EB-5 Financing Lawyer: FAQs: Essentials of EB-5 construction financing for developers

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FAQs: Essentials of EB-5 construction financing for developers
by
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Below are some of the most Frequently Asked Questions (FAQs) and answers regarding EB-5 funding for developers (click the link for answer, or scroll down)

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FAQs (with answers)

1. What is EB-5?
EB-5 is a provision in the United States immigration laws. It is the fifth “Employment Based” immigration provision providing expedited visa processing (hence “EB-5”). The program is a win-win-win arrangement, giving wealthy immigrants the opportunity to earn a “fast-track” to US citizenship if they make a minimum investment of $500,000, and create a minimum of at least 10 new jobs in the United States. In return, communities get the benefit of economic stimulation created by this investment and the new jobs. And developers get a valuable source of financing for new projects that is otherwise more difficult to obtain and more expensive from other sources.
2. **Why is there so much interest in EB-5 financing?**

In the last 5 years, EB-5 financing has become extremely popular in development circles for financing projects in the United States, and it is being widely used by mainstream, institutional players including government entities such as port authorities, major hotel brands like Marriott, Hyatt, and Hilton, and some of the largest owners of hotels and restaurants. EB-5 financing has provided low-cost, non-recourse, 5 to 7 year term financing for the development and construction of new projects and offers a number of advantages to developers. For the past few years, the demand for EB-5 funding has exceeded the 10,000 annual visas available to raise such capital from immigrant investors and/or the capacity of the fund raising channels (mostly regional centers and marketing agents).

3. **Is EB-5 funding available for new construction?**

Generally, YES. Because foreign investor money must create **new** jobs in the United States, construction projects located in the United States are the normal target of EB-5 financing investment. Although the law does not restrict the nature of the investment to real estate, foreign investors have demonstrated a clear preference for real estate-related projects, particularly hotels, restaurants and resorts. EB-5 financing can also be used to add new facilities to existing ones, such as a **new** tower of hotel rooms, a spa, a restaurant or nightclub. And, in limited circumstances, EB-5 financing can be used to rescue a bankrupt or failing business, but this exception is difficult to use.

4. **Can I use EB-5 funding to buy an existing project?**

Generally, NO. Unless a project is in bankruptcy or is failing, EB-5 financing cannot be used for acquisition, because the money will not create 10 new US jobs per EB-5 investor. As noted above, EB-5 financing might be used to add new facilities to an existing project or convert the use of an existing building which will meet the new jobs creation requirement.

5. **Is there any limitation on the kind of project funded with EB-5?**

There is no limitation in the law as to the type of project that can be funded with EB-5 financing. The critical requirement is that the minimum number of 10 new US jobs for each investor will be created within a specified period of time. However, in order to raise money from foreign investors, the project must satisfy the investors’ need for certainty that the project will be completed on time and create the necessary jobs so that the EB-5 investors will obtain their green cards. Secondarily, the project must also be attractive from an investment standpoint, providing a high degree of comfort that it will be able to repay the investment in 5 to 7 years (whether the EB-5 financing is structured as debt or preferred equity).
Analysts estimate that 80% of all EB-5 investors select real estate-related investments, particularly those that create a large number of new US jobs such as hotels, restaurants, night clubs, resorts, hospitals, and senior living. However, we have assisted clients in successfully closing EB-5 financing on solar projects, high tech, entertainment, and projects in other industries.

Certain classes of real estate are problematic for EB-5 investment because of the “tenant occupancy” issue. The USCIS currently takes the position that a project cannot count the jobs created by tenants leasing space in a property. Thus the USCIS generally says that a developer cannot count any of the jobs that are created by its tenants, such as retailers leasing space in a shopping center, or by the businesses that lease office space in an office building. And, unfortunately for the EB-5 job count, the developer/owner is likely to have few employees of its own at a shopping center, office or multi-family project (other than construction jobs during the construction period).

Hotels do not generally have a problem with the tenant occupancy rules because most hotels are not leased. They are franchised and run by independent parties but the owner remains liable for all costs and receives all the profits.

6. How much does EB-5 money cost?

As of mid-year in 2017, EB-5 financing for “preferred” developers typically costs 7% to 8% per annum to the developer on an all-in basis. The foreign investor usually receives 1% or less on his investment, and much of the rest of the per annum cost goes to pay for all the infrastructure and personnel involved in selling the project, raising the money and maintaining EB-5 compliance, securities compliance, and administration.

