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EB-1C: Managers and Executive Transferees

Law Office Of

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DYE GLOBAL IMMIGRATION

The Law Office of Michael B. Dye (DyeLaw) is a full-service immigration law office located in Southern California. DyeLaw provides immigration assistance to potential investors seeking permanent residency in the United States, entrepreneurs seeking to establish business operations in the United States, and companies looking to expand their presence by establishing new offices in the United States. Mr. Dye is a member of American Immigration Lawyers Association (AILA), and is admitted to practice law in various jurisdictions, including California and the District of Columbia.

In addition to serving individuals and entities with global business interests in the immigration context, the Law Office of Michael B. Dye provides a range of international trade law and compliance services.

DyeLaw has affiliate offices (Dye Global Immigration) in Singapore, Indonesia, Dubai, and Doha.

EB-1C: Managers and Executive Transferees

This subcategory of the EB-1C priority worker category is limited to executives or managers who have been working for a qualified company outside the U.S. for at least one out of the past three years. Or, if the person is already in the U.S. on a temporary visa, it's possible to qualify based on having been employed as an executive or manager at that company for one of the three years before arrival in the United States.

The specific employment-based immigrant preference category (EB-1C) was created for managers and executives who meet the L-1A non-immigrant standards and are interested in becoming lawful permanent residents. L-1A status is offered to those intracompany executive or managerial transferees that will be coming to the United States only temporarily. Therefore, the major difference between L-1A and EB-1C is the permanent nature of the EB-1C visa. Although L-1A status is not a prerequisite for immigrant benefits in this category, an immigrant petitioner will have a stronger case for the EB-1C immigrant category if they were in prior L-1A status. However, we have successfully worked with many clients who have applied for EB-1C status without ever having obtained L-1A status.

Comparison between EB-1C and EB-5

The EB-1C category allows international companies to transfer overseas high level managers or executives to their U.S. entities to take a permanent high level managerial or executive position. The EB-5 category is for alien individuals who have invested or are in the process of investing capital into a new commercial enterprise in the U.S. The purpose of the EB-1C visa is to allow companies to cross-fertilize and transfer business practices and commerce, while the goal of the EB-5 category is to stimulate investment and enhance job creation in the U.S. There is no capital investment requirement for EB-1C executives as they work for employers, while EB-5 investors need to invest their own money.

- **Business Structure**

  The EB-1C category requires a qualified multinational relationship between the U.S. and foreign business entities. This relationship involves a company investment from one entity to another (examples of qualifying relationships include parent companies and subsidiaries or affiliates). Additionally, this petition is used for the transfer of executives between related companies. In an EB-1C, the U.S. entity is the petitioner and the transferee alien is the beneficiary. The U.S. entity must be in existence for at least one year before it can file an EB-1C petition. A temporary L-1A visa may be available for transferee aliens before the immigrant EB-1C is filed.

  The EB-5 category is designed for an individual alien to invest into a new business in the U.S., a troubled business or a regional center. The individual does not need to be associated with any overseas corporation. The investor's U.S. investment may be in a variety of different forms. For an EB-5 case, the individual investor is both the petitioner and beneficiary.

- **Funding Source and Investment Amount**

For EB-1C cases, USCIS usually looks into the initial investment between the overseas company and the related U.S. company. However, there is no strict statutory requirement for the amount of capital that must be invested, as EB-1C is established to promote commerce between the U.S. and foreign countries. If the U.S. entity is a relatively new investment of the overseas parent company, USCIS often requires evidence of a monetary transfer from the overseas company to the U.S. entity. There is no set minimum for this investment, but the investment amount must be reasonable to cover the costs of the new office. In practice, we have seen initial investments into the U.S. subsidiary of around $100,000; these EB-1C cases were later approved after the U.S. entity began operating.

EB-5 is stricter as it is established to attract foreigners to invest in the U.S. and also create jobs for U.S. citizens and permanent residents. The petitioning individual's investment must be at least $800,000 in a new commercial enterprise in the U.S. In some cases, a $1.05 million investment is required. In addition, the petitioning individual must prove through solid documentary evidence that the money used for the investment was his or her own money derived from a legitimate source.

For EB-5 cases, assets acquired directly or indirectly by unlawful means such as criminal activities are not acceptable capital. In practice, USCIS is very strict about reviewing the legitimacy of funds. Cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the investor are all acceptable investments for EB-5 purposes. On the contrary, the statute does not specifically state that USCIS should demand evidence proving funds transferred from a foreign company are legitimate.

