MILLER MAYER LLP
Attorneys at Law

Two Key Senators Introduce Bill to Extend and Improve EB-5 Program

By Stephen Yale-Loehr*

On June 3, 2015, Senators Patrick Leahy (D-VT) and Chuck Grassley (R-IA) introduced a bill to reauthorize and improve the employment-based fifth preference (EB-5) green card program. The 79-page bill (S. 1501) would extend the regional center part of the EB-5 program for five years and make several changes to the program.[1] This article summarizes key provisions of the bill.

EB-5 Overview

Congress enacted the EB-5 program in 1990.[2] At the time, the program granted lawful permanent resident status only to immigrant investors who directly invested in and managed job-creating commercial enterprises. Since 1992, with enactment of the regional center pilot program, potential immigrant investors can also invest through EB-5 regional centers.[3] In 2012, Congress reauthorized the regional center program through September 30, 2015.[4] Today, there are over 800 approved EB-5 regional centers.[5]

As background, a potential EB-5 recipient must first file an I-526 petition with the U.S. Citizenship and Immigration Services (USCIS) requesting classification in the EB-5 category. Upon USCIS's approval and a background check, the investor becomes a conditional resident for two years.[6] At the end of that two-year period the applicant must file an I-829 petition with USCIS. The investor must prove that he or she has invested the required capital and that the investment created or will create or save ten full-time jobs for U.S. workers.

Key Features of S. 1501

* Stephen Yale-Loehr (syl@millermayer.com) is co-author of *Immigration Law and Procedure*, the leading 21-volume immigration law treatise, published by LexisNexis Matthew Bender. He teaches immigration law at Cornell Law School, and is of counsel at Miller Mayer (http://www.millermayer.com) in Ithaca, NY. He founded and was the first executive director of Invest In the USA (IIUSA), a trade association of EB-5 regional centers.

I thank everyone who contributed ideas and comments on the article and on the bill discussed in this article. All mistakes, however, are solely my own.

[1] The full text of S. 1501 is at https://www.congress.gov/bill/114th-congress/senate-bill/1501?q=%7B%22search%22%3A%5B%22%5C%22s1501%5C%22%22%5D%7D. A press release summarizing the bill is at http://www.leahy.senate.gov/press/leahy-and-grassley-introduce-legislation-to-improve_extend-job-creating-foreign-investment-program.

[2] Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

[3] Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, § 610, 106 Stat. 1828, 1874; S. Rep. No. 102-918 (1992).

[4] Pub. L. No. 112-76, § 1, 126 Stat. 1325 (2012) (also removing the world "pilot" from the program name).

[5] A list of all approved EB-5 regional centers is on the USCIS web site at http://www.uscis.gov/eb-5centers.

[6] INA § 216A, 8 U.S.C. § 1186b; 8 C.F.R. § 216.6. *See generally* Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ron Wada, Immigration Law and Procedure § 39.07 (2014).

S. 1501, called the American Job Creation and Investment Promotion Reform Act, would make significant changes to the EB-5 program, including:

EB-5 Regional Center Program Extension

Section 2 of S. 1501 would reauthorize the EB-5 regional center program for five years, until September 30, 2020. The bill would also repeal section 610 of the original 1992 appropriations law that set up the regional center program and move it to INA § 203(b)(5)(E).

Minimum Investment Amount

Currently, EB-5 investors invest $500,000 if their investment is in a targeted employment area (TEA) and $1 million otherwise. S. 1501 would increase the minimum investment amount to $800,000 for investments in a TEA and $1.2 million for investments not in a TEA. The Department of Homeland Security (DHS) could increase that amount by regulation. In addition, the minimum investment amount would automatically increase, based on the consumer price index, every five years.

Revised Definition of a Targeted Employment Area

The current statute defines a targeted employment area as a rural area or an area that has experienced high unemployment of at least 150 percent of the national average.[7] The statute defines a rural area as an area not within a metropolitan statistical area (MSA) or the outer boundary of any city or town having a population of 20,000 or more.[8] Each state notifies USCIS which state agency will apply these guidelines, and determines TEAs for that state.

