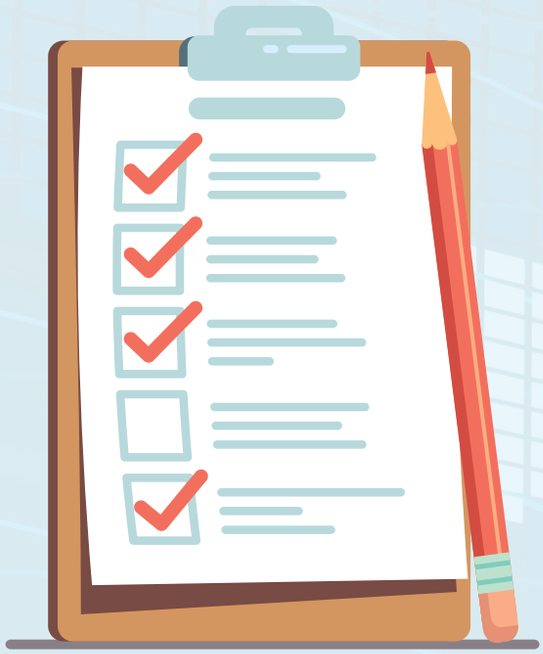

TEA Designations:

Final Rule Leaves Many Questions and Risks

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The final rule for The EB-5 Immigrant Investor Program Modernization regulation was published by Department of Homeland Security (DHS) in the Federal Register on July 24, 2019 ("Final Rule"),[1] and will go into effect on November 21, 2019. Besides a few minor clarifications, The Final Rule language related to TEAs does not differ much from the Notice of Proposed Rulemaking ("Proposed Rule") that DHS released more than two years ago in January 2017. So, by now most EB-5 industry stakeholders are familiar with the following main TEA-related changes in the Final Rule:

(1) Drastically limits census tract combination for high-unemployment TEAs: census tract aggregation will be limited to the project tract(s) plus some or all of the tracts that are "directly adjacent" to the project tract (i.e. a TEA can only consist of the tracts that touch the project tract for aggregation purposes). While this article will not go into great detail on this topic of the new census tract aggregation restrictions, please see the prior Regional Center Business Journal article "TEA Designations – Proposed DHS Rule Would Significantly Alter the Process" which covers the topic in-depth (and is still relevant as the Final Rule does not differ from the Proposed Rule, besides a few minor language clarifications). DHS also will no longer allow census block groups to be used (only census tracts), which also significantly reduces the amount of possible TEAs.

(2) Significant increase in investment levels: Minimum investment in a TEA will be $900,000 while minimum investment outside of a TEA will be $1,800,000.

(3) DHS eliminates the ability of states to designate high-unemployment areas, and instead, DHS will make such designations. Investors will be required to provide sufficient evidence demonstrating the location would qualify for the reduced investment threshold.

While the main takeaways above have understandably garnered most of the attention of the industry, a deeper look at the TEA-related language in the Final Rule reveals many unresolved questions and the need for further clarity from DHS on the following topics:

(1) now that the onus is on the investor to prove the location is a TEA (instead of just providing a state issued letter as under current TEA standards), what data/methodologies must be used for unemployment rate calculations at the census tract level?

(2) how and when do you know if your TEA has been approved?

This article will discuss these topics along with a few other takeaways of interest to stakeholders related to the Final Rule.

What data must be used for unemployment rate calculations under the new standards?

As mentioned previously, it will be the responsibility of the investor to provide sufficient evidence demonstrating the project location qualifies as a TEA (under the restrictions of only using any combination of tracts "Directly Adjacent" to the project). Unfortunately, DHS states it **will not** provide one specific set of data that petitioners can use to demonstrate TEA eligibility. The petitioner must provide evidence that the area qualifies as a high unemployment TEA. First, we will discuss what DHS does state about accepted data, and then discuss what it does not clarify and the resulting questions left unanswered.

DHS does state that unemployment data provided by the U.S. Census Bureau's American Community Survey (ACS) and the Bureau of Labor (BLS) Statistics qualify as reliable and verifiable data for petitioners to use. BLS publishes more recent data than ACS, but only collects data down to a city/town level (including the county-level data which is part of the census-share calculation currently used

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1 https://www.federalregister.gov/d/2019-15000/p-8

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in most TEA calculations). ACS publishes more outdated data than BLS, but collects data for smaller geographic units than BLS (such as at the census tract level which are utilized in most TEA designations). The language from the preamble in the Final Rule related to accepting BLS and ACS data is as follows:

DHS believes that the unemployment data provided to the public by both ACS and BLS qualify as reliable and verifiable data for petitioners to reference in order to carry their evidentiary burden.

