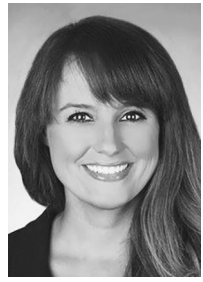
Immigration Issues: A Basic Guide for Franchise Counsel

Laura Hayes



Ms. Hayes

Franchise systems across the United States confront ever-mounting pressure to win the attention and loyalty of well-capitalized franchisees that can pay the initial and ongoing fees associated with launching a franchised business. As economic pressures within the United States affect the ability of many U.S. citizens and residents to access capital, franchise systems increasingly look to foreign investors as potential franchisees. A study released by the U.S. Small Business Administration Office of Advocacy in 2012 found that immigrants have higher business formation rates than nonimmigrants.[1] Approximately, 0.62 percent of immigrant workers in the United States start a business each month.[2] Of perhaps even more appeal to franchise systems, immigrant-owned businesses are often better capitalized than their nonimmigrant counterparts. Nearly 20 percent of immigrant-owned businesses start with more than $50,000 in initial capital, while only 15.9 percent of nonimmigrant owned businesses reach such capitalization levels by launch.[3] Immigrant-owned businesses employed more than 4.7 billion employees in the United States, according to a 2012 Fiscal Policy Institute report.[4] The report also stated that small businesses that are more than half immigrant-owned have an estimated $63 billion in annual earned income, which is 15 percent of the entire $419 billion of annual earned income for business owners in general.[5] Consequently, foreign investors represent a huge pool of potential franchisees.

1. ROBERT W. FAIRLIE, *Immigrant Entrepreneurs and Small Business Owners and Their Access to Financial Capital*, SMALL BUSINESS RESEARCH SUMMARY (May 2012), http://www.sba.gov/sites/default/files/rs396.pdf.
2. *Id.*
3. *Id.*
4. *Immigrant Small Business Owners, A Significant and Growing Part of the Economy*, FISCAL POL'Y INST. (June 2012), http://www.fiscalpolicy.org/immigrant-small-business-owners-FPI-20120614.pdf.
5. *Id.*

Laura Hayes (laura.hayes@mrkpc.com) is an attorney with Mullin Russ Kilejian PC in Richardson, Texas.

These are but a few examples of the driving force behind current immigration policy in the United States, which aims in part to encourage certain types of foreign investment through investor class visa opportunities. Yet, immigration issues facing both franchisors and franchisees expand far beyond the scope of attracting new investors. Franchise systems are faced with myriad immigration issues, including employment-based visa applications and the overwhelming task of ensuring that their respective workforces comply with federal regulations.

This article aims to provide franchise counsel with a basic understanding of the legal framework of some of the immigration issues facing the franchise community.[6] Part I summarizes two of the investment-based visas, including the EB-5 Immigrant Investor Program and E-2 Treaty Investors, which often attract potential franchisees. Part II explains the underlying concept of employment-based visas and provides brief examples of two available visa programs. Part III highlights the potential impact of immigration noncompliance in franchise systems.

I. Investment-Based Visas

A. *Why a Visa?*

In the United States, legal permanent residents, also known as green card holders, have no immigration constraints on their ability to work anywhere within the United States.[7] In contrast, other individuals who are not legal permanent residents are required to leave the United States before their visas expire. Depending on the type of visa, expiration periods can vary immensely.[8] Moreover, these temporary visa holders may or may not be authorized to work during their stay in the United States.[9] Even if a visa holder has a work authorization, a visa might also be subject to certain employment conditions or restrictions, e.g., it may be conditioned on continued employment with a sponsoring employer.[10]

Because visas are subject to time constraints and possible employment conditions, franchisors must understand the visa status of any franchisee applicant. A franchisee's immigration status could directly affect his or her ability to operate the franchised business and, more importantly, his or her ability to stay in the United States.[11] Franchise systems are likely to encounter two common visa categories—investment-based visas and employment-

6. This article in no way, however, aims to replace the necessity of retaining an immigration attorney who specializes in this technical practice area.

