

AN EB-5 BALANCING ACT

DEALING WITH REGIONAL CENTER,
BROKER, INVESTOR AND LAW FIRM GOALS
THROUGH EFFECTIVE AGREEMENTS

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The EB-5 Regional Center Program allows groups of foreign national investors to invest personal funds into a U.S. corporation, which in turn will transfer these funds as equity or as a loan to projects that will create a required amount of jobs. As a result, the foreign national investor will receive conditional permanent residency (a conditional green card).

This article specifically addresses the practice of representing foreign national investors in the filing of the I-526 petitions for EB-5 Regional Center projects. The most important aspect of this article addresses the practitioner's dealings with the brokers, or intermediaries, who source the investors for a particular EB-5 Regional Center project.

First Dealings with Foreign Brokers

Most EB-5 Regional Center projects receive the foreign national investor's funds through foreign brokers. Currently, the majority of foreign brokers are in China, as the Chinese make up most of the foreign investors for the EB-5 Regional Center projects.

There are many circumstances which may exist that have brought the law firm in contact with the foreign broker. For instance, law firms and attorneys attend seminars in China as well as the United States. Alternatively, the law firm's representation of EB-5 Regional Centers has led to introductions to foreign brokers.

Agreements between EB-5 Regional Center Projects and Brokers

An agreement may be reached between the EB-5 Regional Center and a broker to source foreign national investors for their EB-5 project. In certain circumstances, the EB-5 Regional Center project will enter into an exclusive agreement with the foreign broker to source all of the foreign national investors that are needed for the entire EB-5 project.

In other circumstances, the EB-5 Regional Center project will enter into an agreement with a foreign broker to source only some of the required foreign national investors to finance their project.

The agreement between the EB-5 Regional Center project and the foreign broker will usually state the terms related to finder's fees and further financial and time obligations.

The Specifics of Agreements between a Law Firm, Brokers and Investors

The foreign broker will also enter into an agreement with the law firm regarding the sourcing of foreign national investors to the law firm. Under these circumstances, the law firm will be representing the foreign national investors in the preparation and filing of the I-526 petitions, and one-hundred percent of their obligations will be to the foreign national investors.

The foreign brokers, in an agreement with the law firm, will set out terms stating that each of the foreign national investors will pay a certain U.S. dollar amount for the three steps of representation and costs.

The first step will involve the preparation and filing of the I-526 petition. The second step is the preparation and filing of each individual family member's applications for conditional permanent residency with the U.S. Consulate or USCIS. The third step involves the preparation and filing of petitions to remove the conditions to permanent residency.

In most instances, the foreign broker, according to the agreement with the law firm, will pay the attorney's fees and costs for the foreign national investors. Usually, they will pay for the first two steps. The reason for paying for these steps is that the law firm will prepare not only the I-526 petition but also concurrently prepare for the conditional permanent residency application process under the second step.

The foreign brokers, according to the agreement with the law firm, state they are the agents for the foreign national investors, and they have been given authorization by the foreign national investor clients to correspond and review all confidential information and documentation between the law firm and the foreign national investor.

The Agreement between the Foreign National Investor and the Law Firm

The law firm will also enter into an agreement with the foreign national investors who have been sourced by the foreign brokers.

This agreement may appear in one of two different formats. In one format, the amount of attorney's fees and costs is specifically stated in the agreement. In the other format, the attorney's fees are not stated, but there is reference to the fact that the law firm will be representing the foreign national investor in regard to the preparations of the three steps, and the attorney's fees will be paid by a third party (the foreign broker).

Each EB-5 practitioner will have to use due diligence in acquiring, from their state bar association, the rules, regulations or codes in respect to the authorization and parameters for the third party paying the attorney's fees and costs for the foreign investor client.