DHS does not provide much detail or clarifications beyond that. The potentially positive takeaway is that this lack of clarity may provide for some flexibility on the methodology that can be used to satisfy the new TEA standards. Most states under the current standards utilize "census-share methodology" (which utilizes a combination of ACS and BLS data) for TEA calculations at the census tract level, so it was not unreasonable to think that DHS might specifically state that census-share must be used. Instead, DHS states the following:

Although DHS recognizes that there are benefits to limiting the unemployment statistics to a single dataset, the final rule does not provide one specific set of data from which petitioners can draw to demonstrate their investment is being made into a TEA because currently no one dataset is perfect for every scenario. Thus, the burden is on the petitioner to provide DHS with evidence documenting that the area in which the petitioner has invested is a high unemployment area, and such evidence should be reliable and verifiable.

So, while census-share should be perfectly acceptable to DHS, as it uses a combination of both datasets mentioned above (ACS and BLS), and that is what almost all states use to satisfy the current standards, what other potential methodologies could be utilized? It appears that DHS will also accept an "ACS-only" analysis, as the following language in the preamble of the Final Rule appears to specifically refer to an ACS data only scenario:

If petitioners rely on ACS data to determine the unemployment rate for the requested TEA, they should also rely on ACS data to determine the national unemployment rate [sic] to which the TEA is compared.

The language above would leave the reader to believe DHS will accept different methodologies that would utilize different national unemployment rates for comparison. Accordingly, a census-share calculation does need to be compared to a national unemployment standard that is different from an ACS-only calculation.

Census-share versus ACS-only

What is the difference between "census-share" and "ACS-only" methodologies? Census-share utilizes ACS data at the tract level (the most current ACS data available utilizes a five-year average of 2013-2017), and then "trends" the slightly outdated ACS data at the tract level forward by using more recent BLS data to arrive at a more current estimate of census tract unemployment. An ACS-only approach does not take this extra step to "trend" the data forward. As such, an ACS-only approach would compare to a different 150% national threshold than if census-share was used (as DHS alludes to above). Depending on the project location, it might be more beneficial to utilize census-share, or it might be beneficial to use ACS-only (or it might not matter as both methodologies might work).

An ACS-only approach would have a different 150% national threshold for comparison as an ACS-only approach results in a more outdated result than census-share (which takes the extra "trending" step). As national unemployment rates have been steadily dropping over the last several years, census-share methodology based on the most recent data currently needs to meet a lower national unemployment rate threshold than ACS-only.

How does an ACS-only approach compare to census-share when looking at the data? Is one obviously more beneficial than the other for EB-5 purposes? The table below provides information on how many census tracts qualify as a single tract under each methodology. As a disclaimer, the results below do not take into the account the "directly adjacent" possibilities and so the information below does not encompass all the possibilities of how a census tract can qualify under the Final Rule. However, analyzing the single tracts that qualify on their own will give us insight to see if one methodology is clearly better than the other for finding TEA-eligible areas.

As the table demonstrates, the results are similar under each approach with approximately 21% of census tracts in Metropolitan Statistical Areas (MSAs) qualifying as a single tract (without needing any aggregation) using census-share methodology and 22% qualifying using an ACS-only approach. While the overall percentages are very close, the two methodologies do not completely overlap – which is potentially positive news for EB-5 stakeholders. Approximately 2,300 census tracts in MSAs (out of approximately 62,000) qualify under an ACS-only approach that do not qualify under census-share, and similarly approximately 1,900 census tracts that qualify under census-share do not qualify under an ACS-only approach. This lack of overlap leads to more potential qualifying TEAs under the Final Rule than if DHS had specifically mandated that just one method be used. As such, approximately 25% of all MSA census tracts qualify as a single tract under either census-share or ACS-only.

Methodology	150% Threshold	% of Census Tracts Qualifying as a Single Tract
Census-Share - (CY18)	5.9%	20.8%
ACS - Only (2013-17)	9.8%	21.5%
Qualifying under Census-Share or ACS-Only		24.5%

While this potential flexibility is a positive, the general lack of clarity in the Final Rule is problematic, especially because petitioners will not receive a firm DHS "answer" on the question of the TEA compliance until the I-526 is adjudicated (as discussed in more detail later). Some questions and issues due to this lack of clarity are discussed below (several of which were brought up by EB-5 practitioners on the *EB-5 Stakeholder Listening Session regarding the Final Rule* that was held by USCIS on September 9, 2019).

Will DHS actually accept either ACS-only or Census-Share methodologies? While our best interpretation of the Final Rule is that DHS will accept census-share or ACS-only, the Final Rule does not specifically state that.

How long is a TEA approval valid? (i.e. as the federal government releases new ACS and BLS data, when must the petitioner start using the newly released data?) Under the current standards, TEA letters are generally considered to be valid until the respective state starts using more recent data. Almost all states update TEA

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data once a year (typically around April/May when the calendar year BLS data is finalized). However, new ACS data at the census tract level is typically released in December (although the most recent release was delayed a few months due to the government shutdown). While suggested best practices would be to always use the most recent data available, it can be difficult to keep up with the schedule of the release of multiple datasets by the government. This can be especially problematic if a project has a "borderline" TEA that is just barely meeting the threshold based on the new requirements. Hopefully DHS will provide guidance related to this very important issue.