7. Cheryl L. Mullin, Kimberly Kinser & Rivann Yu, *Coming to America: U.S. Immigration Laws and Challenges Facing Immigrant Franchisees*, FRANCHISING WORLD, Oct. 2012, http://www.franchise.org/coming-to-america-us-immigration-laws-and-the-challenges-facing-immigrant-franchisees.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

based visas. The first part of this article summarizes two widely discussed investment-based visas in the franchise community—the EB-5 visa and E-2 visa.

1. EB-5 Immigrant Investor

During the 1990s, in an effort to stimulate the domestic economy, Congress enacted legislation allowing investors satisfying specific criteria to obtain visas through the EB-5 Immigrant Investor Program.[12] This program, which is still in effect, allows investors to obtain permanent status by creating jobs and investing significant capital into the U.S. marketplace.[13] Under the program, qualified applicants enter the United States with conditional permanent resident status. If, after two years, the investor applicant demonstrates to the satisfaction of the U.S. Citizenship and Immigration Services (USCIS) that he or she has satisfied the EB-5 program requirements, the investor and his or her qualified family members will receive legal permanent resident status.[14] This is one of the most attractive investment programs for foreign franchise applicants because it offers them the potential to obtain permanent resident status in the United States.

Although this opportunity to obtain a visa and eventual legal permanent resident status is extremely attractive, the requirements for obtaining this type of visa are arguably the most burdensome in terms of investment requirements and processing time. For example, the processing time to obtain an EB-5 visa is significantly longer than the processing time for E-2 visas. In general, to obtain an EB-5 visa, a foreign investor must:

- invest in a new commercial enterprise;
- invest capital of at least $1 million (in limited circumstances an investment of $500,000 in an area of high unemployment or in a rural area may qualify); and
- create at a minimum ten full-time jobs for U.S. workers (apart from the investor and derivative visa holders) within the first two years that the investor is admitted into the United States as a conditional permanent resident.[15]

One of the biggest obstacles for foreign investors seeking an EB-5 visa is the required $1 million investment,[16] which cannot be borrowed.[17] In calculating an applicant's investment, USCIS considers capital investments beyond cash, including, but not limited to, equipment, inventory, and indebtedness secured by assets such that the investor is primarily and personally liable.[18]

12. U.S. Citizenship & Immigration Servs., EB-5 Immigrant Investor (Mar. 16, 2015), http://www.uscis.gov/eb-5.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*

There are some opportunities for foreign investors to qualify for an EB-5 visa with a lower investment. In some circumstances where the investment area suffers from high unemployment of at least 150 percent of the national average or is considered a rural area, i.e., an area "outside the boundary of any city or town having a population of 20,000 or more according to the decennial census," a lower investment of $500,000 will satisfy this criterion.[19] If a potential franchisee is seeking this type of visa, the initial required investment will be a critical factor.

As stated earlier, an applicant must invest in a new commercial enterprise to be a successful EB-5 candidate.[20] The USCIS defines a "commercial enterprise," including a franchise business, as a "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."[21] To qualify as a "new" commercial enterprise, the target business for the investment must have been established after November 29, 1990. If the target business was established on or before that date, it can still qualify as a new commercial enterprises if (1) it is purchased and restructured in a way that yields a new commercial enterprise, or (2) the investment expands the business by a 40 percent increase in either net worth or number of employees.[22]

The EB-5 visa is also very attractive to potential franchisees because it provides family members of foreign investors the opportunity to obtain legal permanent resident status. Under this visa program, "derivatives," i.e., qualifying unmarried children under the age of twenty-one and the spouse of the applicant visa holder, typically qualify for the same immigration status—conditional legal permanent resident status—as the visa holder.[23] During the two-year conditional period, spouses and children with derivative status may attend school and work in the United States without limitation.[24] If the USCIS approves the foreign investor's EB-5 application, family members will also obtain legal permanent resident status.[25]

