



**By Chad Ellsworth & Amy C. Cococcia / Fragomen, Del Rey, Bernsen & Loewy, LLP**

## Investing in Immigration

*All the attention is on the travel bans,  
but Congress has unfinished visa business*

**W**hile the Trump administration's travel bans have been front and center in the news, there still remain legacy Obama administration legislative and regulatory immigration issues yet to be addressed. Take, for example, the EB-5 visa program. An attractive program for foreign investors seeking to obtain permanent residence in the United States, it's also an increasingly important option and alternative immigration path for private clients.

Here's how it works. If an investor invests \$500,000 in a business or a new commercial enterprise (NCE) within a targeted employment area (TEA), or \$1 million in a non-TEA, they are eligible to obtain a two-year conditional green card. TEAs are designated by individual states and are locations that have either a high unemployment rate (at least 150 percent of the national average) or are located within a rural area (as defined by regulation). Once an investor has a two-year conditional green card, the conditions can be removed to obtain a full-validity green card if the investor demonstrates that 10 full-time jobs were created and sustained within the two-year period. Investors can seek to remove conditions 90 days prior to the expiration of the conditional green card.

### **Two Congressional EB-5 Investment Channels**

At its core, the EB-5 visa program is a jobs-creation program because investors have to demonstrate to U.S. Citizenship and Immigration Services (USCIS) that 10 jobs for qualified U.S. workers were created in order to obtain permanent residence. Investors can choose between a direct

investment model or a regional center (RC) model. The direct investment model is a permanent program that Congress created in 1990, allowing investors to invest in, own and manage their businesses. In contrast, the RC program, created by Congress in 1992, is a temporary program that allows investors to pool their funds in an RC without requiring the investor to participate in the day-to-day management of operations. EB-5 investors overwhelmingly choose the RC model because it allows both direct and indirect jobs to count toward the 10-job requirement. Further, the RC model gives investors the flexibility to live and work in any geographic location, as they are not tied to a physical place while managing the business.

While the RC program continues to be temporary, it's a bit of a misnomer, given its 25-year history. On December 8, 2016, via a continuing resolution, Congress extended the RC program with its current regulations intact through April 28, 2017. This extension was not unique: The program has been extended throughout the years without any substantive changes. In 1997, it was extended for three years; in 2000, for two; in 2003 for five. However, in recent years the extensions have gotten shorter as legislators have sought to draft a comprehensive bill.

The latest such effort is a bill in the House of Representatives (H.R.5992), introduced by Bob Goodlatte (R-Virginia), but it has made little headway. The debate and eventual gridlock occurred primarily because of differing opinions surrounding TEA designations, the concentration of EB-5 investments in metropolitan rather

than rural areas and the required investment amounts.

### **USCIS Proposed Regulations**

As noted by EB-5 Program Chief Nicholas Colucci during Judiciary Committee hearings last year, USCIS has the authority to make changes, including increasing the minimum investment amounts. In the absence of legislative agreement,

USCIS issued its proposed regulations in January, and they are open for notice and comment through April 11, 2017. The proposed regulations include the following:

#### ● **Increases to Investment Amounts**

There has been no increase in the EB-5 investment amounts since the EB-5 Program's enactment in 1990. To account for inflation, USCIS proposes to raise the investment amount in a TEA from \$500,000 to \$1.3 million and the investment amount in a non-TEA from \$1 million to \$1.8 million. This is a dramatic increase compared to legislative proposals such as Goodlatte's Bill, which calls for \$800,000 in TEAs and \$1.2 million in non-TEAs.

#### ● **TEA Designations**

USCIS proposes to allow any city or town with high unemployment (at least 150 percent of the national average) and a population of 20,000 or more to qualify as a TEA. Second, USCIS seeks to federalize

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TEA designations of high unemployment areas, rather than leaving the decision to individual states, to reduce inconsistencies and ensure greater uniformity between and within states. However, this can result in increased processing times and USCIS officers who are not necessarily experts on the local economy.

Despite Colucci's public pronouncement during the House hearings that USCIS intends to act by regulation, there is uncertainty given the Trump administration's freeze on regulations with an annual effect on the economy of \$100 million or more.

While congressional action is certainly possible to reform the EB-5 program, there

continues to be disagreement over TEA designations and investment amounts, making the possibility of another short-term extension increasingly likely. Given the uncertainty, many potential EB-5 investors are choosing to file their I-526 applications before the April 28, 2017 deadline, while existing rules remain in effect.



**Chad Ellsworth** is a partner in Fragomen's New York office. He can be reached at [cellsworth@fragomen.com](mailto:cellsworth@fragomen.com). (Susan Akina, a Fragomen associate, assisted with this article.)



**Amy C. Cococcia**, a partner in Fragomen's New York office, is a leading member of the firm's practice group devoted to compliance. She can be reached at [acococcia@fragomen.com](mailto:acococcia@fragomen.com).