

Practice Update

EB-5 Legislative Update

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While the 10,000 visas that have been set aside for the EB-5 foreign investor program are part of the permanent law, the regional center program, which allows businesses and developers to aggregate the investment proceeds for larger projects, is not. Instead, the regional center program was originally created for a limited time period as a pilot program. Without the regional center program, only “direct” EB-5 investment is permitted and only direct job employment can be included. Regional centers are permitted to count indirect job creation, including jobs such as construction jobs in qualifying projects. The regional center program has been an overwhelming success, generating billions in investment dollars and tens of thousands of jobs. Yet the regional center program has never been made permanent. Congress has periodically reauthorized the program for three to five years. The last time the program was renewed was in September, 2012 during the height of the Obama/Romney presidential race. Up until yesterday, the regional center pilot program was set to expire on September 30, 2015.

Facing this deadline, Congress has been working on legislation to extend the program since the beginning of the year. Bills have been introduced in the House and the Senate. In both chambers, there is overwhelming support for the continued existence of the regional centers. However, there are disagreements this year about the details of the EB-5

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program going forward. Every bill includes some changes to the program. Major issues of contention include the definition of targeted employment areas (TEAs), raising the level of investment required, the amount of DHS oversight and the effective dates of the changes. Unfortunately, Congress was not able to resolve the differences in approaches before September 30. To maintain the program, the Congressional leadership added language extending the program, without any changes, until December 11, 2015. This was done on the Continuing Resolution which is the bill that also extends the funding for the federal government until December 11.

Congress now has ten weeks to pass legislation to continue and amend the EB-5 regional center program and to reform the EB-5 program generally. In the meantime, USCIS was deluged with new applications filed prior to September 30, 2015, in order to be treated under the old law if there are changes in the program which become effective on October 1, 2015, or when the new legislation is enacted. If the legislation is completed before December 11, the new bill takes control—in other words, any changes written into the new bill will supersede the straight extension through December 11 in the Continuing Resolution. If the Congress cannot resolve all the differences before December 11, it will need to pass another extension of the existing law for a definite period of time, like 90 days. At this time, we cannot predict when Congress will pass legislation on the regional center program and reform to the EB-5 investor program.

Obviously we would prefer to get the program made permanent as soon as possible, and it is always unnerving when programs are unsettled. However, we are confident that eventually some legislation will pass that will continue the regional centers. We believe this because there is significant support for the EB-5 program in both the House and the Senate. Also, in addition to the regional center visa program, there is another immigration program that is in the same position—it also expired on September 30.

That program is the E-Verify program, which is the program that allows employers to confirm that potential employees have legal status. E-Verify is extremely important to the Republicans. They will do all they can to see that both programs are continued.

There will certainly be changes in both the regional center program and EB-5 legislation generally. Many assume that the investment levels will be increased. The bill introduced by Senators Grassley and Leahy would increase the minimum investment amounts for an EB-5 foreign investor from \$500,000 to \$800,000 for projects in a TEA or rural area, and from \$1.0 million to \$1.2 million for projects outside those areas. It is generally understood that the investment levels have not been adjusted since the program was first approved in 1992 and that it is time to increase these levels. There very well may be some limits on the ability of State and local governments to create boundaries of TEAs. There may be a specific number of visas set aside for rural projects. There will certainly be more DHS oversight. At the same time, Congress may also increase the number of visas in the program by not counting the families of investors against the 10,000 total. The program may be made permanent. Given the likelihood of changes in the investment levels, projects which are being marketed under the old law will have an advantage over projects which are subject to the new law, since the investors will be required to make a lower required investment to obtain their green card. While there are estimates that it may take up to two years to complete the marketing to foreign investors of the projects for which petitions were filed with USCIS prior to September 30, it is anticipated that there will continue to be increased activity until the new legislation is effective. Since the returns to foreign investors under the EB-5 program tend to be extremely modest, it is easy to see how an increase in the required investment for an EB-5 foreign investor will put a potential investment under the new law at a significant disadvantage to projects

which are available requiring a \$500,000 investment rather than one of \$800,000. We are continuing to work with developers, regional centers and foreign investors to qualify under the existing law, prior to the enactment and effectiveness of the anticipated changes.

We are continuing to monitor future developments and to work with Congressional leaders on the whole legislative effort.

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