

PUBLICATION

EB-5 Reaches Crescendo of Confusion for Past and New Investors

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Prospective EB-5 investors have watched 2019 regulations nearly double minimum investment amounts, only then to see those regulations judicially vacated in 2021 just as the regional center legislation expired on June 30, 2021, putting all existing regional center investors in desperate limbo. Now credible but uncertain lawsuits have been filed claiming that the regional center program is ongoing and only a special and unneeded visa set-aside expired. In addition, USCIS is preparing to deny pending I-526 petitions after March 12 if Congress has not acted by then. Existing investors need to decide whether to sit tight and hope or to bring or join lawsuits against the government. Prospective investors are tempted to jump in before possible legislation is passed to lock in the \$500,000 level, but they fear falling behind an avalanche of prior investors for adjudication and visa numbers if renewal legislation or anti-lapse litigation succeeds.

Background

One thing is clear for now: the statute from 1990 establishing the "direct" EB-5 program is still effective. Today, and until any new legislation makes changes, investors can place \$500,000 as equity into a "new commercial enterprise" that will use the capital to create 10 new full-time jobs per investor and qualify for permanent residence.

The regional center law, which allows direct investment arrangements and credits indirect job creation as assessed by economists, was enacted as a pilot program in 1992 with an expiration date that Congress kept extending until it expired on June 30, 2021. The government and industry always assumed that the entire regional center program expired. Since the June expiration, USCIS has held pending I-526 petitions in abeyance and the government has refused to receive or take any action on any uses of approved petitions to obtain conditional residence. (Everyone has agreed that existing conditional residents and their I-829 petitions are unaffected by legislative expiration).

The 2019 regulations increased the minimum investment to \$900,000 and narrowed where that higher minimum (versus a new "normal" amount of \$1.8 million), grinding new investment to a trickle. But in 2021 a judge invalidated those regulations, because they had been signed by an improperly appointed official. So we have been back to \$500,000 investments in "gerrymandered" high unemployment areas, but only for "direct" investments in which 10 operational jobs are harder to create with such low investment.

Industry forces have been negotiating for years to get Congress to enact some compromise legislation to renew and extend the regional center program for longer periods, probably with higher minimum investment amounts in narrower areas and smaller spreads between amounts, but there has been no clear path to success. Usually regional center legislation gets attached to general government funding legislation, which currently expires March 12.

The American Immigrant Investor Alliance (AIIA), a lobbying of existing investors, has organized to ask Congress to pass a law that grandfathers in existing investors—and all future investors who file while a temporary law is in force. Their cause is just, and Baker Donelson is working with this group to promote this legislation.

Latest News

USCIS has informed legislative committees that it will start denying pending I-526 petitions (and maybe even revoking approved petitions) starting March 12 if Congress has not acted by then. This news has sent existing investors into apoplexy.

Three lawsuits have been filed or are being filed, one by a regional center and two others by groups of investors. The lawsuits claim that the expiration date in the regional center law only affects a special visa "set-aside" but that the rest of the regional center law providing visas from the general pool does not expire, and that the government should be ordered to keep adjudicating existing and new petitions and visa applications of regional center investors and other applications by regional centers.

The lawsuits are based on a textual reading of the regional center law, Section 610 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. 102-395, as amended since then. Their argument is that the highlighted language in section (b) of Section 610 limits the expiration to set-asides, so the regional center program as a whole does not expire. There is some elegance to that purely textual argument, and the obvious unfairness of luring foreigners to invest and file while the program is in place and then jerking the benefits away based on expiration of the program adds an emotional element that could convert a judge to this textual analysis.

The government's best textual response seems to be that the language in section (a), that the government "shall set aside visas for a program," shows that the legislation only did establish a visa set-aside, and section (b) set the time limit for it, so the entire program is time limited. The interesting problem with that approach is that the government has always interpreted 610 to allow giving away more than the set-aside visas, suggesting that section (a) established something more than just a set-aside that does not expire. The government may point to legislative history reflecting an intent that the entire regional center program expires on the named date. The complaints have some possibility of success, but courts often defer to agencies' interpretations of the statutes they implement.

If the government loses the litigation and concedes, then ostensibly it would restore the regional center program for everyone, including those who did not join the lawsuits. The lawsuits were not brought as class actions, but only on behalf of named parties (who can be added by amendment up to some point). The lawsuits do not even ask for an injunction on behalf of other investors, and the Supreme Court has cautioned lower courts against issuing nationwide injunctions. If the government wins, or if it loses but does not concede, then any existing investor may need to bring or join a lawsuit to challenge the I-526 denial. Perversely, all federal circuit courts have ruled that because of a special statute, there is no jurisdiction to challenge a petition *revocation* in court, while a petition *denial* can be challenged. This situation, if it matures, might set the stage for a needed revisiting of those rulings.

The prospect of litigation success may reduce incentives for money center developers and regional centers to compromise in current legislative negotiations, which have failed at their beckoning in the past. But the USCIS threat of denials and the pending litigation may equally incentivize legislators to enact legislation to re-set the rules on a clearer path.

Options:

As an existing EB-5 investor, what can you do in this mystifying environment?

1. Wait and hope for (1) compromise industry legislation, (2) AIIA-backed grandfathering legislation, or (3) government recognition, from some or all of the lawsuits, that the regional center law has not really expired.

2. Join one of the two lawsuits being filed on behalf of investors, coordinating with I-526 counsel. This is likely to cost \$3,000 to \$5,000 per investor, at a minimum.
3. Have your own I-526 counsel start yet another lawsuit claiming that the regional center law has not yet expired. This could be more or less expensive than joining an existing lawsuit, depending on how many investors participate.

As a prospective EB-5 investor, what can you do in this mystifying environment?

4. Look for an available "direct" project or develop your own, and gather evidence of source of funds in hope of filing with USCIS before Congress raises the investment amount. Realize that if existing regional center investors are restored by legislation or litigation, you will be behind them in the queue for I-526 adjudication (which could take many years, unless you pick a project that gets USCIS expediting for humanitarian or governmental interests) and for visa numbers (which for China would be many years and could start growing for a few select countries if and when USCIS picks up its adjudication pace).
5. Wait until some dust settles and then see what is available, which might include regional center investments.
6. Look for a regional center sponsoring projects now (if there are any) and file or join a lawsuit to require USCIS to accept your petition based on it.

There has never been a more fascinating and excruciating time in the EB-5 saga. If you have questions, please contact Robert Divine or any member of Baker Donelson's [Immigration Team](#).

Disclaimer: This article is not intended to provide investment advice or to recommend a particular course of action but only to alert readers to issues to consider and discuss with their own counsel in relation to their specific circumstances.