S. 1501 would revise the statutory definition of a TEA to include a rural area, a closed military base, or an area consisting of a single census tract that has 150 percent of the national average unemployment rate. USCIS would make the final determination on what constitutes a TEA, not the states.

Limiting high unemployment TEAs to a single census tract that has 150 percent of the national average unemployment rate would hurt many EB-5 projects. For example, an industrial development park or a closed military base may not have anyone living in that census tract. It seems doubtful that the bill's drafters intended to preclude EB-5 projects in such areas.

Moreover, a census tract measures where people live, not where they work. If the EB-5 program's goal is to create jobs in rural or high-unemployment areas, the bill should focus on commuting patterns instead.

For TEAs in an MSA, at least fifty percent of a project's job creation would have to be within that MSA to be counted. If the TEA is outside of an MSA, at least fifty percent of the jobs would

[7] INA § 203(b)(5)(B)(ii), 8 U.S.C. § 1153(b)(5)(B)(ii).

[8] INA § 203(b)(5)(B)(iii), 8 U.S.C. § 1153(b)(5)(B)(iii).

have to be created within the county in which the TEA is located. If not, the total number of jobs would be reduced until the fifty percent threshold is met.

This fifty percent requirement could cause problems for some EB-5 projects. For example, assume a regional center wants to build an ethanol plant in a rural part of Iowa. It is likely that much of the money spent on the project will be used to buy equipment or supplies manufactured outside the county in which the ethanol plant will be located. Currently, an economist can count the money spent elsewhere toward indirect job creation. S. 1501 would seem to limit such outside-the-county spending to fifty percent. Depending on how much spending occurs outside the county, that limit could significantly reduce the overall number of jobs that could be allocated to EB-5 investors. It is also hard to know how USCIS or a project developer could determine that fifty percent of indirect jobs would be created in the relevant county.

Senators Leahy and Grassley, who are both from rural states, clearly would like to see more EB-5 projects in rural areas. Some of the bill's language on this issue may significantly hurt EB-5 projects in both rural and urban areas.

Job Creation Requirements (Indirect Jobs)

The regional center program does not require that the immigrant investor's enterprise itself directly employ 10 U.S. workers. Instead, a regional center project can count both direct and indirect jobs.[9]

In response to concerns about how to count indirect jobs, S. 1501 would stipulate that indirect jobs could count for no more than ninety percent of the all the jobs counted for EB-5 purposes. The bill is unclear whether the job-creating enterprise would have to have direct employees. If so, this could hurt infrastructure, construction, and other types of EB-5 projects that typically rely only on indirect job creation.

Currently, jobs created by domestic investors can be allocated to EB-5 investors. S. 1501 would change that. A maximum of thirty percent of the total jobs created through non-EB-5 investment would be allowed, even if the non-EB-5 investment represents more than thirty percent of the project's funding. Assume, for example, that U.S. investors invest $8 million toward a new hotel, and EB-5 investors invest $2 million. Assume also that the new hotel creates a total of 100 new direct and indirect jobs. Under current law, EB-5 investors can claim all 100 jobs. Under S. 1501, only thirty percent of the jobs created by the U.S. investors could be allocated to EB-5 investors.

Regional Center Oversight and Compliance

S. 1501 would add major reporting and compliance requirements for both regional centers and enterprises associated with regional centers. This section would require regional centers to certify annually that they are complying with various requirements. This section would basically

[9] 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11037(a)(3), 116 Stat. 1758 (2002).

codify and expand on the current I-924A reporting requirements. Regional center principals and others associated with a regional center would not be eligible to participate in the EB-5 program if they have previous securities violations or various civil or criminal judgments for fraud, deceit, securities violations, or have been subject to discipline as an attorney.

