

TEA DESIGNATIONS:

Proposed DHS Rule Would Significantly Alter the Process



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On January 13th, 2017, the Department of Homeland Security (DHS) issued a Notice of Proposed Rulemaking to amend certain regulations governing the EB-5 Immigrant Investor Program.

A significant portion of the proposed rules are related to TEAs, and these amendments, if enacted, would drastically alter the way high-unemployment TEAs are both calculated and certified (rural TEAs would not be impacted). The following discussion addresses each of the proposed changes related to TEAs.

REMOVAL OF STATE INVOLVEMENT – DHS WOULD TAKE OVER

DHS proposes to eliminate the ability of a state to designate high-unemployment areas, and instead, DHS would make such designations. Petitioners would submit a description of the boundaries of the geographic or political subdivision and the unemployment statistics in the area for which designation is sought as set forth in proposed 8 CFR § 204.6(i), and the method or methods by which the unemployment statistics were obtained. Investors would be required to provide sufficient evidence demonstrating the location would qualify for the reduced investment threshold.

Due to adjudication processing times for I-924 applications and I-526 and I-829 peti-

tions that are already exceedingly long, the prospect of DHS taking over TEA designation requests and the perhaps scant likelihood of their processing such applications in an efficient and timely manner is of great concern for EB-5 stakeholders. As TEA-eligibility is, at least currently, a make-or-break issue for most projects when deciding to venture down the EB-5 path, not having an efficient or predictable adjudication timeframe for TEA designation requests would be concerning for most EB-5 stakeholders, and would add another layer of unpredictability to an already complex program.

Under the current TEA regulations, states have the authority to designate high-unemployment areas. While this state-dependent process has led to some ambiguity and inconsistency in the calculation and designation

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of high unemployment areas, most states are relatively efficient, and will provide a TEA designation letter (or respond with a rejection) within two to three weeks (and some much sooner). This efficient aspect of the EB-5 program has been essential for EB-5 stakeholders.

The prospect of DHS taking over the TEA designation process would therefore seem to give rise to two key questions for EB-5 stakeholders: 1) how long would it take DHS to actually process the requests, and 2) since investors would be required to provide sufficient evidence of TEA eligibility, would DHS provide clear guidance regarding the required evidence of data and methodologies used to make these determinations?

The proposed rules do not provide clear guidance on either of these two key questions. Regarding the length of time required for USCIS to provide a Notice of Decision designating a TEA, the DHS proposed rule notes only that the “cost savings” to states in eliminating them from the TEA process would mean some “additional costs for DHS in adjudication review time in order to evaluate TEA submissions.” But USCIS declines to estimate the impact on processing times, stating only “DHS cannot accurately predict such added time burden to the Government at this time.” It is unclear also whether the DHS TEA adjudication process would result in a TEA designation only when USCIS adjudicates an I-526 petition (currently a period of over 15 months), or if a Notice of Decision for a TEA designation would be issued before the I-526 petition is adjudicated. It should be noted that some previous legislative bills that also proposed transferring authority to designate TEAs from the states to DHS explicitly stated

that DHS would respond to a TEA designation request within 60 days.

Regarding the data and methodologies to be utilized, again DHS does not provide any additional guidance beyond the limited information gleaned from current policy and practice. For example, the recently published USCIS Policy Manual chapter on EB-5 states only the following:

Acceptable data sources for calculating unemployment include U.S. Census Bureau data (including data from the American Community Survey) and data from the Bureau of Labor Statistics (including data from Local Area Unemployment Statistics).

The main justification DHS points to in proposing to eliminate state involvement in the TEA process is that the current state-driven system has “resulted in the application of inconsistent rules by different states.” One would think then that DHS would elaborate on the TEA standards it would like to see adhered to, and provide clear-cut guidance on the data and methodologies that should be utilized. Without further guidance, however, it seems inconsistencies in the designation of high unemployment areas will persist, and I-526 petitions will continue to be filed with supporting evidence comprising a variety of methodologies and data.

LIMITS ON CENSUS TRACT AGGREGATION

The Proposed Rule indicates DHS would limit the number of census tracts that could be combined for purposes of high-unemployment TEAs. DHS proposes that a high-unemployment TEA may consist of the following, so long as the weighted average of the tract

or tracts is at least 150 percent of the national average:

- (a) a census tract or contiguous census tracts in which the new commercial enterprise is principally doing business (i.e. the project tract(s)) or
- (b) the project tract(s) and any or all additional tracts that are directly adjacent to the project tract(s)

In short, if the project tract (or tracts – for projects that span more than one tract) does not qualify on its own, one may only combine/aggregate census tracts utilizing census tracts that are touching/adjacent to the project tract(s).