As previously noted, the application and review period for EB-5 visas is much longer compared to the processing time of other visa applications. Often, the review process can take up to two years.[26] The uncertainty of this application process can pose a problem for franchise systems granting exclusive rights and designated areas to franchisees who may not have been admitted to the country. Potential franchisees are often dissuaded from this type

19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *See, e.g.*, U.S. Citizenship & Immigration Servs., USCIS Processing Time Information (Feb. 11, 2015), https://egov.uscis.gov/cris/processTimesDisplayInit.do.

of visa because legal permanent residents of the United States are taxed on worldwide income.[27] Foreign investors should be encouraged to seek experienced tax and immigration assistance in pursuing these types of applications.

The process for obtaining an EB-5 visa is onerous and requires technical expertise. To begin the process, an investor must file an initial I-536 Petition for an Alien Entrepreneur.[28] During the application process the investor must demonstrate several things, including that the investment funds were obtained by lawful means and that the business will create (or preserve, in the troubled business case) at least ten full-time jobs for U.S. positions.[29] To demonstrate that the commercial enterprise will create or preserve the required positions, investors must submit a comprehensive business plan with their visa applications.[30] Within the ninety-day period before expiration of the investor's second year as a conditional permanent resident, the investor must submit a Form I-829 Petition for Entrepreneur to Remove Conditions.[31] The application to remove conditions will also require evidence that the investor actually invested in the new commercial enterprise and has sustained the investment and that ten full-time positions were created or will be created within a reasonable time.[32] Given the complexity of such an application and subsequent review process, a foreign investor will likely need to engage an immigration attorney for more specific information.

2. E-2 Treaty Investors

Unlike the EB-5 visa for permanent resident status, potential franchisees can also be admitted to the United States through nonimmigrant visas. The E-2 visa is an example of a nonimmigrant visa popular among franchisees. The E-2 classification allows an individual who is a national of a country with which the United States has a treaty of commerce and navigation (Treaty Countries) into the United States for renewable two-year periods if the applicant invests a substantial amount of capital in a U.S. business.[33] Examples of Treaty Countries include Australia, Canada, and Luxembourg.[34] E-2 visa holders are admitted to the United States for a maximum initial stay of two years with potential extensions in increments of two years.[35] To qualify as Treaty Investor, an investor must:

27. Internal Revenue Serv., Taxation of U.S. Resident Aliens (May 30, 2014), http://www.irs.gov/Individuals/International-Taxpayers/Taxation-of-Resident-Aliens.
28. EB-5 Immigrant Investor, *supra* note 12.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. U.S. Citizenship & Immigration Servs.,E-2 Treaty Investors (Jan. 14, 2014), http://www.USCis.gov/working-united-states/temporary-workers/e-2-treaty-investors.
34. Bureau of Consular Affairs, U.S. Dep't of State, Treaty Countries (Feb. 28, 2015), http://travel.state.gov/content/visas/english/fees/treaty.html.
35. *Id.*

- be a national of a Treaty Country;
- "have invested, or be actively in the process of investing, a substantial amount of capital in a bona fide enterprise in the United States;" and
- be seeking admission to the United States to "develop and direct the investment enterprise."[36]

For the purposes of obtaining Treaty Investor status, a "substantial amount of capital" is defined as: (1) substantial in relation to the total amount necessary to start or buy the business, (2) sufficient to demonstrate that the investor will be committed to the enterprise's success, or (3) of a magnitude such that the enterprise is likely to be successfully developed.[37] In terms of actual monetary commitment, investors should plan to invest at least $100,000 of their funds.[38] To that same end, a bona fide enterprise is a business that is actively operating to produce goods or services for a profit and meets the requirements for doing business in the applicable jurisdiction.[39]

Many potential investors prefer E-2 visas because of the faster application process, the lower investment threshold, and the avoidance of the classification as a legal permanent resident for taxation purposes. To apply for the E-2 visa, an investor must submit a Form I-129 with evidence he or she has satisfied all of the visa requirements.[40] Again, obtaining any type of visa is complicated and generally requires the expertise of an experienced immigration attorney.

