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MEMORANDUM

RE: Discussion of the Requirements for the Alien Entrepreneur (EB-5) Immigrant Visa

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This memorandum is written to provide you with an overview of the requirements for an immigrant visa pursuant to fifth preference employment-based category for the alien entrepreneur (also known as the employment creation aliens) (the "***EB-5 Visa***") which the investors are required to observe and satisfy in order to obtain lawful permanent residency status in the United States.

This memorandum is intended only to provide you with general information about the EB-5 Visa. It does not provide specific information on the types of documentation necessary to be presented for a successful adjudication of the petition/application EB-5 Visa described and is not to be substituted for legal advice on individual cases.

I. INTRODUCTION

The EB5 Visa allows an investor and his family members to initially obtain a conditional lawful permanent residency status based upon his/her investment into the United States. If the alien entrepreneur or investor is able to continue to meet the investment and job creation requirements of the EB5 visa for a period of approximately two years, at the end of the 2 year period, the alien entrepreneur will be granted lawful permanent residency status in the United States.

The EB-5 Visa, although quite complex, has only four primary requirements which are as follows:

Each alien entrepreneur must, after November 29, 1990:

(a) Invest $1.0 million (or $500,000.00 in rural and high employment areas) of lawfully acquired capital into a new commercial enterprise;

(b) Place the entire capital investment at risk for the purpose of generating a return on capital;

(c) Create ten (10) new or additional full-time jobs through such investment, and

(d) Be engaged in the management of the commercial enterprise.

Two or more alien entrepreneurs may invest in the same "new commercial enterprise," however, each such entrepreneur must invest the requisite amount and each such investment must create at least ten (10) new or additional jobs.

II. SUMMARY DISCUSSION OF THE REQUIREMENTS.

Although we will not, in this discussion, attempt to summarize the complex documentary requirements for this category, we do hereinafter describe its general requirements:

A. Requisite Investment of Capital.

(a) Amount of Investment Required. As noted, the standard requisite investment of capital is $1.0 million for each alien entrepreneur seeking LPR status from the investment) made after November 29, 1990. In areas designated as "rural" or "targeted employment areas ("***TEA***")", the requisite investment is $500,000.00. A "rural area" is any area not within either a metropolitan statistical area (so designated by the U.S. Office of Management and Budget) or the outer boundary of any city or town having a population of 20,000 or more. In the State of Hawaii, "rural areas" include all areas outside the City and County of Honolulu and outside the City of Hilo. A TEA is an area, which based on the U.S. Census, has an unemployment level which is at least 150 percent higher than the national unemployment rate.

(b) Definition of "Capital". The definition of capital in the regulations of the USCIS is somewhat broad in that it includes cash, equipment, inventory, other tangible property, cash equivalents (such as certificates of deposit, Treasury bonds and other Instruments that may be converted readily into cash) and "indebtedness" secured by assets owned by the alien entrepreneur (provided that the alien entrepreneur is primarily and personally liable on the indebtedness and assets used to secure the indebtedness are not assets of the new commercial enterprise).

However, in precedent decisions, the USCIS requires that if the alien uses any source of capital other than cash, the USCIS will make a detailed inquiry into whether the capital meets the definition of "capital" as intended by the Immigration and Nationality Act (the "***INA***"). This inquiry is so complex that it is our recommendation that the alien entrepreneurs invest the entire $1,000,000 (or $500,000.00 as appropriate) in cash directly into the commercial enterprise. No portion of the capital invested may be used for any administrative costs, such as legal fees for preparing the documents required to classify the investor for the EB-5 Visa or advertising costs to find other alien entrepreneurs to invest in the commercial enterprise.

(c) Capital must be placed at risk. A key concept, and what the alien entrepreneur must demonstrate to the USCIS, is that the alien has or is in the process of

investing all the capital and the capital is directly at risk in the investment. Where the capital investment will be made into a limited partnership, the USCIS will scrutinize the limited partnership agreement (the "***LP Agreement***") to ensure that the LP Agreement does not contain any redemption agreement allowing the limited partner to sell his or her shares in the limited partnership for a specific amount. The USCIS has determined that the ability to sell the alien entrepreneur's share in the limited partnership is considered to be a minimization of risk on the part of the alien entrepreneur and therefore, the funds are not considered to be "at risk".

(d) Capital invested must originate from a legitimate source. In addition to showing that the capital has been invested into the business, the alien must also show that the capital has been legally obtained. This involves showing the USCIS, in specific detail, how the alien entrepreneur acquired the capital funds used for the investment.

