Donoso & Partners
Trusted Immigration Law

What you need to know: the Renewed EB-5 Program

March 14, 2022

The EB-5 Regional Center Program ("EB-5 Program") was re-authorized on March 11, 2022 pursuant to the EB-5 Reform and Integrity Act of 2022 ("Act"). The Act re-starts processing of pending or approved EB-5 petitions, and offers novel requirements and procedures for new visas. Donoso & Partners, internationally known for our advisory services in the EB-5 Program, prepared this summary of key changes to the EB-5 Program:

A. KEY EB-5 PROGRAM FEATURES

5-Year Reauthorization: The EB-5 Program has been reauthorized for the next 5 years, through September 30, 2027. The 5-year reauthorization gives the EB-5 Program long-term stability. The Act provides express protection to EB-5 investors from a potential future lapse. The Act now requires USCIS to process applications even if the EB-5 Program expires anytime in the future - as long as the application was filed before September 30, 2026.

Investment Amounts: The new investment thresholds are $800,000 for Targeted Employment Areas ("TEAs") and Infrastructure projects, and $1,050,000 elsewhere. This is an increase from today's $500,000 investment in TEAs and $1,000,000 investment elsewhere. Starting Jan. 1, 2027, the minimum investment threshold will be adjusted every 5 years based on U.S. consumer price data and rounded up to the nearest $50,000.

Targeted Investment Areas: Targeted Employment Areas (TEAs") are eligible for investments at the $800,000 amount. The Act maintains 2 types:

- Distressed Urban Areas with high unemployment of 1.5 times the national average unemployment rate (using a new definition of eligible areas).
- Rural Areas which cover any rural areas outside of Metropolitan Statistical Areas and outside of towns with 20,000 inhabitants or more.

All TEAs are to be designated by the USCIS (not state officials). USCIS designation of a TEA is valid for 2 years. Investors who invested during the validity of the TEA designation are not required to invest additional amounts after it expires.

New Visa Allocation System for TEAs: The Act sets aside 20% of EB-5 visas each year to investments in rural areas (i.e., approximately 2,000 visas per year). Any unused visas roll-over into the next year, and are only released to the general pool in year 3 if unused after year 2. The same allocation system will

apply to distressed urban areas, which receive a 10% set-aside, and infrastructure projects, which receive a 2% set-aside.

Changes to Job Creation: The EB-5 Program continues to require creation of 10 new full-time jobs per investor. For new applications, the Act creates the novel requirement that investment projects must create 1 out of every 10 jobs through direct jobs. Direct jobs can be created from construction activity. Also, the Act now allows investors to count jobs created by tenants of newly constructed buildings if the jobs are not simply relocated from an existing business.

B. IMPACT ON PENDING EB-5 PETITIONS

Re-Starts Adjudication: The Act re-starts USCIS adjudication of pending I-526 petitions and pending I-485 Adjustment of Status Applications based on approved I-526 petitions. The Act also re-starts Department of State ("DOS") processing of approved I-526 petitions at the National Visa Center and U.S. Consulates.

Simultaneous Filing of Adjustment of Status: It is now possible to simultaneously file an I-526 petition together with an application for Adjustment of Status (Form I-485) with USCIS in the U.S. To be eligible for Adjustment of Status, applicants must (i) hold lawful visa status in the U.S. and (ii) not be subject to an EB-5 visa backlog. Simultaneously filing the I-526 EB-5 green card petition with I-485 Adjustment of Status gives investors the possibility to live in the U.S. while awaiting USCIS adjudication of the I-526 petition. Adjustment of Status provides the investor and family with a temporary work permit and travel permit while awaiting adjudication. Simultaneous filing of Adjustment of Status is available to I-526 petitions that are already filed as well as new I-526 petitions. Simultaneous filing avoiding consular visa processing and may lock-in the age of children of the principal applicant.

Innocent Investor Protection: The Act adds some protection for innocent investors who suffer termination or debarment of their regional center, new commercial enterprise or job creating entity. As long as their investment arrangements were generally qualified, within 180 days of such adverse action (and notice) they can associate with replacement entities and even make additional investment (which may include proceeds from claims or recoveries) to meet investment and job creation requirements without losing priority date or child status protection. USCIS will allow petition amendment in those situations.

Age-Out Protection for Children of Investors: If a child has become an LPR under an initial I-526 petition of their parent, and then their LPR status is about to be terminated due to I-829 denial, then the child remains under age 21 as a child in the principal applicant's new and subsequent I-526 petition if it is filed within 1 year of termination.