Several significant limitations and drawbacks accompany an E-2 nonimmigrant visa. Investors must maintain that they intend to leave the country when their status expires or is terminated.[41] In addition, investors may work only for the specified enterprise for which they were granted status. Perhaps even more burdensome to potential franchisees, investors must report any change to the enterprise's characteristics including, but not limited to, mergers and acquisitions to USCIS and request an extension of stay for such a change.[42] This type of visa, while much quicker to obtain, can pose problems for franchise systems. Situations such as the failure of the franchisee entity or changes in the entity's ownership structure could potentially force investors and their families to leave the United States.[43] Another drawback of the E-2 visa as compared to the EB-5 is the treatment of derivatives. Although spouses and unmarried children under the age of twenty-one are often granted E-2 nonimmigrant visas, they must apply for a separate

36. E-2 Treaty Investors, *supra* note 33.
37. *Id.*
38. Mullin, Kinser & Yu, *supra* note 7.
39. E-2 Treaty Investors, *supra* note 33.
40. *Id.*
41. *Id.*
42. *Id.*
43. Mullin, Kinser & Yu, *supra* note 7.

work authorization if they wish to seek employment in the United States during their stay.[44]

II. Employment-Based Immigration

Investment-based visas are not a good fit for all franchisees or franchise systems. Moreover, simply forming an entity to employ a foreign franchisee will generally not be a permissible vehicle for a foreign franchisee seeking admission to the United States.[45] Aside from investment-based visas, however, there are many opportunities for the employees of franchisees and franchise systems to obtain employment visas through the current immigration system. Accordingly, information regarding the L-1A and EB-1(c)(3) visa may be of interest to franchisee and franchisor counsel.

A. *EB-1(c)(3): First Preference EB-1 Visa*

The EB-1(c)(3) visa grants permanent authorization for an individual to live and work in the United States. Under this visa program, individuals obtain legal permanent resident status if they (1) have an extraordinary ability, (2) are an outstanding professor or researcher, or (3) are a multinational executive or manager.[46] The third category of applicants is likely the most relevant in franchising. Franchisors and franchisees seeking to obtain a visa for the transfer of a foreign manager to a position in the United States might use this visa application. Of more importance for franchise counsel, this type of program is ripe for immigration fraud such as schemes by which individuals abroad are coerced into paying large sums of money in hopes of becoming a legal permanent resident.

To apply for this type of visa, the employer (not the employee) must submit a Form I-140, Petition for Alien Worker, and pay the corresponding legal fees. To qualify for an EB-1(c)(3) immigrant visa as an executive or manager, the individual must be employed as an executive or manager by a qualified company for at least one of the past three years.[47] A "qualified company" under the Immigration Code is an U.S. affiliate, parent, or subsidiary of a foreign business.[48] In this instance, "executive capacity" means the ability to make decisions over a wide latitude of a company's affairs without much oversight; "managerial capacity" refers to the management of several

44. E-2 Treaty Investors, *supra* note 33.

45. Angelo P. Paparelli, Douglas S. Neville, Rupert M. Barkoff & David Barr, *The Affordable Care Act and Immigration Policy, Law, and Regulations: Addressing Rapid Changes in Government Regulations* (presentation to the 47th Annual Legal Symposium of the International Franchise Ass'n May 4–6, 2014), http://emarket.franchise.org/d/2014-legal-attendees/Affordable%20Care%20Act%20and%20Immigration.pdf.

