The EB-5 Regional Center Program:
Rise of the Phoenix

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Introduction

When Congress enacted the pilot EB-5 regional center program in 1992, it hoped that its job-creation and investor pooling features would spur economic growth and job creation in a way that the "stand-alone" direct EB-5 program had not. It took over a decade for that goal to materialize, but starting with the financial crisis of 2008, the regional center program finally emerged as an important source of alternative project financing and a significant source of foreign direct investment in the United States. Since 2008, the EB-5 regional center program has facilitated over $37 billion of foreign direct investment and the creation of over 820,000 jobs for U.S. workers.

However, the EB-5 process for individual investors is long, and significant changes can occur between investment and various stages of the process, such as processing or project delays, that can affect immigration and investment success. The ultimate existential risk of the regional center program, however, has always been the fact that Congress did not make it permanent. Since enacted in 1992, Congress at various times extended the program with only short lapses in authorization. However, in the December 2020 extension, Congress de-coupled the regional center program from other "must-pass" pilot programs like E-Verify, the Conrad-30 waiver program, and religious workers visa programs. This was intended to exert pressure on the EB-5 industry to force consensus on reform legislation.

The success of the regional center program after 2008 strained the existing legislative guideposts governing process and conduct, and as is true of any moneyed industry, bad actors resulted in negative press. To address such concerns, members of Congress had introduced as early as 2015 proposed legislation to curb regional center program abuses and increase oversight and compliance. Many in the industry balked at those proposed reforms. Others resisted any new legislation that did not address visa number relief. Then came the June 30, 2021 regional center program lapse. This nearly nine-month lapse shook the EB-5 industry to its core. U.S. Citizenship and Immigration Services (USCIS) stopped adjudicating regional center program-affiliated I-526 petitions and the State Department stopped issuing any regional center program-affiliated visas, leaving over 32,000 families in the lurch both in the United States and abroad, with relocation plans put on hold, work authorizations expiring, and dependent children aging out. As the real possibility of a permanent lapse in the regional center program came into focus, the EB-5 industry and Congress finally agreed on legislation. Like a phoenix rising from the ashes, the regional center program has been resurrected.

On March 15, 2022, President Biden signed a $1.5 trillion omnibus spending

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bill that included the EB-5 Reform and Integrity Act of 2022 (the "2022 EB-5 Act"). The 2022 EB-5 Act extends the regional center program for five years, until September 30, 2027. It also makes major changes to the regional center program. Highlights include:

Increasing the minimum investment amount to $800,000 for projects in targeted employment areas (TEAs) or "infrastructure projects." Otherwise, the investment amount is $1,050,000;

- Permitting concurrent filing of adjustment of status applications with I-526 petitions;
- Establishing age out and project failure protections for dependents and investors in certain circumstances;
- Enacting grandfathering provisions permitting USCIS to continue to process EB-5 petitions if the EB-5 regional center program lapses in the future;
- Codifying that USCIS, not States, are to designate TEAs using only single or adjacent census tracts;
- Requiring a fund administrator for most EB-5 projects;
- Imposing myriad regional center reporting requirements, participant restrictions, and sanctions on bad actors;
- Establishing an EB-5 Integrity Fund to finance USCIS investigations and site visits in the United States and abroad; and
- Requiring promoters and migration agents to register with USCIS and disclose fees earned from investors and regional centers.

This article describes generally how the 2022 EB-5 Act affects existing investors, future investors, regional centers, project developers, and overseas migration agents.

These are early days, and this article is limited to the four corners of the 2022 EB-5 Act. Many articles will be written on specific features of the 2022 EB-5 Act involving complicated immigration and securities law issues, changes in job counting and economic modeling, and the reach of U.S. regulatory law to overseas migration agents, to name just a few of the thorny issues the EB-5 industry will need to contend with. This level of analysis is beyond the scope of this article. Moreover, USCIS must still publish implementing regulations and EB-5 stakeholders will need to provide perspective and feedback in the hope that the regulations in fact implement what Congress intended when passing the 2022 EB-5 Act.

1. Impact on Existing and Future EB-5 Investors

Investment Amounts and Adjudication. Existing EB-5 investors, meaning investors who have pending or approved I-526 petitions filed pursuant to either the regional center program or a "direct" EB-5 project, are specifically not subject to the higher investment amounts. We hope that the USCIS Investor Program Office and the State Department will immediately resume adjudication of regional center program petitions and applications.

