DHS's Final EB-5 Regulations: What Stakeholders Need to Know

August 05, 2019| Alert | By **Alexander Hecht**, **R. Neal Martin**, Douglas Hauer, Bob Koen

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The Department of Homeland Security (DHS) has published final regulations that change some of the key features of the EB-5 Program, which makes approximately 10,000 green cards available each year for qualifying investors and their family members. When the final rule takes effect on November 21, 2019, the regulations will create broad, sweeping changes to the EB-5 Program.

While certain changes are clear-cut, such as the increase in required investment amounts, others create notable uncertainty for investors and regional centers — organizations designated by the federal government to sponsor capital investment projects for EB-5 investments. Revisions to the regulations that raise issues include those relating to how investors can retain priority dates from earlier-filed EB-5 petitions, and the impact that giving the DHS control over making Targeted Employment Area (TEA) designations for investments may have on the EB-5 market.

We expect some members of Congress to call for overturning DHS's new EB-5 regulations, but Congress has more than once considered EB-5 reform, without ever reaching bipartisan consensus with the industry on legislative fixes to the EB-5 Program.

Here is what regional centers, investors, recipients of EB-5 capital, and institutional investors or lenders to a project intending to pursue EB-5 financing need to know about the final rule:

1. The minimum investment amounts for investors are increasing substantially – while providing a safeguard for rural investment

The standard minimum investment amount is increasing from $1 million to $1.8 million. Before deciding on the new minimum, DHS compared the EB-5 Program to investment programs that grant citizenship and residency in the United Kingdom, Canada, Australia and New Zealand. DHS determined that the increase to $1.8 million is reasonable when compared with similar programs in those countries.

The final regulations enable EB-5 investors making investments in TEAs, which include rural areas, to reduce their investment by 50% — from $1.8 million to $900,000. DHS maintained this 50% differential to promote Congress's objective of using the EB-5 Program to attract investments to rural areas and areas of high unemployment.

Will Congress step in with legislation to change these revisions to the investment amounts? We believe that Congress is unlikely to unwind DHS's new regulations in the near term, including the revisions to investment minimums. EB-5 legislation would require bicameral and bipartisan support, along with the willingness of key leaders to restart a legislative process. So far, at least one key member, Senator Chuck Grassley (R-IA), former Chairman of the Senate Judiciary Committee, who has long advocated for EB-5 reform, seems pleased with the administration's direction. **Senator Grassley recently took to the Senate floor**, stating that the "rule would raise the minimum investment amounts required under the program. It also makes sure that investments are directed to rural areas and truly high unemployment areas as Congress intended when EB-5 was created in 1990."

While there is always a chance that Congress could prioritize EB-5–related legislation in the future, we expect that the minimum investment amount differential between TEAs and non-TEAs is here to stay.

2. Priority date retention for investors with approved Forms I-526

The final regulations allow certain EB-5 investors to retain their priority dates from earlier-filed and approved EB-5 petitions — and their place in line for a green card — unless DHS revokes a petition's approval for fraud or willful misrepresentation by the immigrant investor petitioner. However, the final regulations disallow priority date retention where there is a later finding United States Citizenship and Immigration Services (USCIS) approved a petition based on a material error. The regulations do not clearly define a material error.

This provision will provide relief to certain investors who have secured an approved EB-5 petition and are waiting to obtain conditional residence status, but who find themselves in circumstances beyond their control (e.g., the termination of a regional center). These petitioners will no longer lose their priority

date, or place in the green card line, when they file a new petition to retain green card eligibility. The provision does not apply to investors who are in projects that simply fail, and who were never granted an approved EB-5 petition. For an investor to benefit from priority date retention in the new regulations, the investor must show that USCIS approved their I-526 EB-5 petition with the priority date in question.

This is a significant shift in USCIS policy, intended to protect innocent investors from issues beyond their control, such as a regional center termination or a material change in an EB-5 business plan. Current policy requires such investors to refile a petition and to reestablish a new priority date, which sends them to the back of the line for a green card. DHS's new regulations on priority date retention provide an important safeguard to qualified investors impacted by such events.

