



POLICY ANALYSIS

How EB-5 Visa Wait Times Could be Impacted by the Fairness for High-Skilled Immigrants Act of 2020 (H.R. 1044)

December 16, 2020

Invest In the USA (IIUSA)

The National Trade Association of the EB-5 Regional Center Industry

<https://iiusa.org>

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Executive Summary

With many factors affecting the immigrant visa process and the irregularities imposed by COVID-19, it's virtually impossible to predict *exactly* how EB-5 visa wait times would be impacted by the *Fairness for High-Skilled Immigrants Act of 2020* (the amended version of H.R.1044) which was passed in the Senate on December 2, 2020. However, using the latest data from the Department of State (DOS) and the U.S. Citizenship and Immigration Services (USCIS) with a list of reasonable assumptions, this analysis aims to shed some light on the *probable* impacts of this legislation on EB-5 visa wait times for new applicants from different countries.

If the Senate version of the bill is signed into law in its current form (i.e., as passed in the Senate on December 2, 2020), we found:

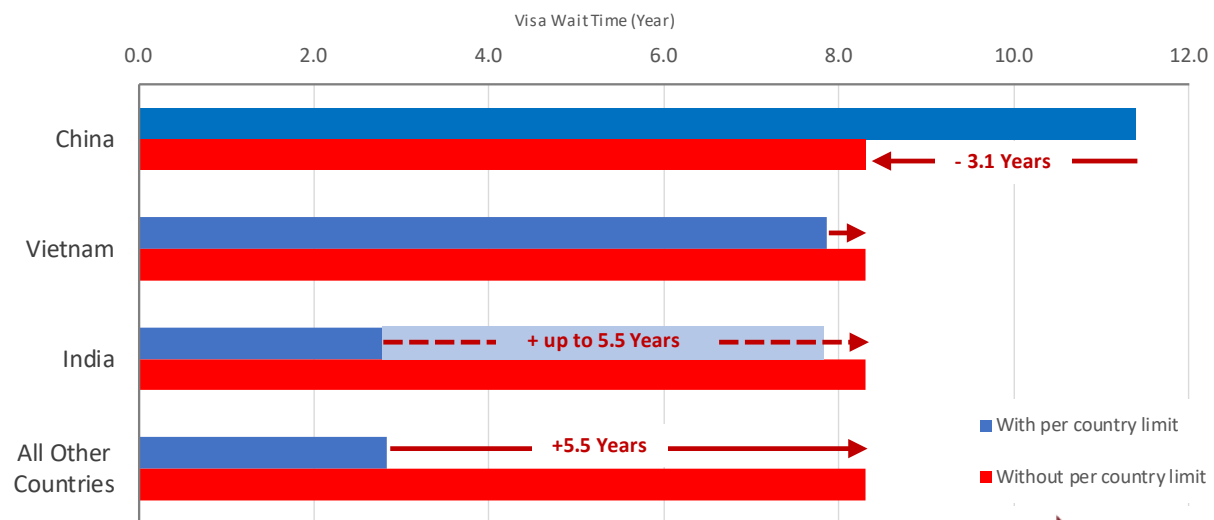
- **The estimated wait time for a new EB-5 investor would be approximately 8.3 years, regardless of the investor's country of origin.**
 - This estimated 8.3-year wait is inclusive of the wait for an I-526 approval from USCIS.
 - This estimate could change if more than 10,000 visa numbers are allotted to and used by EB-5 applicants in any particular year or in multiple years.
- **On China:**
 - The estimated EB-5 visa wait time would be reduced by approximately 3 years from 11.4 years to 8.3 years.
 - The visa wait time for Chinese applicants with a petition on file would no longer be impacted by any new demand for EB-5 visas from other countries.
- **On Vietnam:**
 - The estimated visa wait time would remain approximately 8 years regardless of whether the per-country cap is in place or not.

- **On India:**
 - The estimated wait time could be between 0.5 and 5.5 years longer than would be expected under current law, largely depending on USCIS’ processing of the currently pending I-526 cases filed by investors from India.
- **On all other countries:**
 - The estimated EB-5 visa wait time would be 8.3 years, approximately 5.5 years longer than would be expected under law existing (i.e., before the potential enactment of legislation to remove per-country caps in employment-based immigration).

See Figure 1 for the probable impacts on EB-5 visa wait times for applicants from different countries:

Figure 1: H.R. 1044 would have different impacts on EB-5 visa wait time for applicants from different countries

Changes in estimated visa wait time with vs without the per-country cap by investor origin:



Data Source: U.S. Department of State with calculations by the author
Prepared by: IIUSA



This legislation would not reduce the existing visa backlog that consists of approximately 83,000 applicants. Moreover, **the EB-5 visa backlog could continue to grow and the wait time would be longer if demand for EB-5 visas continues to exceed the EB-5 program’s current equilibrium** (i.e., approximately 3,900 new investors filing an I-526 petition on an annual basis).

This analysis also found that the Senate version of the bill would cause significant economic impact on U.S. communities in the EB-5 context. If this legislation is to go into effect, it would eliminate the availability of EB-5 visas to any new applicants until the current backlog is cleared out, which would take approximately 6 to 7 years after the enactment of the bill. **As visa availability is a critical factor in the EB-5 program’s ability to generate capital investment and create or save jobs for American communities, the elimination of visa availability to new investors would deeply hamper the EB-5 program’s economic development capabilities for American workers when the country needs it the most.**

This report also discussed a number of factors that could alter the actual EB-5 visa wait times for new investors including one or more of the following: annual EB-5 visa availability, average approval rate of I-526 petitions, number of family derivatives qualified or counted for an EB-5 visa, withdrawal rate of EB-5 applicants, and the new demand for EB-5 visas.

