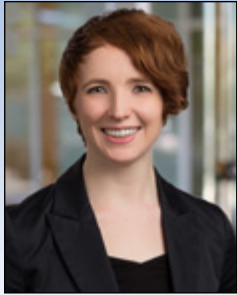
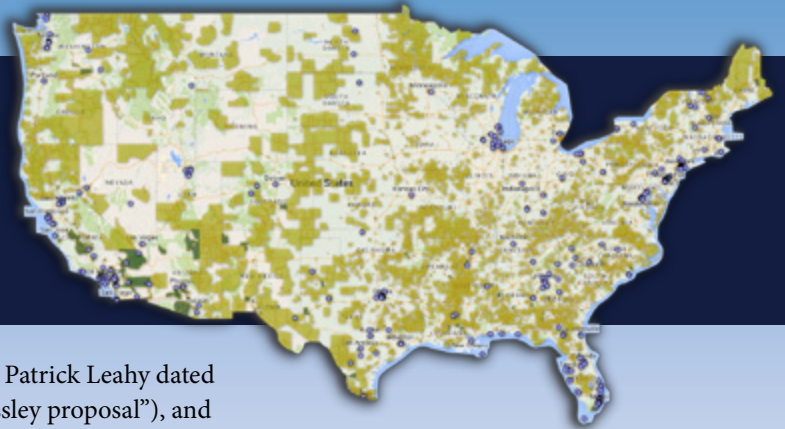


Trends In Proposed Legislation Suggest Very Strict Definitions Of TEAs In The Future



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In the previous publication, several large issues regarding Targeted Employment Areas (“TEAs”) from the

Department of Homeland Security (“DHS”) January-proposed regulations were presented and discussed. Since that time, revisions have continued to be under debate in the legislative branch – and two notable pieces of legislation have been proposed: a draft of EB-5 reform and reauthorization legislation from Senate Judiciary Chair Chuck Grassley and Ranking Member of the Senate Appro-

priations Committee Patrick Leahy dated April 15th (the “Grassley proposal”), and draft legislation for EB-5 reform and reauthorization released from Senate Majority Whip and Immigration Subcommittee Chairman Senator John Cornyn dated April 30th (the “Cornyn proposal”).

The two proposals suggest myriad changes for the EB-5 Program – including new proposed definitions of TEAs. Both proposals offer one TEA type for rural areas and one for urban areas – a similar approach to the current definitions; both also include a new TEA type, which is a closed military base. The table below provides a summary of the proposed criteria for TEAs, as well as other proposed incentives.

A review of the proposals reveals several new

trends in how to determine areas that should receive incentivized investment and how to provide that incentive.

For determining TEAs, two primary trends are noted: (1) the removal of aggregation options; and (2) the incorporation of New Market Tax Credit (“NMTC”)-type criteria (reflective of NMTC’s Severely, or Highly, Distressed criteria). The NMTC program is intended to support economic growth in “underserved” communities, which are determined by unemployment rates, poverty rates, and/or median income rates. By taking an NMTC-type approach, TEAs would be determined under a wider array of criteria than just unemployment rate, MSA status, and/

	GRASSLEY	CORNYN
TARGETED EMPLOYMENT AREAS (qualifying for reduced investment amount)	<p>Rural Area - outside any city/town with 20,000 population, AND - meets one of three:</p> <ul style="list-style-type: none"> outside of MSA within an outlying county of an MSA within a census tract that is > 100 square miles with population density < 100 people per square mile <p>- also receives set-aside provisions</p> <p>Priority Urban Investment Area - single census tract - in MSA - meets two of three criteria:</p> <ul style="list-style-type: none"> unemployment rate ≥ 150% of national unemployment rate poverty ≥ 30% median family income ≤ 60% of statewide/MSA median family income (whichever is greater) <p>- also receives set-aside provisions</p> <p>Military Base Any area within a military installation that has closed in the last 25 years</p>	<p>Distressed Rural Census Tract - any population census tract [that meets the definitions of a rural area*], AND - meets one of three:</p> <ul style="list-style-type: none"> poverty rate > 20% median family income < 80% of statewide a census tract that is > 100 square miles with population density < 100 people per square mile <p>(also qualifies for set-asides)**</p> <p>Distressed Urban Census Tract - any population census tract - in MSA - meets ALL three following:</p> <ul style="list-style-type: none"> unemployment rate ≥ 150% national unemployment rate poverty rate ≥ 30% median family income ≤ 60% of statewide/MSA median family income (whichever is greater) <p>Military Base Any area within a military installation that has closed in the last 25 years - also receives set-aside provisions</p>
RURAL AREA	(See Above)	<p>Rural Area If a location qualifies as a Rural Area, but is not a Distressed Rural Census Tract, it still qualifies for set-asides.*</p> <p>Definition - outside any city/town with 20,000 population, AND - meets one of two:</p> <ul style="list-style-type: none"> outside of MSA within a census tract that is > 100 square miles with population density < 100 people per square mile
OTHER	Manufacturing & Infrastructure	N/A

* It is noted that the language in the latest version of the Cornyn proposal, as of June 2017, omits the requirement that the distressed rural census tract be outside of an MSA, which is presumed to be a drafting oversight.
** Our best interpretation is that, since Distressed Rural Census Tracts are (presumed to be) in Rural Areas, the set-aside rules of the Cornyn proposal also include these Distressed Rural Areas.