Future investors must invest $800,000 in a TEA or infrastructure project. We describe what constitutes a TEA or infrastructure below. Otherwise, the investment amount is $1,050,000.

Upon expiration of the current extension, and every five years thereafter, the $1,050,000 investment amount will increase, based on the change in the consumer price index. The lower investment amount will be equal to 75% of the new higher amount.

Concurrent Filing. If a visa is currently available, the 2022 EB-5 Act permits concurrent filing of an adjustment of status application. An applicant must be in the United States in valid nonimmigrant status to file an adjustment application. Thus, existing investors with a pending I-526 petition (whether direct or regional center-based) and who are currently studying or working in the United States (for example, in F or H-1B nonimmigrant status), or otherwise legally present, can in most circumstances immediately file an adjustment application, provided that a visa is immediately available. Concurrent filing has been available in other visa categories and is a significant provisional immigration benefit to obtain travel and work authorization during the pendency of the I-526 and the adjustment of status application. This change will help thousands of investors and accompanying dependents who can now avail themselves of benefits previously unavailable to them.

Grandfathering Provisions. Existing investor anxiety mounted with each passing day the regional center program remained lapsed after June 30, 2021. Many investors felt the U.S. government and EB-5 industry stakeholders failed to protect their interests after they made good faith investments. A sense of betrayal permeated commentary on blogs, chat boards, and investor forums. Some investors advocated for a stand-alone grandfathering bill to protect existing investors by ensuring that USCIS would continue to adjudicate petitions submitted before the lapse. These concerns were further amplified by the establishment and growth of investor-focused lobbying groups, chief

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among them the American Immigrant Investor Alliance (AIIA). AIIA members - ordinary EB-5 investors - were able to meet in December 2021 with congressional staffers and offer first-hand insights on the cost and impact of the lapse to individual investors. Their efforts persuaded Congress to include in the 2022 EB-5 Act a section that protects EB-5 investors from expired legislation for petitions filed on or before September 30, 2026. Many will consider this date the de-facto expiration date (subject to future re-authorization) of the regional center program extension.

Age-out Protections. The 2022 EB-5 Act contains welcome age-out protections for dependent children in certain circumstances. If the conditional permanent resident status of a "child" over 21 is terminated following denial of an I-829 petition, the individual will still be considered a dependent "child" if still unmarried and if the principal applicant files a new I-526 or I-829 petition within one year of the I-829 denial. Likewise, the saving provision protecting good faith investors from the bad acts of project sponsors, discussed in more detail below, contains age-out protections for investors' dependent children.

Source of Funds. The 2022 EB-5 Act codifies into law much of the guidance and policy that USICS previously used to determine the eligibility of investors' source of funds. The most significant change made in source of funds is the scope of USCIS' analysis, which now extends to the administrative fee and fees "associated" with the EB-5 investment. Filing fees and attorney's fees may be included, depending on how expansive a definition USCIS chooses to apply. This new standard of course means that the actual investment amount subject to lawful source of funds analysis is closer to $900,000, well above the new $800,000 statutory minimum investment amount.

Protections for Good Faith Investors. The 2022 EB-5 Act contains protections for good faith investors from denials of immigration benefits because of the bad acts of project sponsors, including regional centers, new commercial enterprises (NCEs), or job creating enterprises (JCEs). Previously, the termination of a regional center during the pendency of an I-526 petition or during an investor's conditional permanent resident status would result in the denial of EB-5 immigration benefits, even if a good faith investor complied with all EB-5 program requirements. The 2022 EB-5 Act provides that upon termination of a regional center, USCIS must notify affiliated investors of a termination. Investors then have 180 days to reaffiliate with a different regional center. The new regional center's approved geographical boundaries do not need to cover the project location.

If a regional center was terminated before enactment of the 2022 EB-5 Act, good faith investors have at least 180 days from the effective date to reaffiliate. While the new provision applies where regional centers were previously terminated, it is seemingly unnecessary, as the 180-day period runs from the date USCIS notifies investors of the termination. As an alternative to reaffiliation, in certain circumstances good faith investors can also save their immigration benefits by investing additional funds. Where the bad acts of the project sponsor resulted in insufficient job creation, investors can (i) re-invest with a new regional center (where the regional center is at fault) or (ii) re-invest as much money as necessary to create the required jobs (where the NCE or JCE is at fault).

