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A Swirl of EB-5 Developments

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This week two major events occurred in the EB-5 investment visa program: (1) Congress failed to enact a law renewing the law authorizing regional centers and indirect investment and job creation, which expires June 30; and (2) a judge in California ruled that the 2019 regulation, that had nearly doubled the required investment amounts and narrowed where the lower amount can be used, is invalid because the officer who signed it was not legally appointed. While it is likely that both arrangements will be restored before long, the current situation creates at least temporary anxiety for many and some unique opportunity for others. We explain the details in this alert.

Regional Center Authorization Expiring Without Immediate Vehicle for Renewal

A 1990 law created what we now call the "direct" EB-5 program under which the investor must place equity capital in the "new commercial enterprise" (NCE) whose operational full-time employees are all that can count toward the 10-per-investor job creation requirement. A 1992 appropriations bill created a temporary law designating regional centers that can sponsor investors typically making pooled investments in special purpose NCEs that make a business of making loans or investment into separate "job creating enterprises" (JCEs), and the investors can take credit for "indirect" jobs such as assessed by economists, including from the impact of construction expenditures. The law has been consistently extended since then as part of federal spending legislative cycles, but this year it was extended only to June 30 while the federal budget was extended to September 30.

While there is strong legislative support for the EB-5 program in general, there is tension between representatives of big money centers like New York and representatives of more rural states like Iowa and Vermont concerning what the minimum investment levels should be, the areas where a lower amount should be allowed, and the difference between the lower level and the "normal level." Those interests failed to agree, and a bill sponsored by the rural interests to renew the regional center program without changing rules about investment amounts was dramatically blocked yesterday by a lone senator. The money center interests preferred to risk program expiration on the hope of negotiating a better deal for them in coming weeks.

It seems likely that the regional center program still will be renewed, but until that happens the following consequences ensue starting on **July 1**:

- No regional center sponsored investor can make a new investment and make initial filing. It is conceivable that the U.S. Citizenship and Immigration Services (USCIS) will accept new filings but then hold them in abeyance.

- Existing regional center investors and their family who have not yet been admitted to the U.S. as a conditional resident will not be able to obtain I-526 approval, immigrant visa, or adjustment of status. USCIS is expected to hold I-526 petitions and adjustment of status applications in abeyance, and consulates are expected to postpone immigrant visa interviews. It is not clear if U.S. Customs and Border Protection will admit investors and family who already were issued immigrant visas.

- Regional center designations will be meaningless, and USCIS will refrain from adjudicating I-924 applications for regional center designation or "exemplar" project approval.

- Investors and family who already were admitted as conditional residents can file and obtain approval of I-829 petitions regardless of expiration of the legislation.

At some point if renewal legislation does not remain reasonably imminent, the agencies could choose to deny and revoke all I-526 petitions, adjustment and visa applications, and I-924 applications, leaving regional center investors with zero immigration benefits from their investments. We hope and believe that before that would happen, Congress at least would pass a provision "grandfathering" all investors who already filed their I-526 petition. We advocate also that any bill renewing the regional center program should contain a provision protecting all future investors from retroactive effects of expiration of any temporary provisions.

The expiration of regional center legislation will have no effect on investors under "direct" arrangements and counting only direct operational full-time jobs. Such investors could file new petitions and receive approval of new ones. We can expect some developers of "direct" projects to market them heavily during this period. Some commentators are suggesting that existing regional center sponsored investors still could obtain approval without legislative renewal if they could take credit for the operational jobs of the project, but they fail to remember that most such investors did not invest into the entity that is creating those jobs and thus could not take credit for them as "direct" jobs.

2019 Rule Invalidated, For Now: Investment Amounts Back to Lower Level

In a lawsuit brought by a regional center in California, a federal district judge ruled on July 22 that the 2019 EB-5 "modernization regulation" is invalid because it was signed by an official who was not properly appointed under the Federal Vacancies Reform Act (FVRA). This immediately restored the prior regulations under which the investments at $500,000 instead of $900,000 could suffice in a "Targeted Employment Area" and a qualifying "high unemployment area" could be "gerrymandered" in weird shapes and certified by a state agency.

It seems likely that USCIS will appeal and seek a judicial stay of the order, and that could happen quickly. But unless and until that happens, USCIS wins any appeal, or new legislation establishes new levels, an investor could file an I-526 based on an investment of $500,000 in a Targeted Employment Area under the prior rules and USCIS must accept it. Even if USCIS obtains a stay of the order, an investor conceivably could file a $500,000 petition and file an independent lawsuit against USCIS's rejection of the filing, arguing that the $900,000 regulation is invalid under the FVRA independent of the California judge's ruling. Such a filing for a regional center sponsored arrangement could be made only until June 30 unless the regional center legislation gets renewed without changes to the investment amount provisions, but filings for "direct" investments could proceed indefinitely beyond June 30.

Investors seeking to take advantage of this window should be warned that ultimately their filing could be denied, especially if USCIS ended up winning an appeal of the regulation's invalidation, but also if Congress ends up enacting a new "grand bargain" setting new investment amounts that might be made retroactive. While a denied investor might be able to arrange to increase the investment to $900,000 or a new legislated level, this probably would require a new I-526 filing, which would mark a new "priority date" placeholder in any wait for visa numbers (especially for Chinese but maybe for Vietnamese or Indian investors) and could result in "age out" of children from derivative eligibility.

Conclusion

This is by far the most confusing and worrisome moment in the history of the EB-5 program. We expect that Congress and USCIS will act to restore the regional center program and clarify the operative requirements, but

in the meantime investors, regional centers, NCEs and JCEs will need to obtain careful advice to make risk management decisions and sensible next steps.

If you have questions, please contact the author or any member of Baker Donelson's Immigration Team.