The Current "State" of TEAs:
What Was Old is New Again (For Now)

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As of the date of this article, the EB-5 Immigrant Investor Program Modernization Final Rule that was published by the Department of Homeland Security (DHS) and took effect November 21, 2019 remains vacated. Furthermore, the Regional Center program was allowed to lapse by Congress. Based on these two realities, only the Direct EB-5 program remains in effect, and the targeted employment area ("TEA") standards for the Direct EB-5 program are reflective of the pre-November 21, 2019 rules (with USCIS permitting States to once again certify TEAs at an investment level of $500,000).

For ease of reference in this article, we use the terms "$500K TEA standards" and "$900K TEA standards" to mean the following:

- The **"$500K TEA standards"** mean the TEA standards that are currently in effect (i.e., $500,000 minimum investment for projects in a TEA; with each state authorized to designate TEAs using census tract combinations determined by the state)
- The **"$900K TEA standards"** mean the TEA standards that were recently vacated by a federal judge (i.e., $900,000 minimum investment for projects in a TEA, requiring USCIS determination of TEA status and restricting tract aggregation to "directly adjacent" tracts only.[1])

While the $500K TEA standards do provide more flexibility, there are also challenges due to the unpredictability and differing TEA approaches of the individual states. Notably, the TEA standards for rural projects did not change under the Final Rule and are thus the same under both the $500K TEA standards and the $900K TEA standards. Therefore, this article focuses only on the issues with respect to high unemployment TEAs.

1 For further detail on the $900K TEA standards (which are currently vacated but could be re-adopted in the near future), please see the article "New TEA Standards: A Year in Practice – Remaining Questions, Risks, and COVID-19" in the November 2020 issue of the Regional Center Business Journal.

Alert: On June 22, 2021, the U.S. District Court for the Northern District of California, in Behring Regional Center LLC v. Wolf, 20-cv-09263-JSC, vacated the EB-5 Immigrant Investor Program Modernization Final Rule (PDF). While USCIS considers this decision, we will apply the EB-5 regulations that were in effect before the rule was finalized on Nov. 21, 2019, including:

- No priority date retention based on an approved Form I-526;
- The required standard minimum investment amount of $1 million and the minimum investment amount for investment in a Targeted Employment Area (TEA) of $500,000;
- Permitting state designations of high unemployment TEAs; and
- Prior USCIS procedures for the removal of conditions on permanent residence.

In other words, we are applying the regulations in effect before Nov. 21, 2019, on this website and in the USCIS Policy Manual, Volume 6, Part G, Investors. In addition, we again will accept the April 15, 2019, version of Form I-526, Immigrant Petition by Alien Entrepreneur, because the Nov. 21, 2019, version of the form reflects updates from the now-vacated rule.

What guidance has USCIS provided for the $500K TEA standards with respect to high unemployment TEAs?

In July 2021, USCIS released the following guidance on how it would address the current state of the EB-5 program:

From the release, the key takeaways related to TEAs are that USCIS is "applying the regulations in effect before November 21, 2019" from the *"USCIS Policy Manual, Volume 6, Part G, Investors,"* and that USCIS is "permitting state designations of high unemployment TEAs."[2]

What does the Policy Manual Say about TEAs and State Letters?

The Policy Manual[3] in effect before November 21, 2019 stated that in order to demonstrate that the area of the investment is a TEA, as of the date of investment or date of filing the I-526 petition[4] each immigrant investor "must demonstrate that the TEA

2 https://www.uscis.gov/working-in-the-united-states/permanent-workers/eb-5-immigrant-investor-program (last visited August 31, 2021).
3 https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-2 at §5 (last visited August 31, 2021).
4 As applicable to the specific investor. See Id.

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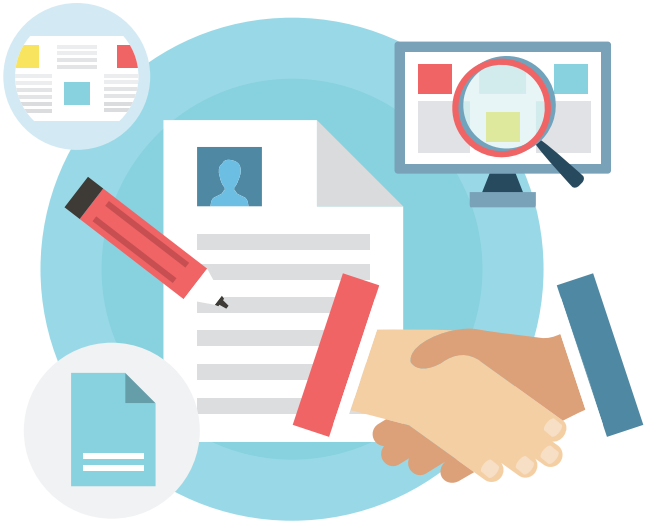