In current practice, most high-unemployment TEAs involve the aggregation of two or more contiguous census tracts (or block groups as discussed later). Furthermore, states currently have been given flexibility in certifying the “areas” or “shapes” of the TEA. DHS notes in the proposed rules that this “reliance on states’ TEA designations has resulted in the application of inconsistent rules by different states” and has “resulted in the acceptance of some TEAs that consist of areas of relative economic prosperity linked to areas with lower employment.” To counteract this, DHS proposes a significantly stricter regulation regarding census tract aggregation, and one in which DHS would make the TEA determination.

DHS provided the following map (FIGURE 1) and corresponding description as an example of how high unemployment areas would be designated.

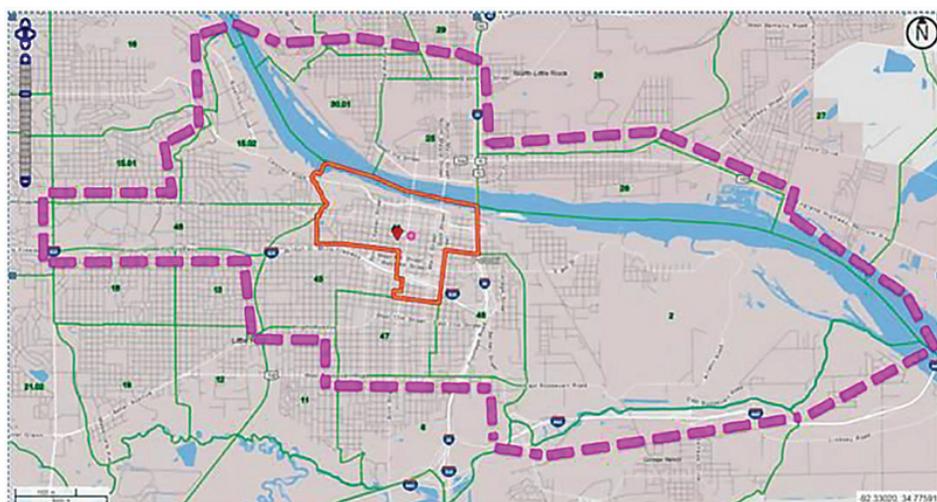


FIGURE 1
The broader area outlined in a dashed bold line contains all of the tracts that are adjacent to the project tract. Under the proposed regulation, the tract outlined in a solid bold line may independently qualify as a TEA. If it does not, an area consisting of that tract and any or all of the additional tracts outlined in the dashed bold line could qualify as a TEA, so long as the weighted average of the combined unemployment rates of each tract is at least 150% of the national average.

TEA DESIGNATIONS – PROPOSED DHS RULE WOULD SIGNIFICANTLY ALTER THE PROCESS

Of the many possible legislative changes related to TEAs discussed over the last few years, an arbitrary limit on the number of census tracts that may be aggregated has been at the forefront. The proposed rule provides for a general limit on combining census tracts by permitting aggregation only with the tracts adjacent to (i.e. touching) the project tract(s). For reference, USCIS refers in the comments to the proposed rule to its analysis of a random sample of 390 census tracts throughout the US, resulting in a range of 3 to 8 adjacent census tracts, with an average and median of approximately six (6) adjacent census tracts to each tract.

The proposed rule for aggregation of census tracts would be a significant departure from current practice, and the proposed limitations could severely hinder many potential projects/investments that would otherwise have a positive impact on the labor force in high unemployment areas.

For example, we analyzed a census tract in downtown Memphis under the current TEA standards versus the proposed DHS rules. As the city of Memphis would not qualify on its own, and neither would the MSA or county containing Memphis, we turned to census tracts for a possible high-unemployment TEA.

In the following maps, high unemployment census tracts are shown in orange, with the project census tract highlighted in light blue. As the maps demonstrate, downtown Memphis has a significant number of high-unemployment census tracts in the area.

Under the current rules, the site would be TEA-eligible by a relatively simple and reasonable combination of only three tracts (one of several possible reasonable combinations). This type of combination would currently be certified painlessly by almost all states, and is shown by the three-tract aggregation encompassed by the green outline in the map on the left.