DHS could sanction a regional center for various violations. Sanctions could include civil penalties of up to ten percent of the total EB-5 capital raise, a temporary suspension, a permanent bar from program participation, or regional center termination.

Regional centers would also have to certify that they and all parties associated with the regional center are complying with state and U.S. securities laws. DHS would have "unreviewable discretion" to terminate a regional center or a commercial enterprise associated with a regional for violations or if the regional center or an associated commercial enterprise has engaged in fraud, misrepresentation, criminal misuse, or poses a threat to national security.

Everyone directly or indirectly involved in running or managing a regional center would have to be a U.S. citizen or permanent resident. No foreign government entities could be directly or indirectly involved with the ownership or administration of a regional center.

S. 1501 would require each regional center to pay an annual fee of $20,000 to establish an EB-5 integrity fund. DHS would use the fund for audits and site visits, and to conduct investigations inside and outside the United States.

The bill would create a registration requirement for promoters of EB-5 projects, and would allow USCIS to set standards of conduct and even place limits on fee arrangements.

S. 1501 would require regional centers to give advance notice to DHS of significant proposed changes to their organizational structure, ownership, or administration, including the sale or rental of a regional center. USCIS would have to approve the changes before they could take effect. USCIS would have to provide notice of any such changes for at least thirty days in advance on its website.

S. 1501 would provide a wide variety of grounds to deny or revoke a regional center approval, project approval, investor petition approval, or even permanent residence. Almost all grounds for denial or revocation would within the unreviewable discretion of DHS. Many of the grounds could be based simply on a reasonable belief that the affected party has committed an offense.

Project Preapprovals

Currently, regional centers can but are not required to ask USCIS to preapprove their business plans and other documents for a new EB-5 project. S. 1501 would make such preapprovals mandatory. The bill would require project developers to file a comprehensive business plan, a detailed economic report, and investment and offering documents, including subscription, investment, partnership, and operating agreements, private placement memoranda, term sheets, management biographies, and any marketing materials to be used with the offering. The documents would have to detail the investment risks, list any potential conflicts of interest,

identify anyone who would receive compensation in connection with the investment, detail any pending litigation, bankruptcies, or adverse judgments over the past ten years, and certify that the project is complying with U.S. securities laws.

A project preapproval would be binding on the adjudication of EB-5 petitions filed by investors in the project, except if USCIS determines that there is evidence of fraud, misrepresentation, criminal misuse, a threat to public safety or national security, a material change concerning the economic model, other evidence affecting program eligibility that was not disclosed, or a material mistake of law or fact in the prior adjudication.

DHS could deny or revoke a project preapproval application if the agency thinks it presents a significant risk of fraud, self-dealing, or conflicts of interest, or if it presents a threat to public safety or national security. DHS would have "unreviewable discretion" to make such determinations.

Source of Funds Changes

An EB-5 investor must prove the lawfulness of the money they are investing in the United States.[10] S. 1501 would expand the "source of funds" review that USCIS conducts. For example, the regulations currently require that investors provide at least five years of tax returns.[11] S. 1501 would expand that to seven years. USCIS currently does not require investors to prove the lawful source of any administrative fees they pay in addition to their capital contribution. The bill would require administrative fees and costs to be lawfully obtained.

S. 1501 would limit the use of gifts as the source of EB-5 investments. Gifted funds could only be used for EB-5 investments if gifted by a spouse, parent, child, sibling, or grandparent.

S. 1501 would also limit the use of loans as the source of EB-5 investments. Capital based on loans would have to be secured by the investor's personal assets. This would codify a recent interpretation by USCIS that limits certain third party loans to EB-5 investors.[12] Moreover, any loans would have to be obtained by a reputable bank or lending institution that is properly chartered or licensed under laws of the applicable state, territory, or country.

Concurrent Filing and Age-Outs

S. 1501 would allow concurrent filing of an I-526 petition and I-485 adjustment of status application if a visa number is immediately available. The bill would also amend INA § 245(k) to include EB-5 investors. This means that an EB-5 investor who has been out of status for less than 180 days would nevertheless be able to adjust status.

