

Analyzing the Recent Trend of EB-5 Expedited Processing



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Time is of the essence, especially in EB-5 petition and application processing. Despite the Immigrant Investor Program Office's ("IPO's") increase in staff and the re-organization of its adjudication teams for more efficient processing in recent years, EB-5 adjudications remain undeservedly long. According to USCIS' September 3, 2018 website screenshot, it takes an average of about 20-26 months for I-526 adjudications, and 19.5-25.5 months for I-924 adjudications. One potential way to speed up EB-5 adjudications is to request "expedited processing" by USCIS.

Is Expedited Processing for Soon-To-Be Backlogged Countries Helpful?

Expedited processing is of particular interest these days for Indian, and some South Korean, and possibly for Taiwan and Brazilian nationals looking to receive Form I-526 approvals before the U.S. Department of State ("DOS") imposes a Final Action Date (i.e. a Visa Bulletin cutoff date), which DOS has informally projected will occur by the Summer of 2019. There is a

possibility that, through expedited processing, an EB-5 beneficiary could slide through to immigrant visa processing before a Final Action Date falls in FY 2019. Individuals lawfully in the U.S. may also be able adjust status and get work and travel authorization during this time. For this reason, the possibility of expedited processing of an I-526 or I-924 has become a powerful marketing tool. It is therefore critical for immigrant investors, regional centers, and U.S. developers to understand how to qualify for such a benefit.

Expedite Criteria

USCIS has established national expedite criteria for all petitions and applications and will review all expedite requests on a case-by-case basis. Granted at USCIS' sole and absolute discretion, there is no such thing as a "guaranteed expedite" in U.S. immigration law. The burden is on the petitioner to demonstrate that one or more of the following expedite criteria have been met:

- Severe financial loss to company or person;
- Emergency situation;
- Humanitarian reasons;
- A non-profit organization whose request is in furtherance of the cultural and social interests of the United States;
- Department of Defense or national interest situation;
- USCIS error; or
- Compelling interest of USCIS

There are two keys to success with an expedite request: providing credible, objective data in support of the national expedite criterion claimed to be met, and pulling on the heartstrings of a USCIS adjudicator. Both strategies should be used to demonstrate the devastating effects that would occur to an EB-5 project or investor without the expedited processing. Letters of support from U.S. Representatives or Senators, interested state or federal agencies, and/or local economic development entities, can help establish a "national interest situation." Treating the expedite request as seriously as any other immigration filing with USCIS and establishing a solid record upon which USCIS can base its approval is essential. A detailed discussion of the severe financial loss, or the national interest being served, is necessary to create a "feel good" story for USCIS to approve the expedite request.

When considering what is a "compelling interest of USCIS," it may be beneficial to consider factors set forth in the non-precedent decision of *Matter of Mississippi Phosphate* (AAU July 21, 1992) regarding national goals for EB-2 National Interest Waiver applications, such as improving wages and working conditions of U.S. workers; improving education and training programs for U.S. children and underqualified workers; improving health care; providing more affordable housing for young and/or older, poorer U.S. residents; or improving the environment of the U.S. and making more productive use of natural resources.

It may be also advantageous to consider strategies for expedite requests submitted to USCIS for other U.S. immigration petitions and applications. For example, it can be common for U.S. companies sponsoring artists with extraordinary ability to request expedited processing on O-1 visa extensions when an upcoming tour event is scheduled shortly in the future, and the artists' presence is necessary for a show. Here, the severe financial loss to the U.S. company and its promoters and advertisers can be shown through the prospect of lost revenue; lost non-refundable deposits to secure a venue; and even the losses associated with the companies' goodwill and reputation. Likewise, a family-based petition or travel document application may be expedited to visit a seriously ill, close family relative before they pass away. Evidence in support can include hospital records or a doctor's letter on the relative's deteriorating health condition.

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On the other hand, expedite requests may not be viable or appropriate for typical pressures, issues, or harms that are common to every immigrant investor or EB-5 project due to extended adjudication processing times. This is even true for “direct” EB-5 investors who may need to be in the U.S. or obtain employment authorization to manage a new commercial enterprise supporting the I-526 petition. Many EB-5 related expedite requests appear to be based on assertions of “severe financial loss to a company or to an individual.” However, USCIS will not grant an expedite request based on hardship resulting from “self-imposed financing arrangements,” such as escrow or other agreements which specify that EB-5 capital may not be released until I-526 approval. Nevertheless, it can be possible to obtain expedited immigrant visa interviews for foreign nationals with children who would otherwise “age out.” Expedite requests are routinely denied without compelling evidence in support of USCIS’ official criteria.