- **USCIS Review Emphasis**

In EB-1C cases, USCIS emphasizes the establishment of a corporate structure and the business operation of the petitioning U.S. entity. The key to success in EB-1C cases is proving that the petitioning U.S. entity has established a corporate structure that will allow the transferee alien to act in a high level managerial or executive function, not just in daily operations or in first line worker supervision. Therefore, in general, 5-7 full time employees are required to establish the corporate structure necessary to satisfy the requirement. In addition, the U.S. entity must have substantial business operations with commensurate revenue. The beneficiary must manage "an essential function" or operation within the organization.

For EB-5 cases, USCIS focuses on the real transfer of the money as well as the legitimacy of the source of the assets and whether the investment created at least ten full-time employment opportunities for U.S. workers. If the investment is in a USCIS approved "Regional Center," indirect employment may be used to calculate job creation numbers.

- **Immigrant Alien's Position and Role**

For the EB-1C category, the position offered to the transferee must have managerial or executive duties. The position must be at a level that involves policy making, major decision making and/or management of other lower managerial subordinates. These duties are generally considered alongside the corporate structure of the U.S. entity.

The EB-5 category does not require an employment offer or a sponsoring employer. In a new business enterprise and troubled business, an investor must be involved in the daily management of the company. Acceptable positions for an investor include acting as corporate officer, board member, etc. If an investor is applying under the Regional Center Program, he or she does not need to be involved in the day-to-day management of the business, nor does the investor need to live in the place of investment.

- **Individual Qualification**

  A managerial or executive transferee in the EB-1C category must have worked in a managerial or executive level position for the related overseas company continually for at least one year out of the last three years prior to filing the petition. There is no minimum educational or experience requirement, but the transferee must be reasonably qualified to hold the offered position.

  The EB-5 has no educational or experience requirements. No investment experience or specific technical skill is required either.

- **Petitioner on the Forms**

  The employer files a Form I-140 is an employer-sponsored petition, meaning the qualified U.S. entity is the petitioner and the employee is the beneficiary. To file an EB-1C petition, the employer files Form I-140 employment-based immigrant petition.

  For EB-5, the investor must file the Form I-526 or I-526E petition. The individual alien investor is the petitioner; there is no sponsoring employer.

- **Required Documents**

  In EB-1C petitions, along with the petition forms, the employer should submit a statement of job duties for the offered managerial or executive position. The employer will also need to provide evidence of the business relationship between the U.S. petitioning entity and the foreign company. Documents needed from both the U.S. entity and the foreign affiliate include articles of incorporation or association, financial documents such as tax returns, bank statements, major business contracts, sample invoices, marketing documents, office lease, photographs of the main office, a description of the company's organizational structure, etc.

  The alien transferee will also need to submit documentary evidence to prove that he or she is qualified to hold the offered position.

  In EB-5 cases the alien investor must submit documentation along with their petition forms to prove the investment has been made or will be made and that the capital has been lawfully gained. Evidence to prove lawful capital includes sales contracts for homes or property, bank statements, stock certificates, evidence of purchased assets, tax returns, business operations records, or other proof of income. In addition, the investor must provide evidence of the existence of the new enterprise, including business organization documents, articles of incorporation, or other authorization to do business in the U.S.

  Furthermore, the investor must provide evidence showing the creation of at least 10 jobs for U.S. workers. If the new enterprise has already hired employees, the investor can submit I-9 forms and tax records. If no employees have been hired, the investor can submit a business plan to demonstrate that 10 U.S. employees will be hired within the next two years. Investors in the "Regional Center Program" will need to provide evidence that 10 jobs have been or will be created in a targeted employment area along with statistical or expert evidence that the targeted employment area has a high unemployment rate.

- **Permanent vs. Conditional Green Card**

  Once the EB-1C petition is approved, the transferee and his or her immediate family members can apply to adjust status if they are already in the U.S. or can apply for an immigrant visa at a U.S. consulate abroad. Once they receive their visas and enter the U.S., or upon adjustment of status, they will receive permanent green cards, without any conditions.

  However, those in the EB-5 category need to undergo a conditional green card period. Once the EB-5 petition is approved, the investor may file for an immigrant visa or adjust status. Unlike the EB-1C, the initial permanent resident status granted to the investor is conditional for two years. Conditional green card status confers the same rights for the two year period as the permanent unconditional green card given to those with approved EB-1C petitions.

