



Partial Investments 101

What Regional Centers Need to Know



Joey Barnett
Partner | WR Immigration



Will Cornelius
Associate | Torres Law



Continued On Page 58

Partial EB-5 investments have always been allowed by U.S. Citizenship and Immigration Services (“USCIS”) but are currently en vogue. Demand for this payment flexibility has grown dramatically with the increased minimum investment amount under the EB-5 Reform and Integrity Act of 2022 and the desire to secure an earlier priority date while the “invisible” visa backlogs grow with Forms I-526E pending at USCIS. Other reasons for undertaking a partial investment relate to flexibility to liquidate assets and mitigating risk and uncertainty due to volatile financial markets. This article explains the legal framework for allowing partial investments and the possible legal issues and downsides from allowing this approach.

WHAT EB-5 LAW AND USCIS REGULATIONS SAY

The Immigration and Nationality Act, as amended, states that EB-5 visas are available for those who have “invested (after November 29, 1990) or, is actively in the process of investing, capital” in a new commercial enterprise. 8 U.S.C. § 1153(b)(5)(A)(i). Applicable regulations indicate:

To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital.

8 C.F.R. § 204.6(j)(2); see also Matter of Hsuing, 22 I&N Dec. 201, 204 (AAO 1998) (“An actual commitment does not exist if the petitioner’s assets are not at risk.”).

However, neither the law nor regulations (nor USCIS) articulate exactly how much capital must be invested to qualify for an EB-5 visa in the event the full minimum investment amount cannot be placed prior to filing the I-526E petition. This is up for negotiation between the immigrant investor, the new commercial enterprise and the sponsoring Regional Center based on, among other considerations, the need for capital by the job creating entity.

Furthermore, the start date for the “sustainment period” for post-RIA investments is “the date that the full amount of qualifying investment is made to the new commercial enterprise and placed at risk under applicable requirements, including being made available to the job creating entity, as appropriate.”¹ As such, an immigrant investor’s sustainment period may likely be extended with the use of a partial investment.

DO THE OFFERING DOCUMENTS PERMIT PARTIAL INVESTMENTS?

Even though partial investments are permissible under the EB-5 Program, it is important to determine as a threshold matter whether an NCE’s offering documents allow partial investments.

Offering documents that permit partial investments will typically memorialize the arrangement in the investor’s subscription agreement (or other similar agreement). The subscription agreement ordinarily provides for the acceptance of the investor’s subscription upon the making of the partial investment, with the balance payable either (1) upon a specified installment schedule set forth in the subscription agreement or (2) pursuant to a promissory note signed by the investor.

The authors note the distinction between “actively in the process of investing” cash as capital (see 8 U.S.C. § 1153(b)(5)(D)(ii) and 8 C.F.R. § 204.6) and investing indebtedness secured by assets owned by the immigrant investor, shown through a promissory note. USCIS’ Policy Manual mandates additional requirements on the immigrant investor and new commercial enterprise when using a promissory note, including perfection of a security interest by the NCE, to the extent provided for by the jurisdiction in which the asset is located.

Though promissory notes can be subject to scrutiny by USCIS, they do provide certain advantages to the NCE. First, the NCE would be a creditor of the investor and would have the same remedies customarily afforded to lenders by applicable law. Second, the NCE can require the investor to pledge collateral to

¹ See EB-5 Questions and Answers (updated Dec. 2023), available at <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-questions-and-answers-updated-dec-2023> (last accessed March 18, 2024).

secure his or her obligation to fund, which often includes a pledge of the investor’s ownership interest in the NCE.

FILING THE FORM I-526E

If permitted by the offering documents, immigration attorneys have different strategies to demonstrate an EB-5 investor’s commitment to invest the balance of the principal investment amount when filing the I-526E petition. Some may provide a detailed explanation of the lawful source(s) of the entire subscription amount at the time of filing, emphasizing that the EB-5 investor has already identified and sourced all the funds that will comprise the principal investment amount. Others may merely provide source of funds documentation for only the partial investment in the NCE.

