Member Perspective: USCIS Policy Manual Changes to Implement EB-5 Modernization Regulation

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On November 6, 2019, USCIS updated its Policy Manual to incorporate changes made by the EB-5 Immigrant Investor Program Modernization Final Rule, published on July 24, 2019, and effective November 21, 2019, available at 84 FR 35750 (July 24, 2019). Unfortunately, USCIS chooses to publish only extremely limited summaries about Policy Manual changes and does not publish any "redlines" showing exactly what changes it made. Luckily, I had made a copy of the latest previous version of the relevant sections of the Policy Manual and can share the results of an electronic comparison. The changes are worth reviewing but are not particularly elucidating.

USCIS made numerous changes to Policy Manual Volume 6 Part G concerning Immigrant Investors under the EB-5 program.

Of course, in Chapter 1 and in Chapter 2, section A.3, USCIS adds a summary of the new "modernization" regulation's increases to the minimum investment amounts of $900,000 and $1,800,000, mentioning future increases. The language is easily spotted and contains nothing unexpected, so I don't quote it here.

USCIS has changed all references from "Alien Entrepreneur" to "Alien Investor" (even when referring to the name of Form I-526, which has not yet so changed) and from "foreign national" to "immigrant investor."

In Chapter 2, Section A.5, concerning how a high unemployment TEA must be evidenced, USCIS made a few inconsequential language changes but added this:

- For petitions filed on or after November 21, 2019, either:
  - Unemployment data for the relevant MSA, specific county within an MSA, county in which a city or town with a population of 20,000 or more is located, or the city or town with a population of 20,000 or more which is outside an MSA;[54] or
  - A description of the boundaries and unemployment statistics that allows USCIS to make a case-specific designation as an area of high

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> unemployment.[55] The area must consist of the census tract or contiguous census tract(s) in which the new commercial enterprise is principally doing business, and may also include any or all census tracts directly adjacent to such census tract(s).[56] The immigrant investor must demonstrate that the weighted average of the unemployment rate for the subdivision (that is, the area comprised of multiple census tracts), based on the labor force employment measure for each census tract, is at least 150 percent of the national average unemployment rate.[57]
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> Acceptable data sources for calculating unemployment included 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).
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> 54. [^] See 84 FR 35750, 35809 (PDF) (July 24, 2019) (to be codified at 8 CFR 204.6(j)(6)(ii)(A)).
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> 55. [^] USCIS makes designations as part of the petition adjudication and does not issue separate designation notices. See 84 FR 35750, 35809 (PDF) (July 24, 2019) (to be codified at 8 CFR 204.6(j)(6)(ii)(A)).
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> 56. [^] See 84 FR 35750, 35809 (PDF) (July 24, 2019) (to be codified at 8 CFR 204.6(i)). See 84 FR 35750, 35809 (PDF) (July 24, 2019) (to be codified at 8 CFR 204.6(j)(6(ii)(B)).
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> 57. [^] See 84 FR 35750, 35809 (PDF) (July 24, 2019) (to be codified at 8 CFR 204.6(i)).

Given that NCEs no longer can get USCIS adjudication of TEA designations before going to the market for investors, one might have hoped for more absolute clarity from USCIS about the methodology and data sets that are permissible in claiming TEAs. In particular, it would have been helpful for USCIS to clarify whether the touching of the project census tract and another census tract at a single point counts as "directly adjacent" and whether annual data is sufficient for comparisons of local and national rates.

USCIS also clarifies, of course, that "A state government's designation of a geographic or political subdivision within its boundaries as a TEA will not satisfy evidentiary requirements for petitions filed on or after November 21, 2019."

In Chapter 2 section C.5, USCIS deleted a sentence and rewrote the remaining text as follows. The apparent distinction between the standards before and after Nov. 21, 2019 seems arbitrary in that the regulation only sought to clarify the intent of a law enacted in 2002 with no legislative changes since then. Nevertheless, USCIS has not been taking a harsh position on essentially passive LLC memberships to date and is not expected suddenly to start taking a different approach in light of this PM change.

5. Engagement in Management of New Commercial Enterprise

The immigrant investor must be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial responsibility or through policy formulation.[75] ~~It is not enough that the immigrant investor maintain a purely passive role concerning his or her investment.~~

To show that the immigrant investor is or will be engaged in the exercise of day-to-day managerial control or policy formulation, the immigrant investor must submit:

- A statement of the position title that the immigrant investor has or will have in the new enterprise and a complete description of the position's duties;[76]
- Evidence that the immigrant investor is a corporate officer or a member of the corporate board of directors;[77]
- For petitions filed before November 21, 2019, if the new enterprise is a partnership, either limited or general, evidence that the immigrant investor is engaged in either direct management or policymaking activities. The immigrant investor is sufficiently engaged in the management of the new commercial enterprise if the investor is a limited partner and the limited partnership agreement provides the investor with certain rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act;[78] or
- For petitions filed on or after November 21, 2019, evidence that the petitioner is engaged in policymaking activities, including evidence that the petitioner is an equity holder in the new commercial enterprise and the organizational documents of the new commercial enterprise provide the petitioner with certain rights, powers, and duties normally granted to equity holders of the new commercial enterprise's type of entity in the jurisdiction in which the new commercial enterprise is organized.[79]

