

EB-5 Visa Backlogs and How HR 1044 or Proposed USCIS Regulations Could Affect Them



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Regional centers and related EB-5 professionals are now well aware of the massive EB-5 visa backlog for China, the substantial one for Vietnam, the soon-to arrive EB-5 visa backlog for India, and the possibly modest future backlogs for a few other countries. At the same time, H.R. 1044's proposed removal of per-country caps or USCIS's proposed regulations could completely change everything. This article therefore explains how EB-5 visas are allocated generally, why they are so backlogged now for China and other countries, and how these backlogs could drastically change if Congress or the Administration move forward on pending proposals.

EB-5 Annual Quota of Approximately 10,000 Visas Per Year

Congress created the EB-5 visa category in 1990, and only Congress has the authority to set numerical limits on the issuance of all types of U.S. visas, including EB-5 immigrant visas. Although most in the industry use the shorthand figure of "10,000" visas per year, the actual annual quota for EB-5 is 9,940, plus or minus technical adjustments prescribed by various sections of the Immigration and Nationality Act (INA). This roughly 10,000-visa supply must be allocated among not only EB-5 investors but also their spouses and eligible children (unmarried and under 21 years of age), which means that the annual quota is enough only to cover a few thousand EB-5 investors per year.

How the U.S. Government Currently Allocates EB-5 Visas

The INA sets forth procedural rules governing the allocation of EB-5 visas, cascading as follows:

- **General Rule: First-In/First-Out (FIFO).** INA 202(a)(1)(A) states that with some exceptions, such as the 7% Per-Country Limit, visa allocation cannot discriminate based on a person's race, nationality, place of birth, etc. Effectively, this means that the general rule for EB-5 visa allocation is FIFO on a worldwide basis.
- **Exception: 7% Per-Country Limit.** INA 202(a)(2) provides that natives of any single foreign state under any of the family- and employment-based categories, including EB-5, may not exceed 7% in any fiscal year. Further, the INA generally makes "country" assignments on the basis of country of birth, not country of current citizenship or residence.
- **Override of 7% Per-Country Limit:** INA 202(a)(3) allows the 7% Per-Country Limit to be overridden to the extent that imposing the 7% Per-Country Limit would cause visa numbers to go unused during the quota period. By analogy, nobody cares who ate how many slices of pizza if slices still remain at the end of dinner.

In turn, the foregoing rules cause the INA to allocate EB-5 visas through the following four conceptual steps:

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1. Start with worldwide FIFO—i.e., starting with the oldest priority date (I-526 filing date) irrespective of country of birth—and continue until at least one country (e.g., China) hits its 7% Per-Country Limit of approximately 700 visas per fiscal year.
2. Temporarily block additional investors from any country that has already reached the 7% Per-Country Limit while still allowing all other countries' investors to continue to use visas. If a second or third or fourth, etc. country (e.g., Vietnam, India, etc.) also reaches the 7% Per-Country Limit, temporarily block investors from that country or those countries, too, but continue to allow everyone else to use visas.
3. Once the number of “leftover” visas is known or can be predicted, allocate any “leftover” visas on a worldwide FIFO basis until the annual quota of approximately 9,940 EB-5 visas is completely used. Under current realities, this step allows the longest-waiting applicants from China to use several thousand EB-5 visas every year while the 7% Per-Country Limit restricts each other country to only approximately 700 visas per country per year.
4. Stop allocating visas when the annual quota is reached and leave everyone without an immigrant visa standing in line on a worldwide FIFO basis until the next fiscal year arrives.

