



MONA SHAH & ASSOCIATES 299 Broadway, Suite 1005  
—ATTORNEYS AT LAW— New York, NY 10007

Tel: 212-233-7473  
Fax: 212-233-4877  
E-Fax: 917-210-3711

E-mail: [info@mshahlaw.com](mailto:info@mshahlaw.com)  
Web: [www.mshahlaw.com](http://www.mshahlaw.com)

## EB-5 STAND-ALONE PETITIONS AND EB-5 REGIONAL CENTER PETITIONS: WHICH ONE MAKES SENSE FOR MY PROJECT?

---

By Mona Shah, Esq.  
Yi Song, Esq.

An EB-5 investment can take one of two forms. The investor can invest in a free-standing project, often termed as “the stand-alone EB-5”/ “Direct EB-5” or the investor can make his/ her investment through a “regional center”, which is an economic unit, public or private, that has economic development impact to a designated geographic area.

Recently, there has been a surge of direct or “stand alone” EB-5 petitions. There have been many factors attributing to this, including USCIS delays, tenant occupancy issues, the expense of putting together a regional center, collapse of A Chicago Convention Center (ACCC) project and its negative publicity associated with the regional center, etc. Traditionally, as regional centers had the approval of USCIS, direct projects were distrusted, particularly after the Mamtek scandal.<sup>1</sup> However, as regional center project preapprovals became unreliable coupled with instances of large regional center project failures the market in China began to swing towards direct petitions.

Other than market forces, some projects are better suited to the traditional direct or stand-alone approach rather than as a regional center project. This article analyzes the difference between a traditional stand-alone EB-5 petition and a regional center EB-5 petition and the cost, the benefit and risk analysis for the two approaches.

---

<sup>1</sup> A Direct EB-5 Project - a sugar factory in Moberly, Missouri turned out to be a fraudulent scheme set up by the principal Bruce Cole. The project collapsed. At least four Chinese investors lost their investment capital. The Chinese authorities issued notice to the migration agencies to warn the risks involved in the Direct EB-5 projects.



- What is a stand-alone EB-5 investment?

Prior to the Regional Center Pilot Program, the traditional method for EB5 investors was through the stand alone investment (INA Section 203(b)(3)). A stand-alone EB-5 investor would have to invest in a new commercial enterprise which may take any lawful business form, including a limited partnership, and must both benefit the US economy and directly created not fewer than 10 full-time permanent jobs for qualifying employees.

- What is a regional center EB-5 investment?

Pursuant to the Regional Center Pilot Program, regional centers as we know them today were born. Regional center EB-5 investors would have to invest in a new commercial enterprise. The investment must be utilized to promote economic growth, including improved regional productivity, job creation, and increased domestic capital investment.

- Minimum Investment Amount

Whether the investor decides to invest in a stand-alone project or in a regional center program, the minimum investment amount does not change. The minimum investment is \$500,000 if the EB-5 project is located in a high unemployment rate area, also known as “targeted employment area” (TEA) or rural area.



A targeted employment area is an area that, at the time of investment, is a rural area or an area experiencing unemployment of at least 150 percent of the national average rate.

A rural area is any area outside a metropolitan statistical area (as designated by the Office of Management and Budget) or outside the boundary of any city or town having a population of 20,000 or more according to the decennial census.

If either the RC project or the stand alone project is not located in a TEA area the minimum investment amount remains \$1,000,000. The investment capital should be invested or is actively in the process of being invested into the new commercial enterprise. The investor must also show that the required amount of capital is “at risk” for the purpose of generating a return.

- Job Creation for Stand-Alone and Regional Center

The most important difference between the two forms of EB-5 investment is the manner in which the jobs created are counted by United States Citizenship and Immigration Service (USCIS). Stand-alone investors make an investment into a new or existing business venture in the U.S. and can do so individually or with other investors. In stand-alone petitions, only direct jobs are counted. The most important advantage of investing through a regional center is that indirect and induced jobs are counted towards the job creation requirement. In regional center-based investments, depending on all input/output model is used to calculate the jobs, the number of jobs created is usually almost three times greater than those created by stand-alone investments.

The difference between a directly created job and an indirectly created job is easy, but important, to understand. Direct jobs are those that establish an employ-employee relationship between the commercial enterprise and the persons that they employ. For example, if an EB-5 project builds a hotel that is open after a year, the receptionist position would be considered a directly created one. Indirect jobs are held by people



who work for the producers of materials, equipment, and services that are used in a commercial enterprise's capital investment project, but who are not directly employed by the commercial enterprise. Construction jobs are often considered indirectly created jobs. A final category of jobs created by EB-5 ventures, which can be counted for regional center-based investments but not stand-alone ones are called induced jobs. Induced jobs are those jobs created when direct and indirect employees go out and spend their increased income on consumer goods and services.

- “Pooled” Investment

In a regional center context, the investors' investment money is “pooled” or combined and invested. In a stand-alone project, the investment can also be pooled, or invested alone. If there are multiple investors in a non-regional center project, the corporate structure must be carefully crafted. The job creation element also becomes more defined. In both cases, there must be a clear nexus between the investment and the job creation.

- “Policy formulation”

There have been several misconceptions in this area. Several immigration practitioners have advised that only investors in regional center programs are allowed to be involved in the “policy formulation” activities and indirect management; further advising that for the stand-alone program the investors must be involved in the daily management of the business. Careful reading of the regulations denotes that this approach is not correct. A stand-alone investor may also be involved in the “policy formulation” activities and indirect management. Please refer to 8 C.F.R. 204 6(j) (5).

