

Congress Extends EB-5 Program for One Year Without Changes
By Stephen Yale-Loehr*

It appears that Congress will extend the regional center part of the EB-5 immigrant investor program until September 30, 2016. After more than six months of efforts to reform the program in exchange for a five-year reauthorization, on December 15 Congress instead opted for a nine-month extension without changes. This article explains what almost happened, what it means for EB-5 projects in 2016, and what might happen in September 2016.

How Did We Get Here?

Congress enacted the EB-5 program in 1990. The program requires foreign investors to invest \$1 million in most areas, or \$500,000 in rural or high unemployment areas called targeted employment areas (TEAs), and create at least 10 jobs for U.S. workers within two years. In return investors get first a conditional and then a permanent green card.¹

Initially, the EB-5 program attracted few investors, particularly because investors had to invest in their own job-creating companies and create 10 jobs directly. In late 1992, Congress expanded the EB-5 program by creating a pilot program to allow investors to invest in so-called “regional centers.”² Congress also allowed people investing in regional center projects to be able to count jobs created both directly and indirectly.

Even with the regional center addition, for many years few people immigrated through the EB-5 category. As late as 2007, for example, fewer than 1,000 people per year immigrated in this category.³ The U.S. recession in 2008-2010, however, closed many sources of domestic capital for U.S. developers. They discovered the EB-5 program as an alternative way to finance some or

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¹ See generally Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ronald Y. Wada, *Immigration Law and Procedure* § 39.07.

² Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, § 610, 106 Stat. 1828, 1874 (1992); S. Rep. No. 102-918 (1992).

³ Office of Immigration Statistics, U.S. Dep’t of Homeland Security, 2013 Yearbook of Immigration Statistics 18 (2014) (Table 6), at http://www.dhs.gov/sites/default/files/publications/ois_yb_2013_0.pdf.

all of their projects. They either set up their own EB-5 regional centers or worked with existing regional centers.

As of 2008 the U.S. Citizenship and Immigration Services (USCIS) had only approved a few dozen EB-5 regional centers. Currently, there are over 750 approved EB-5 regional centers.⁴ In 2014, the EB-5 category reached its annual cap of approximately 10,000 for the first time. The USCIS currently has a backlog of over 17,000 EB-5 petitions awaiting adjudication.⁵

Although EB-5 investors only account for about 1% of all U.S. immigration annually, the program has an outsized economic impact. EB-5 investors have invested more than \$13 billion since 2008 and have created tens of thousands of jobs for U.S. workers.⁶

As the EB-5 program has grown in popularity, so have its problems and visibility. With the EB-5 regional center program due to expire September 30, 2015, Senators Chuck Grassley (R-Iowa) and Patrick Leahy (D-Vermont) introduced a bill in early June 2015 to reform the EB-5 program.⁷ S. 1501 would have increased the minimum investment amount to \$800,000 for investments in a TEA and \$1.2 million for investments not in a TEA. The bill would have revised the statutory definition of a TEA to include a rural area, a closed military base, or an area consisting of a single census tract that had 150 percent of the national average unemployment rate. The legislation would have also added add major reporting and compliance requirements for both regional centers and enterprises associated with regional centers.

Since then legislators and EB-5 industry program experts have been working behind the scenes to try to improve the legislation. As late as two weekends ago, for example, congressional staffers and EB-5 lobbyists met eight hours a day for three days straight to try to work out a compromise.

Until December 15, it looked like an EB-5 reform package was going to be enacted. The latest version of the reform legislation would have increased the minimum investment amount to \$800,000, but kept the higher minimum level at \$1 million. It would have tightened the definitions of targeted employment areas to try to make sure more EB-5 projects would occur in rural areas and fewer in urban areas, but not as much as in the original version of S. 1501. And it would have created annual caps within the overall EB-5 limit to allocate visas for projects in rural and high priority urban areas, and for investors willing to pay \$1 million to invest in a project.

⁴ U.S. Citizenship and Immigr. Services, Immigrant Investor Regional Centers, <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers>.

⁵ U.S. Citizenship and Immigr. Services, Data Set: All Form Types Performance Data (Fiscal Year 2015, 4th Qtr), http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/all_forms_performancedata_fy2015_qtr4.pdf.