Relative Lengths of Existing and Potential EB-5 Visa Backlogs

The table below summarizes the currently estimated waiting times, according to Charles Oppenheim, Chief of the Visa Control and Reporting Division of the U.S. Department of State, who publicly provided these numbers at the 2018 AILA & IIUSA EB-5 Industry Forum in Chicago on October 30, 2018. The

first two columns are self-explanatory, the third column was calculated by the authors, and the final column provides Mr. Oppenheim's best estimates with respect to essentially the following question:

*“If an investor from X country invested **today** (most recently as of October 30, 2018), how long would it take for that investor to obtain conditional immigrant status?”*

Visa Allocation Over the Next Decade or So if Laws Do Not Change

Procedurally, if no laws change, EB-5 visas will be allocated as shown below for roughly the next decade or so. Eventually, Vietnam and then India will begin to share “leftovers” with China, but before then all countries other than China will remain limited to approximately 700 EB-5 visas per year.

Potential Impact of H.R. 1044 Becoming Law

On February 7, 2019, Reps. Zoe Lofgren (D-CA-19) and Ken Buck (R-CO-4) introduced H.R. 1044, the “Fairness for High-Skilled Immigrants Act of 2019” in the House of Representatives. With respect to the EB-5 program, the bill proposes to eliminate the per-country numerical limit for employment-based immigrants, effective October 1, 2019. Because approximately 50,000 currently projected

Chinese EB-5 visa applicants have older priority dates than those of investors from elsewhere in the world, the enactment of H.R. 1044 would effectively ensure approximately 5 years of nearly exclusively Chinese investors at the front of the EB-5 visa line while investors from the rest of the world wait to get to the front of the line.

Thereafter, visas would be allocated to a mix of investors from China, Vietnam, and India (the top three countries for EB-5 demand presently), followed finally by a mix of investors from other countries based on priority dates. Eventually, a truly diverse worldwide FIFO line would exist consisting of a mix of investors determined primarily by each family's willingness to withstand whatever the worldwide backlog is at any given time. Preliminary analysis of Lee Li of IIUSA is that the initial worldwide backlog for new EB-5 investors upon passage of H.R. 1044 would be about 9 years.

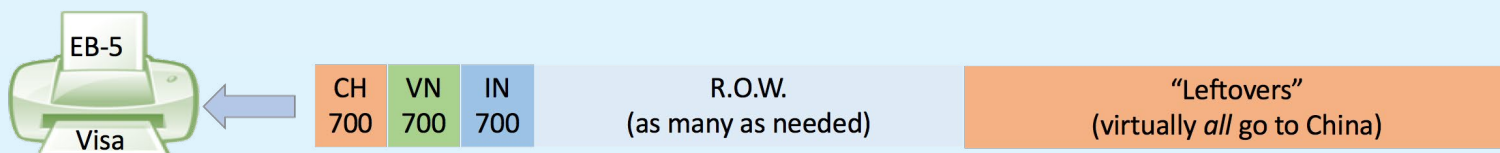
Practically, passage of H.R. 1044 would ensure that regional centers would have substantial difficulty raising new money from countries other than China for several years or more, unless or until something else changes, such as:

- Congress enacts a law specifically increasing the visa numbers available to the EB-5 category.

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Foreign State of Chargeability	Estimated Grand Total of Immigrant Visas Needed for All Principals and Derivatives Inherent in an I-526 Petition Already Filed	Percentage of Worldwide Total Needed by Each Country (rounded)	Approximate Number of Years Needed for a New Investor to Obtain a Conditional Green Card
China - Mainland born	52,828	76.5%	14 years
Vietnam	5,008	7.3%	7.2 years
India	4,014	5.8%	5.7 years
South Korea	1,513	2.2%	2.2 years
China - Taiwan born	1,162	1.7%	1.7 years
Brazil	1,010	1.5%	1.5 years
Rest of World (R.O.W.)	3,525	5.1%	N/A
Total Worldwide Demand	69,060	100%	N/A

Current EB-5 Visa Allocation During One Fiscal Year



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- A court rules in favor of the plaintiffs in the class action case that Ira Kurzban and his partners have filed in *Feng Wang, et al. v. Michael R. Pompeo*, Civil Action No. 18-1732 (TSC) (D.C. Cir. filed 07/25/2018), which argues that the U.S. Department of State should have—from day one—been allocating an EB-5 visa only to the principal investor and allowing derivatives to complete their green card process without the need for an EB-5 visa number.
- The worldwide line shortens enough for new investors to want to invest again.