7. How do I know if EB-5 will work for me and my project?

Generally speaking, it will be essential that your project is in a TEA (or Targeted Employment Area, described below) because more than 90% of all EB-5 investors over the past 5 years chose projects where they could make the minimum $500,000 investment. This minimum investment is only possible when the project being financed is located in a TEA. This determination can be made quickly and at little or no cost.

After establishing that the project is located in a TEA, EB-5 feasibility will be determined by all the relevant factors. These include the developer’s track record of success with similar prior projects, the developer’s (and its completion guarantor’s) financial stability and reputation, and the project’s financial viability. Another series of factors relate to the comfort level that the project will meet all of the EB-5 requirements for immigrant investors to get their permanent visas. For example, what assurance is there that the minimum number of jobs will be created, the project will be completed and opened on time, and the project will be able to repay the investors’ money at the end of 5 to 7 years?

Of course, in addition to a high-quality developer, project, and deal structure, the EB-5 team should be “best of breed” in order to succeed in this competitive environment as ever-more developers seek EB-5 capital. If the due diligence, deal
structure, marketing, escrow releases and other elements cannot be properly executed, even strong offerings will fail to attract sufficient EB-5 investor interest.

**8. What is a regional center and do I need one?**

A regional center is an entity that has received formal approval by the US immigration service (the USCIS) of an application to be designated as such.

A regional center is NOT REQUIRED for the use of EB-5 financing. However, using a regional center increases the critical job count (the requirement of at least 10 jobs per investor) by counting direct jobs, indirect jobs, and induced jobs for a project in accordance with one of four pre-approved economic formulas. This usually results in a calculation of jobs created that are a significant multiple of those that result without a regional center. A multiple job count for EB-5 calculations means a multiple of EB-5 capital that can be raised.

When more jobs are created under the USCIS rules, more investors can get visas, and therefore, more money can be raised. It is also easier to use EB-5 when there is a substantial margin of safety in the job count in case anything goes wrong. As a practical matter, regional centers usually offer immigrant investors a buffer of 20% to 30% more jobs than the law requires to protect against contingencies.

**9. Why is getting the “right” regional center so critical?**

Our developer clients say their top concern in pursuing EB-5 is to quickly determine if EB-5 will work for them before they spend a lot of time and money. Assuming that it is feasible, they want to raise as much money as they can, at the lowest all-in cost to them, in the shortest period of time and with the greatest certainty of execution. Finding the “right” regional center for each project maximizes the prospects to accomplish these goals with a successful closing.

As in any other line of work, a relatively small proportion of the players have the dominant experience, contacts and track record to deliver results that are vastly superior to others. Just look at the numbers and imagine how difficult it would be to randomly find the best match for a given deal.

As of July 3, 2017, approximately 851 regional centers have been approved by the USCIS. Industry experts estimate that more than 85% of the total dollar amount of all EB-5 funding since 1990 has been raised by fewer than (the top) 10% of the regional centers. In other words, there is an extreme concentration of experience and success amongst a very small number of the regional centers.

Why have a virtual handful of regional centers raised such vast portion of the EB-5 funding? The top regional centers have been established for some time, have a strong infrastructure in both the United States and places where there is already an awareness of the EB-5 program opportunity, and strong interest in using EB-5 to migrate to the United States – places
such as China and hot new markets such as Vietnam, Korea, Indonesia, Latin America and parts of the Middle East. These established regional centers have built reliable marketing organizations and have worked out procedures, documentation, and logistics to evaluate new EB-5 projects.

A substantial amount of work is required to underwrite a deal, consummate arrangements with the developer, prepare the project marketing program and materials, sell projects overseas, and get the funds released for deployment by the project. In addition to the transaction work of making deals and raising capital, the regional center must also insure compliance with securities and immigration laws. And above all, the regional center must establish a track record of success in obtaining permanent visas for its EB-5 investors, because the regional center’s ability to raise capital in the future will depend upon being able to establish a high probability of success in getting green cards for its projects based on its prior performance.

10. Should I form my own regional center?

Most developers should not form their own regional centers. Here are some of the relevant considerations for and against forming your own regional center:

The “advantages” of forming your own regional center are touted by certain immigration lawyers and advisors who stand to earn substantial legal fees for helping you form the regional center. They ask “Why should you pay someone else to serve as a regional center for your deal when you can have your own?” They suggest that you might be able to shave 1% or 2% off the cost of your EB-5 financing. Perhaps you could have greater control over the fund raising process. You could hand-select the marketing agents who will sell your offering. You can use the regional center for future deals and turn it into a profit center for handling other developer’s projects.

