



Let's keep a good thing going: Congress urged to save the EB-5 Program - by Debbie Klis

August 20, 2019 - Spotlights

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The November 21st, 2019 effective date of U.S. Citizenship and Immigration Services (USCIS) new EB-5 program modernization rule is approaching fast. The new rule will increase the minimum investment amount per investor to \$900,000 for projects in a "Targeted Employment Area" (TEA) and to \$1.8 million for projects outside of a TEA. The EB-5 program is a merit-based immigration category that promotes U.S. job creation through foreign direct investment that has been around since the early 1990's. The EB-5 program's popularity grew significantly during the Great Recession when access to capital was halted or diminished and has remained popular. Many attribute much of the United States' quick rebound from and stability following the Great Recession to the significant foreign investment through the EB-5 program.

Developers are scrambling to commence and complete fundraising for current and future projects in their pipeline before the effective date of the increase with good reason. The new rule abolishes decades of state sovereignty to determine whether a project is located in a TEA within their state. Failure to qualify as a TEA means the applicable investment amount changes to \$1.8 million not \$900,000 under the new rules, which would represent a 73% increase over the current rules prescribing for a \$500,000 investment for projects in a TEA.

Ceding TEA determination to USCIS means that projects in affluent areas located adjacent to high unemployment areas may no longer receive TEA designation notwithstanding that the residents of the surrounding census tracts would have travelled to the project site for construction and permanent jobs. Practically speaking, it means that a real estate project on Fifth Ave. that currently qualifies as a TEA, because the state of New York permits use of unemployment data in adjacent census tracts through Brooklyn, Bronx, etc., probably will no longer qualify as a TEA under the new rules. Projects in affluent census tracts are advised to complete fundraising by November 20th or risk a per-investor increase, potentially, to \$1.8 million instead of \$900,000 if the applicable census tract no longer qualifies as a TEA.

Unless Congress enacts legislation to amend the new rules before November 21st, the coming months may yield the final reign of the EB-5 Program. There are many areas of the EB-5 Program to

improve upon to increase its effectiveness such as providing for additional annual visas and providing greater specificity on what USCIS will rely in rendering TEA determinations. While rural areas will continue to qualify as TEAs, the new rules limit TEA determination to projects located in a single census tract, contiguous census tracts, or census tracts directly adjacent to a census tract, that qualify under federally published data showing an unemployment rate of 150% of the national average. The new rules sought to eliminate “aggressive” practices of snaking census tracts together. The lack of definitive criteria regarding sources of data and methods to assess TEA eligibility under the new rules is expected to cause significant strain on economists and increase risk to investors. Developers in metropolitan areas are holding out hope that Congress will step in to remedy these shortcomings to prevent the inevitable and profound curtailment in foreign investment in their city.

The EB-5 Coalition commissioned a report released in March 2019 that revealed that during the past two years approximately \$11 billion in capital investment in U.S. real estate and businesses occurred through the EB-5 program. The report supplements a study by American Action Forum in January 2018 that revealed that investors in the EB-5 program invested more than \$20 billion in the U.S. economy from 2009 to 2018; investment through the EB-5 program during these ten years equates to 40,000 investors who created at least 400,000 jobs. The American Action Forum study showed an investment of \$5 billion in 2017 through the EB-5 program and an associated actual job creation of more than 174,000 jobs, which represents approximately 16 jobs per investor, which exceeds the ten jobs per investor requirement.

The foregoing data demonstrates the EB-5 program’s profound value to the current U.S. economy and job numbers as well as demonstrates the tragedy of its demise. The EB-5 Program should be kept out of the immigration debate and supported to continue U.S. job creation and investment that benefits American interests. Congress is urged to step in and amend or overrule USCIS’s new rule on the investment amount and TEA determination and increase visa numbers.

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