- Capital at Risk and Redemption Agreement



Both stand-alone EB-5 investors and regional center EB-5 investors bear the business risk to make the investment. That means the investor must have the chance to gain profits or lose the investment. The business agreements for the new commercial enterprise cannot contain a buy-back agreement, such as a redemption clause guaranteeing the return of the alien investor's capital investment, then the EB-5 investor's capital investment will not be a qualifying "at-risk" investment for EB-5 purposes.

- Cost, Benefit and Risks

The EB-5 stand-alone investors and regional center investors need to retain attorneys specialized in EB-5 practice to prepare their petitions. There are two general stages: I-526 where the investors obtained conditional permanent residency and I-829 where the investors petition for removal of condition on their permanent residency.

The EB-5 petition includes two segments of information: firstly that the evidence to prove the project is viable, credible and secondly the evidence to prove the investors' capital is obtained through lawful means. For the project information, the petitions cost usually include costs to attorneys for the tailored EB-5 compliance comprehensive business plan, cost to the economist for certifying the economic development impact and job creation requirement, cost to securities/corporate attorney for drafting and reviewing the securities offering documents, cost to market analysis firm for certify the project is viable, feasible and credible, and cost for filing the new commercial enterprise to the State where the project is located and cost of filing the regional center with USCIS.

For some stand-alone EB-5 investments, the principals of the project have to be prepared to bear the cost of the project documents. For regional center EB-5 investors, the regional center will cover the costs to the project portion of the I-526 petition. One distinction between the two is that stand-alone projects require the petitioner to submit



all of the evidence by themselves, with the help of their immigration lawyer. This is not the case in pooled direct investment projects. Either way, investors who invest through regional centers or pooled direct projects must ensure that the project meets all of the criteria set by USCIS.

- SEC Form D and I-924A

Two things are easily neglected for EB-5 projects: the SEC Form D and I-924A annual filing.

Any regional center or Direct EB-5 who has solicited investment from foreign investors via a private placement offering relies on an exemption from registration pursuant to Regulation D. The securities law requires the regional center and Direct EB-5 project to file a Form D – Notice of Exempt Offering of Securities with the SEC within 15 days after the first sale of securities in the offering.

A Regional Center which has received USCIS designation must file the I-924A form on or before December 29 each year. The failure to timely file a Form I-924A Supplement for each fiscal year in which the regional center has been designated for participation in the Immigrant Investor Pilot Program will result in the issuance of an intent to terminate the participation of the regional center in the Pilot Program, which may ultimately result in the termination of the approval and designation of the regional center.

- Escrow Account

Most regional centers will require an investor to put the investment funds into a specially-designated escrow account, usually with a bank. There is no legal requirement that an escrow agreement ever be used in EB-5 investments. It is simply a marketing tool. In stand-alone projects, escrow arrangements have been utilized, though for very small projects, there is usually no escrow arrangement at all and the money is wired directly into the project in order to avoid delays. When an escrow agreement is in place,



the investment money will subsequently be released directly to the project upon a triggering event, either upon petition receipt by USCIS or when the I-526 petition is approved. Both stand-alone EB-5 investors and regional center EB-5 investors bear the business risk to make the investment.

The EB-5 projects have to follow a strict timeline under the immigration laws. The 10 full-time jobs for each EB-5 investment will have to be created or will likely to be created within two years. The two year clock starts kicking in six months since the adjudication of the I-526. The investors are requested to submit timeline and cost estimates for the project based on reasonable analysis method. If the project is subject to delays or other “material change”, the investors bear the risk that they might not be able to remove the condition on their permanent residency. Though the draft policy memorandum released by the USCIS in February 2013 gives much flexibilities regarding material change.

- Marketing Advantages

Filing a stand-alone petition is certainly a lot faster than filing for regional center status and waiting for a response from USCIS. Whereas once upon a time, the majority of stand-alone investors would be investors wishing to expand or set up their own business, more recently, project developers requiring less capital and who could show a clearly defines are utilizing this route. The adjudication time for stand-alone EB-5 petitions is shorter in most cases.

### About the Authors:

Mona Shah, Esq. is the principal of Mona Shah & Associates in New York City. The firm has assisted many Regional Centers and Investors in navigating this complex, nuanced and constantly changing area of immigration law. Mona has more than 18 years of legal experience in immigration law and extensive knowledge in EB-5 law. Mona's substantial litigation background includes her



MONA SHAH & ASSOCIATES 299 Broadway, Suite 1005  
—ATTORNEYS AT LAW— New York, NY 10007

Tel: 212-233-7473  
Fax: 212-233-4877  
E-Fax: 917-210-3711

E-mail: [info@mshahlaw.com](mailto:info@mshahlaw.com)  
Web: [www.mshahlaw.com](http://www.mshahlaw.com)

representation of clients in both state and federal courts. She has handled complex immigration law appeals before the US Circuit Courts of Appeal nationwide. Before coming to the US, Mona was a crown prosecutor in the UK. Mona has authored and published numerous articles and has spoken extensively both in the US and overseas.

Yi Song, Esq. is an attorney at Mona Shah & Associates focusing on EB-5 and securities law. She is also admitted to practice law in New York and People's Republic of China. She has authored many published articles on EB-5 financing and securities law. She practiced tax law in China and has experience in class action securities litigation cases. Yi is a graduate from Georgetown University Law Center in Washington, DC.

Mona Shah & Associates reserve and hold for their own use, all rights provided by the copyright law, including but not limited to distribution, producing copies or reproducing, sales of this document. This article is a general summary of complex legal issues. No legal advice is provided in this article. Please consult the securities attorney for advice applicable to your particular circumstances.

All rights reserved by Mona Shah & Associates ©