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Looking Ahead: EB-5 Program Reform

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The Immigrant Investor Program, more commonly referred to as the EB-5 program, gives foreign entrepreneurs the opportunity to permanently reside and work in the United States after investing capital into an American commercial enterprise creating a sufficient number of full-time jobs.

In recent years, the number of EB-5 visa applications filed has surged. A large number of these applications relied on the Immigrant Investor Pilot Program, which is the part of the EB-5 program that provides for regional centers to facilitate larger capital raises. While legislators and stakeholders recognized that program reforms were needed, no consensus could be reached before the program was set to expire on September 30, 2015. Consequently, the U.S. Congress passed in December 2015 a short-term extension of the program to September 30, 2016. Looking ahead, the likely areas of reform may be gleaned from two of the proposed reform bills that were not passed, and from homeland security concerns. Developers, investors and other stakeholders should also be aware of stepped-up Securities and Exchange Commission enforcement activity.

Proposed Reforms

One of the proposed reform bills that was not acted upon was a bill introduced by Sens. Chuck Grassley and Patrick Leahy entitled The American Job Creation and Investment Promotion Reform Act (“S. 1501”). S. 1501 would have extended the pilot program through September 2020. The minimum investment amounts would be raised to \$800,000 for investments in targeted employment areas and \$1.2 million for investments in non-TEAs (presently \$500,000 and \$1 million, respectively). The authority to certify TEAs would have been given exclusively to the Department of Homeland Security. In addition, the designation of TEAs would have limited them to a smaller number of contiguous census tracts. Finally, S. 1501 provided that only nine out of the required 10 jobs each investor must create may come from “indirect job creation.”

Another reform proposal that was not acted upon was a bill introduced by Sen. Rand Paul, entitled The Invest In Our Communities Act (“S. 2122”). Unlike S. 1501, this bill sought to permanently reauthorize the pilot program. S. 2122 would also retain the present minimum investment amounts in effect – \$500,000 for TEAs and \$1 million for non-TEAs. This bill also sought to expand the number of visas that could be issued under the EB-5 program by eliminating derivative family members from the EB-5 visa count (i.e., an applicant, spouse and two children would count as one visa rather than four), removing the per-country

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quota, increasing the numbers of visas, and requiring adjudication of petitions and applications to be made within 180 days of submission.

Likely Future Reforms

Designation of TEAs

S. 1501's proposed reforms to the designation of TEAs sought to address one of the most contentious issues in the Immigrant Investor Pilot Program: the alleged "gerrymandering" of TEAs, by which regional centers and developers combined economically disadvantaged census tracts with high-value census tracts in high-profile locations like New York City and Miami to facilitate large capital raises in prime development locations. Because the original intent of the program was to facilitate larger capital raises in less affluent areas, some believe that additional criteria are needed to assure that the original intent of the program is maintained.

Homeland Security

In addition to the reforms described above, Sen. Grassley, one of the proponents of S. 1501, has expressed concern with the expedited approval of EB-5 applicants from China, Russia, Pakistan and Malaysia, whose applications are allegedly approved in most cases in no more than 30 days, which many believe is insufficient time to perform the basic and necessary homeland security investigations. Thus, future reform of the EB-5 program may feature increased processing times and costs.

SEC Enforcement

Another issue of concern has been the defrauding of foreign investors by regional centers and individuals offering EB-5 investments. The SEC has announced enforcement actions against lawyers across the country who have allegedly received commissions for selling and facilitating EB-5 investments in violation of the relevant securities laws and regulations by failing to disclose that they received commissions on the investments they recommended. The SEC will likely continue to scrutinize EB-5 transactions closely and will not hesitate to bring enforcement action. Furthermore, the latest compromise legislation would have created an "integrity fund" to help further monitor regional centers and prevent fraud on foreign investors.

Retroactivity

Finally, one of the biggest questions left unanswered is whether new rules and regulations governing the pilot program will take effect only when enacted, will be applied retroactively or will apply as of a cutoff date before enactment. This uncertainty has resulted in a flood of applications by those hoping that any new reforms will not be applied retroactively.

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