  In order to remove the conditions on his or her green card status, the investor (and his/her family

members) must request removal of the conditions within 90 days prior to the expiration of the two years conditional green card. Investors must file Form I-829 "Petition by Entrepreneur to Remove the Conditions" to do so. Along with Form I-829, the investor should submit evidence that proves he or she has met all requirements of the EB-5 category including documents demonstrating the required amount has been invested in a new enterprise and ten full-time positions for U.S. workers have been created.

The investor will remain in valid status while the I-829 petition is pending; investors are also allowed to travel during this period. If the investor fails to request removal of the conditions, his or her conditional resident status will be terminated. Once the conditions have been removed, the investor and his or her family members will receive permanent unconditional green cards.

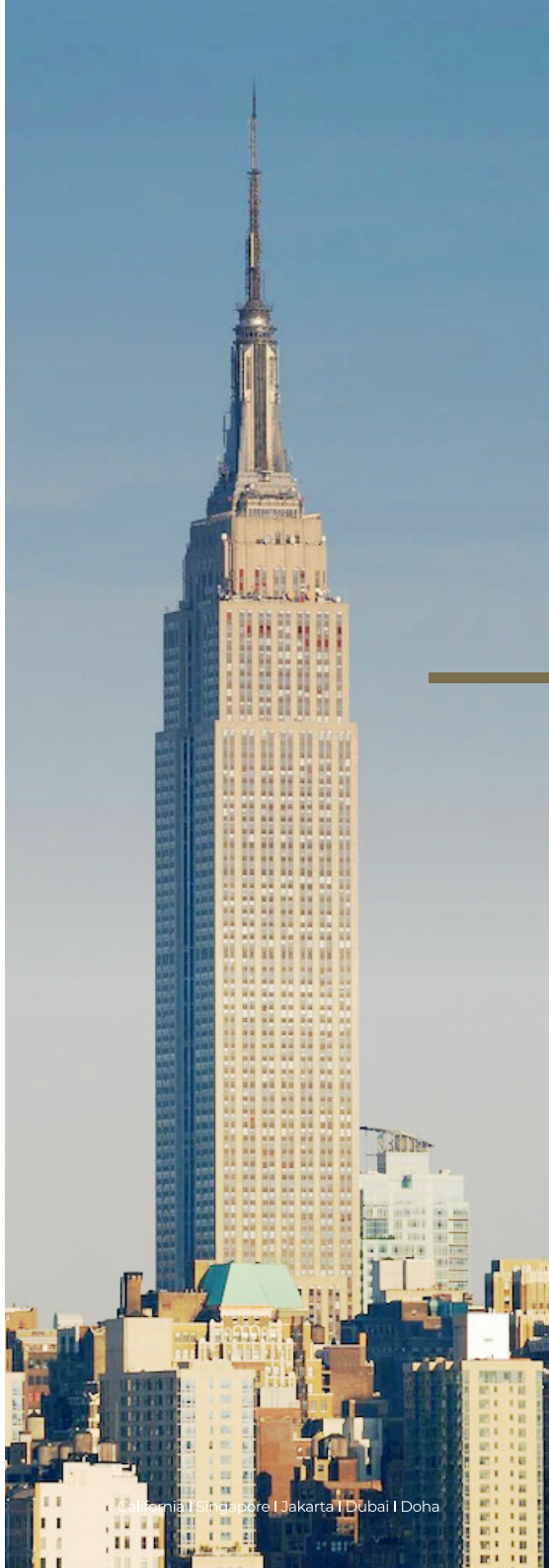
EB-1C is best suited for those who are in high level managerial or executive positions in overseas companies that already have U.S. business exposure and are familiar with U.S. business operations. For individuals with limited business experience or for those who do not have a position within a multinational company but with considerable financial resources, the EB-5 category might be a better option. Furthermore, the EB-5 may also be a good option for those who do not want to work under a corporate structure or who do not have the corporate authority to transfer.

- **Time Difference**

  From a procedural perspective, the EB-5 category process may take longer and involve more uncertainty as the review for removal of conditions comes two years after approval of the initial conditional green card. However, the EB-5 has unique features that provide options to those who do not have business operational experience by allowing them to invest through a regional center program. Ultimately, if the investment program is stable, final approval of unconditional permanent residency is expected for the majority of EB-5 cases.

- **Requirement for the U.S. Company:**

  The key to success in EB-1C cases is to prove that the petitioning U.S. entity has established a corporate structure that will allow the transferee alien to act in a high level managerial or executive function, not just in daily operations or first line worker supervision. Therefore, although no specific statutory requirement is promulgated, 5-7 full time employees are often required to establish the corporate structure necessary to satisfy the requirement. In addition, the U.S. entity must have substantial business operations with commensurate revenue.



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