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or population. The incorporation of NMTC-type criteria is found in both proposals. Both utilize the NMTC-criteria for urban-based TEAS, and a variant of the approach is also used in the proposed Distressed Rural TEAS in the Cornyn proposal.

A secondary trend is that urban areas must meet two or more of the new criteria: the single census tract that contains the proposed project must qualify on its own by meeting at least two (out of three) of the unemployment, median income, and/or poverty criteria. Individually, both of these requirements - the single census tract and the two-or-more

FOR CENSUS TRACTS THAT ARE IN MSAs*

	% OF TOTAL
Total No. of Census Tracts	100.0%
Single MSA tracts that meet current TEA High Unemployment criteria	19.3%
Single MSA tracts that do not meet any NMTC-type criteria	69.5%
Single MSA tracts that meet 1 or more NMTC-type criteria	30.5%
Single MSA tracts that meet 2 or more NMTC-type criteria	16.1%
Single MSA tracts that meet 3 or more NMTC-type criteria	8.4%

Notes: The estimates do not account for overlap with areas that could potentially qualify as rural TEAs under the “MSA Outlying Counties” or large area/small density provisions; inclusion of the overlap has an almost negligible impact. The estimates also do not account for the requirement of a “population census tract”, as required under the Cornyn proposal; inclusion of a greater-than-zero population parameter has a negligible impact on the estimates.

criteria – impose limitations on TEAs that are much stricter than the current definitions; taken together, these requirements reduce potential TEA project locations significantly, especially for non-rural projects.

Data from the most recent American Community Survey (“ACS”) were analyzed to see how the two requirements would affect potential urban TEA locations. The table below shows the estimated number of non-rural census tracts that would qualify with these criteria.

Out of the total number of MSA census tracts in the entire nation, approximately 19% meet the current TEA High Unemployment criteria on an individual basis. As is common knowledge within the EB-5 industry, the

volume of potential high unemployment TEA locations is actually much higher than 19%, as TEAs currently can be created by combining census tracts. For illustrative purposes, under the DHS-proposed contiguous-and-adjacent methodology, up to 41% of urban-area census tracts would qualify as high unemployment TEAs, according to research by IIUSA (“Targeted Employment Area (TEA) Reform: Policy Proposals Comparative Analysis State by State”, by Lee Li, May 2017).

Compared to those numbers, only about 16% of MSA census tracts would meet Grassley’s criteria for a Priority Urban Investment Area. Similarly, only 8% of the entire national MSA geography would meet Cornyn’s criteria for a Distressed Urban Census Tract. If a more lenient definition was imposed, requiring only one of three NMTC criteria to be met at a single tract-level, roughly 30% of the nation’s MSA geography would meet the urban TEA definition.

The proposed legislation also highlights trends in legislative attempts to incentivize investment in the targeted areas by implementing set-asides, as summarized in the table below. “Set-aside” visas, under the proposals, are a set number of visas out of the total allotted to the EB-5 Program overall (currently approximately 10,000) that are reserved for investors who invest in the specified areas.

The introduction of set-asides shows an intent to drive investment into rural areas (and/or special urban areas) by allowing qualified projects to avoid visa backlogs, which can add years to the investor’s immigration process. Concurrently, both proposals would increase the TEA investment amount to \$800,000 (up

from \$500,000), while the standard investment level would either remain at \$1,000,000 under the Grassley proposal or be lowered to \$925,000 under the Cornyn proposal. Under either scenario, the “delta” (the difference between the TEA amount and the standard amount) is smaller than under current practice and much smaller than that in the DHS proposed regulations – and the avoidance of the backlogs would therefore likely become the stronger incentive than a lower investment level.

The use of set-asides has been in several of the pieces of proposed legislation over the past few years. Notably, the Cornyn proposal also excludes investors’ spouses and children from the overall EB-5 visa cap of 10,000, which would help free up the number of visas available for investors and reduce backlogs.

Beyond the trends summarized above, a review of the proposals’ details related to TEAs demonstrates other interesting differences and similarities. While certain aspects of the latest draft proposals are unclear, the following provides a brief summary of these additional noteworthy points.

