

The Realities and Implications of Chinese EB-5 Investors' Wait for Visa Numbers

by [Robert C. Divine](#)¹ of Baker Donelson

January 5, 2016

The EB-5 industry needs to face a new reality: Investors born in mainland China who file I-526 petitions from now to the foreseeable future will have to wait at least six years before a visa number will be available for them to use an approved I-526 petition to actually immigrate to the United States. The higher the number of I-526 petitions that exceeds the visa supply, the longer the wait will get.

This is an important statement. I first explain how I arrived at this conclusion and then explain some important implications of it.

How the Visa Allocation System Works for EB-5

Currently, approximately 10,000 EB-5 immigrant visas are allocated annually, on a fiscal year beginning October 1, to alien investors and their spouses and qualifying children. EB-5 visa numbers are allocated in the order in which the investor filed the I-526, so the I-526 filing date is the “priority date” for the investor. When allocating EB-5 immigrant visas, U.S. law limits each country to an aggregate maximum of 7% of the total number of EB-5 immigrant visas available each fiscal year. Until FY2015, the annual quota was not reached, and applicants born in mainland China have tended to use approximately 85% of the numbers. (See [Report of the Visa Office 2015](#), Table IV Part 4, reflecting that mainland China born accounted for 7,616 of the total 8,773 EB-5 visa numbers issued). If the annual worldwide quota is likely to be reached in a fiscal year, the State Department imposes a “cut-off date” for applicants born in a country that appears likely to exceed the 7% per country limit to restrict visa numbers to such applicants to the 7% limit, plus any additional numbers that will not be used by applicants born in all other countries combined. (If visa demand from applicants from countries not using the 7% limit were likely on a combined basis to exceed the worldwide limit, the State Department would impose a worldwide “cut-off date,” but that has not been the case for EB-5, given the heavy predominance by mainland China and the lack of demand from elsewhere).

An applicant receiving I-526 petition approval cannot move forward in the process toward conditional permanent residence (whether through consular processing overseas or adjustment of

¹ Robert C. Divine leads the Global Immigration Group of Baker, Donelson, Bearman, Caldwell, & Berkowitz, P.C., a law firm of over 650 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 has served as Chair of various committees of the American Immigration Lawyers Association and currently serves on the EB-5 Committee. He has served six years as Vice President of the Association to Invest in the USA (IIUSA), an association for EB-5 regional centers. 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. His contacts and biography can be found at www.bakerdonelson.com/robert-c-divine. Mr. Divine thanks Stephen Yale-Loehr of Miller Mayer law firm for helpful editorial review.

status in the United States) until the applicant's "priority date" (the date the I-526 petition was filed) is earlier than any applicable published cut-off date. In April 2015, the State Department for the first time imposed a "cut-off date" for EB-5 investors born in mainland China. It is expected to continue to do so for the foreseeable future, because worldwide demand exceeds 10,000 per year. As a result, for investors born in mainland China (not including Macau, Hong Kong, or Taiwan) and not otherwise "chargeable" to a different country, delays in the processing for immigrant visa or adjustment of status application will occur.

According to the January 2016 [Visa Bulletin](#), the cut-off date for allocation of non-regional center EB-5 visa numbers for investors from mainland China is January 8, 2014. This is the "application final action date" for the 5th employment preference in the Visa Bulletin for January 2016, which was published on December 9, 2015. On that date of publication, the law that enables regional center sponsorship was set to expire on December 11, so that Bulletin reflects that visa numbers for regional center-sponsored investors are "unavailable." The Visa Bulletin for December 2015 had listed December 15, 2013 as the cut-off date for China-mainland born applicants both for non-regional center and for regional center sponsored investors, and it appears that the January 2016 Bulletin's cut-off date of January 8, 2014 would now also apply to regional center-sponsored investors given the extension of the regional center legislation to September 30, 2016 that was included in the [Consolidated Appropriations Act, 2016](#) (See Division F, Title V, Section 575). This would cause one to assume that the wait for a visa number for a China-born investor is two years. That assumption would be mistaken, however, because far more than two years' worth of people are already in the queue.

How Long Chinese Investors are Likely to Have to Wait

Just how long is that wait likely to be for new investors today? Two sets of people need to be added together to figure out how many people are ahead in the queue for visa numbers based on I-526 filing date: those who have filed petitions and are awaiting adjudication, and those with approved I-526 petitions who are awaiting visa number allocation.

Pending petitions

Take a look at [USCIS performance data about I-526 processing](#). On December 4, 2015, USCIS published a report that it had 17,367 I-526 petitions pending as of September 30, 2015, which is the end of the fourth quarter of the fiscal year ending on that date. By now USCIS has received 3 additional months of filings but has completed adjudications during those same 3 months. There was a huge spike in filings during the fourth quarter of FY2015 ending September 30 (6,575 filings compared to an average of under 3,000 receipts during the previous seven quarters). The Q4 FY2015 spike surely was due to the expiration of the regional center legislation on September 30 and the expectation that renewing legislation would increase the minimum investment by at least 60% (to \$800,000 from \$500,000) and possibly change other eligibility rules, so interested investors were making their purchases before an expected price increase. The regional center legislation was initially extended until December 11 and then again to December 16 while more investors stepped up to purchase with a more heightened expectation of price increase and rule changes based on publicized proposals and negotiations about the same.