FIGURE 2: CURRENT TEA STANDARDS: ONE OF MANY POSSIBLE COMBINATIONS

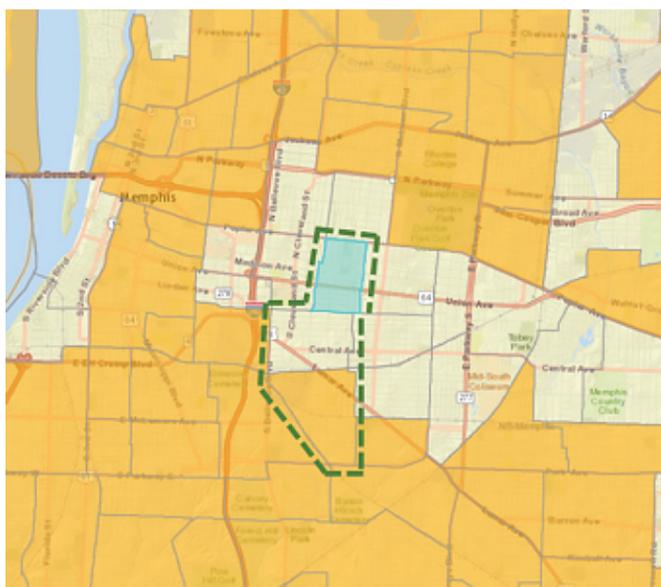
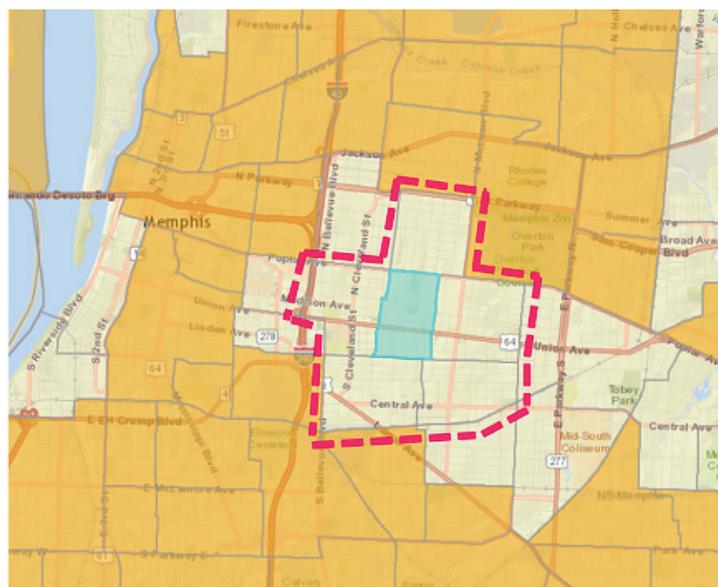


FIGURE 3: PROPOSED DHS TEA RULES: CENSUS TRACT NOT TEA-ELIGIBLE



This example is not unique, as the proposed DHS rules would result in similar limitations throughout the United States. In Memphis, like many cities, higher unemployment areas are highly concentrated in a certain area of the city, as opposed to being scattered throughout. While the rules are partly intended to limit perceived “gerrymandering”, “gerrymandering” is tough to define. While instituting a general census tract limit might remove some possibilities of what may appear to be “gerrymandering”, more significantly a tract limit could hinder potential EB-5 projects that would have had real, measurable positive economic impacts on nearby high unemployment areas. As such, if these sorts of limits were imposed, which do not take the reality of commuting patterns into account, projects located in parts of the city

with lower unemployment might not be TEA-eligible, even though these projects would positively impact the labor force in nearby high-unemployment areas.

OTHER IMPORTANT NOTES RELATED TO HIGH-UNEMPLOYMENT AREAS

BLOCK GROUPS

The proposed rule notes that “DHS also surveyed agencies in several locations to obtain information regarding how they have approached the TEA designation process, namely: the states of Illinois, New York, and California, and the city of Dallas, Texas. Every state or local agency consulted by DHS relied on census tract level unemployment data in the TEA designation process.”

This statement is a bit misleading, as many states, including New York, also currently permit the use of block groups in TEA determinations. As the use of block groups has grown in popularity over the last few years, it is also somewhat surprising that DHS makes no specific reference to block groups in the sample of existing TEAs they analyzed to try and gauge the impact of the proposed rules.

A block group is a smaller sub-area than a tract, as each tract is made up of one or more block groups. While in current practice, tracts are the typical building blocks of a TEA, several states (New York, Washington, Oregon, New Mexico, several cities in Texas, and others) currently utilize block groups when determining TEA-eligibility. Block groups can provide a significant amount of flexibility, due

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to the use of a smaller subarea.

As the proposed DHS rule only discusses census tracts, it appears the use of block groups would no longer be permitted, which would make the impacts of the proposed rule even more drastic in states such as New York that currently utilize block groups on a regular basis.

HOW LONG IS A TEA LETTER VALID?