B. **Investment into a New Enterprise**. The alien must make his or her investment in a "new commercial enterprise" (the "***Enterprise***"). A "commercial enterprise" means any for profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust or other entity which may be publicly or privately owned. A new commercial enterprise may consist of:

(1) An original business created or formed after November 29, 2009; or

(2) If created prior to November 29, 2009,

(i) The enterprise will be considered as "new" if the investment resulted in a simultaneous and complete restructuring or reorganization such that a new commercial enterprise results; or

(ii) The investment into the business resulted in an expansion of an existing business in an amount resulting in a forty percent (40%) increase in the net worth or number of employees of the existing business. (Otherwise stated, the new net worth or number of employees must equal at least 140 percent (140%) of the pre-expansion net worth or number of employees).

C. **Job Creation**. Regardless of the type of Enterprise, the investment by each alien entrepreneur must create no less than ten (10) new full-time jobs for U.S. workers who are defined as U.S. citizens, lawful permanent residents (or "green card holders") and other immigrants authorized to be employed in the United States, not including the alien entrepreneur(s) or his or her spouse or children or any nonimmigrant alien (such as, e.g., E-2 investors, F-1 students, etc.). The jobs must be "full time"; part time jobs and jobs granted to independent contractors are specifically excluded by USCIS rules (although job sharing

arrangements, whereby two persons combine to fill what is clearly one full-time job, may be counted towards the "full time" jobs requirement).

If the investment is made into a Regional Center recognized by the USCIS, indirect job creation may be used to partially satisfy the job creation requirement. "Employment multipliers" are created which are used to determine how many jobs are indirectly created by a new enterprise in a specific industry for each job directly created by the new enterprise.

A further exception to the job creation rule is where an alien entrepreneur invests in a "troubled business." A "troubled business" is one that **(i)** has been in existence for at least two (2) years, **(ii)** has incurred a net loss for accounting purposes (based on generally accepted accounting principles) during the twelve (12) or twenty-four (24) month period prior to the submission date of the alien's Petition and **(iii)** the loss for such period is at least equal to twenty percent (20%) of the troubled business's net worth prior to such loss. If an alien entrepreneur invests in a "troubled business", the alien entrepreneur need not create jobs but, instead, must demonstrate that the number of existing employees will be maintained at no less than the pre-investment level for a period of no less than two (2) years.

D. **Engaged in Management**. The alien entrepreneur must be engaged in the management of the Enterprise either through exercise of day-to-day management control or through policy formulation. The alien entrepreneur may not be a passive investor.

There is one important exception to the "engaged in management" rule. In the case of a limited partnership, if the alien is a limited partner and the limited partnership agreement provides the alien with certain rights, powers and duties normally granted to limited partners under the Uniform Limited Partnership Act, the alien will be considered "sufficiently engaged in the management of the new commercial enterprise." For example, it is conceivable that a United States developer, as a general partner, could enter into limited partnership agreements with numerous alien entrepreneurs to develop a hotel or other establishment (with each such entrepreneur investing $1.0 million dollars and thereby creating at least ten (10) new jobs). Each alien entrepreneur could petition for permanent residence status based upon such an investment. This option of a limited partnership may be particularly attractive where, for example, a developer, as the general partner, is engaged in a new construction project in a rural area. In this situation, the qualifying investment for an alien entrepreneur would be the lesser amount of $500,000.00.

However, when the Commercial Enterprise is created as a limited partnership under the Uniform Limited Partnership Act, the Commercial Enterprise becomes subject to State and Federal Securities laws and the Commercial Enterprise must hire an attorney to draft a Private Placement Memorandum which would **(a)** provide investors with the ability to evaluate the risk of their investment into the limited partnership and **(b)** provide

the Commercial Enterprise with an exemption from registration requirements under the Federal and State Security laws.

III. **FILING PROCEDURE**.

To apply for the EB5 Immigrant Visa, the alien entrepreneur must file a Petition for Alien Entrepreneur (USCIS Form I-526) (the "***Petition***") and supporting documentation with the California Service Center of the USCIS for the EB-5 Visa classification. The supporting documentation – which should include a detailed business plan – must show that the alien entrepreneur has met or will meet each of the requirements described above. If this Petition is approved and the alien is currently living abroad, the alien will apply for an immigrant visa at the U.S. Embassy or Consulate in his or her home country. If the Petition is approved and the alien is in the U.S. in a lawful, nonimmigrant visa status, the alien may file an Application to Register Permanent Residence or Adjust Status (Form I-485) to adjust his status in the United States to that of a conditional permanent resident. The alien entrepreneur will be granted the status of conditional permanent resident for a period of two years.

Ninety (90) days prior to the two-year anniversary of acquiring status as a "alien entrepreneur", the alien must file with the USCIS a petition to remove the conditional basis of his or her permanent residence. In this petition, the alien must again prove that he/she met all the requirements described above and sustained the investment and the ten (10) jobs through-out the two-year period. If the USCIS determines that the alien entrepreneur has not accomplished met and sustained these requirements, the USCIS will terminate the alien's permanent residence and initiate deportation proceedings. Therefore, it is important for the alien entrepreneur to meet all the requirements described above until the conditional status is removed and the alien and his family have obtained the status of lawful permanent residents of the United States.

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