Refund of Attorney's Fees

In most cases, according to the agreement between the law firm and the foreign national investor, the law firm will not refund attorney's fees if there is a denial of the I-526 or the application for conditional permanent residency. The law firm will have spent a substantial amount of time, advice and expertise in the preparation and filing of the petitions and applications with USCIS or the U.S. Consulate.

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In some instances, the foreign brokers will insist (before they send foreign national investors to the law firm for the representation of the first two steps) that if there is a denial of either the I-526 petition or the conditional permanent residency through USCIS or the U.S. Consulate that the attorney's fees for these steps will be refunded to either the foreign broker or the foreign national investor.

The main reason as to why a broker would demand this stipulation is solely, in our opinion, for marketing purposes; it is easier for the broker to collect management and attorney's fees from the foreign national investors if there is a stipulation that the attorney's fees are to be returned upon a denial.

In fact, the brokers may even insist that the EB-5 Regional Center projects refund the administration fees usually paid by the foreign national investor in addition to their, generally, \$500,000 investment amount.

It is recommended that the law firm prepare an agreement of representation that stipulates the obligations of the foreign national investor in regard to the required information and documentation that is required to be supplied at the time of the initial preparation of the first or second steps and the further obligations of the foreign national investor to respond reasonably and fully to requests for further evidence, notices of intent to deny and to assist the law firm in filing motions to reopen, reconsider or the filing of appeals. That is, the foreign national investor is obligated to assist the law firm in respect to exhausting all administrative remedies to obtain approval of the I-526 petition or conditional permanent residency.

These obligations have to be met by the foreign national investor before any refund is due by the law firm in regard to the final decision of a denial of the first or second step.

Alternative Solutions to Refunds

In circumstances where there is an existing attorney-client relationship between the law firm and the EB-5 Regional Center project, there is a desire for the law firm to also represent the foreign national investors in the preparation of the first two steps of representation.

Under these circumstances, it is recommended, and often required, to have disclosure clauses in the agreements between the law firm and foreign national investors explaining the relationships between the law firm, the EB-5 Regional Center and the foreign national investor; the fact that the law firm is representing the foreign national investor only in regard to the U.S. immigration process; and that if there is a conflict between the foreign national investor and the EB-5 Regional Center, the law firm will represent neither.

The EB-5 Regional Center project will usually understand the marketing reasons behind the foreign broker's insistence that the law firm refund the attorney's fees in the event of a final denial.

The principals also understand the need to quickly obtain the foreign national investors' funds to finance their projects.

In summary, there are three concurrent needs. The foreign brokers, for marketing purposes and attracting foreign national investors, need to state that there will be a refund of attorney's fees based on a denial. Meanwhile, there is an immediate need for the EB-5 Regional Center project to obtain funding from the foreign national investors and there is a need for the law firm to obtain attorney's fees for the preparation and filing of steps one and two.

To satisfy the needs of all parties concerned, the following is a recommended solution: the EB-5 Regional Center project and the law firm may enter into an agreement stating that if there is a final denial, which would require the law firm to refund the attorney's fees for the first or second step to the foreign national investor or broker, under the circumstances the EB-5 Regional Center project will pay the law firm the amount attorney's fees that would be refunded.

It is also recommended that, before representation of the foreign national investors begins, the EB-5 Regional Center project deposits a certain amount into an escrow or trust account governed by a trust or escrow agreement that states the conditions in which this amount can be released. This agreement can reference that the stated amount will be transferred to the law firm in the event of a denial for the particular foreign national investor.

If the foreign national investor achieves a successful result for the first or second step, the amount in trust can be returned to the EB-5 Regional Center project.

Conclusion

The EB-5 practitioner should not offer guarantees of results or offer business advice on any EB-5 project.

The EB-5 practice, especially in regard to EB-5 Regional Center projects, is now a reflection of the current demands from the EB-5 Regional Center project, foreign brokers, foreign national investors and the EB-5 law firm practice.

Hopefully the above recommendations will show how all parties involved can achieve their respective goals concurrently.

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