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meets the statutory and regulatory criteria" by submitting either:

This means that in order to satisfy the

> - A letter from the state government designating a geographic or political subdivision located outside a rural area but within its own boundaries as a high unemployment area;[57] or
> - Unemployment data for the relevant MSA or county;

$500K TEA standards, a state TEA letter should be obtained unless one of the two items below are true:

- The county where the project is located is eligible as a TEA on its own:
  - Many notable counties currently qualify in their entirety based on the latest calendar year data (CY2020), for example – Los Angeles County, Philadelphia County, Clark County, NV.
  - If the County is eligible as a TEA, then an independent analysis including acceptable unemployment data should be included with the I-526 (state TEA letter is not needed); or
- The Metropolitan Statistical Area (MSA) where the project is located is eligible as a TEA on its own
  - If the MSA is eligible as a TEA, then an independent analysis including acceptable unemployment data should be included with the I-526 (state TEA letter is not needed)

In practice, most EB-5 projects must still rely on a "geographic or political subdivision" that is smaller than the county or MSA for TEA eligibility. Typically, this is done by analyzing census tracts (or block groups if the state permits block groups). In these cases, a state-issued TEA letter will be required in order to rely on census tracts.

Are all States providing TEA letters?

The $900K TEA standards that took effect in November 2019 removed TEA certifying authority from the states and gave it directly to USCIS. As states have not been issuing TEA certification letters for almost two years, it has been a challenge to obtain state designation letters again.

As of the date of this article, the following states have confirmed they are reviewing and issuing TEA certification letters again: *California, Florida, Illinois, Louisiana, Minnesota, New Jersey, New York, Nevada, Oklahoma, Oregon, Pennsylvania, Tennessee, Washington and Wisconsin.*

Also as of the date of this article, the following states have indicated that they are not yet reviewing or issuing TEA certification letters (and it is unclear if or when they might begin doing so): *Arizona, Arkansas, Colorado, Georgia, North Carolina and Ohio.*

In Texas, obtaining TEA letters can sometimes be even more challenging, because in Texas the cities and counties have historically certified TEAs.

Not all states are listed above. Other states not listed above may or may not be providing TEA letters.

What methodology are States using for TEAs?

Each state has its own (and sometimes evolving) policy regarding TEA certifications and one must work within those parameters to understand and provide the data or analysis required to obtain a TEA certification. Regarding census tract combinations, the majority of states are relatively flexible, however some have very restrictive policies. Some permit block groups (which provides even more flexibility), but most do not.

The $500K TEA standard affords states much more flexibility than the $900K TEA standard which restricted tract aggregation to only "directly adjacent" census tracts. States can generally certify any TEA using census tracts (or block groups) that are contiguous and within their boundaries as long as the unemployment rate calculations are done correctly. USCIS will defer to the state for determining the boundaries of a TEA, but will review state determinations of the unemployment rate and assess the methods by which the state authority obtained the unemployment statistics.

With the $500K TEA standard, most states use the "census-share method" for measuring unemployment at the census tract level,[5] Almost all states have historically provided TEA certifications on a calendar year basis, updating the TEA data once a year when new data is released by the Bureau of Labor Statistics (around April/May). For further reading on the census-share method, please see the article *"New TEA Standards: A Year in Practice – Remaining Questions, Risks, and COVID-19 in the November 2020 issue of the Regional Center Business Journal.*

In general, for those states that are providing letters, they are using the same methodology as they did prior to the $900K TEA standard taking effect in November 2019. One reasonable industry concern was that some states might decide to adopt the "directly adjacent" restrictions of the $900K TEA standards, but so far that has not been the case.

Common Issues and Questions in Practice

The following are some of the most common issues and questions that are arising in practice with the renewed use of the $500K TEA standard:

5 For further reading on the census-share method, please see the article "New TEA Standards: A Year in Practice – Remaining Questions, Risks, and COVID-19" in the November 2020 issue of the Regional Center Business Journal.

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What can be done if a location is mathematically eligible as a TEA, but the state is not yet certifying TEAs?

