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CHAIN INSIDER

EB-5 Program Opens A New Finance Avenue For Restaurants

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The restaurant community has recently embraced a unique tool to secure additional capital for restaurant development. Restaurant owners who have proven concepts and need to develop are taking advantage of the EB-5 Program, also known as "buying a Green Card." This legislation was enacted in 1990 to stimulate the U.S. economy through job creation and capital investment by foreign investors. (There is also an entrepreneur-oriented program known as EB-1, which we will discuss in a future article).

The EB-5 Program offers permanent legal residence to an immigrant who will invest either $500,000 (for target areas) or $1 million in a U.S. business that creates 10 verifiable new full-time jobs for U.S. citizens or legal residents. The 10-new-jobs requirement is upheld stringently in cases where the investors target a stand-alone business.

A less demanding—and more popular—option allows investors to invest in so-called Regional Centers, entities created by business owners to promote economic growth in a designated geographical area. In these cases both direct and indirect job creation within the area will count toward the EB-5 requirement. A vast majority of EB-5 investments are made through Regional Centers.

Aside from making separate, individual investments, EB-5 investors can pool their funds to invest in an enterprise, again with the object of creating at least 10 new jobs per pool member. All jobs created by a pooling arrangement are distributed evenly among investors.

The EB-5 Program has attracted a number of investors from Asia—mainly China, South Korea and Taiwan—and has enjoyed considerable success in the hospitality industry. We recently have seen restaurant owners and even franchisors of restaurant concepts actively seek out groups that can secure appropriate types of foreign investors.

Let us look at a sample structure for the use of this program. In most cases the restaurant group will connect with an EB-5 specialist (who will often turnkey the investment process). The specialist lines up the investors, conducts the due diligence on the concept, provides a term sheet, and retains both immigration and corporate/securities attorneys (the latter must be familiar with establishing an investment product, which is really a private placement, as the vehicle to invest in the restaurant target).

The investment vehicle needed to satisfy the EB-5 requirements can take various forms, but the structure needs to be equity, not debt. The investment needs to continue until all governmental requirements are completed.

The funds received through the private placement are usually invested in a newly established restaurant entity; and these funds are used for any real estate, equipment and soft costs. In the case of a franchise restaurant, the restaurant investment entity that owns the assets would then enter into an agreement with the franchisee who is approved by the franchisor. The operating partner normally oversees this process. The investor does not need to be involved in the day-to-day management of the business but does need to have some meaningful involvement.

The EB-5 investment is similar to the type of approach used in attracting private equity investors, except in most cases the foreign investor does not have the type of control rights and say that the private equity group does. Further, the foreign investor generally has a defined exit strategy, which is normally some type of put or call provision after five years, which allows the target company to take the investor out. If the investor is not taken out, the investor would have a put right at the end of the same five-year period to obtain his investment back. If the company cannot pay back the investor's investment, there may be a forced sale provision allowing the investor to sell the company and get back his investment.

Given the above structure, there are a lot of hoops that need to be jumped through. Securing an attorney who is familiar with and involved in the EB-5 Program is necessary to develop a successful approach. In addition, it is necessary to have full compliance with the various security laws (both private placement and credit investor) and potential state filing requirements. This is a securities offering; and the fact that there is a foreign investor gives rise to additional hoops along the way.

Here is the timeline for the EB-5 investor. In most cases, the immigrant investor will be investing in a shelf-ready investment put together by the promoter or the restaurant group. There is a three- to six-month waiting period for investor approval. Once approved, the investor has six months to land in the United States. A filing is required within 20 to 24 months after landing. The permanent U.S. visa approval is 10 to 12 months after the filing of the proof of job creation.

For restaurant owners seeking alternative sources of financing to grow their system, the EB-5 Program may be a good fit, particularly if the restaurant concept is one that has a lot of bricks, mortar and significant investment. The program is a cheap way of gaining the potential investment dollars with minimal strings attached for the operator and the restaurant concept.

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