[10] 8 C.F.R. § 204.6(j)(3); *see also* Stephen Yale-Loehr, *USCIS Explains How to Deal with EB-5 Source of Funds Issues*, https://iiusa.org/blog/government-affairs/uscis-government-affairs/uscis-explains-deal-eb5-source-funds-issues-stephen-yaleloehr/; Stephen Yale-Loehr & Christopher Repole, *Show Me the Money: Proving Lawful Source of Funds for EB-5 Immigrant Investors*, https://millermayer.box.com/s/xy9ugp21yf80ao1l1d0t.
[11] 8 C.F.R. § 204.6(j)(3)(ii).
[12] Lincoln Stone & Susan Pilcher, *Investing Cash from Loan Proceeds: A New Interpretation of "Indebtedness,"* https://iiusa.org/blog/uncategorized/investing-cash-loan-proceeds-interpretation-indebtedness-lincoln-stone-susan-pilcher/.

S. 1501 would help certain children of EB-5 investors. If a parent's I-829 petition is terminated, the bill would allow a child to still be considered a child for EB-5 purposes if the child remains unmarried and the parent files a subsequent I-526 petition within one year after the original petition was terminated.

Effective Dates

S. 1501 has several different effective date provisions, some of which do not seem to jibe with others. Many of the changes would take effect immediately upon enactment; others would grant a one or two-year delay.

The changes proposed by S. 1501 should not take effect immediately. Many projects may take a year or longer to find investors and have them file petitions. Moreover, USCIS currently takes over a year to decide I-526 petitions, the first step in the EB-5 process. It would be unfair and burdensome to both investors and regional centers to have some investors in a project subject to new rules, while other investors would be subject to current rules. Also, any changes mid-stream in a project would require securities attorneys to revise the project offering documents.

Finally, it will take USCIS several months to publish rules implementing any new law. If changes created by the new law take effect immediately, what are projects and investors supposed to do until implementing regulations are published?

For all these reasons, S. 1501 should be amended to state that all EB-5 petitions and projects filed before the enactment date are grandfathered to the old statute, rules, and USCIS policies. The new rules should only apply once USCIS publishes implementing regulations.

Other Provisions

S. 1501 would provide that if a regional center or new commercial enterprise is terminated, investors who have already obtained conditional residence would have 180 days to affiliate with a new regional center, invest in a new project in the same regional center, or make a new investment through a project affiliated with a different regional center. The two-year conditional residence program would start over.

If an EB-5 investor has sustained his investment for at least two years before being admitted to the United States, S. 1501 would allow the investor to file his or her I-829 petition at any time. They would not have to wait an additional two years after being admitted as a conditional resident. This would help EB-5 investors who make their investment but then are delayed in entering the United States because of processing delays of visa quota backlogs.

The bill would require DHS to make at least one site visit to every regional center project.

Conclusion

S. 1501 is significant because it is a bipartisan bill introduced by Senators Grassley and Leahy, who are the ranking members on the Senate Judiciary committee. It is also significant because of the many changes it would make to the EB-5 program.

S. 1501 is not the only bill that would revise the EB-5 program. A bill to make the EB-5 regional center program permanent (H.R. 616) was introduced in the House of Representatives in late January. That bill, which has 18 co-sponsors, would also make significant changes to the EB-5 program, such as eliminating the per-country cap for EB-5 and other employment-based green cards. Representatives Darrell Issa and Zoe Lofgren are expected to introduce separate bills soon to extend and enhance the EB-5 program. Their bills may propose other changes to the EB-5 program besides the ones already introduced.

With all this legislative activity, it is unclear whether Congress can agree on changes to the EB-5 program by September 30, when the regional center part of the program is scheduled to sunset. If Congress fails to agree on improvements to the EB-5 program by that date, it is possible that Congress could simply extend the program for a short time without changes while it finalizes substantive changes. Stay tuned for an interesting summer and fall.