Minimum EB-5 Investment Increase and TEA Restriction Proposed by Senate Bill S. 1501

Section 4 of S. 1501 proposes two changes to the existing EB-5 program that could have a direct impact on investor participation:

1. **Increase of the required minimum EB-5 investment amount to $1,200,000 ($800,000 for Targeted Employment Areas).** Currently, the minimum investment amount for EB-5 eligibility is $500,000 for investments made in Targeted Employment Areas (TEAs) and $1 million for investments made in non-TEAs. The new bill increases the minimum amounts to $800,000 for TEA investments and $1.2 million for non-TEA investments.

2. **Redefinition of "high unemployment area" for TEA purposes to a single census tract—which would make it more difficult for project locations to qualify as TEAs, and thus for investors to qualify for the lower investment threshold.** Currently, the EB-5 regulations authorize states to designate "a particular geographic or political subdivision" as a high unemployment area if the unemployment rate for that defined area is at least 150% of the national average unemployment rate based on the most recent available data. Based on the regulations, USCIS allows a high unemployment area to be defined by calculating the unemployment rate for an aggregate area consisting of multiple contiguous census tracts that broadly encompass the investment project site. In addition, USCIS's current policy is to defer to state high unemployment area determinations. However, S. 1501 restricts the geographic boundaries of a "high unemployment area" to "a [single] census tract"—the tract immediately encompassing the project site—and also provides that the Department of Homeland Security will make high unemployment area designations without being bound by determinations made by other federal or state entities.

Effective Date of Proposed Minimum Investment and TEA Changes

Both provisions above would apply to standard EB-5 and regional center program investments alike, and would be effective upon the bill's enactment (which would have to occur by September 30, 2015 if at all). There is one important exception to the effective date: I-526/I-829 petitions submitted in connection with regional center-affiliated projects that either filed or received approval of "an application for business plan approval" before the bill became law would *not* be subject to the new minimum investment and TEA rules. Such petitions would be grandfathered and remain subject to the current $1,000,000 and $500,000 investment thresholds, and the current TEA definition. There is no grandfathering benefit for non-regional center-affiliated investments.

Key to Grandfathering for Regional Center Investors: Filing of an "Application for Business Plan Approval"

"Application for business plan approval" is not defined by Section 4 of S. 1501, but appears to refer to the existing exemplar I-526 petition process, since that is the only means currently available to a regional center for obtaining pre-approval of actual project documents. In other words, S. 1501 appears to say that to grandfather a project (and future investors in that project) into the current minimum

investment threshold and TEA rules, a regional center must file an exemplar request for the project before the bill's enactment. The submission of an investor's I-526 petition before the bill's enactment would *not* be sufficient for grandfathering, but it seems that the filing of an exemplar request *would* be.

Background on the Exemplar Process

When USCIS introduced the exemplar process in 2009, regional centers welcomed it with open arms. The process allowed regional centers to seek pre-approval of an "exemplar I-526 petition," which referred to the full set of actual project documents that would be submitted with an actual investor's I-526 petition. Because of USCIS's deference policy (under which the agency will generally not revisit determinations it has previously made), an exemplar approval could have substantial benefit to both projects and investors alike. Projects could expect more consistently favorable review of their documents by USCIS adjudicators, and also have greater credibility in the marketplace due to "pre-approval" by USCIS. Investors had a way of gaging a project's EB-5 compliance, and could have greater confidence in the approvability of their I-526 petitions.

In the early days, exemplar applications were free of charge and exemplar approvals could be obtained within a few short months. Starting in November 2010, exemplar applications became coupled with the Form I-924 and its hefty $6,230 filing fee. Meanwhile, the explosive growth of the EB-5 program led to slowdowns in processing times across the board. Exemplar applications by shovel-ready projects routinely began taking over a year to reach an adjudicator's desk, severely limiting the utility of the exemplar process. In May 2013, USCIS further deflated the exemplar bubble by announcing that material changes in a project after exemplar approval could result in a loss of deference—leaving "material change" undefined and thus open to broad interpretation. As of July 2015, the USCIS processing time for exemplar I-526 petitions (filed using the Form I-924) remains at over a year and there is currently no premium processing option available.

Despite its drawbacks, the exemplar procedure now has great value in light of S. 1501 due to its potential grandfathering power.

Elements of an Exemplar Approval Request

Assuming "application for business plan approval" in S. 1501 refers to the existing exemplar approval application process, such application would include the following elements:

- A comprehensive business plan for the job-creating project to be funded with EB-5 capital via the new commercial enterprise. This should include a credible business description, market and competitive analyses, relevant permit and license information, marketing strategy, organizational structure, substantiated pro forma; and demonstrates how the project's activities will result in the creation of at least 10 jobs per EB-5 investor within 2.5 years from I-526 approvals.
- Documents showing the current status of the project. These could include, as applicable, project design materials, third-party feasibility studies, financing commitment letters, permit copies, and other evidence showing actual implementation of the business plan.
- Economic analysis explaining how the project receiving EB-5 investment will create jobs, as calculated using a reasonable methodology.

- Offering document drafts showing that the terms of the proposed investment are EB-5 compliant.
- TEA certification letter from the relevant state agency, if applicable.
- Sample Form I-526 (for an unnamed investor) with cover letter discussing how the evidence demonstrates the project's EB-5 compliance.

To request exemplar I-526 petition approval, a regional center would include the above items in an amendment request filed on a Form I-924 with filing fee (currently $6,230).

Conclusion

S. 1501 as currently drafted may or may not become law. If it does, the filing of an exemplar as currently understood may or may not be deemed sufficient to grandfather an investor. However, based on the potentially tremendous benefit of a pre-enactment exemplar request filing, regional centers with actual projects underway should consider submitting exemplar requests prior to September 30, 2015. Finally, exemplar requests should be prepared and submitted in consultation with qualified EB-5 counsel.