Although transition rules in the Senate bill do not apply to EB-5, it is still critical to evaluate the potential impacts should EB-5 be included in the same proposed transition rules on future amended legislation.

Based on our analysis, if the transition rules were applied to EB-5 applicants:

- The estimated visa wait time for China would not be altered significantly and would remain at approximately 8 to 9 years.
- Applicants from other countries, including Vietnam and India, would be protected by the transition rules and able to continue receiving certain but limited numbers of EB-5 visas per year.
 - However, how the transition rules could alter the visa wait times for these applicants is highly unpredictable and largely depends on the I-526 processing times at USCIS.
- Depending on how fast USCIS adjudicates an I-526 case:
 - In the *best-case scenario*, a new EB-5 visa applicant from a country that is not one of the two countries with the highest demand (e.g., Brazil), *could* still receive an EB-5 visa number immediately after his/her I-526 petition is approved under the transition rules.
 - In the *worst-case scenario*, the estimated wait time for any new investors not from China *could* still be approximately 6 to 7 years even with the transition rules in place.

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H.R.1044 & the Per-Country Cap

On December 2, 2020, the U.S. Senate passed by unanimous consent the, *Fairness for High-Skilled Immigrants Act of 2020*,¹ an amended version of H.R.1044 that was passed by the U.S. House of Representatives in 2019.² If this legislation (H.R.1044) is signed into law, it would eliminate the 7% per-country cap for all employment-based immigrant visa categories, including EB-5.³

The Senate version of the legislation would also establish transition rules for employment-based visas allocation in the first nine fiscal years after the effective date, reserving a certain percentage of EB-2 and EB-3 visa numbers for applicants not from the two countries with the highest level of demand for such visa categories. However, EB-5 is not included in the transition rules in the bill that was passed in the Senate by unanimous consent.

Overall, this legislation would not reduce the EB-5 visa backlog but only change how immigrant visa numbers would be distributed amongst applicants from different countries. The EB-5 visa category is still subject to the annual numerical limit of approximately 10,000 visas. That is, if more than 3,333 EB-5 investors become documentarily qualified for a visa in any particular year or in multiple years, the EB-5 visa backlog would continue to grow even if H.R. 1044 is signed into law.

In addition to visa wait times, H.R. 1044 would also cause significant economic impact on U.S. communities in the EB-5 context. Unlike the EB-1, EB-2 and EB-3 categories, many EB-5 applicants reside overseas while awaiting their immigration benefits and are unable to contribute to the U.S. economy through things like home purchasing and spending money on American businesses. Most of the EB-1, EB-2 and EB-3 category applicants already reside in the U.S. under a temporary visa (i.e., H1B) while waiting for their immigrant visa to become available, allowing them to contribute to the U.S. economy before their permanent residency is issued. Factors like this make visa availability critical for EB-5 to generate capital investment and create or save jobs for American communities. In fact, with the per-country cap in place, new EB-5 applicants not from one of the backlogged countries continue to enjoy visa availability and account for the majority of the total new EB-5 investment inflows since 2018.⁴

¹ H.R.1044 EAS: <https://www.congress.gov/116/bills/hr1044/BILLS-116hr1044eas.pdf>

² H.R.1044 EH: <https://www.congress.gov/116/bills/hr1044/BILLS-116hr1044eh.pdf>

³ The Immigration and Nationality Act limits each foreign state/country to an annual maximum of 7% of all employment-based legal permanent residency admissions, known as the 7% per-country cap. Read more about the per-country cap and the backlog of the employment immigration system here: <https://crsreports.congress.gov/product/pdf/R/R46291>

⁴ EB-5 investment inflows are estimated based on the number of I-526 petitions filed to USCIS.

EB-5 Backlog Data and Assumptions

The EB-5 visa backlog consists of two types of visa applicants: 1) the actual number of applicants already waiting at the National Visa Center (NVC) which includes principal investors and family dependents; and 2) the number of visa applicants that would eventually become documentarily qualified for an EB-5 visa after the principal investor's I-526 petition is approved by the U.S. Citizenship and Immigration Services (USCIS). Based on the most recent data shared by Mr. Charlie Oppenheim, *Chief, Visa Control & Reporting Division in U.S. Department of State (DOS)*, the current EB-5 visa backlog includes:⁵

- **Grand Total: 83,003 visa applicants** (DOS reports 49,063 actual applicants waiting at NVC and estimated 33,940 applicants with a petition on file at USCIS). Specifically:
 - **China: 56,961 visa applicants** (44,803 actual at NVC; 12,158 estimated at USCIS);
 - **Vietnam: 5,499 visa applicants** (1,662 actual at NVC; 3,837 estimated at USCIS);
 - **India: 5,765 visa applicants** (799 actual at NVC; 4,966 estimated at USCIS); and
 - **All other countries: 14,778 visa applicants** (1,799 actual at NVC; 12,979 estimated at USCIS).

The above estimates from DOS are the best data available for calculating the potential wait times for investors from different countries and the probable impacts of the Senate version of the bill.

In addition, this analysis relies on the following assumptions:

- **10,000 EB-5 visas would be used to clear out the backlog every year.** While the Immigration and Nationality Act (INA) ensures that 7.1% of the employment-based visas are allocated to EB-5, the law also allows EB-5 to receive additional visa allocations from the unused family-sponsored visa numbers in the previous fiscal year.⁶ For example, 121,500 visa numbers from unused family-sponsored numbers in FY2020 have fallen across to the employment-based numbers in FY2021. In the current fiscal year, EB-5 is entitled to an extra 8,626 visas in addition to its regular 10,000 annual allocation, for a total of 18,626 visas in the current fiscal year. However, due to the COVID-19 pandemic, it's unlikely that all of the 18,626 EB-5 visa numbers would be used in FY2021 because of the on-going closures of consular offices. In fact, while 11,111 immigrant visas were allocated to EB-5 in FY2020, only 3,602 EB-5 visas were actually

⁵ See Appendix I for detailed data shared by Mr. Oppenheim

⁶ See INA: 8 U.S.C. § 1153

used in that fiscal year (see Appendix I).⁷ Since there are too many unpredictable factors that could affect the annual number of EB-5 visas available and used in the future, we simply assume 10,000 EB-5 numbers would be used on an annual basis to clear out the current backlog.

