



## EB-5 Reform and Integrity Act of 2020: Section by Section Summary

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The below is a high level section-by-section summary of the [EB-5 Reform and Integrity Act of 2020](#) (the “Integrity Act” or the “Act”) proposed this week by Senator Chuck Grassley. Most of the substantive amendments to the current Immigration Nationality Act (“INA”) section 203(b)(5) and the public law governing the regional center program are in Section 2 of the Integrity Act.

The Act is effective upon enactment, except Section 2 which is effective 90 days after enactment. EB-5 investor petition eligibility will be determined at the time of filing. This means the Act will apply only to investor petitions filed on or after enactment without retroactive impact on pending investor petitions. Form I-829 petitions will be decided by the law under which the underlying I-526 petition was filed.

**SECTION 1. Short title.** This section simply states the title of the proposed law, “EB-5 Reform and Integrity Act of 2020.”

**SECTION 2. Reauthorization and Reform of the Regional Center Program.** This section adds onto existing INA 203(b)(5) which ends at subparagraph (D) and adds subparagraphs (E) through (Q).

### ***Subparagraph (E) Regional Center Program.***

Subparagraph (E) incorporates the current regional center authorization statute.<sup>1</sup> It contains standards for establishing a regional center, which will be required to include a description of the policies and procedures reasonably designed to ensure program compliance and monitor new commercial enterprises and job-creating entities.

Attestations confirming compliance with “good actor” provisions in subparagraph (H) will also be required. Ten percent (10%) of required jobs must be directly created but may be established by employees of the job-creating entity and estimated by economically valid methodologies. Regional centers are required to retain 5-year records and will be audited at least once every 5 years.

### ***Subparagraph (F) Business Plans for Regional Center Investments.***

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<sup>1</sup> Section 610 of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1993 (8 U.S.C. 1154 note), which would be repealed if S. 2540 passes into law.

Subparagraph (F) requires regional centers to file business plans for specific projects, what we today call “exemplar” applications on the Form I-924. Importantly, the business plan need not be approved before investor petitions may be filed. There is a list of items required in the application, including material investment risks, material litigation, and information regarding fees paid by the regional center, new commercial enterprise, or any issuer of securities to agents, finders, and brokers involved in the offering.

***Subparagraph (G) Regional Center Annual Statements.***

Subparagraph (G) requires annual statements containing several certifications generally to the certifier’s knowledge after due diligence investigation. The regional center must certify that it is only involved with *bona fide* actors not precluded by subparagraph (H) and that it is in compliance with securities requirements set out in subparagraph (I) as well as promoter requirements in subparagraph (K).

Sanctions for failing to submit, knowing submission of untrue facts, or failure to conduct itself in accordance with its designation will subject a regional center to fines, temporary suspension, permanent bar, or termination.

***Subparagraph (H) Bona Fides of Persons Involved with Regional Center Program.***

Subparagraph (H) precludes persons failing to meet the *bona fides* requirements from involvement with a regional center, new commercial enterprise (“NCE”), or job-creating entity (“JCE”). A person is precluded if the person (1) has committed a crime or offense involving fraud, (2) is subject to an adverse order by a financial regulator, (3) would be barred under U.S. immigration inadmissibility laws, or (4) has been listed, disciplined or reprimanded for reasons including fraud.

A separate preclusion applies to a person who is not a U.S. national or a permanent resident. Foreign governments also may not fund or have any ownership or administration role over a regional center, NCE, or JCE, but a foreign investment fund owned by a sovereign wealth fund or foreign fund permitted to do business in the U.S. may be involved with the ownership, though not the administration of, a JCE.

***Subparagraph (I) Compliance with Securities Laws.***

Subparagraph (I) requires compliance with U.S. and applicable State securities laws. It specifies the content of the initial and annual regional center certification, which must confirm compliance with securities laws to the best of the certifier’s knowledge after a due diligence investigation. Discovery of noncompliance is required to be reported along with remedial efforts and certification that the regional center and associated parties are back in compliance.

Significantly, the regional center’s oversight requirement now has a reasonableness standard. A regional center is required to use commercially reasonable effort to “monitor and supervise” securities transactions. In prior iterations of this provision, this obligation was open and undefined.

***Subparagraph (J) EB-5 Integrity Fund.***

Subparagraph (I) creates a fund to monitor, investigate, ensure compliance, and to conduct audits and site visits. Starting October 1, 2021, the annual fee is \$20,000 from each regional center, reduced to \$10,000 for one with 20 or fewer total investors in the prior year. A failure to pay the fee will subject the regional center to a penalty and termination. The DHS will be required to submit an annual report describing the uses of the fund in the prior year.

***Subparagraph (K) Direct and Third-Party Promoters.***

Subparagraph (K) authorizes DHS to prescribe rules and standards for direct and third-party promoters (including migration agents) to oversee the promotion of EB-5 offerings. The rules and standards may include: registration with USCIS, certification of compliance with subparagraph (H)'s *bona fides* requirements, guidelines for accurately representing the visa process to investors, and guidelines describing permissible fee arrangements under securities and immigration laws.

***Subparagraph (L) Source of Funds.***

Subparagraph (L) requires business and tax records or similar records to be filed with form I-526, including tax returns of any kind filed during the past 7 years (or another period determined by the DHS) by or on behalf of the investor. The identity of all persons transfer funds into the U.S. on the investor's behalf is required and any funds used to pay costs and fees associated with the investment, not limited to the capital investment, will need to be shown as lawfully sourced.

