Member Perspective: EB-5 Implications from IIUSA Conference Leading up to November 21 Effective Date of Regulations

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I would like to clear up a few things from the IIUSA meeting in Seattle this week, with hope this helps someone take a better course of action than they might have otherwise in a critical moment as we dash to the end of the original era and into the new regulations taking effect on November 21, 2019.[2]

Important Note: I said something totally wrong in my panel on "Busted Deals," and I provide correction in the first section (and a footnote) below.

Re-Filings to Fix a Mess Using New Priority Date Retention

One of the really unfair phenomena in EB-5 is that an investor can get left in the cold if something adverse happens to his project after I-526 filing: the offering documents is found to contain an impermissible redemption clause or debt arrangement, the project never gets off the ground for lack of needed permits, funding, etc.; the project changes materially; the sponsoring regional center becomes terminated; or the organizers spend the capital inappropriately. If these happen before the investor becomes admitted to conditional permanent residence, by USCIS policy the investor is subject to denial or revocation of his I-526 petition. The investor always has been able to cure by filing a new I-526 about investment in the same project (for instance, with the impermissible redemption clause removed, or reflecting the material change, or sponsored by a different regional center) perhaps with no additional investment, or for a different project with a new investment (which might come in part or all from a refund from the first project), but the new I-526 petition has established a new place in an increasingly long queue for visa numbers.

The new regulation gives rise to an opportunity for a certain subset of such adversely affected investors to take action to fix their problem without losing their place in the visa queue. If the investor has received I-526 approval and has not yet used it to enter the U.S. as a conditional

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[2] For a previous blog first explaining the new regulations, see https://iiusa.org/blog/wp-content/uploads/2019/07/IIUSA-Member-Analysis-The-Rush-is-On.pdf.

resident, and he files a new petition ***on or after November 21***,[3] he can retain the original "priority date" (the place in the visa queue marked by the first I-526 filing) as long as the initial I-526 was not in fact ineligible at the time of filing. The new petition filed after November 21 is subject to the regulation's increased minimum investment (generally $1.8 million, and $900,000 in a Targeted Employment Area) and restrictions on TEA eligibility for use of the $900,000 level. Thus, to fix a problem without losing one's place in the visa queue, the investor would need to invest at least another $400,000 even if the project fits new narrower TEA rules. If the new I-526 involves staying in the original new commercial enterprise, the investor might be able to just add in another $400,000, as USCIS Investor Program Office Director Sarah Kendall mentioned in her September 19, 2019 listening session introductory speech. If the fix is through investment in a new NCE, it appears that the investor must invest a full amount: either $900,000 in a "new TEA" or otherwise $1.8 million, although some of that might be recovered from the initial investment.

Unfortunately, this priority date retention does not specifically protect the investor's children from "aging out" of derivative eligibility, and the Child Status Protection Act calculation of the child's age will be the child's absolute age minus the USCIS processing time of the later I-526 petition as of the date a visa number becomes available, but at least a visa number will be available earlier due to priority date retention.

Visa Number Usage

The State Department's Charlie Oppenheim once again helpfully made his projections on visa wait times. But with the new regulation now about to be in effect, his assumptions about future use have meaningful implications for mainland China-born investors. He assumed that there would be only 3,500 visa numbers per year available for China, which he derived from patterns of 6,500 per year use by the "rest of world" who get to go in front of Chinese investors up to 700 per country per year. But with the new regulation imposing higher minimum investment and narrower TEAs for the $900,000 level, it seems likely that starting on November 21, 2019 EB-5 filings from worldwide origins will decrease substantially, especially after the current frenzy of filings leading up to November 21, 2019 at lower investment levels.