Currently, TEA-eligibility for a project can change over time, and there is no guarantee that a site will remain TEA-eligible in the future. Currently, TEA “timing” can be problematic. Decisions involving potentially hundreds of millions of dollars are made based on the perceived TEA eligibility of a project. The absence of predictability and lack of clear-cut guidelines can lead to poor decision-making, wreak havoc in the EB-5 marketplace and potentially stifle projects that might have otherwise created jobs. More predictability regarding the length of validity of TEA designations would vastly improve decision making at the initial planning stages, and ameliorate one aspect of the challenging task of marketing an EB-5 project. This would also lead to a greater comfort level for investors making the important, potentially life-changing decision to invest in an EB-5 project.

While several of the draft legislative bills over the last few years provided language to lock-in a TEA determination for a set period of time, the proposed DHS rules do not address this issue.

CITIES AND TOWNS WITH A POPULATION OF 20,000 OR MORE

DHS proposes to allow any city or town with high unemployment and a population of 20,000 or more to qualify as a TEA. Currently, TEA designations are not available at the city or town level, unless a state designates the city or town as a TEA and provides evidence of such designation to a prospective EB-5 investor for submission with Form I-526.

While investors would no longer have to obtain a state letter for locations that are within a city that qualifies on its own, this rule would have little to no impact overall. Currently, projects located in high-unemployment cities/towns are virtually always easily certified by the states. As an economist who has analyzed hundreds of sites for TEA-eligibility, I

have not come across a state that would refuse to certify a location in a city that qualifies as a high-unemployment TEA in its entirety.

RURAL AREA DEFINITION

DHS is also proposing to amend the definition of a “rural area” to mean any area other than an area within a metropolitan statistical area (as designated by the Office of Management and Budget (OMB)) or within the outer boundary of any city or town having a population of 20,000 or more based on the most recent decennial census of the United States.

The proposed DHS rules would not impact “rural areas”, as the above is strictly a clarification of the existing language defining a “rural area”, and is meant to clarify that “consistent with statute, that qualification as a rural area is based on data from the most recent decennial census of the United States”.

OTHER METHODOLOGIES CONSIDERED BY DHS

Commuting patterns: DHS also considered options based on a “commuter pattern” analysis, which

Would focus on defining a TEA as encompassing the area in which workers may live and be commuting from, rather than just where the investment is made and where the new commercial enterprise is principally doing business. According to DHS, “the ‘commuter pattern’ proposal was deemed too operationally burdensome to implement as it posed challenges in establishing standards to determine the relevant commuting area that would fairly account for variances across the country.”

The California model: DHS considered limiting TEA configurations to an area containing up to, but no more than, 12 contiguous census tracts, a method currently used by the state of California. However, DHS reasonably concluded that it was “not confident that this option is necessarily appropriate for nationwide application, as the limitation to 12 census tracts may be justifiable for reasons specific to California but may not be feasible on a national scale.”

Further extensions: DHS considered extending the cluster to census tracts beyond those directly adjacent to the project tract(s), but determined that doing so in some cases would include areas that are too far from the site of the proposed project. While this might

be true in some cases, DHS did not elaborate in great detail about consideration of this methodology, beyond the citing of a few studies in a footnote.

SUMMARY

The proposed DHS rule would significantly alter the way high-unemployment TEAs would be both calculated and designated. While transferring authority to designate high unemployment area TEAs from the states to DHS is of great concern to EB-5 stakeholders for the reasons discussed above, of even greater concern is the very restrictive proposal limiting the aggregation of census tracts, which could result in USCIS playing a heightened role in the decision-making process for developers in project site selection. In analyzing the potential impacts of the rule changes related to census tract aggregation, DHS notes that “for example, a regional center seeking to locate a project on one city block that would no longer qualify as a TEA may opt to locate the project on another block that could qualify as a TEA under the new rule”. This statement appears to reflect a lack of understanding of the complexities of bringing a development to fruition. Even if a developer could easily move a project, which is not typically the case, DHS does not seem to recognize that the viability of the project itself may be undermined by doing so.

While the main motivation for proposing a limit on census tract aggregation may be the desire to eliminate what it perceives as “gerrymandering,” the proposed DHS rules do not recognize employment creation that positively impacts workers commuting from areas outside the census tracts immediately adjacent to the project tract. Based on current EB-5 market realities, restricting high-unemployment TEAs to those few tracts immediately adjacent to the project tract will limit potential EB-5 projects that would otherwise positively impact nearby areas experiencing high unemployment and economic hardship. Unemployment is not uniform across a community, and the benefits of a more carefully considered USCIS EB-5 adjudication policy that allows for flexibility reflective of the significant variations in the concentration of high unemployment areas at the local level would seem to outweigh the additional potential operational burdens that might arise. ■