USCIS has been adjudicating on average less than 2,500 petitions per quarter for the last four quarters. My conclusion from this is that pending I-526 petitions at USCIS increased to at least 20,000 by the end of December 2015 (the end of the first quarter of FY2016). On average in 2014 and 2015, 90% of I-526 petition adjudications have been approvals, so let's reduce the number by 10% and say 18,000 petition approvals are in the USCIS adjudication pipeline.

But that is 18,000 investors, and visa numbers are used also by family members, so how many visas does that represent? According to the [Department of Homeland Security's 2013 Yearbook of Immigration Statistics](#), in Table 7 among a [compendium of attached tables](#), more than half of employment-based immigrants are family members. Let's assume just half: that for every investor there is on average one family member getting a visa. Therefore, there are probably about 36,000 visa numbers to be used by the investors with a pending I-526 petition.

Approved petitions awaiting visa numbers

The second group affecting the wait for visa numbers is the people who have received I-526 approval but have not yet received a visa number. During the negotiations leading up to the extension of the regional center legislation from December 16, 2015 to September 30, 2016, negotiations became heated concerning some proposed "set asides" proposed for certain categories of investors. During these negotiations, the State Department informally reported that as of mid-December 2014 there were 17,500 registered EB-5 applicants pending at the National Visa Center.

It is hard to know what to make of this number, but I think it is an under-estimation of visa demand from approved I-526 petitions. The National Visa Center has been sending fee bills only directed to the investor and not mentioning any family members, because the I-526 form itself, unlike the I-130 for family-based petitions and the I-140 petition for other types of employment-based petitions, does not ask for identification of family members who may accompany or follow the investor in the immigration process. Only if the investor realizes that family members should be included at the fee bill stage and brings this up to the National Visa Center before paying the bill does the National Visa Center issue a revised fee bill for the rest of the family members. The NVC should have been sending out fee bills to investors who filed before May 1, 2015 based on the Visa Bulletin for December 2015 reflecting that the "date for filing" for EB-5 was May 1, 2015. Some people would not have sent in the fee bill knowing that they had a long time to go before their "application final action date" became current with their priority date. And some people might have been in the United States when the I-526 was filed and indicated that they expect to use adjustment of status, so USCIS would not have sent their petition to the National Visa Center for registration at all. So I suspect that the 17,500 "registered applicants" under-estimates the investors and family members with approved petitions and waiting in line.

Let's figure it a different way. In the December 2015 Visa Bulletin the people with visas available for "final action"-- meaning allocation of a visa number-- had filed their I-526 petition before December 15, 2013, two years before. To be the least alarmist about the expected wait times of new investors, let's assume that everyone whose petition was approved before the end of December 2013 (the end of Q1 of FY2014) had been issued a visa number already (which we know is not true, because some people straggle). The total number of I-526 petitions approved since Q1 of FY2014 is 12,418. Typically 85% of EB-5 investors are from mainland China, so

15% might have been able to go ahead and immigrate promptly after petition approval, so let's assume only 10,555 approved investors are in queue for a visa. As with the pending petitions, we double that to account for family, so 21,000 un-issued visa numbers are spoken for by investors and family members based on approved petitions. That sounds like a more realistic upward adjustment from the 17,500 number of "registered applicants" in the NVC system.

Putting the two categories together, the total number of EB-5 visas spoken for by pending (36,000) and approved (21,000) investors and their family members seems to be about 57,000. That is almost six years' worth of numbers at 10,000 per year.

Other Adjustments

Consider also that every investor chargeable to a country other than mainland China who files during those six years will get to "cut in line" ahead of every mainland China applicant. How many might that be? Assuming the recent history of 15% of EB-5 visa numbers going to other than mainland China-born, 1,500 of the 10,000 visa numbers per year for the six years of wait to total would be 8,000. That delays today's new Chinese investors almost another year.

Some investors might lose interest or die before their visa number becomes available, and some approved petitions may become revoked due to material changes, due to USCIS investigations into the projects, or due to termination of the sponsoring regional center. I am not aware of any data on the dissipation rate of approved investors, but I assume a 5% dissipation rate. That would reduce the wait time by about a half a year.

Conclusion

Overall, I figure a new Chinese investor today will wait *six years* to get an EB-5 visa. I might be off by a year or two in either direction.

Implications of a Six-Year Wait for Visa Number by Chinese Investors

So what are the implications of such a wait?