Careful consideration based on the investor’s circumstances is required to prevent any inconsistencies that could be deemed “material misrepresentations” which would adversely affect U.S. immigration options in the future. A “petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication.” 8 C.F.R. § 103.2(b)(1). In addition, “a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts.” See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm ‘r 1971).

A partial capital contribution, a signed subscription agreement, and an attestation showing the present commitment to fund the balance within a certain period of time can assist to demonstrate the actual commitment of investing the full amount, not a prospective investment arrangement. Illustrating how and when the funds will be available in the future (a closing date for a real estate transaction, or a bond coming due) is prudent. It is advisable to complete the full investment amount prior to any action taken by USCIS on the case, and to interfile the remaining “source of funds” documents.

Additional evidence showing how the EB-5 investor has already made arrangements or formulated a strategy for transferring the balance into the new commercial enterprise’s account could also be helpful, as it demonstrates real and actual steps the investor has already initiated in preparation for the transference of the full EB-5 investment amount.

If the full investment has not been made when the Form I-526E is adjudicated, USCIS will issue a Request for Evidence, asking for information and documents related to the full investment amount. With processing times picking up – in particular for investments in rural projects that have I-956F approvals – immigrant investors should ensure the ability to fully fund the minimum investment amount quickly.

WHAT ABOUT ENGAGEMENT IN THE NEW COMMERCIAL ENTERPRISE?

An EB-5 investor is required to demonstrate at the time of filing that that he/she is engaged in the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation, in accordance with 8 C.F.R. § 204.6(j)(5). A Regional Center must ensure that the new commercial enterprise’s offering provides an immigrant investor with this right, notwithstanding the use of partial investment. In particular, if the immigrant investor has not made the full investment amount into the new commercial enterprise, then how will he/she be able to demonstrate compliance with this regulatory provision?

These questions are critical and demonstrate precisely why it is important to understand the subscription and investment procedures contained in the offering documents. At the outset, investors should review the NCE’s operating agreement or limited partnership agreement to confirm that their rights as a member or limited partner comply with the EB-5 Program, including their engagement with the NCE. Investors should also be careful to ensure that they are immediately admitted as a member or limited partner once their subscription is accepted and their initial installment funded. Once accepted, investors would be entitled to the rights granted to members or limited partners under the NCE’s operating agreement or limited partnership agreement.

WHAT HAPPENS IF FULL INVESTMENT AMOUNT IS NOT TRANSFERRED?

An NCE and/or Regional Center must also consider the possibility that an immigrant investor reneges on the commitment to fully fund the EB-5 investment. In these situations, it is important to review the offering documents and other partial investment documents, such as promissory notes.

Continued On Page 61



If the partial investment is structured as a promissory note, the NCE would be able to enforce its rights as a creditor should an investor fail to timely fund the balance of their investment. The NCE would also have the right to foreclose on any collateral pledged to secure the obligations under the promissory note. If an investor pledged his or her interests in the NCE as collateral, the NCE can effectively remove the investor from the NCE by foreclosing on their pledged interests.

Even if an investor's obligation is payable over installments that are not evidenced by a promissory note, EB-5 operating agreements and limited partnership agreements typically include expulsion provisions that allow the manager or general partner to expel an investor for failure to timely fund the balance of their investment.

In either event, the threat of losing their interest in the NCE (and possibly the immigration benefits sought under the EB-5 Program) may prove effective in deterring investors from not timely funding the balance of their capital contribution.

CONCLUSION

There are certainly some advantages to accepting partial payments of EB-5 capital, both from the perspective of prospective investors and NCEs, regional centers and project developers. However, EB-5 stakeholders on all sides must be mindful of the critical issues discussed in this article in order to both ensure EB-5 compliance and properly address any concerns regarding project capitalization. ►