Let's assume that the "other than China" will produce filings to use only 1,000 visa numbers per year going forward from November 21. Of course, there will be a few years in which the investors already in the lengthy I-526 adjudication pipeline will get approved and keep using perhaps the 6,000 projected level, but after that there will be far less use by other than China, making it possible for the 50,000 or so China-born investors and family to take nearly all of the annual quota, and the result could be that an investor born in mainland China investing today will not take 16.2 years to

[3] In the panel I moderated concerning "Busted Deals," I erroneously stated that the provision of the regulation on priority date retention took effect before Nov. 21. Upon further review, I find that the regulation's preamble says that it takes effect only for new I-526 petitions filed on or after November 21. I sincerely apologize for getting anyone's hopes up for a less expensive solution to their problems than is available. Nevertheless, an investor who does not have another $400,000 or more to add to the original investment might be able to file a new I-526 before November 21, 2019 with no new investment and plan to challenge in court USCIS' position that the priority date retention rule is not fully retroactive, perhaps under the Equal Protection Clause of the Constitution. The cost to preserve this challenge would be only the $3,675 and limited attorney fees.

get a visa but maybe 10 years, and the waits would get shorter and shorter for investors filing from now into the future.

It seems that this would not affect investors from Vietnam and India so much, because even if the rest of the world's usage drops, the earlier-filed Chinese investors will go before the India and Vietnam investors over 700 per year. So Mr. Oppenheim's predictions for Vietnam and India are likely to be fairly accurate even if new EB-5 filings go down in 2020 and beyond.

Partial investment before November 21

I have seen some post-conference blogs and emails suggesting that, as a result of comments made by IPO Director Sarah Kendall at the IIUSA conference mentioning the possibility of "partial investment," it is totally fine for investors to put up part of the required $500,000 capital with some kind of agreement to put up the rest later, file the I-526 before November 21, 2019, and invest the rest of the $500,000 capital after November 21. That is wishful thinking, and it is fraught with risk of I-526 denial 5 years from now when USCIS gets around to adjudicating the petition. At that point the only opportunity for cure will be to refile after investing the rest of the $900,000 or $1,800,000 required (depending on whether the project fits the new TEA requirements), assuming the NCE and project still could make use of such additional capital, but losing the place in the visa queue and increasing risks of age out of children.

Here is the question that Ms. Kendall was responding to, submitted through IIUSA:

> We anticipate that in some instances investors will be unable to complete a full transfer of the $500,000 or $1,000,000 investment before filing their I-526 petitions before the November 21, 2019 effective date. Please confirm that as long as these I-526 petitions are filed before the effective date, they are still eligible for adjudication under the current regulations, including current investment amounts. We note that the statute, regulations, and USCIS policy permit investors to be “actively in the process of investing” the required capital. Please further confirm that because such cases will be adjudicated under the rules in place at the time of filing, that as long as the investment area was a TEA at the time of investment or filing, the required investment amount in these scenarios will remain at the levels required under the current regulations.

Here are my *notes boiling down* what Ms. Kendall said at the meeting responding to that question: "Partial investment before 11/21 and still actively in process of investing the rest must show *actual commitment* of the required capital, identifying the capital and source and showing that investor is actively in process, such as escrow (no other example). Must be eligible at time of filing."

I note that the preamble to the new regulations only mentioned placing capital in escrow as an example of being "in the process of investing," which the statute and regulations technically recognize. The fact that neither the regulation nor Ms. Kendall mentioned partial payment as qualifying suggests to me that USCIS is not comfortable with approving such arrangements and will not approve them. If that were the case, then why didn't Ms. Kendall just say that? I do not know.

I do know that USCIS has recognized, in effect, one other method of being "in the process of investment," in *Matter of Hsiung*, 22 I&N Dec. 201 (AAO 1998), one of the four "precedent decisions designated by the Attorney General in the late 1990s when legacy INS was tightening up its EB-5 interpretations. In *Matter of Hsiung*, the legacy INS Administrative Appeals Unit decided that an investor can be approved if he placed less than the required minimum of cash in the NCE but agreed with the NCE for the rest in the form of a promissory note to the NCE secured by assets owned by the investor; the assets are specifically identified as securing the note; the security interests in the note are perfected in the jurisdiction in which the assets are located; the assets are fully amenable to seizure by a U.S. note holder, and the assets have a fair market value exceeding the amount of the note taking into account the assets' value, their amenability to seizure, and the present value of the note.

I cannot say that escrow and the arrangements in *Matter of Hsiung* are the only ones that could qualify as being qualified, and I guess neither could Sarah Kendall, but I cannot say that anything else *will* be found to qualify, and I do believe that anything else is at serious risk of denial one day.