This is currently the biggest issue facing many EB-5 stakeholders who must rely on census tracts (or block groups) for TEA eligibility. Some states with historically high levels of EB-5 activity (such as California) are not yet certifying TEAs. In this situation, many EB-5 issuers are moving forward with a project with the expectation that the state will begin certifying TEAs in the future and that the state will eventually issue a TEA certification letter. While this is a reasonable expectation, there is increased risk with this approach that should be discussed with all interested parties. It would also increase the risk of denial to move forward with a TEA that did not follow the guidelines that the state previously used for certification of TEA status.

Does it make sense to also make sure my project would qualify if the $900K TEA standards return?

With so much uncertainty surrounding how long these more flexible $500K TEA standards might be around, some EB-5 issuers are also reviewing whether or not their location also qualifies based on the more restrictive $900K TEA standards, as it seems likely those will be reinstated at some point. This would be especially important for issuers who are unsure if they will be able to quickly find investors to file while the $500K TEA investment amount is still in effect. For some EB-5 issuers, it might be safest to only move forward with a project that also satisfies the more restrictive $900K TEA standards.

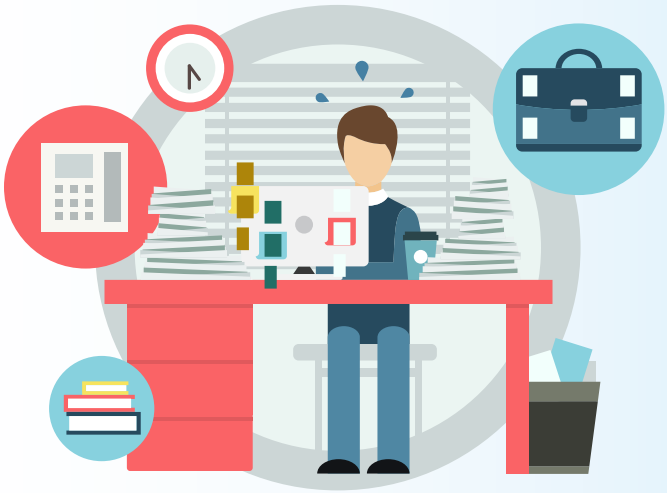
It might mitigate risk if the TEA is eligible based on the more restrictive $900k TEA standards (directly adjacent census tracts) if the state where the project is located does not issue TEA certification letters. Immigration attorneys may wish to argue that if a state will not issue TEA certification letters, the next best criteria should be those that would be applicable under the 2019 regulations; however, such a position is without textual support in the currently effective version of the regulations.

Other questions/issues

- *Should an EB-5 issuer wait for a state to issue a TEA certification letter?* Some states that previously issued certification letters very quickly are taking a longer time to process TEA certifications. With all of the uncertainty surrounding the program now, this can cause additional uneasiness for EB-5 issuers who are trying to move quickly to file investors at the $500K level before the $900K TEA standards are restored. Some EB-5 issuers may elect to move forward because their investors can only afford the $500K minimum investment.

- *Is a TEA certification letter required if the city where the project is located qualifies on its own (but not the county or the MSA)?* Unfortunately, not according to the text of the regulations and by USCIS police. The Policy Manual only indicates that you do not need a state-issued TEA certification letter if the county or MSA qualifies.

- *Is a TEA certification letter required if the project is located in an eligible single census tract TEA, or if it only requires "directly adjacent" census tracts?* While projects located in these areas would have qualified under the more restrictive $900K TEA standards, unfortunately the Policy Manual only indicates that a state-issued TEA certification letter is not required if the county or MSA qualifies. The Policy Manual for the $500k TEA standards makes no distinction between simple or elaborate census tract combinations.



- As the guidance issued by USCIS in July 2021 states that USCIS is "permitting" state TEA designations, rather than "requiring" TEA designations, are TEA certification letters required? Since USCIS' intent is unclear and the pre-2019 regulatory text required TEA certification letters, it would mitigate the risk of denial to obtain a state TEA certification letter if possible.

Summary

EB-5 stakeholders have had to make many adjustments as the standards for high unemployment TEAs keep changing. For projects with investors filing I-526 petitions under the $500K TEA standards that must rely on census tracts or block groups, the safest route forward is to obtain the state TEA letter. However, with so many uncertainties (only some states providing TEA letters, the regional center program being allowed to lapse, the uncertainty around how long the $500K TEA standards will be in place, etc.), EB-5 stakeholders should continue to carefully consider the potential TEA certification of their respective projects with their experienced EB-5 economists and attorneys.