- **No significant changes occur to I-526 adjudications at USCIS.** Approximately 41% of the current EB-5 backlog would stem from investors with a pending I-526 case at USCIS. Since it's impossible to predict the future movement of I-526 approval rates or the number of I-526 petitioners being approved by USCIS in any given year, our analysis assumes that overall, I-526 adjudication at USCIS remains relatively constant in the future. Under this assumption, 83,003 EB-5 visa numbers are required to clear out the current visa backlog and none of the new EB-5 investors would be able to receive their visa allocation until the current aggregated EB-5 visa backlog is cleared out.

Overall Impact on EB-5 Visa Wait Time⁸

Without the per-country caps, EB-5 visa numbers would be allocated solely based on the applicant's priority date, regardless of his or her country of birth. Based on the data provided by DOS, the current EB-5 visa backlog consists of approximately 83,003 visa applicants (including principal investors and family dependents). With 10,000 immigrant visas available to EB-5 applicants each year, it would take approximately 8.3 years to clear out the current EB-5 backlog. **In other words, if the Senate version of the bill is signed into law, the estimated EB-5 visa wait time for all investors would initially become approximately 8.3 years regardless of the country of birth.**

It's important to note that the estimated 8.3-year wait includes two parts: 1) the wait for an investor to receive an I-526 approval at USCIS; and 2) the wait for this documentarily qualified applicant to receive an EB-5 visa number at NVC. While H.R. 1044 would change the wait time for visa availability for EB-5 investors from different countries, it would still be depending on USCIS' productivity to determine an investor's wait time for receiving an I-526 approval (the regular I-526 processing times are approximately 34 months for a petitioner from a non-backlogged country and 51 months for a Chinese petitioner).⁹

⁷ Department of State Published Annual Numerical Immigrant Visa Limits for FY2020: 1,111 Additional Visas Will Be Available to The Eb-5 Applicants. <https://iiousa.org/blog/department-of-state-published-annual-numerical-immigrant-visa-limits-for-fy2020-1111-additional-visas-will-be-available-to-the-eb-5-applicants/>

⁸ All the "visa wait times" estimates throughout this report are for an EB-5 investor who files an I-526 petition on November 1, 2020.

⁹ See USCIS processing times here: https://iiousa.org/eb5_processing_times/. As of December 7, 2020.

In addition, a number of factors would alter the actual wait time for EB-5 applicants, including:

Annual EB-5 Visa Numbers: The estimated 8.3-year wait could be a conservative estimate because it is based on the minimum number of immigrant visas that EB-5 is entitled to on an annual basis. If EB-5 receives more than 10,000 visa numbers in a fiscal year (as it happened in FY2021 and likely would happen to a lesser extent in FY2022) and all the numbers are fully utilized by EB-5 applicants, the visa wait time for a new EB-5 investor could be shorter.

I-526 Approval Rate: With a lower approval rate of I-526 petitions, less of the existing applicants would become documentarily qualified for an EB-5 visa so that the wait time for new investors would be shorter, and vice versa. Based on the recent statistics on I-526 petitions, USCIS approved only 70% of I-526 cases in 2020 and only 72% of I-526 petitions in 2019, a significant decline compared to 2018 and 2017 when average I-526 approval rate was 88% and 92% respectively.¹⁰

Family Derivatives: The annual EB-5 visa limits include numbers used by principal investors and family derivatives. Based on the data provided by DOS, one EB-5 investor could use approximately three visa numbers, so the annual limit of 10,000 EB-5 visas would only be sufficient for approximately 3,900 new investors in any particular fiscal year (see Appendix A). However, if the wait time becomes more than 8 years for all applicants, some children of the existing investors may unfortunately age out while awaiting visa numbers, which would reduce the actual number of visa applicants in the backlog.

Withdrawal Rate: Currently, the number of EB-5 visa applicants withdrawing from the waiting line is relatively low. However, the withdrawal rate could be higher in the future because existing investors from a non-backlogged country with an I-526 petition on file did not expect to wait over 8 years for their visa number. With more applicants withdrawing from the visa queue, the wait time could be lower than the estimated 8.3 years. But so too could the amount of economic development and job creation generated by EB-5 investment

New Demand for EB-5 Visas: H.R. 1044 would not change the annual numerical limit on EB-5 visas. If the demand exceeds the EB-5 program's capacity, the visa backlog would increase and any new investor could face a longer wait time for their visa numbers.

¹⁰ See Form I-526 statistics here: <https://iiusa.org/i526data/>.