If the developer cannot find and attract a great regional center to its deal, then, to a greater or lesser extent, the developer may find itself forced into the “immigration business” if it wants to use EB-5 financing. The developer may form a regional center, seek to identify regional centers to “rent,” or otherwise cobble together marketing agents and other components of the EB-5 capital raising chain. This is a difficult, time-consuming and somewhat risky course to set unless the developer fully understands the nature of the commitment, effort and capital likely to be required. Operating a regional center means running a complicated business that requires financial skills, a deep working understanding of the immigration business, and most importantly, establishing and maintaining a great network of contacts overseas in order to raise capital.

The developer forming its own regional center will be competing with a handful of dominant players who have been established for many years (as described in the immediately preceding section). These established, dominant regional centers have spent a vast amount of time and money to build their presence in China and other markets, along with their marketing organization, infrastructure, systems, forms and reputation amongst the EB-5 investor community. It can be daunting to compete with them in attracting immigrant investors for EB-5 capital.

An extraordinarily high percentage of developers who initially believe they want to form their own regional center and build their own EB-5 infrastructure will ultimately abandon their path. Although we can help clients establish a regional center and related infrastructure, developers need to understand this alternative involves setting up and operating an entirely new
business – the immigration business. It takes a long time to get regional center and project approvals and even longer to push projects all the way through the EB-5 pipeline so that you can show new investors that all your prior investors got their green cards.

Most of our clients find that it is far better to connect with and rely upon well-established major players in the EB-5 financing chain. We serve as counselors to assist them through this process.

11. What is a TEA?

In the EB-5 world, TEA is not pronounced like the hot drink. It is pronounced by naming each of the capital letters in its name, e.g. “T”… “E”… “A” and those letters stand for “Targeted Employment Area.” TEAs are either certain narrowly-defined rural areas, or other specifically defined geographic territories where the unemployment rate is 150% of the national unemployment rate. Determination of whether a project is in a TEA is critical, because 90% of all the EB-5 investors for the past three years invested in projects in TEAs. This is the only way the EB-5 investors can make the minimum $500,000 investment for the expedited process to get a green card under EB-5. If the project is not in a TEA, then the immigrant must invest a minimum of $1 million, and less than 10% of the foreign investors have invested this larger amount over the past three years.

Every jurisdiction has its own rules for determining TEAs. Some, such as the State of New York, are extremely liberal. Other states, including California, are much harder to work with, but there are a variety of ways to configure a census map to qualify as a TEA. Once you know why it is important to have your project in a TEA, don’t waste any further time on this yourself. Call an expert and see if we can get you a TEA designation letter for your project.

12. How much money can I raise?

There is nothing in the EB-5 regulatory scheme that sets a limit on the amount of money that can be raised for a project under the EB-5 program, except the requirement that at least 10 new US jobs must be created for each EB-5 investor within the specified time period. So the calculation of new US jobs is one of the most critical factors in determining the maximum amount of EB-5 financing. As noted elsewhere, regional centers are often employed because where they are used, the new job calculation for EB-5 purposes is not limited to the direct, full-time employees with W-2s, as it would be otherwise. With a regional center, new jobs include direct jobs as well as indirect jobs and induced jobs.

After the crucial jobs creation requirement, the other major factor affecting how much EB-5 capital can be raised is the attractiveness of the deal to your marketing organization and the EB-5 investors. These players tend to prefer that the EB-5 investment be limited to 25% or 35% of the total project cost. They want to see substantial equity and they want to see that all other parts of the capital stack are in place to help ensure that the project will be completed on a timely basis, and that at least the minimum number of EB-5 jobs will be created for all investors to qualify for their permanent visas.
With good advice, the amount of money raised by EB-5 can be optimized with proper sizing and positioning of the capital stack and structure of the overall deal.

### 13. What are the 6 biggest mistakes developers make with EB-5?

There are a number of mistakes developers often make with EB-5 financing. What are 6 of the most common mistakes? We find that too often, developers . . .

- don’t bring in EB-5 experts at the very outset of the project
- don’t document intention to raise EB-5 funding early enough
- rush to form their own regional center
- start negotiations with regional centers without guidance
- don’t count all jobs created in mixed-use or master planned development
- don’t perform enough or the right kind of due diligence

For more details on these mistakes and tips to avoid them, see “Tips to avoid the 6 most common mistakes developers make with EB-5.”