For the three top EB-5 markets of China, Vietnam, and India, passage of H.R. 1044 would likely impact each market differently. With respect to China, passage of H.R. 1044 would create a cascade of benefits. Cutting the wait time for new investors in that market from the currently projected 14 years to the potentially projected 9 years would by itself create hope in that market, according to recent

discussions with agents there. Also, increasing the expected worldwide wait times from 0 years to 9 years would dampen worldwide demand, which in turn would increase the number of “leftover” visas available to Chinese investors each year. Finally, additional “leftover” visas would further reduce expected wait times for all Chinese investors and ultimately revive demand in that market. Vietnam going from the currently estimated 7.2 years to the potential 9 years would likely further weaken that already backlogged market.

The likely impact on the Indian market is much more complicated by goose-gander impacts on EB-2/EB-3 and EB-5. That is, by simultaneously lengthening the wait period for Indian nationals in EB-5 from the estimated 5.7 years to the projected 9 years while shortening the wait period for Indian nationals in EB-2 and EB-3, H.R. 1044, if passed, would cause Indian nationals who are already working in the United States to carefully weigh whether pursuing EB-5 remains a reasonable means of bypassing the excruciatingly long EB-2 and EB-3 lines. The overall Indian EB-5 market is quite diverse, though, making predictions of ultimate impact of H.R. 1044 passage more difficult.

regulations to the Office of Management and Budget (OMB), which effectively means that the proposed regulations could become law anywhere from a few weeks to never, depending solely on the desires of the Administration. Like the potential passage of H.R. 1044, the administratively proposed 270% increase in the minimum investment requirement, if enacted, would yield more “leftover” EB-5 visas each year, which could help all existing investors from currently or soon to be backlogged countries, such as China, Vietnam, and India, but would otherwise substantially drive down worldwide interest in EB-5 generally.

Practical Issues for Regional Centers

As with all legislative or regulatory proposals, H.R. 1044 and the currently proposed regulations may or may not become law. Regional centers and affiliated professionals should nonetheless prepare for the possible negative impact such changes could have on their operations and ongoing projects.

Secondarily, with respect to existing EB-5 visa backlogs, the various recent analyses by Charles Oppenheim of the Department of State, Lee Li of IIUSA, and others show that the Visa Bulletin by itself cannot effectively predict future waiting times for families considering a new investment in EB-5. Regional centers and issuers of the underlying securities might therefore want to consider whether disclosures mentioning potential wait times based on what the Visa Bulletin currently shows are sufficiently accurate. Similarly, the mere possibility of H.R. 1044 eventually passing significantly raises the risk of substantial negative future impact on investors from all countries other than China—even if those countries do not currently face a backlog. Technically, the potential regulatory increase of the minimum investment amount from \$500,000 to \$1.35 million is somewhat different in that it creates primarily a pre-investment/pre-filing risk, whereas the potential passage of H.R. 1044 also creates a potential post-investment/post-filing risk for investors.

Conclusion

Current EB-5 visa backlogs already reduce investment and job creation in the United States. Potential legislative or regulatory changes could drastically affect regional centers, projects, and existing and future investors. The entire industry must therefore continue to advocate for positive change on behalf of EB-5 investors and the U.S. workers who directly benefit from the industry's efforts. ■

Of course, exploding the worldwide wait time from 0 years to 9 years would likely implode the worldwide EB-5 market, which is a serious industry concern.

Potential Impact of USCIS's Proposed Regulations Becoming Law

In January 2017, the Department of Homeland Security (DHS) proposed to amend USCIS's EB-5 regulations, including, among other things, increasing the minimum EB-5 investment from \$500,000 to \$1.35 million. Most recently, on February 22, 2019, DHS forwarded the proposed

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