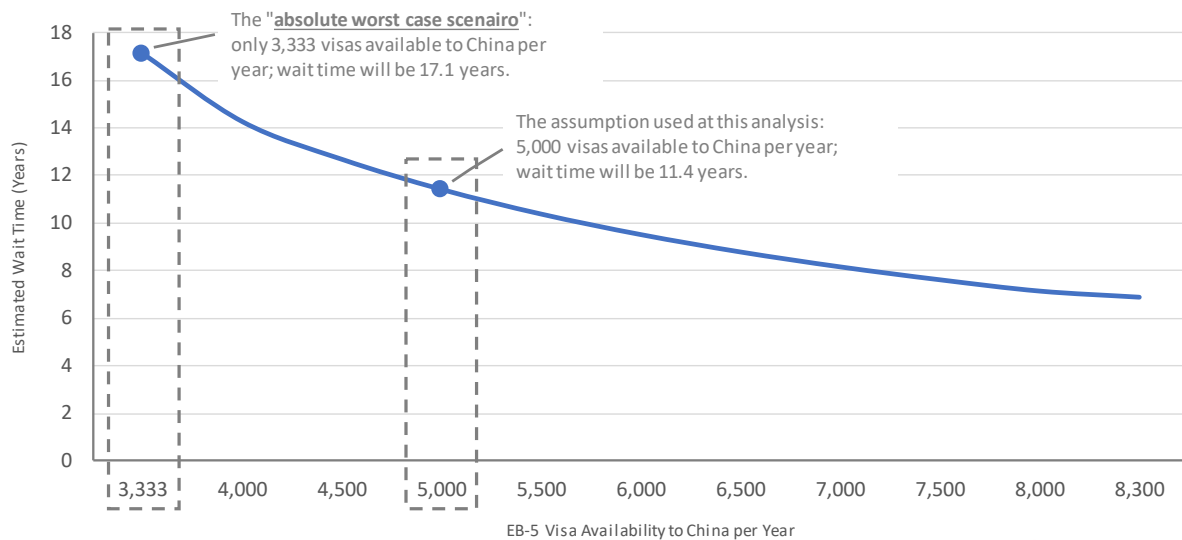
Impact on EB-5 Applicants from China

Based on the latest backlog estimates provided by DOS, approximately 56,961 (69% of the total) EB-5 visa applicants from mainland China either immediately need or will eventually need an immigrant visa number. With per-country cap remaining in place, as they would for the EB-5 category in the version the Senate passed on December 2, 2020, the EB-5 visa availability to Chinese applicants would continue to depend on the number of otherwise unused EB-5 visas left in a fiscal year after the use of the 7.1% allotted per country. For example, if the aggregated demand from non-Chinese applicants use 6,000 EB-5 visas in one fiscal year, 4,000 “otherwise unused” visas would be available to Chinese applicants; while if non-Chinese applicants only used 3,000 visas per year, the number of EB-5 visa availability to China would be 7,000. **In other words, the EB-5 visa wait time for a Chinese investor could fluctuate widely depending on the number of new applicants from all other countries.**

However, based on the current I-526 adjudication volumes and the I-526 filings patterns, we estimated the current visa wait time for new Chinese investors could be 11.4 years with the per-country cap in place based on an average of 5,000 EB-5 visas to be available to China on an annual basis until the existing visa backlog is cleared out (see Figure 2). That is, with per-country caps in place, it could take 11.4 years to clear out the Chinese visa backlog that consists of 56,961 applicants until an EB-5 visa is available to a new Chinese investor.

Figure 2: Estimated EB-5 visa wait time for Chinese applicants could be 11.4 years with the per-country cap in place

Estimated visa wait time for Chinese investors by visa availability per year:



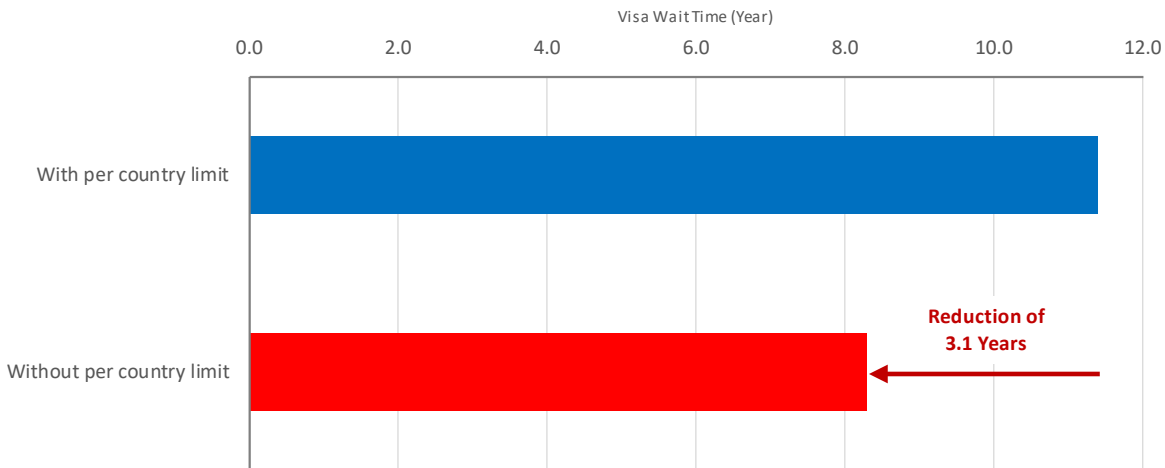
Data Source: U.S. Department of State with calculations by the author
 Prepared by: IIUSA



If the Senate version of H.R.1044 is signed into law, the visa wait time would be reduced by 3.1 years for new EB-5 investors from China. Based on our analysis, if the per-country cap is lifted, the EB-5 visa wait time for any new investors would be 8.3 years regardless of the investor’s country of birth. That said, eliminating the per-country cap could reduce the visa wait time for Chinese investors and their family dependents from 11.4 years to 8.3 years, a reduction of 3.1 years (See Figure 3).

Figure 3: H.R. 1044 could reduce the EB-5 visa wait time by 3.1 years for Chinese applicants

Estimated visa wait time for Chinese investors:



Data Source: U.S. Department of State with calculations by the author
Prepared by: IIUSA



In addition, without the per-country cap in place, new demand from other countries would no longer impact the wait time for existing Chinese applicants who have already established their priority date. That means, after the enactment of H.R.1044, no matter how many new investors participate in the EB-5 program from the rest of the world, the wait time for any existing investors from China would not worsen.