Are there other methodologies that can be considered besides ACS-only and census-share? If so, what are those methodologies? DHS states in the final rule that they have left things open-ended here in part because "states will utilize different methodologies than ACS and BLS". Almost all states utilize the same census-share methodology, so it is unclear what other methodologies the Final Rule is referring to.

If using census-share, does the analysis have to use a calendar year (CY) basis (as almost all states currently use), or would a rolling 12-month period be allowed? For some borderline TEAs, looking at different rolling 12-month periods might be more beneficial than utilizing a calendar year basis only, however the Final Rule provides no specifics on this topic.

Do vertex connections (i.e. census tracts that only touch "at a point") meet the "Directly Adjacent" requirement? While it seems likely that DHS would allow vertex connections (based on the vertex definition and since almost all states currently allow them), but it would be reassuring if they would explicitly state that they are accepted.

The ambiguity in the Final Rule regarding accepted data and methodologies has potentially huge implications, as petitioners will not receive a quick answer on whether the TEA has been accepted by DHS. This is discussed in further detail next.

The Final Rule DOES NOT establish a separate application or process for obtaining TEA designation from USCIS prior to filing the EB-5 immigrant petition and USCIS will not issue separate TEA designation letters for areas of high unemployment.

Due to adjudication processing times for EB-5 related petitions that are already exceedingly long, the possibility of DHS taking over TEA designation requests has long been of great concern for EB-5 stakeholders. Unfortunately, under the Final Rule, petitioners will have to wait until the I-526 is adjudicated to have a confirmation on if the TEA has been accepted by USCIS, as there will be no separate designation process for TEAs. The current posted I-526 processing times as of the date of this article are a lengthy 27.5 months to 46.5 months. As discussed previously, with so much ambiguity regarding the data and methodologies that can be accepted to meet the evidentiary burden for TEAs under the Final Rule, this could be a very nervous two years (or more) for project stakeholders as DHS reviews the TEA designation evidence with the I-526 to determine eligibility. Until DHS provides further clarity (assuming that happens), or the first I-526s under the Final Rule start being adjudicated (likely two years or more from now) the ambiguity will certainly cause marketing and other issues as investors decide whether or not to invest $900,000 in a project that might have some TEA uncertainty. Investors will no longer have the comfort of having a state-designated TEA letter before investing/filing, but will have to rely on a third-party report that attempts to meet the evidentiary burden. While this adds an additional risk factor for investors, it will also need to be addressed by attorneys in their EB-5 related documentation and communications. Investing $900,000 in a project without a good level of certainty that the project is TEA-qualifying is a legitimate risk for all EB-5 stakeholders to be concerned about. Due to the above it will be exceedingly crucial that supporting documentation included with each I-526 petition be done correctly by a practitioner experienced with TEA calculations.

How many current projects will be affected?

The Final Rule makes it much more difficult to obtain a TEA designation. From a sampling of TEA certifications from actual EB-5 projects, DHS estimates that only 54% of regional center projects in the sample would have been affected by the new TEA standards. Based on experience, this estimate appears low on the surface. For comparison, an IIUSA Policy Research Report prepared by Policy Analyst Lee Li estimated that approximately two-thirds of current projects would be affected and would have seen their minimum investment level jump significantly from $500,000 currently to $1,800,000 after November 21, 2019.

Best Practices and Summary

The DHS Final Rule will significantly alter the way high-unemployment TEAs are both calculated and designated. While the transferring of authority to designate high unemployment area TEAs from the states to DHS and the very restrictive limiting of the aggregation of census tracts are of great concern to EB-5 stakeholders, the industry must also be mindful of the lack of clarity and outstanding questions that remain.

As the industry adjusts, below are some potential Best Practices to consider:

(1) As independent evidence for a high unemployment TEA based on census tracts, provide a clearly detailed formal analysis demonstrating the data utilized to determine that the TEA qualifies based on the Final Rule (including direct citations from the Final Rule). Again, as the states will no longer be providing certification letters, it will be crucial that the analysis be clearly laid out and done correctly so a USCIS adjudicator has nothing to (reasonably) question.

(2) If the TEA qualifies under both census-share and ACS-only methodologies (if it qualifies under one methodology it is likely to qualify under the other as well), provide an analysis of both methodologies as independent evidence to USCIS. While it appears that utilizing only one of the methodologies above should be sufficient, providing DHS with both might provide an extra level of comfort.

(3) Utilize the latest and greatest data from ACS and/or BLS in the analysis. Be diligent in keeping up-to-date on when the government releases new data.

EB-5 stakeholders will have to make many adjustments based on the Final Rule. Adjusting to new market-based realities due to the increased minimum investment levels combined with other changes resulting from the Final rule will take time. Decreasing the number of unknowns will help everyone with this transition and so hopefully DHS will listen to the comments from the industry and will provide additional clarification to some or all of the questions raised in this article.