### 14. What does JMBM do to help developers with EB-5 financing?

JMBM specializes in representing top developers and projects where we have a high degree of confidence that the desired financing can be obtained and closed on optimum terms. In such cases, we can usually help our client to accomplish the following items, including sourcing the EB-5 capital:

- Source EB-5 financing
- Evaluate EB-5 threshold feasibility
- Optimize developer profile and project structure
- Assemble the right “EB-5 team” with best players
- Help size and structure the capital stack
- Negotiate optimal deal terms with current input on what is “market”
- Negotiate and finalize funding documents with the capital source
- Validate EB-5 funding strategy
- Oversee issues in the capital raising process
- Close the financing

As the developer’s counselor, we negotiate a fairly complex loan or preferred equity transaction in a regulatory environment that requires compliance with USCIS, SEC, & FINRA. This process also necessitates identifying, selecting, negotiating and coordinating with an immigration law firm, an economist, various hotel consultants and one or more regional centers to get your loan properly sized and documented.
As part of the financing process, for each EB 5 financing project we work with, each client and appropriate members of the EB-5 team to do the following:

- Obtain a TEA map and letter of authorization from an economist
- Manage "new job count" issues for direct, indirect, and induced jobs to ensure compliance with EB-5 requirements of the USCIS to support the size of your EB-5 financing
- Assist in developing the proper business plan for your project
- Verify calculations from the economist and regional center and strategize best way to maximize loan size and terms for the developer
- Drive loan sizing and capital stack position
- Negotiate loan commitment and loan documents that reflect proper collateral, have appropriate escrow release provisions and security so terms will be acceptable to both the developer and to traditional construction lenders who may be in a senior lien position
- Negotiate and finalize inter-creditor agreements, escrow agreements, completion guarantees, various security agreements (depending upon collateral provided by the developer), and other related financing documents

How to get help evaluating and executing on EB-5 financing.

We have a lot of practical experience in helping our developer clients raise EB-5 funding. If you would like some help to evaluate whether EB-5 could work for you, or what strategy is best for you, then give us a call. There is no cost for an initial discussion.

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For more information about EB-5 financing, including the latest updates, go to www.HotelLawBlog.com, scroll down the right-hand side under LEARN MORE ABOUT and click on “EB-5 Financing” where you will find all the articles on the subject.

For your convenience, here are a few popular EB-5 articles that may be of interest:

President’s Trump’s budget deal includes extension of EB-5 through 12-8-17

The Hotel Developer’s EB-5 Handbook

FAQs: Essentials of EB-5 construction financing for developers

EB-5 construction financing term sheet for top developers
More than $1.5 billion of EB-5 construction financing closed for JMBM clients

Are hotels still the darling of EB-5 financing?

The 5 questions every developer is asking about EB-5 financing

Tips to avoid the 6 most common mistakes developers make with EB-5

Why you do NOT want to form your own regional center

What does JMBM do to help with EB-5 construction financing?

This is Jim Butler, author of www.HotelLawBlog.com and hotel lawyer, signing off. Please contact us if you would like to discuss any issues that affect your hotel interests or see how our experience might help you create value and avoid unnecessary pitfalls. Who’s your hotel lawyer?

Jim Butler is a founder of the JMBM law firm and chairman of its Real Estate Department. He founded and chairs the Firm’s Global Hospitality Group® and its EB-5 Finance Group which provide business and legal advice to owners, developers and investors of commercial real estate, particularly hotels, resorts, restaurants, spas and senior living. This advice covers purchase, sale, development, financing, franchise, management, labor & employment, litigation, ADA, IP, and EB-5 matters for such properties.

Jim is recognized as one of the top hotel lawyers in the world and has led the Global Hospitality Group® in more than $87 billion of hotel transactions and more than 3,900 hotel properties located around the globe. They have helped clients with more than 1,000 hotel management agreements, 1,000 hotel franchise agreements and more than 100 hotel mixed-use projects.

JMBM’s EB-5 Finance Group has advised on more than 100 EB-5 projects, closed more than $1.5 billion of EB-5 financing, and sourced more than half of that for our clients. EB-5 Investors Magazine named Jim one of the top 25 EB-5 lawyers in the United States, and Jim serves on the Public Policy Committee of the IIUSA, the EB-5 industry’s trade group for regional centers.

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David Sudeck is a partner at JMBM, and a senior member of its Global Hospitality Group® and real estate department with extensive experience handling all types of commercial residential properties, including the complex issues associated with hotels, resorts, vacation ownership properties, restaurants, golf courses and spas. David represents clients in the purchase and sale, development, construction, financing (with extensive experience in EB-5 financing), leasing, and sale-leaseback of properties, and advises them on their operations, including management and ADA compliance issues.

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Hotels we have worked on over the years. Visit our hotel photo gallery to see some of the more than 3,900 properties around the globe that the hotel lawyers of the Global Hospitality Group® have been involved with, on behalf of our clients. For a more comprehensive list of hotels properties and projects we have worked on, see our Credentials.