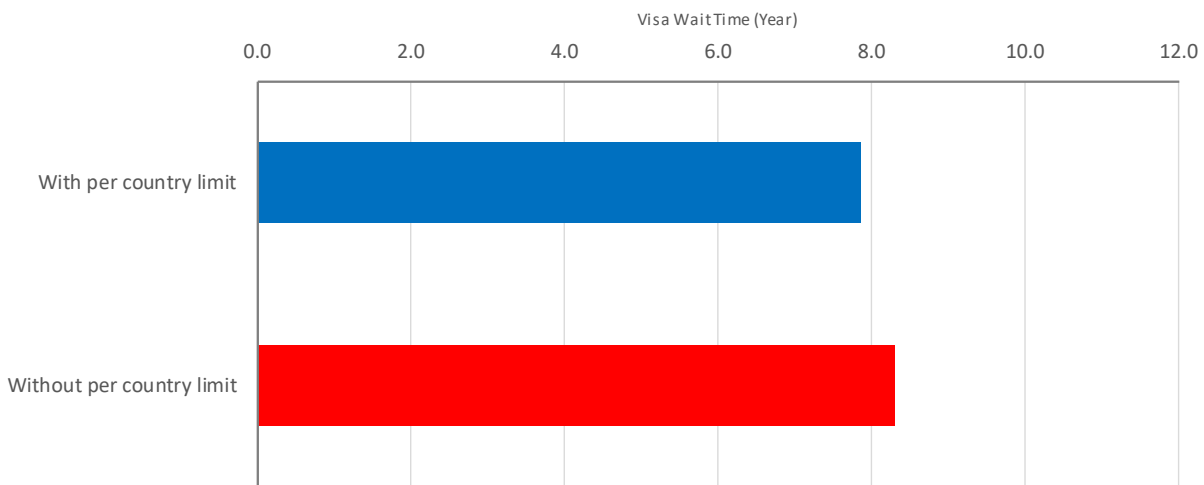
Impact on EB-5 Applicants from Vietnam

Based on the latest estimates from DOS, the current EB-5 visa backlog includes 5,499 visa applicants from Vietnam. With 700 EB-5 visas allocated to Vietnamese applicants every year under the per-country cap, it could take approximately 7.9 years to clear out the current Vietnamese EB-5 visa backlog for any visa number to be available to new investors from Vietnam.

In contrast, without the per-country cap in place, the estimated wait time for any new investors regardless of his or her country of birth would be 8.3 years. **That is, the EB-5 visa wait time for Vietnam could remain at approximately 8 years regardless whether the per-country cap remains in place.** The Senate version of the bill would virtually have no impact on the visa wait time for new EB-5 investors from Vietnam (see Figure 4).

Figure 4: H.R. 1044 would virtually have no impact on the EB-5 visa wait time for Vietnamese applicants

Estimated visa wait times for Vietnamese investors:



Data Source: U.S. Department of State with calculations by the author
Prepared by: IIUSA



Impact on EB-5 Applicants from India

Although DOS estimated a total of 5,765 applicants from India with a petition on file in line, approximately 86% of these applicants still had a pending I-526 petition at USCIS awaiting approval. With only 799 documentarily qualified applicants at NVC, India is not subject to an EB-5 visa backlog under the latest monthly Visa Bulletin (as of December 2020).¹¹

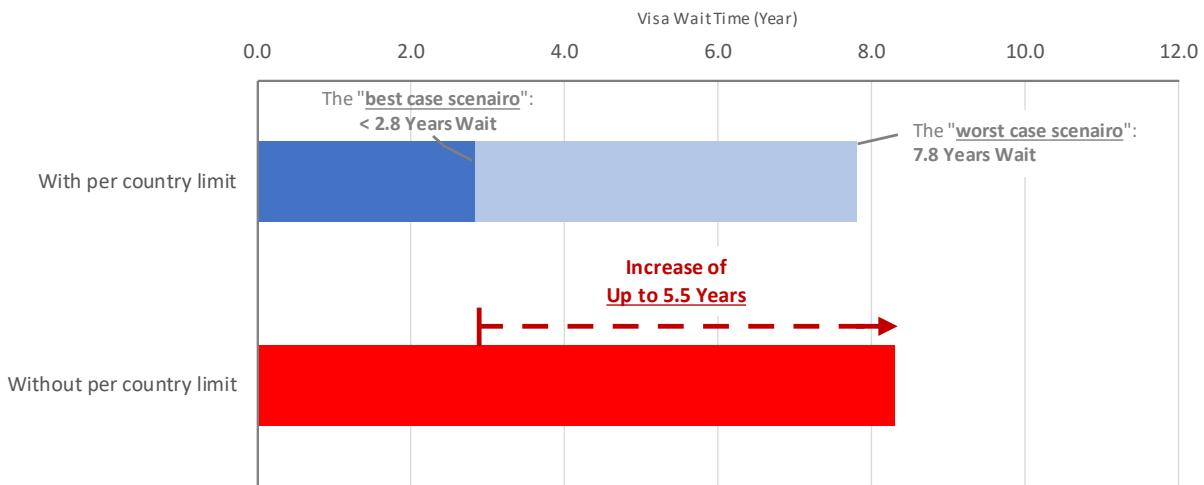
It's virtually impossible to predict the wait time for Indian investors under the current law because it largely depends on USCIS' pace in adjudicating pending I-526 cases filed by petitioners from India. If

¹¹ Department of State Visa Bulletin for December 2020: <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2021/visa-bulletin-for-december-2020.html>

USCIS approves more than 310 Indian investors in a year, India could be subject to an EB-5 visa retrogression¹² and the wait time for India could be 7.8 years in the worst-case scenario with the per-country cap in place. However, based on the latest Visa Bulletin from DOS, an Indian investor is still able to secure an EB-5 visa number as soon as he/she receives an I-526 approval without any delay. In that case, the wait time would be only the wait for an I-526 approval from USCIS, which is approximately 2.8 years.¹³ That means, without the per-country cap in place, the wait time for new investors from India would be increased by up to 5.5 years (see Figure 5).