78. [^] See 8 CFR 204.6(j)(5)(iii) (PDF) (as in effect before November 21, 2019). As explained in the EB-5 Immigrant Investor Program Modernization Notice of Proposed Rulemaking (NPRM), 82 FR 4738 (PDF) (Jan. 13, 2017), clarifications were necessary to conform this clause—as well as other parts of 8 CFR 204.6(j)(5)—with amendments made by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107-273 (PDF) (November 2, 2002) to INA 203(b)(5). In particular, the amendment made by Public Law 107-273 to INA 203(b)(5) expressly permitting limited partnerships as new commercial enterprises was not intended to restrict investor choice with respect to the type of entity used in investment structuring, but was intended to permit flexibility in the administration of the EB-5 program with respect to the use of different entity types (including the longstanding use of limited liability companies with structures analogous to limited partnerships). Accordingly, 8 CFR 204.6(j)(5) was revised to clarify and conform existing regulations with the statutory requirements of INA 203(b)(5), as amended by Public 107-273.

79. [^] See 84 FR 35750, 35809 (PDF) (July 24, 2019) (to be codified at 8 CFR 204.6(j)(5)(iii)).

With no consequence, USCIS moved to footnote 97 what had been in text: "USCIS recognizes any reasonable agreement made among immigrant investors in regard to the identification and allocation of qualifying positions. See 8 CFR 204.6(g)(2)."

USCIS added this at the end of Chapter 2:

> **F. Priority Dates**
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> Under certain circumstances, the petitioner may use the priority date of a previously approved Immigrant Petition by Alien Investor (Form I-526) for purposes of a subsequent Form I-526 filed on or after November 21, 2019, for which the petitioner qualifies.[107]
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> 107. [^] See 84 FR 35750, 35808 (PDF) (July 24, 2019) (to be codified at 8 CFR 204.6(d)). For more information, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability, Subsection 3, Priority Dates [7 USCIS-PM A.6(C)(3)]. For general information on limited visa availability, see Volume 7, Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 6, Adjudicative Review, Section C, Verify Visa Availability, Subsection 2, Numerically Limited Visa Availability [7 USCIS-PM A.6(C)(2)].

At the end of Chapter 4 concerning material change before admission as a conditional resident, USCIS added this language:

> For petitions filed before November 21, 2019, amendments or supplements to any offering necessary to maintain compliance with applicable securities laws based on regulatory changes effective on November 21, 2019, must not independently result in denial or revocation of a petition, provided that the petitioner:
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> Was eligible for classification as an employment-based 5th preference immigrant[10] at the time the petition was filed; and
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> Is currently eligible for classification as an employment-based 5th preference immigrant, including having no right to withdraw or rescind the investment or commitment to invest into such offering, at the time of adjudication of the petition.[11]
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> 10. [^] See INA 203(b)(5).
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> 11. [^] See 84 FR 35750, 35809 (PDF) (July 24, 2019) (to be codified at 8 CFR 204.6(n)).

And in Chapter 5 concerning material change at I-829 adjudication USCIS added this:

> For petitions filed before November 21, 2019, amendments or supplements to any offering necessary to maintain compliance with applicable securities laws based upon regulatory changes effective on November 21, 2019, may not be considered material.[11]

To carry out the regulation's provisions allowing retention of priority dates for certain EB-5 investors, USCIS also made changes to Volume 7 concerning adjustment of status adjudications.

At Vol. 7A Chapter 6, Section C.3, USCIS added,

> Similarly, an applicant with an approved Form I-526 filed on or after November 21, 2019, is entitled to the priority date of a previously approved 5th preference immigrant investor petition, including petitions whose approval was revoked on grounds other than those set forth below.[29]
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> 29. [^] See 84 FR 35750, 35808 (PDF) (July 24, 2019) (to be codified at 8 CFR 204.6(d)).
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> *For Employment-Based 5th Preference Cases*
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> As discussed above, the priority date may not be retained or conferred to any subsequently filed 5th preference immigrant petition if the alien was lawfully admitted to the United States for permanent residence using the priority date of the earlier approved petition or if USCIS revoked the approval of that petition based on a material error. Unique to the 5th preference, revocation of an approved petition for fraud or willful misrepresentation of a material fact is only a bar to priority date retention if the petitioner engaged in fraud or willfully misrepresented a material fact.[33]

The last sentence above resulted from USCIS' attempt to accept comments during the regulatory process that the exceptions to priority date retention should not punish innocent investors. It will be interesting to see how USCIS adjudicates priority date retention requests when the original petition was the subject of fraud about the project made by the NCE and/or JCE but not by the investor. Under this language and the regulation, it would seem that priority date retention will be available for the innocent investor, but it remains to be seen whether USCIS will seek to cancel the import of this distinction by asserting that the approval nevertheless was the result of "material error" relating to the facts that were misrepresented by other than the investor.