above, perhaps a holding company that will be able to slot in future businesses as necessary if the investor wants to use those businesses to qualify for EB-5), and the effect an owner obtaining US permanent residency may have

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on other E-2 visa holders working for the company, as well as E-2 visa duration and immigrant intent. Note, this is a very case-specific issue, and it is best to seek a thorough understanding from immigration counsel to help rebut any presumptions of immigrant intent, such as strong home ties and evidence of future return.

Hybrid Vehicles as Project Financing for US Businesses & Agents

While the above example may work for an individual investor, the analysis and standards listed above change dramatically if approached from the perspective of U.S. businesses and migration agents seeking to create such hybrid vehicle options.

In many cases, U.S. businesses and migration agents will both encounter the same fundamental issue: inventory and scalability. Direct investments have been around since the dawn of EB-5, but the same problems that prevent most direct EB-5 investments from being sold at scale will hinder most businesses from being sold as E-2 (or L-1) investments, unless certain conditions are met, namely, limited inventory for the amount of resources that must be committed. After all, creating a new offering for only 2 or 3 units every time will quickly balloon the ultimate cost of capital for a business.

Thus, a U.S. business and agent that wants to create a hybrid investment program to raise money on the scale of a pseudo-Regional Center will have to consider several factors, including:

- **Ample & Predictable Inventory:** If an agent has 50 investors, does the U.S. business have adequate inventory? Or is it a new concept that, although promising, has only 2 locations.
- **Predictable Investment Terms:** E-2 (and L-1) investors do not make decisions overnight and the closing process can be longer than an EB-5 investment. The U.S. business will ideally have a constant deal structure that is easily understood and will survive new sales/marketing people being hired by their partners around the world.
- **Track Record of Managing Multiple Locations & Operators:** While there

may be promising brands and concepts in the marketplace, what the client and agent may not always be aware of is that they may not be dealing with the master franchisor and may be dealing with a new franchisee with limited track record. In other words, you may be investing in a Starbucks, but the franchisee that was awarded the Starbucks contract may have only one or two locations under management.

- **“Developing and Directing” - Management Systems & Organizational Structure:** Though the investor is undoubtedly in charge of ultimate policy making and direction, who will help support the U.S. investor as he or she grows the U.S. enterprise? Will there be a proven multi-unit operator familiar with the U.S. business that will help support the U.S. investor if needed? Are there predictable staffing and employment needs that will support an EB-5 petition?

Put another way, it is well understood that the owner of a hotel is usually not the day-to-day operator of the hotel – yet the owner will still maintain full control and direction over the hotel’s business. It is thus critical that the U.S. business has systems in place such as Standard Operating Procedures, cloud-based management software, organized meeting minutes, etc. that are readily available to help the investor run and track information anywhere in the world. This will especially be critical as a business grows to even 10 or 20 units. In any event, it is critical that immigration counsel and the business make it clear that the investor retains sufficient rights and power to ensure they meet the E-2 requirement to develop and direct a business, regardless of whether a third-party manager or operator is in control. Again, this is a case-specific situation and the company’s bona fide organizational and business structure will be the best evidence here.

- **Partial Investments & Financing:** Depending on the flexibility and resources of the U.S. business, it may be possible for an E-2 investor to file for an I-526 based on a partial investment and

complete the funding of the business in the future with either profits or dividends (paid to the investor after any applicable taxes due) or even credit lines/unsecured loans in the name of the investor (see *Zhang v. USCIS*).

- **Standardized Immigration & Business Documents:** Similar to EB-5 offerings, it’s advisable to have immigration counsel work closely with the U.S. business to standardize or template the necessary business and corporate documents, as well as to train and oversee the work of an agent’s case processing team to ensure smooth processing of new cases.

These are but a handful of issues, and the parameters and players in each deal will dictate the ultimate deal terms. Creativity and flexibility among the key players will be paramount, and it’s predicted that as EB-5 offerings evolve over time, so will these hybrid vehicles.

Closing Thoughts

The simplest investment path to the U.S. has, and always will be, the EB-5 Regional Center program. However, a new area brings new opportunities. Unfortunately, many of these issues are those of first impression and different consulates may have more stringent adjudication, so there will likely not be crystal clear answers or a consensus within the industry on the best way to move forward. Moreover, as complex as the underlying legal and business issues may be, they are dwarfed only by the difficulty of assembling a competent professional team from around the globe that understands these issues from a variety of immigration, business, and investment industries. These hybrid immigration investment models are certainly not for everybody, but forward-thinking groups around in the world have already poured countless hours because they all see the same opportunity and market demand. Either way, as investment and immigration programs continue to evolve, so will more paths to the U.S. and the more opportunities that will ultimately develop for the EB-5 industry. ■

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