Figure 5: H.R. 1044 could increase the EB-5 visa wait time by up to 5.5 years for Indian applicants

Estimated visa wait times for Indian investors:



Data Source: U.S. Department of State with calculations by the author
Prepared by: IIUSA



Impact on EB-5 Applicants from All Other Countries

Currently, only applicants from either China or Vietnam are subject to EB-5 visa backlogs under the Visa Bulletin. Investors from all other countries (including India) are currently able to secure their EB-5 visa number as soon as they become documentarily qualified without any delay. That means the current “wait time” for these EB-5 applicants only stems from the wait for receiving an I-526 approval from USCIS.

¹² With the per-country cap in place, 700 EB-5 visas are reserved for Indian applicants on a regular fiscal year, which is only sufficient for approximately 310 documentarily qualified Indian investors in one year. See Appendix A

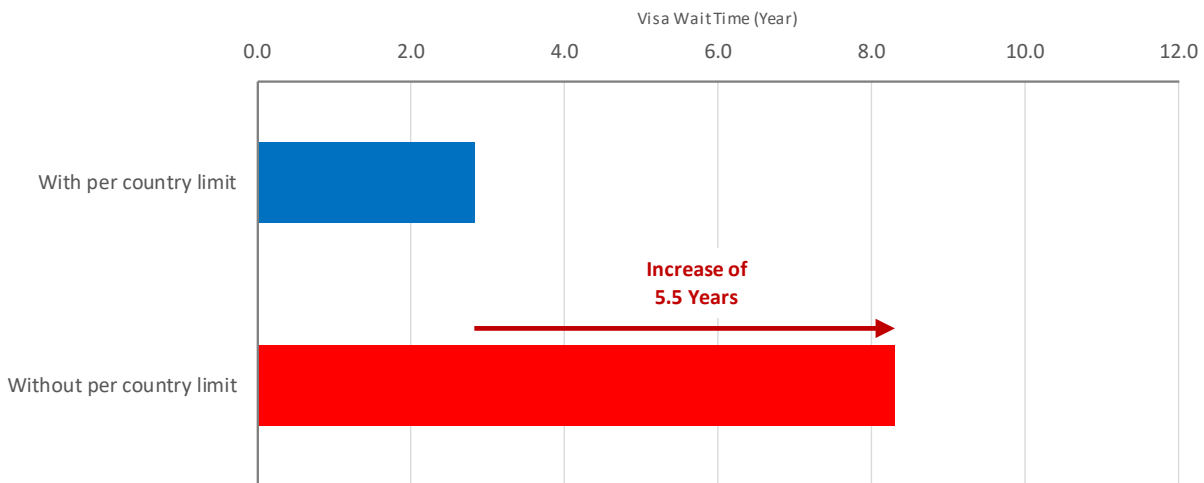
¹³ USCIS I-526 processing time as of December 16, 2020.

According to USCIS, the regular processing time for an I-526 petition filed by an investor from a non-backlogged country is approximately 2.8 years (or 34 months) as of December 2020.¹⁴

However, **if the per-country cap is lifted but without any transition rules in place for EB-5 (i.e., the bill that passed the Senate on December 2, 2020), all countries would be expected to be subject to a visa retrogression immediately when the legislation goes into effect.** According to DOS, there are 44,804 visa applicants from China and 1,662 applicants from Vietnam in NVC awaiting visa availability, indicating that all of the EB-5 visas in the first 4 fiscal years after the effective date of the Senate bill would be used by Chinese and Vietnamese applicants with an approved I-526 petition waiting in NVC. That means, all other countries would be backlogged immediately. The estimated visa wait time for any new investors would be 8.3 years, regardless of his/her country of origin, an additional 5.5 years longer than under existing visa availability (see Figure 6).

Figure 6: H.R. 1044 could create a delay of 5.5 years for applicants from the rest of the world in receiving their EB-5 visa numbers

Estimated visa wait times for EB-5 investors from a non-backlogged country:



Data Source: U.S. Department of State with calculations by the author
Prepared by: IIUSA



¹⁴ The regular processing time range for an I-526 petition filed by an EB-5 investor from a non-backlogged country is between 27.5 months and 40.5 months. The median is 34 months. USCIS Processing Times (https://iiousa.org/eb5_processing_times/). As of December 7, 2020.

It's also important to note that the effective date in the Senate bill is the "first day of the second fiscal year beginning after the date of enactment," indicating there is a delay between when the bill is signed into law and when the bill becomes effective. That is, before the bill fully goes into effect, immigrant visas would continue to be allocated with the per-country cap in place. Visa applicants with a petition on file or any new investors not from China or Vietnam who receive an I-526 approval before the effective date of the bill would still enjoy EB-5 visa allocation as soon as they become documentarily qualified without any delay thanks to the per-country cap preventing virtually all visas in the initial years from otherwise going to investors from China and then Vietnam.

Discussions on the Transition Rules

The Senate bill includes a 9-year period with transition rules applicable for EB-2 and EB-3 visa applicants, reserving a certain percentage of employment-based immigrant visas each year for applicants who are not natives of the two countries with the most visa applicants among other provisions (*Sec 2. (e)*).¹⁵ Although the transition rules in the Senate bill do not apply to EB-5 visa applicants, it's still valuable to discuss the potential impacts of these transition rules should EB-5 be included in future amended legislation in the House.

