akerman

Practice Update

# Developments on the EB5 Program: the Administration, House and Senate Weigh In

June 12, 2015

By Rogelio J. Carrasquillo, Scot Patrick O'Brien, Richard L. Spees, and Nicholas A. Falvo

The Regional Center part of the EB-5 immigrant investor program is set to sunset on September 30, 2015. Recent actions by the Obama Administration, the Senate and the House demonstrate this program now has significant bi-partisan support.
The EB-5 Program (officially the Employment-Based Fifth Preference Immigrant Investor Program) was created by Congress in 1990 to stimulate the American economy through job creation and capital investment by foreign investors. In 1992, Congress established an EB-5 pilot program under which certain EB-5 visas also are set aside for investors in Regional Centers. The EB-5 Program allows a foreign person – and qualifying immediate family members – to obtain permanent resident status in the United States by making an investment in a new commercial enterprise in America (e.g., real estate project, business) that creates or saves no less than 10 full-time U.S. jobs. The minimum investment is $1 million, or can be reduced to $500,000 if the investment is in a rural area or "targeted employment area" ("TEA"). A TEA is a designated geographic area with high unemployment (at least 150% of the national rate) currently determined by the individual states and territories. Since its inception in 1990, the EB-5 program has spurred

## Related People

Scot Patrick O'Brien
Richard L. Spees

## Related Work

EB-5 Immigrant Investor Program
Economic Development and Incentives
Real Estate

## Related Offices

New York
Washington, D.C.

billions of dollars in capital investment while creating thousands of jobs across a wide variety of projects.
On January 28, H.R. 616, the *American Entrepreneurship Act of 2015* was introduced in the House, by Congressmen Jared Polis (D-Colorado) and Mark Amodei (R-Nevada). The bill currently has 18 cosponsors. On April 27, the Secretary of the Department of Homeland Secretary, Jeh Johnson, sent a letter to Congress expressing support for the program, but also recommending a number of changes to it. Finally, on June 3, Senators Grassley (R-Iowa) and Leahy (D-Vermont) introduced S. 1501, the *American Job Creation and Investment Promotion Reform Act of 2015*.
The Secretary's letter, and both bills, include a number of changes to the program. But while there are differences in the three versions, it is extremely encouraging that all the parties are active and engaged in the process. It is particularly notable that Senator Grassley is involved. He is the Chair of the Senate committee of jurisdiction, the Senate Judiciary Committee. He has also been a significant skeptic of the program in the past. It is important that he is signaling that he too now wants to see a bill passed.

Regarding the Senate bill, the proposed changes to the EB-5 regional center program include:

- Establish statutory guidelines for an average application adjudication timeline of 120 days for processing exemplars, which become mandatory, and a limit of 150 days, on average for the processing of the I-526 petitions and 180 days for the processing of the I-829 to try to increase program predictability and functionality, while allowing for "premium processing" for a fee.
- Raise investment thresholds to $800,000 for Regional Centers within TEAs and $1.2 million for investments in non-TEAs.
- Pre-approval of business plans prior to visa petition of foreign investors.

- Require the Department of Homeland Security ("DHS") to examine EB-5 projects earlier, before foreign nationals apply for visas and invest in projects.
- Provide investors with increased disclosures regarding their investments pertaining to the owners and managers of regional centers.
- Establish an "EB-5 Integrity Fund," paid for by Regional Centers at a cost of $20,000 per year, which will allow DHS to proactively conduct audits and site visits to detect fraudulent activities both domestically and internationally.
- Allow DHS to immediately deny or terminate projects where fraud, misuse, or a threat to national security is found.
- Require Regional Centers to file annual statements of compliance, including an accounting of all foreign investor money invested in the Regional Center. Centers not found in compliance may be sanctioned, fined, suspended, or terminated.
- Transfer the authority from the individual states and territories to DHS for the determination of a TEA.
- Redefine TEAs based upon census data to include an area consisting of a single census tract that has 150% of the national average unemployment rate, a rural area or a closed military base.
- Allow for up to 90% of the job creation requirements to be created indirectly, while 50% of the job creation must be within the TEA.
- Foreign investors will only be allowed to receive credit for up to 30% of the jobs created as a result of investment capital provided by sources other than EB-5 investment.
- Set aside 5,000 visas designated for TEAs.
- Changes the source of foreign capital to limit gifts to family members and secured loans.

We at Akerman will stay deeply involved in the legislative process on the EB-5 bill. There will be hearings, markups, amendments, and votes on the bill. The final version may look very different than either H.R. 616 or S. 1501. Further, dates of some of the changes may be delayed to grandfather projects halfway through development. The Akerman EB-5 Team will be issuing client alerts in the coming days analyzing the effects of the proposed legislation on Regional Centers, investors and developers looking to use the EB-5 Program.

---

This Akerman Practice Update is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.