Although many changes are beneficial to investors, there are open-ended questions not addressed in the final regulations. For instance, the regulations do not specify whether an investor solely seeking a change in regional center designation would be required to invest according to the applicable new investment minimum if filing a new petition after November 21, 2019. Also left open is whether USCIS will re-adjudicate an investor's source of funds and review all eligibility criteria when an investor files a new petition solely to report a new regional center sponsor for their investment or material changes to a business plan. The risks of a re-adjudication could have a chilling effect on investors, who may have waited more than two years for a decision on an initial petition.

3. States have lost authority in designating a TEA, with USCIS assuming this function and moving to a more restrictive definition of a TEA

In the new regulations, USCIS is seeking to stop states from gerrymandering TEAs by linking multiple census tracts and thus steering investments to particular affluent, urban areas. This change is of great importance to stakeholders interested in raising EB-5 capital for projects in cities such as New York and Boston, as well as for investors. As some members of Congress have criticized the EB-5 Program for becoming a refinancing tool for large developers, based on how states define TEAs, this development is not a surprise to the industry.

One of the most significant concerns for investors regarding the TEA provisions is that USCIS will now adjudicate a TEA designation at the time the agency reviews an investor's I-526 petition. The only advance approval that a project can rely on with respect to a TEA designation would be an exemplar approval obtained by a regional center for projects that meet specific criteria. However, this option is imperfect because exemplar petitions may remain unadjudicated for as long as three years, meaning that investors will need to assume additional USCIS adjudication risks on TEA designations. The final regulations do not clarify whether an investor can "cure" a negative adjudication on a TEA by increasing their investment to $1.8 million in situations where all other aspects of a project meet eligibility requirements.

The practical effect of these revisions to TEA provisions is that issuers of EB-5 investments will be required to increase the specificity of disclosures in offering documents. These disclosures will need to warn investors of the risk of an adverse TEA adjudication – perhaps more than two or three years after an investor has committed funds to a project. Uncertainty on TEA designations, and a lack of uniformity in USCIS adjudications, may be destabilizing to EB-5 projects seeking to raise capital in urban areas at the downward adjusted investment amount of $900,000. This may lead some investors to conclude that investments in rural areas, which Congress defined clearly in the law when creating the EB-5 visa, present a lower level of immigration-related risk. DHS has contemplated this very scenario, and affirms in the final regulations that one objective of the new EB-5 modernization framework is to level the playing field, allowing rural projects to have a greater ability to compete with urban projects.

Conclusion

The new EB-5 regulations appear to be here to stay. They present a framework that will shift the marketplace. One implicit objective of the regulations is shifting the EB-5 Program from being an overused, backlogged green card path, to one that is more limited.

In the current climate, as indicated above, it is not likely that a legislative "fix" will be coming in the near term to roll back DHS's regulations. While the increased investment amounts may deter some investors, Congress will very likely extend the EB-5 Program along with other temporary immigration programs. But we could envision potential stakeholder litigation, particularly over disputes with USCIS on uniformity in the adjudication of TEAs and over confusion with the mechanics of the priority date retention provisions.

In the broader context of citizenship by investment programs globally, the EB-5 Program, with its 10,000 visas set aside per year, will likely remain attractive and continue despite DHS's new regulations. Other programs are, in fact, more restrictive and less certain. Take Malta's Individual Investor Program (MIIP) as an example. MIIP leads to citizenship faster, but its strictly limited quotas are fully dependent on a legislative process for renewal. The $1.8 million investment minimum is actually low when compared to programs in New Zealand, Australia and the United Kingdom.

While certain urban projects may have to limit planned uses of EB-5 financing, the new regulations may otherwise offer rural projects a real advantage in the coming years. We expect the EB-5 Program to continue, albeit in a different form, after November 21, 2019.

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