⁶ Invest in the USA, <https://iiousa.org>.

⁷ See Stephen Yale-Loehr, *Two Key Senators Introduce Bill to Extend and Improve EB-5 Program*, 20 Bender's Immigr. Bull. 695 (July 1, 2015) (summarizing S. 1501).

Congress seemed willing to include the EB-5 reform package in a massive \$1.1 trillion omnibus spending bill, in part because a new \$10,000 fee on EB-5 petitions would be used to fund the health care costs of first responders to the September 11, 2001 terrorist attacks in New York City and Washington, DC. On December 15, 2015, however, congressional leaders decided to delete the EB-5 reform package from the spending bill. Instead, the EB-5 program will simply be extended until September 30, 2016.⁸

What Will Happen in the Near Future?

Congress' failure to reform the EB-5 program is both good and bad for EB-5 developers, regional centers, and investors. For the time being EB-5 developers can still market their projects at \$500,000, under the same TEA rules. Investors do not have to worry about having to invest more money, at least for now. But everyone will worry about the new September 30, 2016 expiration date. Some versions of the draft EB-5 bill in 2015 would have made certain changes retroactive. An EB-5 reform law enacted in 2016 could also apply retroactively, on the theory that the EB-5 industry knew since June 2015 that Congress is serious about enacting changes to the EB-5 program.

Moreover, the draft EB-5 bill contained some key protections for investors that currently don't exist. For example, the draft bill would have protected investors with pending EB-5 petitions in regional centers that are terminated. Such investors now face another nine months or longer of uncertainty.

In the meantime, USCIS has an avalanche of over 17,000 pending EB-5 petitions to adjudicate. That will cause major backlogs for EB-5 investors. And expect another surge in petitions filed just before September 30, 2016, as investors worry about possible legislative changes then.

What Might Happen in September 2016?

2016 is a presidential election year in the United States. That typically means that little substantive legislation gets enacted. That is particularly true for immigration, which is always controversial, but even more so now, after recent terrorist attacks in Paris, France, and San Bernardino, California. For that reason, Congress could just extend the EB-5 program again, without changes or with minor changes, in late 2016.

However, Congress knows we have a broken immigration system, and Republicans in particular are keen on winning Hispanic votes in the 2016 presidential election. While most pundits predict that comprehensive immigration reform is impossible in 2016, Republicans could put together a smaller immigration reform bill aimed at helping high-skilled immigrants, such as the SKILLS bill introduced by Rep. Darrell Issa in 2013.⁹ EB-5 reform could be part of such a package,

⁸ H.R. 2029, Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2016, § 575, available at <http://docs.house.gov/billsthisweek/20151214/CPRT-114-HPRT-RU00-SAHR2029-AMNT1final.pdf>.

⁹ H.R. 2131, 113th Cong. (introduced May 23, 2013).

especially since most of the EB-5 reform details have already been negotiated. Alternatively, Congress could enact a stand alone EB-5 reform bill.

It is not unusual for Congress to take years to enact substantive changes to a program. It took ten years, for example, in the 1980s for Congress to pass immigration reform. Congress did that in two steps, first by enacting the Immigration Reform and Control Act of 1986 to create a legalization program for about three million undocumented immigrants, and then the Immigration Act of 1990 to overhaul our legal immigration system. It is even harder to enact major legislation now, 25 years later.

Nor is gridlock in Congress limited to immigration issues. It took Congress over 17 years to fix a formula governing payments to doctors caring for Medicaid patients.¹⁰

Such is the legislative world we live in. It is not pretty. A politician once quipped that there are two things no one should see being made: sausage and legislation.¹¹ But at least the EB-5 program continues to fight another day.

¹⁰ Billy Wynne, *May The Era Of Medicare's Doc Fix (1997-2015) Rest In Peace. Now What?*, Health Affairs Blog, Apr. 14, 2015, <http://healthaffairs.org/blog/2015/04/14/may-the-era-of-medicares-doc-fix-1997-2015-rest-in-peace-now-what/>.

¹¹ Attributed to Otto von Bismarck, <http://www.brainyquote.com/quotes/quotes/o/ottovonbis161318.html>.