Overall, with the transition rules in place, a number of EB-5 visas would be reserved for investors not from the two countries with the highest demand on an annual basis. Let's use a South Korean investor for example. If his/her I-526 petition is filed after the enactment of the bill and if this investor receives an I-526 approval from USCIS fast enough *and* a sufficient number of reserved EB-5 visas are still available, this investor would not experience any delay for visa availability thanks to the transition rules. This is the *best-case scenario* for new investors from an emerging market; although unlikely, it is still possible.¹⁶

In contrast, without the transition rules in place, we project that all of the EB-5 visas in the first few fiscal years after the effective date would be entirely allotted to Chinese applicants who have been waiting in NVC. That is, none of the EB-5 visa numbers would be available to other applicants until all of the Chinese applicants with an earlier priority date have received their EB-5 visa numbers.

¹⁵ The Senate passed bill (H.R.1044 EAS) and the House passed bill (H.R.1044 EH) have totally different transition rules. This analysis is based on the transition rules that were passed in the Senate bill on December 2, 2020.

¹⁶ An analysis conducted by IIUSA found that the shortest processing time of an I-526 approval was only 20 days. *EB-5 Processing Times: Trends and Data Insights of Form I-526 Processing Times at the Immigrant Investor Program Office*. June 7, 2019.

Specifically, Table 1 below summarizes the number of EB-5 visas that would be reserved and made available to applicants not from the two countries with the largest demand under the transition rules during the first nine years after the bill goes into effect (fiscal year 1 through 9). Table 1 also shows the number of unreserved EB-5 visas available to any applicants based on priority date. Since the effective date in the Senate bill is defined as “the first day of the second fiscal year after the date of enactment,” EB-5 visas during the two fiscal years before the effective date of the bill would still be allocated to applicants with the per-country cap in place. We assume China would use 5,000 visas and Vietnam would take 700 visas on an annual basis, therefore 4,300 visas would be available to all other countries.

Table 1: EB-5 Visa Availability under Transition Rules

Based on 10,000 immigrant visas will be allocated to the EB-5 category every year.

Fiscal Year	Reserved EB-5 Visa Pool			Unreserved EB-5 Visa Pool		
	%	Visa Availability (Per Year)	Visa Availability (Accumulative)	%	Visa Availability (Per Year)	Visa Availability (Accumulative)
(Before ED*)	-	4,300	4,300	-	5,700	5,700
(Before ED*)	-	4,300	8,600	-	5,700	11,400
1	30%	3,000	11,600	70%	7,000	18,400
2	25%	2,500	14,100	75%	7,500	25,900
3	20%	2,000	16,100	80%	8,000	33,900
4	15%	1,500	17,600	85%	8,500	42,400
5	10%	1,000	18,600	90%	9,000	51,400
6	10%	1,000	19,600	90%	9,000	60,400
7	5%	500	20,100	95%	9,500	69,900
8	5%	500	20,600	95%	9,500	79,400
9	5%	500	21,100	95%	9,500	88,900

**Before the effective date of the bill, Immigrant visas will be processed with per-country cap in place; Author assumed 4,300 visas will be used by applicants not from the two countries with the largest demands on an annual basis.*

Transition Rules on HR1044 EAS Sec. 2. (e)



Transition Rules Impacts on China

The transition rules in the Senate version of the bill would impose an “85% cap” on the unreserved visas to be allotted to applicants from a single country (*Sec.2(e)(2)(B)*). With this 85% cap, applicants from China would not be able to receive all of the unreserved EB-5 visas made available on an annual basis, despite these applicants having an earlier priority date (see Table 2). Depending on how many EB-5 visas are available to China before the effective date of the bill with the per-country cap in place (we estimate

5,000), with an estimate of nearly 47,000 Chinese applicants with a petition on file when the bill goes into effect, it could take up to 7 years to clear out the current Chinese backlog. **That is, the estimated wait time for new investors from China would be approximately 8 to 9 years regardless of whether the transition rules are in place for EB-5 applicants. The transition rules would not alter the EB-5 visa wait time for China significantly.**

Table 2: Availability of the Unreserved EB-5 Visa Numbers for China

Note: Estimated Chinese visa backlog consists of 46,961 applicants as of October 1, 2022.

Fiscal Year	Unreserved EB-5 Visa Pool		
	Annual Visa Availability (Unreserved)	Annual Visa Availability with the 85% Cap	Visa Availability with the 85% Cap (Accumulative)
1	7,000	5,950	5,950
2	7,500	6,375	12,325
3	8,000	6,800	19,125
4	8,500	7,225	26,350
5	9,000	7,650	34,000
6	9,000	7,650	41,650
7	9,500	8,075	49,725
8	9,500	8,075	57,800
9	9,500	8,075	65,875

** DOS estimated the EB-5 visa backlog consists of 56,961 applicants from China as of October 1, 2020. Author assumes 5,000 EB-5 visas will be used to reduce the Chinese backlog in FY2021.*



Transition Rules Impacts on Vietnam or India

It’s enormously complicated to predict how the transition rules would impact applicants from Vietnam or India. The definition of “the largest aggregate numbers of natives waiting for immigrant status” is unclear in the transition rules. Currently more applicants from Vietnam with an approved I-526 petition are waiting for visa availability in NVC. However, based on DOS’s estimates, more investors from India with a pending I-526 petition are waiting for adjudication at USCIS. Depending on how soon these Indian petitioners become documentarily qualified for an EB-5 visa, India could become the second country with “the largest aggregate numbers of natives” in the future. With that, either Vietnam or India could be the second country with the most EB-5 visa applicants and thus ineligible for reserved visas.

