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The Rush is On: New EB-5 Rule Nearly Doubles Minimum Investment in 120 Days

Authors: Robert C. Divine
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USCIS has published its final EB-5 regulation in the Federal Register. Effective for I-526 filings arriving at USCIS on or after November 21, 2019, new EB-5 investments must be at least $900,000 in a "targeted employment area" (TEAs) and otherwise $1,800,000, and the areas that can qualify as TEAs for the lower investment amount are more limited. Absent legislation to provide additional visa numbers, the next four months may be the last great days for entering and subscribing investments under the EB-5 Program for the foreseeable future.

Before the Rule Takes Effect

The new regulation is as important for what it will cause pre-effective date as after.

The Surge: The rule allows investors to remain under the current investment amounts and TEA areas if they file the first step in the EB-5 process (I-526 petition) before the November 21, 2019 effective date. This means that during the next four months anyone who is contemplating making an EB-5 investment should rush to invest and file at the lower investment level of $500,000. According to the regulation's preamble, EB-5 investments already made appear likely to use up at least seven years' worth of the 10,000 visa numbers available to investors and family members each year. In fact, the nationalities of the heaviest usage face even longer waits due to a 7% per-country limit, and those born in lower volume countries face much shorter or zero waits. The new rush of filings in the next four months will extend the existing waits for high volume countries by many years. (Oft-proposed but yet unpassed legislation could eliminate the per country cap and make all new investors wait the same regardless of nationality.) The combination of nearly doubled minimum investment amounts and expanded wait time for visa numbers will pose huge disincentives for investors filing under the new rule. Thus, now begins the last great four-month EB-5 investment rush unless Congress allocates additional visa numbers to the program.

The Scramble: In the scramble to invest and file, some investors will ask to invest with less than the full $500,000 amount, using the law's allowance for those "actively in the process of investing." Some sellers of investments may be tempted to accept such investors. If such investors can qualify under present law, their I-526 filing with less than the full amount might preserve their ability to invest only $500,000 under current regulations. The new regulation itself only acknowledges placing the full funds in escrow. USCIS case law requires that if an investor invests part of the required capital plus "indebtedness" (owing the remainder not in escrow), the investor's debt to the investment enterprise must be adequately secured by his or her personal assets under arrangements that are legally perfected in their location. Full investment up front is strongly advised to avoid risk of denial.

Even apart from the capital actually invested, investors must show in their I-526 filing that their source of funds is legitimate. Investors will be tempted to slap together skeletal evidence of their sources of funds. But USCIS can deny petitions that turn out not to have been "approvable at the time of filing." While responses to USCIS requests for evidence normally can add evidence about facts that existed at the time of filing, USCIS can refuse evidence of newly identified or switched sources. USCIS might take more aggressive positions against investors who slopped in sketchy filings to lock in the $500,000 investment amount. All of this argues against

only partial capital contribution and in favor of making the best effort possible to document sources on the front end.

The Risks: Issuers of investments should consider amending their offerings now to include disclosure of risks posed by the new regulations' higher investment amounts, including the prospect that any EB-5 capital not raised for the project before November 21 might be much more difficult to raise, necessitating other sources for any funding gaps. Many projects that are in state-designated TEAs today may not qualify under the new rules, making post-November subscriptions of EB-5 capital practically impossible.

After the Rule Takes Effect

Here is how the rules will change for I-526 petitions filed on or after November 21, 2019:

Investment Amount: The normal minimum investment level will increase from $1 million to $1,800,000. The minimum investment in a Targeted Employment Area (TEA) will increase from $500,000 to $800,000. The rule also provides for a process of inflation-based adjustments to the minimum investment amounts beginning on October 1, 2025 and every five years thereafter, with the TEA level always 50% of the "normal" amount. The price adjustment of the normal amount will be based on the Department of Labor's "Consumer Price Index for All Urban Consumers for the U.S. City Average" as compared to $1 million in 1990 when the EB-5 program was created, rounded down to the nearest $100,000.

TEAs for lower investment: Whether a project's location can qualify for the lower $900,000 level by being in a TEA will remain as crucial as before, given the 50% differential. The TEA definition of a rural area remains unchanged: *both* outside a town of 20,000 *and* outside a Metropolitan Statistical Area (MSA). Some areas will be TEAs based on federally published data showing an unemployment rate of 150% of the national average: an MSA; a county within an MSA, or a city or town outside an MSA. Otherwise, a "specially designated" high unemployment area may be determined only by USCIS itself (not by the states as before) and must either include the single census tract or contiguous census tracts in which the job creating business will operate or also any or all census tracts directly adjacent to such tract(s). This change is meant to cut down on the "gerrymandering" of extended snake-like areas previously subject to state designation including project areas that many criticized as not worthy of the lower investment level.

Process for TEA "Special Designation": Sadly, USCIS will not establish a separate process for "specially designated" TEAs before a project is organized or offered, except when a regional center seeks optional "exemplar" approval of a project, which can take a few years to get. Instead, investors must include in their I-526 petitions the data on which the TEA can be determined by USCIS. The rule does not identify one definitive set of data for these determinations, because "no one dataset is perfect for every scenario." The regulation specifically mentions data from the U.S. Census Bureau in the American Community Survey or from the DOL's Bureau of Labor Statistics as "reliable and verifiable," which probably will result in those sets being relied on most, and the rule's preamble mentions the need to use consistent data both for the local and national unemployment rates. But the lack of absolute clarity in data and methodology puts huge pressure on the economists on whom the project developers and regional centers rely to make a correct assessment of TEA eligibility, and on investors to make sure that the data to be used in their filing is the latest available data as of the time of filing.

