

Whether an E2 or L1 Capital Investment May be Applied to an EB5 Green Card

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EB5 Defined Generally In The Direct Investment Context

The Immigration and Nationality Act provides that an immigrant visa shall be made available when a foreign national invests or is in the process of investing capital, currently in the amount of \$500,000 (for rural or high unemployment areas) or \$1,000,000 into a new commercial enterprise and creates 10 full time jobs for the U.S. citizens or lawful permanent resident holders (other than the investor's spouse or children). There are numerous issues and factors that must be carefully examined for an

EB5. Here we are narrowly examining whether an investor that invests in a business and receives an E2 or L1 visa and subsequently creates 10 full time jobs may apply the investment and job creation to an EB5 Green Card.

E2 Visa Defined

8 CFR provides that a foreign national of a Treaty Country may obtain E2 status when the investor: (i) Has invested or is actively in the process of investing a substantial amount of capital in a bona fide enterprise in the U.S., as distinct from a relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living; (ii) Is seeking entry solely to develop and direct the enterprise; and (iii) Intends to depart the U.S. upon the expiration or termination of treaty investor (E-2) status."

It's important to point out that unfortunately foreign nationals of India and China are not eligible for an E2 visa, which is a shame as there is very strong demand from foreign investors in these countries that would be beneficial for the



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U.S. economy. Nevertheless, investors of India and China generally inquire into an L1 visa or an EB5 green card mentioned above.

L1 Visa Defined

8 CFR defines an L1 visa as "Intercompany transferee means an alien who, within three years preceding the time of his or her application for admission into the U.S., has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to



enter the U.S. temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge. Periods spent in the U.S. in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the

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U.S. for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted towards fulfillment of that requirement.”

L1 and E2 Distinguished for Investor Purposes

In the context of this article, namely whether an investor that invests in a business and receives an E2 or L1 visa and subsequently creates 10 full time jobs may apply the investment and job creation to an EB5 Green Card. L1 and E2 have a huge distinction. The purpose of an L1 visa is to transfer an employee of an overseas company to a related or affiliated company in the U.S. The transferee is

viewed as an employee of a separate overseas entity and of the U.S. entity and not an investor. In many cases, especially in small businesses, the transferee is both an investor of the overseas company and the U.S. company. However, in the eyes of the U.S. Immigration law, the transferee is an employee. In contrast, U.S. Immigration views the E2 investor as an investor. Similarly, in an EB5 green card Immigration views the foreign national investor as an investor. Apples to apples and oranges to oranges, but do not compare apples to oranges, is an American saying. Similarly, an E2 investment is comparable to an EB5 investment, while an EB5 and L1 are apples and oranges.

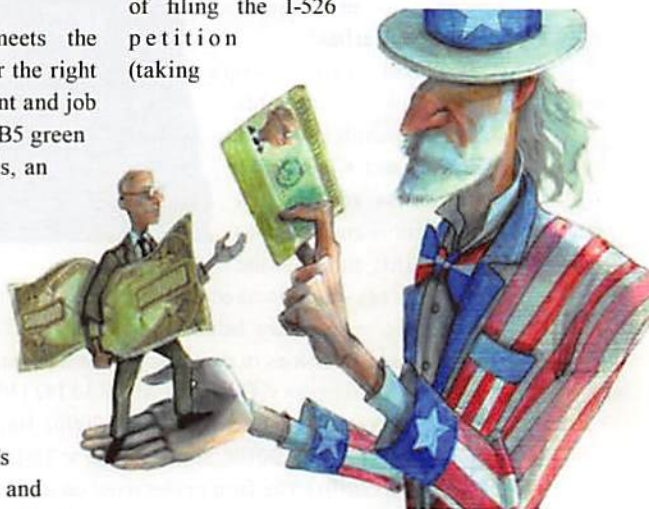
E2 to an EB5 - There must be an infusion of Capital, not just retention of profits

Provided an E2 investor meets the requirements for an EB5, under the right circumstances, an E2 investment and job creation may be applied to an EB5 green card. As *Kenkhuys v. INS* holds, an EB5 investment “requires an infusion of new capital, not merely a retention of profits of the enterprise.” *Kenkhuys v. INS* no.3. OI-CV-2224-N (N.D. Tex. Mar 7, 2003.) If an investor is going to pursue an E2 with an EB5 as the ultimate goal, it’s important to plan accordingly and to seek the assistance of an experienced immigration lawyer and business advisor/accountant. It would not be pleasant to be successful in the E2 business, invest \$1m one way or another, create 10 US full time jobs, and then find out that the source of funds is not sufficient for EB5 purposes.

L1 or EB5 For the Investor From India or China

Investors from India, China, and other non-treaty countries are faced with the decision, go for an EB5 Investor Green Card or consider an L1 and subsequently and EBIC (International Manager or Executive Green Card). Generally speaking L1 cases for new and/or small U.S. businesses are scrutinized more

than larger established entities in the U.S. (this is not all cases but just a general proposition to consider.) Moreover, does the investor want to start off large in the U.S., if so, then perhaps an EB5 is the correct strategy. Remember, the EB5 process requires an initial I-526 petition for conditional residency. Once the I-526 petition and Immigrant Visa are approved, the investor may enter into the U.S. as a conditional resident. The investor must then create 10 full time U.S. jobs within 2 years (some cases are given 2 1/2 years) and a permanent green card can be obtained through the filing of an I-829 petition and adjustment of status application. An EB5 case (from date of filing the I-526 petition) is looking at a minimum of 2 years, but in most cases at least 3.5 years from date of filing the I-526 petition (taking



into account processing times). The other option is to pursue an L1, which in some cases can be obtained in approximately 2 to 8 weeks with premium processing. If it’s a new entity in the U.S. an L1 will be issued for 1 year, in which the investor will want to file for a renewal after 1 year. The investor in many cases may want to wait until the L1 renewal is approved before filing the EB1(c) Green Card. However, each case has a unique set of facts and there are various strategies. As mentioned above, it’s important to work with an experienced immigration lawyer and business advisor/account/lawyer. 