C. VISA PROCESSING FOR FUTURE EB-5 INVESTORS

Priority for Rural Projects: USCIS "shall prioritize" "processing and adjudication" of visa petitions for "rural areas".

Simultaneous Filing of Adjustment of Status: It is now possible to simultaneously file an I-526 petition together with an application for Adjustment of Status (Form I-485) with USCIS in the U.S. if the applicants hold lawful visa status in the U.S. Simultaneously filing of the I-526 EB-5 green card petition with I-485 Adjustment of Status gives investors the possibility to live in the U.S. while awaiting a USCIS on the I-526 petition, and will provide a temporary work permit and travel permit while awaiting adjudication of the

investor's I-526 petition. This benefit is available to current I-526 petitions that are already filed, and new I-526 petitions. Simultaneous filing avoiding consular visa processing and may lock-in the age of children of the principal applicant.

Source of Funds: Investors must provide 7 years of tax returns. Gifts of capital require evidence that they were made in good faith and not to circumvent restrictions on permissible lawful capital. Donor must provide equivalent source of funds evidence as investors.

Business Plan Pre-Approval: Mandatory approval application for new capital investment projects. Application filed by the regional center with USCIS for the associated NCE. Both new applications for business plan pre-approval and exemplars approved before enactment of the Act are binding for visa petitions based on those pre-approvals. Investors may file I-526 petitions only after the regional center files an application for business plan pre-approval.

Management of Bank Accounts: Regional centers and their associated new commercial enterprises must deposit and maintain the capital investment of each alien investor in a separate account, including amounts held in escrow. Release of funds only to another separate account, the capital investment project for which the funds were intended, or the investor.

Certain Investments are Prohibited: A new commercial enterprise cannot guarantee repayment, redemption or a rate of return. The prohibition includes call options or put options conditioned on cash flow. The prohibition includes call options to be exercised in sole discretion of the NCE, except if the investor has completed "sustainment period". Similarly, investments in bonds available to the general public are prohibited.

Document Reduction: investor may submit a certification that records previously filed with USCIS are deemed incorporated by reference.

New Fees: $1,000 per petition. USCIS has up to 60 days to engage in a review of filing fees for EB-5 petitions to determine how to reduce processing times to 240 days. Fee increases appear imminent.

Changes to I-829 Removal of Conditions: Applicable only to investors who file I-526 after enactment, the Act requires that upon admission as a Conditional LPR, the investor must already have invested and may not still be in the process of investing. An investor who files Form I-829 still may be actively in the process of creating the employment required, but the investor must make an additional filing a year later showing that the jobs have been created. Even "Acts of God" such as hurricanes and pandemic might not justify a longer delay in job creation.

D. OUR ANALYSIS

A longer-term reauthorization will result in resumption of adjudication at all levels (including consular process as well as adjustment of status for approved applicants) of existing EB-5 applications upon reauthorization date with immediate effect.

The rules pertaining to higher investment amount and revised TEA designations will not apply to pending applicants retroactively.

Prior regional center law is repealed upon enactment and the new RC law takes effect 60 days later. Apparently, no new RC filings (including investor's I-526 sponsored by RC) may be filed within 60 days after enactment.

Projects that qualify as Rural are favored by the Act due to the preference given to EB-5 visa allocation and the express requirement for USCIS priority processing.

Simultaneous filing of EB-5 I-526 visa petitions with Adjustment of Status will become the "star" of the new EB-5 program. It is the most important positive development for investors' visa strategy.

- Simultaneously filing will allow F-1 students to apply for EB-5 visas with Adjustment of Status soon after the start of their studies in the U.S. and have the expectation of holding an open work permit by the time they graduate. No H-1B visa lottery will be required.
- Simultaneous filing will allow persons to move to the U.S. on L, H-1B, E or O visa status and shortly thereafter file for I-526 visa petitions with Adjustment of Status with access to an open work permit and travel permit.

In a separate proposed rule, USCIS intends to offer accelerated processing of temporary work permits under Adjustment of Status.

New regulations and forms will be required from USCIS the months following enactment of the Act to formalize many features of the Act, including TEA designations and business plan pre-approvals.

The Act requires USCIS to increase the pay of employees administering the EB-5 program, which opens the door towards additional staffing and faster processing of EB-5 cases.

The Act also includes integrity measures and higher compliance standards for regional centers. These provisions promote transparency and will help protect EB-5 investors.

CONTACT DONOSO & PARTNERS

Donoso & Partners, a leading immigration law firm based in Washington, D.C., will continue to report on developments regarding the immigration law and policy through our news section of donosolaw.com.