No Promises

There is a big difference between “Premium Processing” and “Expedited Processing.” Under a premium processing service, USCIS guarantees 15 calendar day processing for certain employment-based petitions and applications. Premium Processing is not currently available for the EB-5 category. On the other hand, with an expedited processing request, the petitioner merely asks that USCIS adjudicate an immigration petition more quickly, and unlike Premium Processing, there is no requirement or standard for how quickly USCIS must act, either on the request itself or after granting expedited handling.

Additionally, USCIS is not required to approve an expedite request for an investor, even if USCIS had previously approved the expedite request made by either the regional center affiliated with that investor, or another immigrant investor in the same EB-5 project. Expedited processing of an I-924 application does not automatically entitle the investors to expedited handling of their I-526 petitions, although such treatment should be requested in an I-924 expedite request. Although anecdotes related to expedited processing for EB-5 cases appear to indicate that IPO has approved I-526 petitions in as few as nine (9) days after an expedite request is approved, or more typically within sixty (60) to one hundred twenty (120) days after filing, caution is advised: approvals of expedite requests merely get the case in front of IPO officer quicker; it will not speed up the

time of the actual adjudication. Additionally, many times, an IPO officer team of two (2) to three (3) individuals adjudicates the I-526 petitions associated with the same EB-5 project, and approvals can come in bundles, despite differences in filing dates. Regional centers and immigration attorneys should be conservative in making any representations or guarantees regarding the timing, applicability, and likely impact of an expedite request.

Making the Expedite Request

There are multiple ways to request expedited processing. For new EB-5 applications, the request can be submitted to USCIS with the Form I-526, Form I-829, or Form I-924 paper application. Note, however, that USCIS receives thousands of EB-5 petitions every fiscal quarter, and it is critical that employees working the in-take room can easily distinguish between cases that are to be processed normally and those associated with an expedite request. It is suggested that an expedite request be submitted as a separate package with a bright cover page and its own exhibit list, fastened to the EB-5 application. Additionally, once a receipt notice is received, attorneys should follow up with IPO via email to notify the office that an expedite request has been included with the application. Finally, attorneys are wise to diligently (but also reasonably) inquire with IPO about the status of the expedite request to ensure it isn’t lost among all the files.

For a pending EB-5 application or petition, an immigrant investor or Regional Center may write the Immigrant Investor Program Office at USCIS.ImmigrantInvestorProgram@uscis.dhs.gov, and include supporting evidence to demonstrate that at least one of the expedite criteria has been met.

In the event a Form I-526 or Form I-924 is denied, there is an avenue to file an appeal with the Administrative Appeals Office (“AAO”) within thirty (30) days of the denial. The AAO generally processes appeals in the order received but will review expedite requests on a case-by-case basis under the same criteria set forth by USCIS. To request expedited processing, the applicant is to mail or fax a written request to AAO, clearly stating on the cover letter that it is an “EXPEDITE REQUEST,” and including supporting evidence to demonstrate that at least one of the expedite criteria has been met. It also appears that expedited processing requests to the AAO can be made by contacting, via phone at 1-800-375-5283, the USCIS Contact Center, which will take the “service request” and forward it to the AAO. When making an

expedited processing request by phone, it will be necessary to state concisely the grounds for the requested expedite, so the request will progress beyond the call center screening stage.

Recent EB-5 Expedites

In the past couple of months, a couple of regional centers have seized the opportunity created by the impending EB-5 visa backlogs to market their previously-expedited project approvals. These successfully expedited projects are in geographic locations with substantially higher rates of enduring unemployment than required under current TEA definitions and have been found by USCIS to be “in the national interest.”

Support for applications for expedited processing include information related to the severe financial losses for a company if construction deadlines for the EB-5 project were not met for previously-scheduled, high-level international events, as well as the advancement of U.S. Small Business Administration goals to increase woman- or minority-owned businesses. This expedite request was also based on furtherance of the economic goals of the EB-5 Program and the establishment of a self-sustaining economic entity that would create and support the growth of other local businesses that enhances the development and well-being of the EB-5 project’s geographic area.

In another case, a regional center was able to demonstrate the significant benefit the EB-5 project would bring to an island community, such as improving public transportation utilities and increasing access to health care in rural or disadvantaged communities, through written support by relevant local and federal government agencies. It appears that political support from both parties can go a long way in convincing USCIS of the EB-5 project’s “national interest.”

Final Word

An EB-5 project’s qualification for expedited processing can be a key consideration for prospective investors when making an EB-5 investment decision. The EB-5 industry will likely see an increase in expedite requests due to the burdensome I-526 Petition waiting times and EB-5 visa backlogs. However, as expedited handling is viewed as a truly exceptional benefit, it is unlikely to be available to the vast majority of applicants, but instead reserved for the rare few who are able to differentiate themselves from the pack for exceptional reasons USCIS finds particularly compelling under the circumstances. ■