Date that Locks in TEA: Importantly, under the statute the date of investment is the date the investment area must qualify as a TEA. But when capital is placed first in escrow until I-526 filing (and possibly beyond), USCIS considers the time of investment to be the time of I-526 filing. Therefore, we can expect the popularity of even short escrows to decline in order to ensure that an investor can depend on the TEA data as of the time of actual investment and can avoid any disastrous change in TEA data that could occur between investment and filing.

Retention of I-526 Priority Dates: The onslaught of investment during this season will result in even longer waiting lists for visa numbers than already exist. The new regulation mercifully provides that if an investor gets an I-526 petition approved, and then for some reason that I-526 is abandoned or even revoked (because of some material change) other than for misrepresentation or for ineligibility as of the time of filing, then the investor can take the place in the queue marked by that first approved petition and apply it to a subsequently filed I-526 petition. Importantly, a priority date that is actually used to immigrate as a conditional resident cannot be carried forward to a new petition, which means that investors who experience project-related problems that result in denial of I-829 would need to start all over in the queue. Also, a "material change" to an investment project that results in denial of an I-526 petition in the first place will provide no priority date, while a material change after that I-526 approval--though resulting in revocation of the petition before immigration to conditional residence--marks a place in the queue that the investor can take to a new petition. One investor who after I-526 approval decides not to immigrate cannot pass on a priority date to a family member. The regulation does not provide any new protection from a child "aging out" of eligibility by reaching an adjusted age of 21 (absolute age minus the time of I-526 adjudication) by the time a visa number becomes available to the investor. Thus, as in the I-140 context for the first three employment based preferences, only the time the ultimately used petition was pending will be subtracted from the child's absolute age under the Child Status Protection Act. Importantly, a place in the visa queue marked by an approved I-526 will not be useful in immigrating under an I-140, and vice versa. And a subsequent I-526 retaining a prior petition's priority date will not allow the investor to use the lower level of minimum investment that may have been in effect for the first petition.

Miscellaneous Clarifications: Several additional "changes" are basically clarifications of existing interpretations. For instance, the filing of an I-526 petition is what marks an investor's place in any queue for visa numbers. EB-5 investors may take credit for all of the new jobs created by a project even if dependent on other capital in addition to that of EB-5 investors. Family members of investors who do not file with the investor (including divorced spouse or child who has married) or who do not file I-829 at all (such as because they have abandoned permanent residence to live elsewhere) must file their own individual petitions (not filing together without the principal) with their own fees and show how the investor sustained the investment and created the requisite jobs. Family members can file I-829 together with one fee if the investor has died. While essentially passive investments as limited partners in a limited partnership were recognized because of specific reference in the statute, now the regulation acknowledges that an investor is sufficiently engaged in policy making activities of the investment enterprise if the organization documents provide the investor with "certain rights, powers, and duties normally granted to equity holders of the … type of entity in the jurisdiction" which include the commonly used LLC structure. It does not appear that USCIS is seeking to use the regulation to tighten its current approach that essentially allows EB-5 investors to have essentially a passive role, even if only a nominal right to make "policy input." Nevertheless, one could imagine a future nightmare if USCIS began to evaluate what kinds of rights LLC members are "normally granted."

I-829 Interview Locations: One seemingly small change could have meaningful effect for investors. USCIS may require the investor and family filing an I-829 to remove conditions on residence to appear at an interview at the USCIS office having jurisdiction over either the location of the investor's commercial enterprise, the investor's residence in the United States, or the location of the adjudication of the petition, at the agency's discretion. These locations could be far from the investor's residence, so interviews could cause meaningful inconvenience and expense.

I-829 Denial Process: The regulation clarifies numerous aspects of the process to remove conditions from an investor's permanent residence based on an I-829 petition, including that a denial of the petition shall result in a "Notice to Appear" that starts removal proceedings where the investor and family can appeal the denial in front of an immigration judge. The regulation says that upon USCIS I-829 denial the investor must surrender

the green card and does not say that USCIS will issue temporary evidence pending appeal in removal proceedings, but under the law investors are entitled to such temporary evidence and should demand it.

Offering Tweaks: The rule allows necessary modification of securities offering documents without jeopardizing any previously filed petitions based on some notion of material change, but it is hard to imagine how any changes necessitated by this rule would trigger such notions as to existing investors anyway.

What Else Might Happen: Some parties might bring litigation against USCIS to stop the regulation, alleging some fault in the rulemaking process or analysis. Congress might be persuaded to pass a new EB-5 law that overrules the regulation on the investment amount and TEA approach and makes other changes, including integrity measures, and maybe even to increase the available visa numbers (a very politically challenging task). Neither will stop a current rush of investors expecting the rule to take effect as planned.

This article was first published on IIUSA.

Robert C. Divine leads the Global Immigration Group of Baker, Donelson, Bearman, Caldwell, & Berkowitz, PC, a law firm of more than 700 lawyers and public policy advisors with offices in 20 cities in the U.S. including Washington, D.C. Mr. Divine served from July 2004 until November 2006 as Chief Counsel and for a time Acting Director of U.S. Citizenship & Immigration Services (USCIS). He is the author of "Immigration Practice," a 1,600 page practical treatise on all aspects of U.S. immigration law now in its Fifteenth Edition (see www.jurispub.com). He has practiced immigration law since 1986 and served seven years as Vice President of Invest in the USA (IIUSA), the EB-5 industry trade association. Under his leadership, Baker Donelson serves a wide range of legal needs for regional centers, developers, and investors, including immigration, securities, business, real estate, tax, international, government investigations, and litigation.