ML STRATEGIES

EB-5 Program Reauthorization: Proposed Legislative Reforms

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Background

Created by the Immigration Act of 1990, the Immigrant Investor Program, more commonly referred to as the EB-5 program, offers foreign investors an opportunity to secure permanent residency in the United States by making a minimum capital investment of $1 million per investor into a New Commercial Enterprise (NCE) that will create at least 10 jobs for US workers. Under the law now, the $1 million investment amount is adjusted downward to $500,000 for an NCE that creates jobs in a Targeted Employment Area (TEA), which is defined as a rural area, or as an area that has an unemployment rate that is at least 150 percent of the national average.

In 1992, in an effort to spur interest in the program, Congress followed up by creating a pilot program that allowed for the establishment of EB-5 Regional Centers, which are private for-profit or government-affiliated entities that receive special designation from U.S. Citizenship and Immigration Services (USCIS) to administer EB-5 investments and oversee job creation. The Regional Center program allows indirect jobs to be counted toward the job creation requirements.

According to USCIS, as of June 1, 2015, the agency had approved more than 700 regional center applications.

More than 90 percent of EB-5 investments are made through Regional Centers, or projects affiliated with Regional Centers. The program has been a success, creating in Fiscal Year 2013 alone more than 41,000 jobs. The program has attracted the investment of more than $4.5 billion in qualified U.S. projects.

Current Reauthorization Legislation

In the current congress, legislation has been introduced in the House of Representatives to make the Regional Center program permanent, and in the Senate to extend the program for five years. Both measures would make reforms to the program, which has faced reports of fraud and abuse, processing delays for developers and investors, and concerns that the benefits of the program are not going toward rural and high-unemployment TEAs.

Congress has reauthorized the Regional Center program five times since its inception in 1993, most recently in 2012 when the program was extended through September 30, 2015. The legislation to extend the program was agreed to in the Senate by unanimous consent and in the House of Representatives in a vote of 412-3.

The same legislation also extended through September 30, 2015 the authorization for the E-Verify Program, the Special Immigrant Non-minister Religious Worker Program, and the Conrad State 30 J-1 Visa Waiver Program.

House of Representatives

In March, Representatives Jared Polis (D-CO) and Mark Amodei (R-NV) introduced H.R. 616, the American Entrepreneurship and Investment Act of 2015, which would make the Regional Center program permanent, while also making reforms and enhancements to the program. Specific reforms include:

- Improving the definition of TEA designations, by codifying the designation authority, which is done at the discretion of the states, and by lengthening the validity period of TEA designations to two years
- Increasing the program's efficiency by requiring that the Secretary of Homeland Security establish a preapproval procedure that enables a Regional Center to seek preapproval of a business plan before seeking project investors
- Establishing a new requirement that USCIS defer to its prior rulings except in the case of material change, fraud or legal deficiency
- Enhancing Regional Center transparency and accountability with a requirement that investors comply with federal securities laws and other additional enforceable regulations and laws
- Providing for an expedited 180-day adjudication process for I-924 or I-526 filings, which can take between 12 and 18 months for approval currently

- Amending the age determinations for children of EB-5 investors and allowing for concurrent filings by of EB-5 petitions for permanent residence status by immediate family members of principal investors
- Affirming the applicability of the Foreign Corrupt Practices Act (FCPA) to any EB-5 petition

Senate

In June, Senate Judiciary Committee Chairman Chuck Grassley (R-IA) and Ranking Member Patrick Leahy (D-VT) introduced S. 1501, the American Job Creation and Investment Promotion Reform Act of 2015. The bill would reauthorize the Regional Center program for five years, while overhauling it with oversight tools, security enhancements, and anti-fraud provisions to make the program more transparent. The bill would provide the Department of Homeland Security with the authority for expanded background checks and a more thorough vetting of proposed investments, and would also allow DHS to proactively investigate fraud, here in the United States and internationally, using a dedicated fund that would be paid for by certain participants in the program. Other reforms include:

- Increasing the required minimum investment amount in a TEA from $500,000 to $800,000, and from $1 million to $1.2 million for non-TEA investments
- Revising the definition of a TEA to include a rural area, closed military base, or area consisting of a single census track with a unemployment rate that is 150 percent of the national average, but with specific requirements related to the TEA's location within or outside of a metropolitan statistical area
- Specifying that indirect jobs can make up no more than 90 percent of all the jobs counted for the purpose of the Regional Center designation
- Requiring that Regional Centers provide an annual certification that they are complying with program requirements and also that they are in compliance with state and U.S. securities laws
- Making U.S. citizenship or permanent resident status a requirement for anyone directly or indirectly engaged with operating a Regional Center
- Limiting the use of gifts and loans as the source of EB-5 investments
- Allowing concurrent filing of an I-526 petition and I-485 adjustment of status application if a visa number is immediately available, and also specifying that if a parent's I-829 petition is terminated their child will still be considered a child for EB-5 purposes provided that the child remains unmarried and the parent files a subsequent I-526 petition within one year after the termination of the original petition
- Introducing new parameters for applying job creation statistics with respect to determining the amount of EB-5 capital that may flow into projects that are also financed by non-alien entrepreneurs and other sources of capital

Outlook

While anything is possible in Congress these days, insiders believe that the House and Senate should be able to work together in a bipartisan, bicameral way to reauthorize the EB-5 program.

Congressional staffers working on this issue anticipate that the House will likely pass a reauthorization on the suspension calendar; although the final bill may not be a permanent authorization as called for in H.R. 616, but could instead be a shorter five or seven year extension. It is possible that the House will not act on reauthorization until late September as the expiration date draws near.

Both Rep. Bob Goodlatte (R-VA), chairman of the Judiciary Committee, and Rep. Darrell Issa (R-CA), a senior member of the committee, are thought to be generally supportive of the Polis/Amodei legislation, but are expected to seek changes to the bill.

In the Senate, the outlook is murkier. As discussed above, Chairman Grassley and Ranking Member Leahy have introduced a five-year extension bill, but Senators Charles Schumer (D-NY), Jeff Flake (R-AZ), and John Cornyn (R-TX), all members of the Senate Judiciary Committee, are thought to favor a reauthorization that is closer to the House legislation.

With limited legislative days left before the program's expiration on September 30th – the House and Senate are in recess for the month of August and first week of September – the most likely, although not certain, outcome is that Congress will pass some version of the Polis/Amodei legislation (with a limited number of years' extension, versus being made permanent). We could also see a short-term extension of the program to allow House and Senate policymakers to negotiate a compromise reauthorization bill.

Authors

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