To use the good faith investor savings provision in the new law, an investor must file an amendment to their existing petition, including a new business plan if necessary. USCIS will not deem such amendments to be a material change affecting eligibility. Reinvesting investors retain their original priority date and dependent children will not age out.

Timely Processing. USCIS' website currently states that the average I-526 adjudication is between 52 and 77 months, while the I-829 processing average is between 39 to 72 months. Why EB-5 petitions have some of the longest adjudication timeframes baffles EB-5 practitioners and enrages good faith investors. While the 2022 EB-5 Act does not grant an expedited processing option for EB-5 petitions, it does require USCIS to complete a fee study by March 2023. The study will establish fees sufficient to permit, on average, USCIS to adjudicate initial and exemplar I-924 applications within 180 days, or 90 days if the exemplar project is located in a TEA. I-526 and I-829 petitions should be adjudicated, on average, within 240 days, or 120 days if the I-526 petition involves a TEA investment.

2. Impact on Regional Centers and Developers

The 2022 EB-5 Act makes far reaching changes that will result in some current regional center operators being unable to continue in the regional center program, and which will significantly increase the cost of running a regional center and complying with the new rules. The 2022 EB-5 Act also makes some tweaks to job counting and creation requirements for the types of jobs necessary for petition approval. The 2022 EB-5 Act repeals the prior regional center section and provides a 60-day period before which the new section takes effect.

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I-924 Applications, Business Plans and Amendments. Exemplar pre-approval applications now must be filed before an investor may file any associated I-526 petition. While this was already a "best practice" methodology among most regional centers, the 2022 EB-5 Act memorializes the approach. It is also less onerous than earlier versions of the bill, which would have required I-924 approval before an I-526 petition could be filed. Upon certification by the investor, the records contained in the I-924 exemplar can be incorporated by reference in the associated I-526 petitions.

Regional centers must file an amendment 120 days before organizational, ownership, or administrative changes, including sale of the regional center. An exception is made in exigent circumstances, in which case the regional center must notify USCIS of any such change within five days. The 2022 EB-5 Act also provides that USCIS may establish procedures for amendments to I-924 exemplar applications. One welcome feature of this section is the specific incorporation of any such approved amendment into pending I-526 and I-829 petitions, which should eliminate the need for interfiling by investors.

The 2022 EB-5 Act business plan requirements largely echo what is already required by the precedent AAO decision *Matter of Ho*, with additional requirements, including, among other things, agent fees and compensation and a description of the services rendered in connection therewith. The business plan also must describe conflicts of interest that may exist among the regional center, NCE, JCE, principals and lawyers, disclosures that are typically already included in capital project securities documents. The 2022 EB-5 Act grants deference to prior business plan approvals for I-526 and I-829 petitions filed before the date of enactment. However, the exceptions to such deference in the new law are broader than what USCIS sets forth in its policy manual.

Job Creation. Up to 90 percent of the job creation requirement can be satisfied from indirect jobs, meaning that every regional center project must now provide evidence of 10 percent direct job creation. This should not be particularly onerous, since accepted methodologies for counting direct jobs are accepted, as opposed to actual I-9 and payroll record evidence of direct jobs. Moreover, where direct jobs result from construction activity lasting less than two years (USCIS seemingly accepts that construction jobs lasting more than two years are permanent), such jobs can now be counted as direct jobs, but only the fraction of the two-year period that construction lasts. Previously, direct construction jobs were only counted where construction activity lasted more than two years. Indirect construction jobs, however, are now capped at 75% of the total job creation requirement. Tenant jobs may be included in the job count, provided the regional center can demonstrate that the tenant jobs did not previously exist and have not merely been relocated.