However, it’s clear that the transition rules would be beneficial to applicants from Vietnam or India because these applicants would continue to receive some number of EB-5 visas on an annual basis thanks to the reserved visa provision and the 85% county cap on the unreserved visas provision included in the

transition rules. **In contrast, none of the EB-5 visas would be available to Vietnamese or Indian applicants in the first few years after the effective date without the transition rules in place.**

With an estimate of 5,500 Vietnamese applicants and 5,765 Indian applicants on file waiting in the current visa backlog, in the *worst-case scenario*, the potential wait time for new investors from Vietnam and India could still be 6 to 7 years even with the transition rules in place.

Transition Rules Impacts on All Other Countries

The transition rules would also be beneficial to EB-5 applicants from the rest of the world since a certain percentage of the annual EB-5 visa allocation is reserved for these applicants throughout the nine-year transition period. **That means the transition rules would create a possible *best-case scenario* for a new EB-5 investor not from the two countries with the most demand to receive visa allocation without delay.** For example, with the transition rules in place, if an investor from a country like Brazil receives an I-526 approval while there is an available EB-5 number from the reserved visa pool, this investor would be able to secure his/her EB-5 visa number without experiencing any delay thanks to the transition rules. This is considered as the *best-case scenario*.

In contrast, it would be impossible for any non-Chinese investors to receive any visa allocation in the first few years after the effective date if the transition rules are not in place, no matter how soon the investor receives his/her I-526 approval.

However, it's also important to note that the number of reserved EB-5 visa numbers would be very limited on an annual basis during the transition period. In fact, it's very likely that these reserved EB-5 visas would not be sufficient to meet the existing demand for EB-5 visa numbers based on the current I-526 adjudication volume at USCIS. Additionally, DOS estimated nearly 14,800 applicants from all over the world excluding China, Vietnam and India have established a priority date with a pending I-526 petitions on file as of October 1, 2020. In the *worst-case scenario*, the potential wait time for any new investors could still be 6 to 7 years even with the transition rules in place, depending on how many I-526 cases are adjudicated by USCIS per year.

Conclusions

With so many moving parts and the irregularities imposed by the COVID-19 pandemic, it's extremely complicated to predict the potential impacts of the *Fairness for High-Skilled Immigrants Act of 2020* on the EB-5 visa wait time. However, based on the latest data from DOS with a list of reasonable assumptions, we found that the Senate bill would create an 8.3-year wait for any new EB-5 applicants if the legislation is signed into law in its current form. The bill would reduce the wait time for Chinese applicants by approximately 3.1 years but increase the wait time for EB-5 applicants from all other countries by up to 5.5 years. If EB-5 is included in the transition rules listed in the Senate bill (which it is currently not), it would slightly balance the impacts on visa wait time and the fairness amongst EB-5 applicants from different countries.

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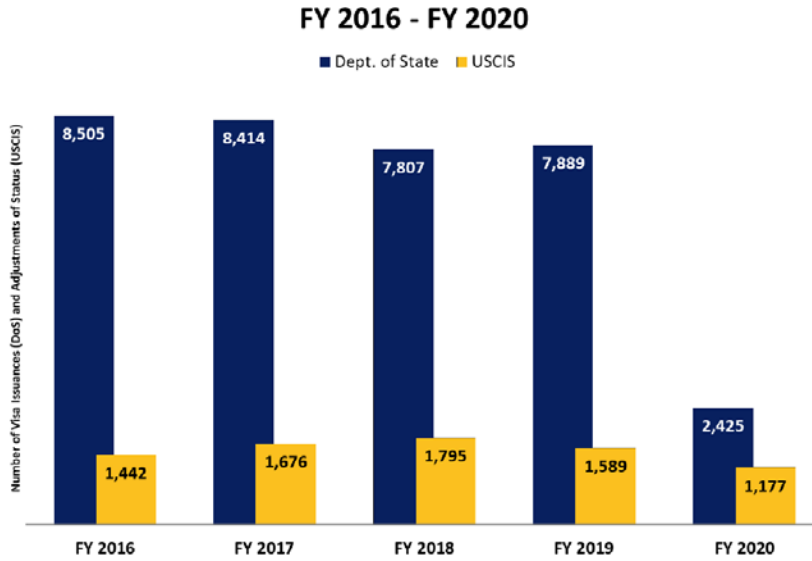
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Appendix I: Data Shared by Mr. Oppenheim (as of October 1, 2020)

EB-5 Number Use

EB-5 Number Use: Department of State vs. USCIS



Percentages of EB-5 Visa Numbers Use by Principal Investors

**Average Percentage of EB-5 Principal Investors
(FY 2017 – 2019)**

	China – Mainland Born	Vietnam	India	S. Korea	Brazil	China – Taiwan Born	Rest of World
FY 2019	36.9%	25.4%	44.3%	38.0%	30.0%	37.0%	36.0%
FY 2018	36.8%	26.3%	41.2%	35.8%	32.7%	36.9%	33.6%
FY 2017	36.1%	27.2%	42.0%	35.9%	29.4%	39.4%	34.0%



EB-5 Visa Backlogs

**EB-5 Applicants with Petitions on File at NVC and Estimated USCIS Applicant Data
(As of October 1st, 2020)**

Foreign State of Chargeability	Actual Number of Applicants at NVC	DoS <i>ESTIMATED</i> Number of Applicants with Petition on File at USCIS	<i>Estimated Grand Total</i>
Brazil	274	940	1,214
China-mainland born	44,803	12,158	56,961
India	799	4,966	5,765
South Korea	205	2,594	2,799
China-Taiwan born	148	1,535	1,683
Vietnam	1,662	3,837	5,499
Rest of World	1,172	7,910	9,082
Grand Total	49,063	33,940	83,003





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