■ TEAS IN RURAL AREAS: GRASSLEY’S PROPOSAL EXPANDS CURRENT DEFINITION

Under Grassley’s proposal, the definition of a rural-based TEA continues to only consider general geography and population – and, further, the definition would be expanded to include outlying counties of Metropolitan Statistical Areas (“MSAs”) and large, low-population census tracts. Rural-based TEAs under

	GRASSLEY	CORNYN
Rural Areas	- 7.5% in 2018 - 15% in 2019	20% of visas (estimated to be approximately 2,000) for rural areas (including distressed rural census tracts) and closed military bases. Set-asides are for projects through regional center projects.*
Priority Urban Investment Areas	- 7.5% in 2018 - 15% in 2019	
Roll over?	- Any unused visas will remain in the category for one more year; then made generally available	Roll over? - Any unused visas at end of year will be made available

*The exact language of the proposal is a bit unclear on this matter; this is our best interpretation.

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this definition would not be restricted to singular census tracts.

By contrast, Cornyn's proposal requires rural-based TEAs to be determined at the tract level and to be "distressed" to qualify – but the proposal seems to also allow rural-based TEAs to qualify for both reduced investment and visa set-asides. To qualify, the area must be rural and show a high poverty rate, low median income, or a large census tract with low population density. While the language is unclear, it is presumed that, if a location is within a "Rural Area," but not within a "Distressed Rural Census Tract", it still qualifies for the set-asides (but not the reduced investment level of the TEA).

■ ROLE OF CENSUS TRACTS

TEAs under the Cornyn proposal rely on singular census tracts for both the urban-based and rural-based TEA definitions. The Cornyn proposal also requires that the individual tracts be "population" tracts. Urban-based TEAs under the Grassley proposal are similarly required to be determined on a singular basis, without the population requirement. (The language in Grassley's proposal technically allows for an area "consisting of a census tract or tracts" – however, all of them must qualify on their own, so the definition essentially applies solely to the single census tract hosting the project.) As discussed above, rural-based TEAs are not restricted to census tracts under the Grassley proposal.

■ DATA FOR DETERMINING TEAS: CORNYN'S PROPOSAL IS CLEARER THAN GRASSLEY'S

While specific methodologies are not addressed, Cornyn's proposal does specifically state that TEAs would be defined based on "the most recent five-year estimates of the American Community Survey", for TEAs in both rural and urban areas.

Under Grassley's proposal, the necessary data source(s) and methodologies for determining TEAs in urban areas is

not specified. The language states that urban-based TEAs will be based on the "most recent census data available"; it is unclear if the intention is to use only ACS data, or if the use of Census-Share methodology, as currently used, would still be required/allowed.

■ DHS TO DETERMINE TEAS: SAME FOR BOTH PROPOSALS

Under both proposals, the role of state authorities in the designation of TEAs would be removed completely. TEA requests would be submitted to and approved by DHS.

■ LENGTH OF TEA DESIGNATIONS: GRASSLEY'S PROPOSAL IMPOSES AN EXPIRATION DATE; CORNYN'S PROPOSAL APPEARS TO LOCK-IN THE TEA AT TIME OF EXEMPLAR FILING.

Grassley's proposal specifically states that TEA designations would last for two years. Cornyn's proposal does not give a specific timeline – however, it could be interpreted that the TEA status would remain for the life of the project (from the date of the exemplar filing) and would not need renewal.

■ SPECIAL PROJECTS: GRASSLEY'S PROPOSAL INCLUDES INFRASTRUCTURE/MANUFACTURING PROJECTS

Grassley's proposal allows for the TEA-level investment amount for projects that are considered to be infrastructure or manufacturing projects, regardless of location. Cornyn's proposal does not include any language regarding special projects.

After over 15+ years without any major changes or revisions to the Program, the trends in the proposed legislation regarding TEAs seem to have swung from very accessible to extremely stringent, by imposing not only the stricter NMTC criteria, but also by removing state involvement, removing the ability to aggregate census tracts, and raising the TEA minimum investment amount. Similar trends are also present in the DHS proposed regulations, with slight variances.

However, this stricter TEA criteria need to be considered in light of the concurrent narrowing of the investment-level gap. The proposed bills raise the TEA minimum investment amount, but not the standard investment amount – therefore, the "delta" is smaller than under current practice. From a capital-raising standpoint, it is possible that the smaller delta may offset the challenges imposed by stricter TEA definitions. In short, the "TEA question" may not be the make-or-break issue it currently is, as the driving incentive could become visa set-asides (instead of monetary differences).

Taking the trends observed in the TEA definitions discussed above, combined with trends regarding other integrity matters, it is clear that policymakers want to see a change in the Program. Some of the trends gaining steam, however, may have some important kinks to be ironed out – for example, the proposal that DHS be the authority on certifying TEAs. As processing times for I-924, I-526, and I-829 petitions are all currently averaging more than a year, many EB-5 stakeholders are concerned that DHS might not be able to accommodate the additional workload of TEA certifications in a timely fashion.

While the final details of the future TEA definitions are clearly still unknown, it remains possible that they will follow the trends outlined here, at least in some variation. As EB-5 stakeholders, we can all prepare by becoming more familiar with NMTC-type criteria and by continuing to discuss, ask questions, and monitor the legislative and regulatory proposals. ■