Visa Set-asides, TEAs and Infrastructure. Visa set asides were heavily negotiated by EB-5 stakeholders, with competing interests in rural, urban and infrastructure project designations. The 2022 EB-5 Act reflects this compromise, with 20 percent of all EB-5 green cards reserved for projects in rural areas, 10 percent in high unemployment areas, and 2 percent for "infrastructure projects." It remains to be seen if existing investors can claim a set-aside visa number based on a prior investment, or whether those numbers are reserved only for future investors. Of course, any prior project would need to qualify under the new category of "infrastructure" and high unemployment area TEAs that were previously designated by State officials. Whatever the case, regional centers are sure to structure projects that take advantage of these set asides and thus retrogression specific to these categories may occur quickly, depending on demand and specific country investment numbers. That rural area petitions are specifically prioritized ahead of other petitions will make the category even more attractive for investors seeking speedy adjudication.

In a blow to those that argue states know best which areas ought to qualify for lowered EB-5 investment amounts, the new law states that only the federal government can designate high unemployment TEAs. The methodology is the so-called "donut" approach, where the unemployment rate for the census tract in which the NCE is principally doing business, and any adjacent census tract, is 150 percent of the national average unemployment rate. The designation is valid for two years from the date of investment or the date of I-526 filing, and may be renewed for additional two-year periods. It remains to be seen whether USCIS will establish a separate procedure outside the typical I-924 exemplar pathway to enable regional centers to determine if a candidate investment project will qualify as a high unemployment TEA. While a qualified economist can analyze data to make a preliminary determination that a project location qualifies as a TEA, USCIS is the final arbiter. If TEA approval is essentially contingent on eventual

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I-924 exemplar approval, unnecessary uncertainty will exist for associated I-526 petitions filed after the I-924 application submission, but before its approval.

The USCIS, as opposed to any state or other official, will also determine whether a project meets the requirements to be classified as an infrastructure project. The 2022 EB-5 Act defines an infrastructure project as a capital investment project administered by a federal, state, or local governmental entity that is also the job-creating entity or new commercial enterprise. The project must be providing financing for maintaining, improving or constructing a public works project. Given the ambiguity in the infrastructure project definition, USCIS should establish a procedure by which regional centers can seek approval of an infrastructure project designation short of submitting an I-924 exemplar application.

Redeployment. The 2022 EB-5 Act codifies certain existing redeployment guidance. While it is unfortunate that investors must redeploy their funds and keep such funds at risk, even after the initial capital investment project is complete and full job creation has been achieved, the ability to do so "anywhere within the United States" is a significant improvement over the prior guidance that limited redeployment to the regional center's approved geography. The industry will have to wait for implementing regulations, but stakeholders advocating for investor rights should seek to maintain maximum flexibility in regulations for the types of investment that will satisfy the at-risk requirement. Stunningly, USCIS does not consider stock or bond investments to be at-risk, leaving open the possibility that investors will need to shoulder years of additional risk in projects or redeployment schemes not contemplated when they made their initial EB-5 investment.

Auditing and Oversight. Regional center oversight and compliance were arguably the principal congressional concerns in its push for legislative reform of the EB-5 regional center program. The broad scope of the 2022 EB-5 Act provisions affecting regional center operations is therefore not surprising. These changes will significantly increase the cost and complexity of operating a regional center and limit the people that can be involved with the EB-5 regional center program, including regional center principals and employees, EB-5 borrowers, and third-party promoters.

- **Audits and Record Keeping** – USCIS must audit regional centers at least once every five years. Regional center documentation relating to capital investment project, certifications, and investor petitions, among other things, must be preserved for five years.

- **Annual Statements** – This will likely be an expansion of the current I-924A annual reporting requirement. Regional centers must submit an annual statement detailing operational and commercial activities and data for the preceding fiscal year. Noncompliance will result in stiff sanctions, and potentially a suspension or permanent bar from participation in the regional center program. Furthermore, annual statements must be made available to investors within 30 days of a request. Though certain information may be redacted from the annual statement if it does not pertain to the investor, this obligation is a significant step towards greater transparency.

- **Securities Compliance Certifications** – Before USCIS will approve any I-924 for initial designation or amendment, regional centers must undertake a due diligence investigation to ensure that the regional center and any individual "associated" with the regional center comply with U.S. securities laws. The 2022 EB-5 Act defines persons associated with the regional center to include the regional center and any NCE, "affiliated" JCE or securities issuer associated with the regional center, as well as regional center and NCE owners, officers, directors, managers, partners, agent, employees, promoters, and attorneys. USCIS has the opportunity to further clarify and add to this list in its implementing regulations.