46. U.S. Citizenship & Immigration Servs., Employment-Based Immigration: First Preference EB-1 (Sept. 10, 2013), http://www.USCis.gov/working-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1.

47. *Id.*

48. *Id.*

other professional employees as well as the management of an entire subdivision of the entity, such as an entire department.[49] "Managerial capacity" in some instances refers to the employee's ability to manage the entity at a high level without any direct oversight.[50] While these visas are desirable, they are extremely expensive and involve time-intensive applications. Additionally, sponsoring employers have no assurance that employees will continue to work for the business upon receiving status.

B. *L-1A Intracompany Transferee Executive or Manager*

In some instances, employees of franchisors and franchisees may be able to utilize the L-1A visa program. To obtain a visa under this program, executives and managers of franchisors or franchisees who have been working for that same company abroad for at least three years may be able to obtain an L-1A visa to operate a location for that same franchisee or franchisor in the United States. This visa is a nonimmigrant classification that allows a U.S. employer to transfer an executive or manager from an office abroad to an affiliate office within the United States.[51] Like the EB-5 and E-2 visa, this visa requires detailed business plans that include business formation documents that show the ownership of the companies. To obtain this visa, the employer must have a qualifying relationship with a foreign company and must currently be, or will be doing, business as an employer in the United States and one other country for the duration of the visa holder's stay.[52] The individual must be working for the organization abroad for one of the past three years preceding the petition and must be entering the country in an executive or managerial capacity as an employee of the qualifying organization.[53]

Like the EB-1(c)(3)visa requirements, a qualified organization is a U.S. affiliate, parent, or subsidiary of a foreign business.[54] For the purposes of this application, "doing business" means the "regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad."[55] Just as in the EB-1(c)(3) context, the individual must be employed as an executive or manager of the company as defined by the Immigration Code.[56] L-1A visa holders are allowed to stay for the initial one-year period and may have the opportunity to renew their visa for two-year terms.[57]

49. *Id.*
50. *Id.*
51. U.S. Citizenship & Immigration Servs., L-1A Intracompany Transferee Executive or Manager (June 17, 2013), http://www.USCis.gov/working-united-states/temporary-workers/l-1a-intracompany-transferee-executive-or-manager.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*

III. Other Concerns—Why Should Franchisors Worry?

The federal government aggressively seeks to enforce immigration compliance and prosecute those who actively commit wrongdoing. The government has pursued companies like the Indian IT company Infosys for immigration fraud after a whistleblower attack.[58] In the unfortunate scenario of Infosys, the company allegedly engaged in a pattern of immigration fraud that included coaching employees on statements regarding their work activities during consular interviews.[59] It is extremely important that companies continually monitor their recruitment and employment practices to ensure that they comply with federal law.

Similarly, although the immigration status of a franchisee's employees is generally the responsibility of that franchisee entity, a franchisee's poor immigration compliance can negatively impact an entire franchise system. Because brand management is an ever-pressing concern for franchise systems, franchisee noncompliance with federal immigration laws can and has affected entire franchise systems, as discussed below. Both franchisors and franchisees must comply with federal immigration regulations, including I-9 requirements. Under the Immigration Reform and Control Act, every employer must hire only employees who are authorized to work in the United States and must not discriminate on the basis of citizenship status or national origin.[60] More specifically, it is unlawful for an employer to employ an alien who is not authorized to be employed for a position, and it is unlawful for an employer not to use an employment verification system.[61] Accordingly, employers must complete a Form I-9 for each new employee to verify the identity and employment authorization of that employee. It is imperative that franchisors themselves use and also encourage franchisees to also use I-9 verification systems. Noncompliance by one franchisee can trigger I-9 audits of franchisees throughout an entire franchise system.

