New TEA Rules:
Frequently Asked Questions

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EB-5 Immigrant Investor Program Modernization, the final rule published by the Department of Homeland Security (DHS) in the Federal Register on July 24, 2019 ("Final Rule"), went into effect on November 21, 2019.[1] Under the Final Rule, USCIS is no longer accepting Targeted Employment Area ("TEA") certifications from the individual states. Instead, USCIS is requiring that I-526 petitions contain evidence that a Project qualifies as a TEA and will review that evidence as part of I-526 adjudication.[2] Additionally, the Final Rule changed the requirements for qualification as a high-unemployment TEA. MSAs, counties, cities with a population greater than 20,000 and outside of an MSA, and census tracts can all qualify individually if their unemployment rate is at least 150% of the national unemployment rate.[3] A high-unemployment TEA may also consist of a combination of "directly adjacent" tracts, if the weighted average unemployment rate of the combined tracts is at least 150% of the national unemployment rate.

1 https://www.federalregister.gov/d/2019-15000/p-8 codified at 8 CFR 204.6(j)(6)(ii)(A).
2 https://www.federalregister.gov/documents/2019/07/24/2019-15000/eb-5-immigrant-investor-program-modernization
3 https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-2

Q: Since USCIS is no longer recognizing TEA letters provided by the states, how do I obtain a TEA certification?

A: Under the Final Rule, evidence that a Project site qualifies as a TEA must be submitted with each investor's I-526 petition and will be reviewed by USCIS as part of I-526 adjudication. USCIS will not be providing a separate process for reviewing TEA certifications. Under the Final Rule, TEA status will not be confirmed until the I-526 petition has been processed, and as of March 18, 2020, I-526 processing time is currently estimated to be between 33 and 50 months.[4]

Q: What evidence needs to be presented to USCIS to show that a Project site qualifies as a TEA?

A: The evidence submitted to USCIS as part of the I-526 petition must show that at the time of investment or I-526 filing, whichever came first, the Project site met the requirements for TEA qualification. The evidence should include the source of the data used to determine the labor statistics of the MSA, county, city, or census tract(s), the TEA unemployment threshold, a map showing

4 https://egov.uscis.gov/processing-times/

the project site and the county, city, or census tract(s) included in the TEA, the labor statistics (civilian labor force, employment, and unemployment, plus the unemployment rate) of the county, city, or census tract(s), and the weighted average unemployment rate of the combined census tracts if the TEA relies on census tract combination.

Q: How many tracts can I combine to create a TEA?

A: USCIS does not have a specific limit on the number of tracts that can be combined, but combination is limited to the project tract(s) and any or all "directly adjacent" tracts.[5]

Q: Are tracts that border each other only at the corner or cross bodies of water "directly adjacent"?
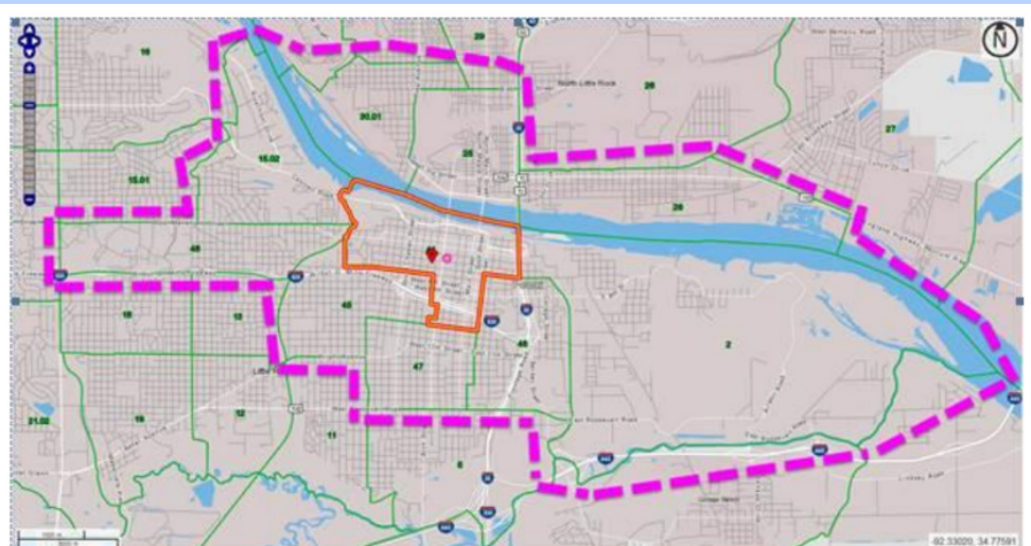
A: When USCIS published the Notice of Proposed Rulemaking (NPRM) on January 13, 2017,[6] they included a map (shown below) that demonstrated the meaning of "directly adjacent."[7] According to USCIS, all of the tracts within the dashed border are considered directly adjacent to the Project

5 https://www.federalregister.gov/d/2019-15000/p-115
6 https://www.federalregister.gov/d/2017-00447/p-1
7 https://www.federalregister.gov/d/2017-00447/p-195

Continued On Page 17

Continued From Page 16

tract (the tract with the thick orange border), including the tract to the northeast of the Project tract, which borders the Project tract only at the corner and all three tracts to the north of the Project tract, which border each by crossing a body of water.