- **Requirements for Persons Involved with a Regional Center** – No person may be "involved" with a regional center, NCE, or JCE if the person has a criminal or civil conviction involving fraud or been imprisoned for more than one year. Also excluded are any persons who are subject to an order or suspension from federal or state securities commission or similar regulatory authorities during the term of such order. There are further restrictions for persons deemed to have engaged in drug trafficking, theft, espionage, money laundering, and other major crimes. The new law defines "involved" broadly as a person who has substantive authority to make management decisions regarding the funds raised in the course of an EB-5 capital investment project.

- **Fund Administration** – While

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misappropriation of EB-5 investor funds by regional centers is rare, it has dominated much of the bad press surrounding the regional center program. The 2022 EB-5 Act establishes strict parameters for handling EB-5 capital. Specifically, regional centers must establish "separate" bank accounts, presumably for each capital investment project or NCE. Moreover, the NCE must retain an independent "fund administrator," who must be a CPA, attorney, or broker-dealer. The fund administrator must oversee and be co-signatory on transactions in the separate account. In addition, the fund administrator must make information about the account available periodically to individual investors. The new rules provide an exception if an NCE or affiliated JCE is a broker-dealer, or if the NCE commissions an annual financial audit conducted in accordance with generally accepted accounting principles.

- **EB-5 Integrity Fund** – This fund will be used to pay for ongoing USCIS compliance activities. It requires USCIS to use at least one-third of the amount deposited into the fund to monitor and investigate "program-related events and promotional activities" and investor compliance with source of funds rules. Perhaps USCIS will attend and participate in overseas events sponsored by industry trade groups and organizations. On occasion, site visits have been conducted to individuals and business associated with an investor's source of funds. Under the new law, such visits may increase. The balance of the funds may be used more generally to investigate fraud or other crimes in the United States, to conduct site visits and audits, and other compliance monitoring USCIS may specify in implementing regulations. If a regional center has 20 or fewer investors in the preceding fiscal year, it must pay a fee of $10,000 into the integrity fund. Otherwise, the annual fee due is $20,000. Other sources of funding for the integrity fund include a $1,000 fee filed with each I-526 petition, as well as penalties that may be assessed under other provision of the 2022 EB-5 Act. If even half of the currently approved regional centers remain active, USCIS will have quite a war chest at its disposal.

3. Impact on Promoters and Foreign Migration Agents

The 2022 EB-5 Act specifically imposes requirements on migration agents. This means that USCIS will significantly expand its jurisdiction to foreign entities that wish to participate in the marketing of capital investment projects offered under the regional center program. The requirements are extensive and onerous and will include disclosure obligations on fees and payments previously referenced, in most instances, in general offering disclosure documents.

All promoters must individually register with USCIS, providing information contact information and confirmation that a written agreement exists between the promoter and the regional center, NCE, or affiliated JCE. The new law defines an "affiliated JCE" as a JCE controlled, managed, or owned by any individuals involved with the regional center. USCIS may at its discretion make this information publicly available. In addition, promoters must certify compliance with the same requirements listed above for persons permitted to be involved with the regional center, and must certify that the promoter has guidelines in place for accurately presenting information to clients about visa processing, such as timing and age-out risks arising from retrogression. USCIS may suspend or permanently bar promoters for noncompliance.

Fee arrangements (fees, ongoing interests, and other compensation) between the regional center and the promoter must be disclosed, and the disclosure must be signed by investors and included in I-526 petition submissions. This is an unprecedented level of transparency that will significantly affect relationships and promoter compensation structures in the EB-5 industry.

The 2022 EB-5 Act also specifically bars foreign governments from any direct or indirect involvement in the ownership or administration of regional centers, NCEs, or JCEs. This broad prohibition extends to government agencies, officials, or similar representatives. The new law contains exceptions for sovereign wealth funds and other foreign state-owned enterprises, but only for nonaffiliated JCEs.

Conclusion

The 2022 EB-5 Act creates the most significant changes to the EB-5 regional center program in almost 30 years and is a historic victory for advocates of reform. It will take time for USCIS to publish implementing regulations, and for regional centers, developers, and investors to understand and comply with the new rules. Nevertheless, the EB-5 regional center program can now resume, helping to create needed jobs for U.S. workers and provide green cards for foreign investors seeking to better their lives in the United States.