Foreign ag investors choose between employment discrimination, green cards

Dairy basics - Management
Written by Alan B. Goldfarb
Tuesday, 07 June 2011 13:50

Foreign dairy farmers who invest at least $500,000 to establish a U.S. dairy operation can qualify for permanent residence based on their investment. Many Dutch and Canadian dairy farmers have sold their farms and milk quotas during the last two decades to invest significant amounts of capital into the U.S. rural economy in order to build large dairy operations in this country.

They typically enter the U.S. as temporary investors after buying underutilized rural property, building new infrastructure and hiring U.S. workers.

At some point, they establish permanent connections and want their immigration status to reflect their own commitment to this country. As temporary investors, they have to return home every five years to apply for new E-2 visas, risking the fate of their families and their farms each time they leave.

Their future depends on a U.S. consular officer's non-reviewable decision. If their visa is refused, they lose everything. Even if successful in renewing their temporary status, their children must still leave when they turn 21 because they would then no longer qualify as E-2 dependents.

The EB-5 immigrant investor petition gives foreign farmers and their families a chance to pursue permanent residence and to stabilize their future in this country.

Attracting capital, creating jobs
This path to permanent residence through investment is now at risk because of changing priorities for immigration enforcement. Foreign dairy farmers filing EB-5 petitions are required to create jobs for U.S. workers at a time when dairy producers are increasingly vulnerable to farm labor shortages.

Farmers have become more reliant than ever on immigrant labor. Many U.S. employers are caught in a conundrum of worker shortages in certain sectors of the economy and immigration laws that provide no legal visa program to hire immigrant workers.

This problem is more pronounced for foreign dairy farmers filing EB-5 petitions, since their eligibility for investment-based permanent residence depends on job creation.

To qualify for EB-5 approval, foreign investors must prove they invested $1 million, or $500,000 in a rural area, in a new commercial enterprise that has created or will create 10 full-time jobs for U.S. workers.

For foreign dairy farmers, the hardest part in this process may not necessarily be in proving the amount of capital they invested or the number of jobs they created, but in documenting the legal status of their workers who claim to be U.S. citizens or permanent residents on their I-9 forms. Dairy farmers may not be able to find enough qualified U.S. workers for a successful EB-5 case.

They also face a dilemma in proving the legal status of workers who have attested on their I-9 forms that they are U.S. citizens or permanent residents without engaging in the type of document abuse prohibited by the anti-discrimination provisions of the Immigration and Nationality Act.

Complying with I-9 requirements

Like all U.S. employers, foreign dairy farmers must comply with employer sanctions laws. They must verify the identity and employment authorization of their workers by completing I-9 forms, which are used to document that they conducted the required verification.

In Section 1 of the I-9, employees attest to their status as citizens, nationals, permanent residents or others authorized to work temporarily in the U.S.

In Section 2, employers record their review of original documents presented by the employee from a specific list of acceptable documents to verify identity and eligibility to work. While imposing penalties for non-compliance, the I-9 process also prohibits employers from discriminating based on national origin or citizenship status.

Employers must accept the documents presented if they appear “reasonably genuine” and relate to the person presenting them. The antidiscrimination laws are intended to prevent employers from excluding lawful workers who appear foreign, refusing documents that appear genuine on their face or requesting more or different documents.

U.S. Immigration and Customs Enforcement’s (ICE) new worksite enforcement strategy focuses on employers by using I-9 audits as an enforcement tool. This new approach increases the risk of significant penalties and prosecution for employers who fail to comply with U.S. employment laws. Dairy farmers throughout the country have been targeted under this new enforcement policy.

Foreign investors are at an even greater risk of being audited because of their EB-5 petitions. Certainly, dairy farmers, like all U.S. employers, must now pay even closer attention than before to improving their systems for ensuring compliance with I-9 requirements.

Avoiding discrimination
At the same time, U.S. Citizenship and Immigration Services (USCIS) now routinely asks EB-5 investors, and permanent residents seeking to remove their conditional status, for documents that exceed Form I-9 requirements to prove that the jobs being created are filled by U.S. workers.

To qualify under the regulations, EB-5 investors need to show that they will create at least 10 full-time positions for qualifying employees through copies of relevant tax records, form I-9 or other similar documents for 10 employees. A qualifying employee includes a U.S. citizen, permanent resident or another immigrant with legal authorization to work.

The investor is now routinely being asked to submit additional documents to verify the accuracy of their employees' I-9 attestations regarding their status as citizens or permanent residents, even if the I-9 forms were properly completed and the employer verified the required documents to prove identity and authorization to work and submitted copies of this documentation with the EB-5 petition.

Conflict between EB-5 eligibility and employment discrimination
The Office of Special Counsel (OSC) for Immigration-Related Unfair Employment Practices within the Department of Justice responded to a recent inquiry on this apparent conflict between EB-5 eligibility and unlawful employment discrimination. The inquiry addressed the concern that USCIS requires EB-5 investors to prove their eligibility for investor-based immigration by violating the anti-discrimination provision of the Immigration and Nationality Act.

The OSC clarified that the request for more or different documents violates the statute only if committed with the intent to discriminate based on citizenship status or national origin. According to the OSC, an employer can avoid discriminatory documentary practices by following a consistent approach to employment eligibility verification without regard to citizenship status or national origin.

Still, OSC promised to bring the matter to the attention of USCIS.

Recommended approach
EB-5 investors should focus less on their intent to discriminate and more on their intent to create. The EB-5 regulations allow petitioners to submit alternative evidence of job creation through a comprehensive business plan demonstrating their intent to create not fewer than 10 positions for qualifying workers.

Investors need to show their ability to meet the job creation requirements within a reasonable period of time, but there is no firm requirement on timing. Even the statute on the removal of conditions on permanent residence is silent on the need to present evidence of employees.

Rather than presenting I-9 forms, tax records and other similar documentation, employers should present a comprehensive business plan showing that, due to the nature and projected size of the new enterprise, they will need at least 10 qualifying employees within a reasonable period of time.

Through this alternative approach, investors avoid the apparent conflict in the law between EB-5 eligibility and employment discrimination. They also reduce the risk of being targeted by ICE as part of its new worksite enforcement strategy. ***PD***

Alan Goldfarb is a partner with the Minneapolis-based immigration law firm of Davis & Goldfarb, PLLC.

References omitted due to space but are available upon request to editor@progressivedairy.com.

Alan B. Goldfarb
Partner
Davis and Goldfarb, PLLC
alan@dgvisalaw.com