

Memorandum to Clients

From: Steve Yale-Loehr
Re: Planning for EB-5 Retrogression for Investors from China
Date: January 31, 2014

This memorandum is for EB-5 investors, regional centers, and project developers to help you understand and plan for possible EB-5 retrogression for cases from mainland China.

What is retrogression?

Every employment-based (EB) immigrant visa category has an annual limit. For EB-5, it is approximately 10,000 visas a year. That number includes principal EB-5 investors, their spouses, and their children under 21.

The State Department publishes a Visa Bulletin each month to let people know which green card categories are backlogged and by how much. The Visa Bulletin is available at http://travel.state.gov/visa/bulletin/bulletin_1360.html. If the Visa Bulletin says a certain category is “C,” that means the category is “current” and has no backlogs other than the processing times at the U.S. Citizenship and Immigration Services (USCIS) and the State Department’s National Visa Center (NVC). If a date appears for a certain category, that means the category is backlogged, or “retrogressed,” and the State Department is setting up visa interview dates only for people who have started their green card process before the date indicated on the Visa Bulletin. That date is known as the person’s “priority date.” For EB-5 cases, a person’s priority date is the date the USCIS receives their I-526 petition.

Why will EB-5 retrogression affect EB-5 investors from China first?

In addition to the overall EB-5 annual limit, the U.S. immigration law also has per-country caps. For EB-5 investors from mainland China, that is about 700 a year. The State Department can allocate more than 700 EB-5 green cards to investors and their family members from mainland China each year, however, if EB-5 investors from other countries don’t use up their own per-country cap. The State Department has done that for several years now.

Investors from mainland China constitute about 80% of all EB-5 petitions. Because the per-country limits would set in before the EB-5 quota is backlogged for the entire world, the State Department would create a waiting list for Chinese investors to make certain that EB-5 visas remain available for investors from other countries.

When will EB-5 retrogression occur?

No one knows for sure. Annual EB-5 usage has increased each year for the last several years, and reached over 7,000 in fiscal year 2013. The USCIS estimates that about 7,000 EB-5 I-526 petitions are pending. The number of petitions only reflects the number of principal EB-5

investors. Adding spouses and children, the total number of people who are seeking EB-5 green cards through I-526 petitions pending at the USCIS may be about 20,000.

In addition to EB-5 I-526 petitions pending at the USCIS, about 5,000 approved I-526 cases are pending at the NVC. Those cases must complete processing at the NVC before the State Department will allocate a visa number to them.

Overall, the slow processing times at the USCIS and NVC have delayed EB-5 retrogression from occurring so far. Assuming those processing times don't improve, the EB-5 quota might not be reached this fiscal year, which ends September 30. More likely, EB-5 retrogression for China may begin in the last quarter of this fiscal year (July, August, September).

When retrogression for EB-5 cases from mainland China occurs, it may not be too severe at first. If so, it will have no immediate impact on when EB-5 investors actually get their green cards. Assume, for example, that Mr. Zhang, an EB-5 investor from China, files his I-526 petition on July 1, 2014. Assume that the State Department announces on August 1, 2014 that EB-5 cases from China are retrogressed 7 months, to January 1, 2014. That means that Mr. Zhang could not immediately get his EB-5 conditional green card at the U.S. consulate in Guangzhou, China, even if he was ready to do so. But Mr. Zhang is a long way from getting a visa interview. The USCIS is currently taking about 18 months to decide I-526 petitions. The NVC is currently taking 4-6 months to process EB-5 cases after I-526 approval. Thus, it could be almost 2 years before Mr. Zhang will be ready for an interview in Guangzhou. During that time the State Department will update its retrogression date for EB-5 cases every month in the Visa Bulletin. The chances are good that the EB-5 retrogression date will advance more than 7 months during the 22+ months that Mr. Zhang's case winds its way through the USCIS and NVC. As long as the EB-5 retrogression date for China is on or after July 1, 2014 by the time Mr. Zhang's case is ready to be assigned a visa interview date, probably sometime in early 2016, the retrogression will not directly affect him. Thus, given current USCIS and NVC processing times, EB-5 cases may have to be retrogressed 18 months or more in the Visa Bulletin to truly affect EB-5 investors from China.

When EB-5 retrogression occurs, it will apply to both direct and regional center cases equally.

What should EB-5 investors do about EB-5 retrogression?

Investors should file their I-526 petition as soon as possible, so that their EB-5 priority date will be as early as possible. This will help them when EB-5 retrogression occurs.

If an EB-5 investor has a child who is nearly 21 years old, the investor should file his or her I-526 petition before the child's 21st birthday. Moreover, after the I-526 petition is approved, the investor should file the DS-260 application as early as possible to "lock in" protection under the Child Status Protection Act (CSPA). Otherwise, establishment of a cut-off date for EB-5 China could see many derivative children "age out" while waiting for their priority dates to become current. The child may also age out if, on the date his or her priority date becomes current, deducting the number of days the I-526 petition was pending still results in the child being over 21. Calculating whether a child remains protected under the CSPA is a case-by-case

determination that is affected by priority dates, USCIS processing times, and how old the child was when the I-526 petition was filed.

How does EB-5 retrogression affect EB-5 projects?

Many regional center projects involve loans from the new commercial enterprise to the EB-5 project. These are often 5-year loans, premised on the assumption that all investors will receive permanent resident status before the loans are paid back. Regional centers and/or project developers may need to revise loan agreements if EB-5 retrogression occurs. Such changes may affect investors' exit strategies and timing.

On the other hand, if EB-5 visa retrogression occurs, regional center projects would have longer periods of time to create the requisite jobs if EB-5 retrogression delays the onset of the conditional residence period of investors in the project.

Direct EB-5 investors may have particular problems if EB-5 retrogression occurs. In a direct EB-5 investment, the investor often manages the investment. Quota retrogression may delay the ability of Chinese nationals to immigrate after filing their I-526 petition and therefore to start up the business. An investor who cannot immigrate to the United States for a few years because of EB-5 retrogression may not be able to demonstrate that he will be able to manage a direct EB-5 investment and may need to either find someone else to manage the business or develop a nonimmigrant visa strategy to come to the United States to start up the business. Unfortunately, a Chinese national cannot obtain an E-2 nonimmigrant visa, as the United States does not have an investment treaty with China. Additionally, the investor must demonstrate that the commercial enterprise will employ no fewer than 10 qualifying employees within 2½ years of I-526 petition approval. A comprehensive business plan must accompany the I-526 petition demonstrating that the qualifying employees will be employed within that time period. It may be difficult to produce a credible business plan when an investor has no idea of when he will be able to actually immigrate to the United States.

Can anything being done to prevent EB-5 retrogression from occurring?

Various bills in the U.S. Congress would allocate more visa numbers to the EB-5 category, either directly or by eliminating spouses and children from the visa numbers. Some bills would also eliminate the per-country caps. These bills are not likely to be enacted immediately, however.

Conclusion

EB-5 retrogression for cases from China is a murky subject, with many unknowns. The unknown variables affecting whether and when retrogression affects investors include ever-changing USCIS and NVC processing times. We will continue to update you as more facts become available.