In a noteworthy example, a 7–Eleven franchisee with several convenience stores was investigated for several counts of immigration fraud.[62] The immigration investigation regarding allegations against one set of owners caused 7–Eleven franchisees to be investigated nationwide.[63] 7–Eleven was subjected to significant negative publicity, and some of the news articles likened

58. John Davis, *Immigration Fraud Whistleblower Likely to Receive a $5M Bounty from Infosys's $34M False Claims Act Settlement: Is Your Business Immigration Program Prepared for a Similar Whistleblower Attack?*, JDSUPRA BUS. ADVISOR (Nov. 14, 2013), http://www.jdsupra.com/legalnews/immigration-fraud-whistleblower-likely-t-28212/.

59. *Id.*

60. 8 U.S.C. § 1101 (2015).

61. 8 U.S.C. § 1324a (2015).

62. Steven A. Meyerowitz, *7-Eleven Stores Seized as Feds Allege Multi-State Immigration Fraud and Identity Theft Scheme*, LEXISNEXIS LEGAL NEWSROOM (June 17, 2013), http://www.lexisnexis.com/legalnewsroom/financial-fraud-law/b/blog/archive/2014/01/06/7-eleven-stores-seized-as-feds-allege-multi-state-immigration-fraud-and-identity-theft-scheme.aspx.

63. *Id.*

the convenience stores to modern day plantations. As a result, 7–Eleven incurred the expense and media scrutiny of an internal review of the immigration compliance of 5,600 franchisees.[64]

When confronted with issues regarding franchisee compliance with federal immigration laws, franchisors must navigate the underlying tension between ensuring that franchisees comply with federal immigration laws and the possibility of incurring vicarious or employer liability. Although franchisors traditionally have not been directly responsible for a franchisee's compliance with federal immigration regulations, recent employment law trends reveal that the federal government is increasingly eager to impute employer liability to franchisors. Particularly when a franchisor exercises significant control over franchisee operations, the franchisor should consider the potential for its own criminal liability under federal statutes such as the anti-harboring statute, 8 U.S.C. § 1324 (a)(1), which criminalizes "any person who knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place."[65]

Given trends in current employment law cases, it is conceivable that government agencies and courts could one day impute such a responsibility to the franchisor, particularly in franchise systems where the franchisor is involved in any business dealings tangentially related to a franchisee's immigration status or compliance, e.g., escrowing money for master franchisees or area representatives recruiting foreign investors, has knowledge of a pattern of bad immigration conduct, or does not require system-wide I-9 compliance. To help mitigate any potential immigration liability, franchisors should consider implementing immigration compliance policies, conducting regular I-9 audits of their company, engaging independent auditors to evaluate franchisee compliance, and enforcing employment and immigration compliance provisions of their franchise agreements.[66] To that same end, at a minimum, franchisors might consider verifying that the managing owners of franchisees have the requisite immigration status to operate the franchised business. The value of these activities, however, must be balanced with the potential increased risk of liability for issues relating to the franchisee's employees.

64. Aaron Katersky, Susanna Kim & Alyssa Newcomb, *7-Eleven Cracks Down on Franchisees After Federal Authorities Seize 14 Stores*, ABC NEWS, June 20, 2013, http://abcnews.go.com/Business/eleven-reviews-compliance-5600-franchisees-authorities-seize-ny/story?id=19449002.

65. Mary E. Pivec, *Brand Protection: The Case for Franchisor Auditing and Enforcement of Franchise Agreement Compliance Clauses*, LEXOLOGY (Oct. 3, 2014), http://www.lexology.com/library/detail.aspx?g=7842ad0b-d222-4ff1-9758-aaa1817ac918.

66. *Id.*

IV. Conclusion

Although immigration may be perceived as Pandora's box in the current political climate, franchise systems and franchise counsel can significantly benefit from familiarizing themselves with the basic types of visas available to investors and employees, and other immigration issues facing the franchise industry. A basic understanding of immigration opportunities for foreign investors can be a powerful asset in the development and expansion of a franchise system, while ignorance of immigration risks and pitfalls can have lasting negative impacts on a business and franchise system.