The Final Rule[8] does not include a similar map, but since the "directly adjacent" language did not change significantly between the proposed rule and the Final Rule, it appears that USCIS will view tracts that touch only at the corner and tracts that border each other at bodies of water as "directly adjacent."

Q: What data can be used to determine the unemployment rate for census tracts?

A: The Final Rule did not specify what data sources must be used. Instead, it only requires that the data be "reliable and verifiable." The Final Rule also stated that unemployment data published by ACS and BLS qualify as reliable and verifiable data sources, so these two datasets can be used to provide evidence that a site qualifies as a TEA. Using data from ACS and BLS, there are two methods to determine the unemployment statistics of a census tract: the ACS-only method and the census-share method.[9] The ACS-only method relies only on the most recent data from the ACS 5-year estimates of labor statistics at the census tract level.[10] The census-share method combines labor force data from the ACS 5-year estimates of labor statistics at the census tract level with BLS's annual averages at the county level.[11] There is no BLS-only method for census tracts, because BLS does not publish labor force data at the census tract level. Most tracts that qualify as a TEA qualify under either the ACS-only method or the census-share method, but, under certain circumstances (for example the county unemployment rate improved at a faster rate than the national unemployment rate), tract(s) may only qualify under one of the methods.

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8 https://www.federalregister.gov/docu-ments/2019/07/24/2019-15000/eb-5-immigrant-investor-pro-gram-modernization
9 The census share method was generally accepted method for determining TEA qualification by states prior to the implementation of Final Rule.
10 U.S. Census Bureau, Employment Status for the Population 16 Years and Over ACS 5-year estimates. Data set available at https://data.census.gov/cedsci/.
11 Labor Force Data by County, 2018 Annual Averages. https://www.bls.gov/lau/laucnty18.txt

Q: Are there any datasets besides the ACS 5-year estimates and BLS annual averages that can be used as evidence that a Project site qualifies as a TEA?

A: Since USCIS only limited the datasets to those that are "reliable and verifiable," presumably they would accept datasets other than the ACS 5-year estimates and BLS annual averages as evidence that a Project site qualifies as a TEA. However, in order to protect investors, until we get feedback from USCIS in the form of I-526 adjudications or further public communications, the only safe datasets to use to determine TEA qualification are the ACS 5-year estimates and the BLS annual averages.

Q: When do the datasets get updated?

A: ACS data is updated in late December and BLS LAUS annual averages at the county-level are finalized in late April.

Q: When does TEA evidence need to be updated?

A: The timing of TEA letter data is a gray area. Under the old TEA rules, the census-share method was utilized by the majority of states, and states updated their data once a year, when the new BLS annual average data was finalized in April. Some states claimed that their certification letters were valid for a year (or sometimes longer), but in practice USCIS required TEA letters to be based on the most recent available data available as of the time of the investment or I-526 filing, whichever came first. So, TEA letters were generally considered to be valid from around April to April each year under the old rules. Under the new rules, it's unclear whether USCIS will continue to accept evidence based on the census-share method that is updated only in April when the new BLS data is released, or will require census-share data to be updated twice a year; once when the BLS data is released in April and again when ACS data is released in December. TEA qualification evidence needs to be based on the most recent available data for each investor at the time of investment or I-526 filing, whichever comes first. As long as new investors are being added to a Project, TEA evidence based on the census-share method should be updated in April and again in December and TEA evidence based on the

ACS-only method should be updated once a year, in December.

Q: How do I know if my site will continue to qualify as a TEA?

A: While some TEAs are so significantly above the threshold that they are almost certain to stay a TEA from year to year, for many locations it is difficult to predict whether or not they will qualify as TEAs in the future. We can analyze the margin between the unemployment rate of the tract(s) and the TEA threshold, the number of bordering tracts with an unemployment rate greater than the TEA threshold, and the historic year-over-year unemployment rate changes of the Project tract(s) and adjacent tracts to estimate the likelihood that a tract will continue to qualify as a TEA when the data updates. However, given the relatively small population size of most tracts and the difficulty in estimating how a single tract's unemployment rate is likely to change compared to the national unemployment rate, it is very difficult to say with any certainty that a tract(s) that qualifies as a TEA at any single point in time will continue to qualify as a TEA in the future.

Q: What is the unemployment threshold for TEA qualification?

A: The qualification threshold for TEAs depends on which dataset is used to calculate the labor statistics of the census tract(s). According to USCIS, regardless of which data is presented, the data should be *internally consistent.*[12] So, if ACS data is used to calculate the unemployment rate for the tract(s), then ACS data must be used to determine the national unemployment rate, and if the census-share method is used to calculate the unemployment rate for the tract(s), then BLS data must be used to determine the national unemployment rate.[13] Under the ACS-only method, using ACS 14-18, the qualifying high unemployment rate for TEAs is 8.9% (150% of the 2018 BLS national annual average civilian unemployment rate of 5.9%). Under the census-share method, using ACS 14-18 and BLS CY18, the qualifying high unemployment rate for TEAs is 5.9% (150% of the 2018 BLS national annual average civilian unemployment rate of 3.9%). ▶

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12 https://www.federalregister.gov/d/2019-15000/p-375
13 https://www.federalregister.gov/d/2019-15000/p-375