Age-Out of Children

Delayed visa availability will end up disqualifying many more children from derivative eligibility due to age. One of the main reasons Chinese investors use the EB-5 program is to create opportunity for their children who immigrate with a parent investor. Only a child who is unmarried and under age 21 at the time of the investor's and the child's admission as a conditional resident can qualify to immigrate based on the investor's immigration. Under the Child Status Protection Act, codified at Section 203(h) of the Immigration and Nationality Act, the "adjusted age" of a child will be "frozen" during the period that the investor's EB-5 Petition is pending with USCIS. But once USCIS approves the petition the child's "adjusted age" will resume advancing until a visa number becomes available based on the date the investor filed the EB-5 Petition. If the child's adjusted age reaches 21 before visa number availability, the child will "age-out" of eligibility for an immigrant visa based on the parent investor's immigration. With a six year gap between I-526 petition filing and visa number availability for an investor chargeable to mainland China, and with

an estimated 12 month I-526 processing time, a child who is 16 or older at the time of EB-5 Petition filing could reach an adjusted age of 21 before visa number availability and thus fail to receive an immigration benefit from the parent's investment. The longer the period of waiting for a visa number turns out to be, the younger a child needs to have been at the time of I-526 filing to avoid "aging out." Unfortunately, it is impossible to predict what the waiting time will be at the time of I-526 filing. Congress needs to change the law to lock in a child's age under 21 at the time of filing an I-526 petition.

Many Chinese families, fearing age-out, will consider making a gift to their child for the child to be the EB-5 investor who immigrates independently. This creates interesting questions and risks for EB-5 developers concerning the enforceability of investment agreements with minor children who could not themselves be considered accredited investors. Such issuers of securities might consider including the parents in the agreements and confirming the parents' accreditation and source of funds.

Loss of Eligibility

Numerous events could occur during the wait for visa numbers resulting in loss of immigration benefits.

Legislative Expiration or Changes

The legislation allowing credit for indirect job creation based on regional center sponsorship expires on September 30, 2016 -- long before expected visa number availability for new Chinese investors. If the regional center legislation is not extended, then according to announced USCIS policy investors who have not been admitted to conditional residence before legislative expiration will be unable to use the program to enter the United States, even if an I-526 petition was already approved. Therefore, Chinese investors require multiple successive legislative reauthorizations (in the absence of a permanent authorization) to realize their immigration benefits. Moreover, during the wait for visa number availability Congress could enact retroactive changes to the EB-5 program that could render the project or investor no longer eligible or could allow categories of other investors and their families to move ahead of the investor in the queue for visa numbers, perhaps substantially increasing the investor's wait time. In 2015 Congressional leaders drafted a bill that would have created certain categories for visa number "set-asides" that might have more than doubled the already lengthy wait time for new Chinese investors who did not qualify for the set asides. No matter what happens after the current law's expiration, Congress needs to protect the expectations of investors who already will have invested and filed petitions.

Material Changes

USCIS' May 30, 2013 [EB-5 Adjudications Policy Memorandum](#) states that if an EB-5 investment project materially changes from the date of filing the I-526 to the point that the investor actually immigrates to the U.S. as a conditional permanent resident, the I-526 becomes deniable or even revocable. The longer the wait for a visa number, the more chance there is for material changes to occur to the project, with a possible loss of the investor's EB-5 eligibility. An investor who experienced such material change could file a new petition showing that the material changes

nevertheless qualify for EB-5 benefits, but in doing so the investor will have to go to the end of the queue for visa numbers, and the risk of age-out of any derivative child increases significantly. With such long waits for visa numbers, the risk of change arguably becomes unreasonable. USCIS should allow adjudication of an EB-5 petition as filed and allow investors to carry their place in the visa queue from that petition to any subsequent petition needed to cover any material changes.

Sustainment of Investment

Additionally, USCIS interpretations of EB-5 laws and regulations state that an investor must sustain the “at risk” nature of his or her investment with resulting job creation during the entire period of conditional permanent residency. Visa unavailability may significantly delay the period of an investor’s conditional permanent resident status and thus extend the time throughout which the investor must sustain the investment and sustain created jobs. If invested funds are liquidated from the relevant enterprises or created jobs are lost before an investor’s conditions are removed, USCIS could deny removal of conditions on that basis. USCIS has issued and needs to finalize draft policy suggesting that unexpected loss of jobs or liquidation of funds from the job creating enterprise after the requisite jobs have been created might not result in loss of benefits as long as the new commercial enterprise re-deploys the liquidated capital in other “at risk” investments, but the policy has not been finalized and lacks critical details. Re-deployment creates new risks of loss of the investment even if immigration benefits are retained.

Conclusion

I hope I am wrong, but I feel compelled to make known that the wait for a visa number for an investor born in mainland China (and without an immigrating spouse born elsewhere) seems likely to be six years or more. Chinese investors seeking to benefit children age 16 or older might be sorely disappointed and might need to consider a different strategy. And the age line might turn out to be younger than 16.

Securities issuers need to disclose these age-out and eligibility risks to prospective EB-5 investors, who otherwise may be lulled into complacency by the Visa Bulletin that appears to reflect a two-year waiting period. And USCIS and Congress need to take action to provide more protection of the reasonable expectations of today’s and yesterday’s investors and their children.