Gifts and loans now have a good faith requirement accompanied by an emphasis on disqualification of funds from impermissible sources including illegal activity. The donor's records will be required in gift cases.

***Subparagraph (M) Treatment of Good Faith Investors Following Program Noncompliance.***

Subparagraph (M) provides substantive relief and procedures to preserve immigration benefits for investors associated with terminated or debarred EB-5 entities. Under subparagraph (M), when a regional center is terminated or NCE or JCE debarred, DHS will notify investors. Investors will be given 180 days then to file an amendment or file a notice with DHS to confirm or establish continued eligibility.

Within the 180 days, the NCE can affiliate with a regional center in good standing, if the associated regional center is terminated. If the NCE is debarred, the investor can associate with an NCE in good standing. Additional investment is needed solely to the extent necessary to satisfy job creation. Amendments may be filed without being deemed material change and recovered funds may be used to meet EB-5 requirements.

Investors will retain their priority dates and, significantly, children will be protected from age-out.

None of these benefits apply if the investor was a knowing participant in the conduct leading to the termination or debarment.

***Subparagraph (N) Threats to the National Interest.***

Subparagraph (N) requires DHS to deny or revoke EB-5 benefits including approved petitions, designations, and exemplar applications if approval is contrary to the national interest of the United States for reasons relating to public safety or national security. If a regional center, NCE, or JCE has its participation in the EB-5 program terminated for national interest reasons, any person associated with the terminated entity will be permanently barred if the person was a knowing participant in the conduct leading to the termination.

***Subparagraph (O) Fraud, Misrepresentation, and Criminal Misuse.***

Subparagraph (O) allows DHS to deny or revoke EB-5 benefits upon determining that the benefit was predicated on fraud or criminal misuse. The DHS will provide notice of its determination.

***Subparagraph (P) Administrative Appellate Review.***

Subparagraph (P) provides for administrative appellate review by the Administrative Appeals Office (“AAO”) for any DHS determinations made under INA section 203(b)(5). There is judicial review to review a determination after exhaustion of all administrative appeals. This means if there is a denial or revocation, the decision must first be appealed with the AAO before seeking remedy in federal court.

***Subparagraph (Q) Fund Administration.***

Subparagraph (Q) requires separate accounts for all NCEs including the involvement of a fund administrator unless waived., and additional procedures for affiliated JCEs, In general, independent fund administrators will be required to monitor, track, verify, and approve fund transfers. Fund administrator retention may be waived if an NCE or affiliated JCE is controlled by or under common control of a registered investment advisor or broker-dealer. The DHS will grant a waiver in other instances involving an annual independent financial audit.

***Effective Date.***

Section 2 of the Integrity Act will take effect 90 days after enactment.

**SECTION 3. Conditional Permanent Resident Status for Alien Entrepreneurs, Spouses, and Children.**

This section amends INA section 216A, which governs the removal of conditions on residence. A petition for removal of conditions is made on the Form I-829.

A key amendment to Section 216A is that if the required jobs are not all created at the time of filing the Form I-829, investors will have 1 additional year to create the remaining jobs. If the additional year is needed, the investor’s capital also must be invested during that time.

A defrauded investor who makes a second investment in accordance with subparagraph M may file for removal of conditions during the 90-days before the second anniversary of the subsequent investment, though the procedural mechanics of this intended benefit will need to be sorted out.

**SECTION 4. EB-5 Visa Reforms.** Section 4 adds new defined terms, including “affiliated job-creating entity,” “job-creating entity,” and “certifier.” An “affiliated job-creating entity” is a JCE that is controlled, managed, or owned by any of the people involved with the regional center or NCE.

Section 4 provides further age-out protection for children of investors whose conditional residence is terminated under section 216A or the new subparagraph (M), where the investor files a subsequent EB-5 petition. The dependent must remain unmarried and the second I-526 petition must be filed not later than 1 year after the termination of conditional residency.

Concurrent filing of EB-5 petitions and adjustments of status applications will now be permitted in cases of immediate visa availability, and EB-5 petitions will also get the same reprieve for status violations for 180 days or less under INA section 245(k). These provisions bring EB-5 more in-line with benefits afforded to other employment-based immigrants.

**SECTION 5. Procedure for Granting Immigrant Status.** An EB-5 petitioner must establish eligibility at the time of filing. This means that pending petitions will be decided by the law in place at the time of their filing. Petitions filed under the regional center program as amended by the new subparagraph (E), will establish eligibility under the Integrity Act and be subject to the approval of an exemplar approved under the new subparagraph (F). This Section also requires that DHS continues to adjudicate petitions while it is implementing the changes in the program required under the Act.

**SECTION 6. Timely Processing.** Not less than 1 year after enactment, the Director of United States Citizenship and Immigration Services (“USCIS”) will complete a fee study. After completing the fee study, the Director will be required to set fees at a level to process petitions according to the schedule in Section 6, including 180 days for initial regional center designations and investment/exemplar applications, 240 days for investor petitions, and 90 and 120 days, respectively, for the same filings based on targeted employment area investments.

**SECTION 7. Transparency.** DHS employees will be required to act impartially without preferential treatment. Written and oral communications are required to be kept in the record of proceedings and logs also maintained. Communication from a third party may not be made a part of the record without notice and the opportunity to respond. Law enforcement information may also not be made a part of the record without consent.

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