The Real Estate Roundtable

EB-5 Reform and Integrity Act of 2022

Fact Sheet

April 11, 2022

Congress passed a major overhaul of the EB-5 "regional center" investment visa program in March 2022. The *EB-5 Reform and Integrity Act* is found at "Division BB" of the *Consolidated Appropriations Act of 2022*. It represents the first major reforms to the EB-5 program since it was enacted in the early 1990s. Reforms include:

Reauthorized EB-5 "Regional Center" Program

- 5-year extension through September 30, 2027
- Reduces litigation risk from ~ 90,000 EB-5 investors who have seen no action by DHS on their petition since the regional center program expired on June 30, 2021.

Expanded Targeted Employment Area (TEA) Designations

- TEA projects qualify for **both** lower investment levels **and** visa set-asides (see below):

Prioritizing Rural Projects

- In areas outside a Metropolitan Statistical area, or within the outer boundary of any city or town with a population of 20,000 or more. (No change from prior law).
- U.S. Citizenship and Immigration Services (USCIS) must prioritize processing visas for investors in rural areas.

New Criteria for Distressed Urban Area Projects ("High Unemployment Areas")

- Codified the 2019 USCIS regulation ("donut" approach in which a project must be within a census tract – or any "contiguous" census tracts that "touch" the project's tract - where the average unemployment rate is 150% of the national average.
- DHS Secretary has the discretion to include a "directly adjacent" tract (to either the "anchor" tract or a "contiguous" tract) to satisfy the requisite 150% high unemployment criteria.
- Distressed Urban TEA designations last for 2 years. These can be reviewed if the qualifying census tract(s) continue to meet "high employment" criteria.
- If a project was in an Urban TEA but falls out of high unemployment status, an "original" investor does not have to increase investment amounts to the non-TEA upper level.
- Only DHS can approve an Urban TEA "high unemployment" designation – unless the Secretary designates such authority to another federal official. No state or local official can approve.

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Defining "Infrastructure Projects"

- A "capital investment project" administered by a "government entity" – that serves as the "job-creating entity" funded by EB-5 investors, and that contracts with a regional center – qualifies as an "Infrastructure Project."
- Must be a "public works project." No particular type of infrastructure "asset class" specified.
- Only DHS can designate an Infrastructure Project – unless the Secretary designates such authority to another federal official. No state or local official can approve the designation.

Qualified Investment Amounts & Adjustments

- $800,000 in TEAs
- $1,050,000 in non-TEAs
- On January 1, 2027, and every 5 years thereafter, investment amounts adjust for inflation.
  - Non-TEA level "adjusts up" for inflation.
  - TEA level "adjusts up" to 75% of the non-TEA level (with the goal of keeping the $250K delta between investment levels intact).

Clarifying Visa Set-Asides

- Set asides are a percentage of the roughly 10,000 EB-5 visas available every year.
- 20% for Rural projects
- 10% for Distressed Urban/High Unemployment Area projects
- 2% for Infrastructure Projects
- Unused visas "carry over" in the same category in the following year.
- Unused visas in any "set aside" category made generally available for **any** project, in the year immediately following the "carry over" year.

"Aging Out" Criteria

- An investor's "child" who is admitted to the U.S. on a "conditional" basis and who turns 21 shall continue to be considered a "child" if:
  - she/he remains unmarried **and**
  - the principal investor is approved as a permanent resident **and**
  - the principal investor files a petition for the child to remain in the U.S. no later than 1 year after the child's conditional status has terminated.
- The principal investor can only file 1 "aging out" petition after the child turns 21.

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Allowing the Broad Redeployment of Capital

- DHS to enact regulations that allow the new commercial enterprise to deploy capital **anywhere** in the U.S. to keep the investment "at risk."

Sovereign Wealth Funds (SWFs)

- Capital from a "bona fide" SWF may be stacked with EB-5 capital to finance a project.
- The SWF can be involved with the equity "ownership" – but not the administration – of the job-creating entity.
- DHS to implement regulation for SWF funding in an EB-5 project.

Job Creation Criteria

- 10 jobs must be created per investment (same as prior law).
- 1 job must be a "direct" job. It can be "modeled" and it is not necessary to produce a W-2 for a particular employee.
- The other 9 jobs can be "indirect," modeled, and estimated (same approach under prior law).
- Construction jobs that last less than 2 years can satisfy 75% of the estimated "indirect" jobs.

Allowing the Concurrent Filing of I-526 and I-485

- Investors can **concurrently** file their I-526 petitions (showing EB-5 compliance and investment) and their I-485 petitions (application for a "conditional" green card, which adjusts status from a "non-immigrant" to a conditional permanent resident). This can only be done if there is already a visa number available and current.
- Concurrent filing can reduce the time to adjust status once an I-526 is approved.

"Grandfathering" Existing Investors

- If Congress fails to reauthorize regional centers after the Act's expiration on September 30, 2027, DHS will continue to process petitions filed on or before September 30, 2026.
- Applies to I-526 petitions and I-829 petitions (to remove conditional status and allow permanent residency without conditions).
- DHS may not deny an I-526 or I-829 simply because the regional program might expire in the future.
- An investor is eligible to file the I-829 2 years after filing the I-526.

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New "Integrity Measures" to Deter Fraud and Safeguard National Security

- USCIS to conduct an audit of each regional center at least once every 5 years.
- Explicit authority granted to USCIS to deny regional center "business plans" where an applicant has engaged in fraud, criminal conduct, or where plan approval would threaten national security.
- Confirms the application of U.S. securities laws over regional center offerings and investment advice.
- Regional center must submit annual statements of investment activities to USCIS. Failure to submit or falsify an annual statement results in sanctions that can include fines, temporary suspension, and a permanent "de-bar" of individual and regional centers that fail to comply with new oversight requirements.
- No person convicted of a crime (in the last 10 years) or fraud-related civil offense (that resulted in liability greater than $1M USD) can participate in EB-5 activities.
- With a limited exception for bona fide sovereign wealth funds, no foreign government representative may provide EB-5 capital or be involved in the administration or ownership of a regional center, new commercial enterprise, or job creating entity.
- Requires fingerprints and other biometrics of persons involved in EB-5 activities to be submitted to USCIS.
- Strict new "source of funds" requirements to ensure that an investor's funds are derived from legitimate and lawful sources.
- Establishment of a new "EB-5 Integrity Fund," capitalized by regional center program feeds, to support amplified USCIS oversight and site visits.