Insight

Changes to the Immigrant Investor Visa

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The Department of Homeland Security (DHS) recently published changes to the U.S. immigrant investor program, two and a half years after first proposing reforms to the EB-5 visa. The new rules, effective November 21, alter the qualifications for an EB-5 visa, and include: raising investment requirements, altering the designation process of targeted employment areas (TEAs), and easing the application process for some applicants.

The EB-5 Program

The EB-5 program aims to attract foreign investment and spur job creation in the United States by offering investors permanent residency. To qualify, prospective immigrants currently must invest at least $1 million in a new commercial enterprise (formed after November 29, 1990) and create at least 10 full-time jobs – either directly or indirectly, depending on if the investment is independent or in a regional center. EB-5 immigrants are only required to invest $500,000 if the investment is in a TEA, which can either be a rural area or one with unemployment levels at least 50 percent higher than the national average. A project qualifies as being in a rural area if it not located in a metropolitan statistical area (MSA) and not in a municipality with a population greater than 20,000.

Estimates indicate that EB-5 immigrants have invested $27.5 billion in the United States since 2008. Some lawmakers, however, have been critical of the program after several cases of fraud in which EB-5 investments were funneled to individuals instead of job-creating projects. The changes made to the program are a response to this concern and an attempt to modernize the program, albeit with mixed implications.

Investment Requirements

The new regulation raises the investment level needed to qualify for an EB-5 visa by 80 percent. The minimum investment required in a TEA increased from $500,000 to $900,000 (less than DHS's original proposal of $1.35 million), while investment requirements in non-TEAs rose from $1 million to $1.8 million (the same as DHS's original proposal).

The EB-5 program is highly utilized by foreign investors. Only 10,000 visas are allocated annually to both EB-5 investors and their family members, and this cap has been reached each year since 2014. Therefore, barring a drastic change in investor demand, these new investment requirements will likely increase the amount of EB-5 investment in the United States. Simultaneously, however, these changes may encourage investment to move away from the United States and to one of 50 other nations with similar immigrant investor programs, including nearly half of the European Union.

Further, the new investment requirements will impact the distribution of investments within the United States. Currently, the difference between a TEA and non-TEA investment is $500,000. This difference, unsurprisingly, incentivizes 99 percent of all petitioners to invest in projects located in TEAs. Doubling the gap to $900,000 will continue to drive nearly all EB-5 investments to rural and low employment areas.

TEA Designations

Currently, TEAs are designated by the state economic agencies, such as departments of labor or economic development. The new rule takes this authority away from the states and instead gives it to DHS, which will designate TEAs using unemployment data from the American Community Survey. Like current law, the new rule allows for the consideration of multiple census tracts in the determination of low-unemployment areas. Unlike current law, however, consideration can only be given to multiple census tracts if the new commercial enterprise is located in more than one census tract or if it principally does business in a “directly adjacent” census tract. This addition of the “directly adjacent” language is meant to prevent cases in which economically thriving areas are linked to economically struggling ones within a TEA, allowing EB-5 projects in prosperous cities to qualify for reduced investment levels.

Other Changes

The new rule includes additional procedural changes to make the EB-5 application process easier for some applicants. The first allows priority-date retention. A priority date is defined as the date a prospective immigrant files his or her petition to become a legal permanent resident. It is used to determine one’s place in line if there is a backlog, i.e. if the number of applicants for a visa is greater than the number of visas available. Like most other immigration categories, the EB-5 program faces a backlog, and individuals from China, India, and Vietnam are currently experiencing wait times of 5 years after their application is approved before they are eligible for a visa.

Currently, if investors must refile petitions (for instance, because a regional center they were going to invest in goes out of business) they cannot use their original priority date for the second application. The new regulation allows individuals to retain their priority dates if their applications must be amended for reasons outside of their control. Because an earlier priority date means that approved applicants can obtain their visas earlier, this change will reduce wait times for those applicants.

The rule also affects how the family members of foreign investors obtain green cards. EB-5 investors and their families are given conditional permanent residence when they first obtain their visas. Once they have been in the United States for two years, and assuming the conditions of the EB-5 visa are met, they may apply to have the conditions of their visa removed and transition to legal permanent status (green cards). The new rule requires family members not on the principal investor’s application each to apply separately, as opposed to applying jointly, increasing the filing fees collected from green card applications. The new rule, however, also provides more flexibility for the time and location of green card interviews, eliminating the need for interviews to be held in the same location as the new commercial enterprise.

The flexibility in interviewing locations will likely ease the green card process for investors and families, although the regulation does not address the fact that family members are included in the visa cap. On average, approximately two family members are granted visas for every one principal investor. A helpful reform moving forward would be to exempt family members from the annual limit so that the U.S. economy can fully reap the benefits of the immigrant investor program.