

August 13, 2015, EB-5 Stakeholder Engagement Highlights Ongoing Development of EB-5 Program

During USCIS's quarterly EB-5 stakeholder engagement held on August 13, 2015, Immigrant Investor Program Office ("IPO") staff announced a number of developments reflecting the EB-5 program's continued momentum ahead of the regional center program's September 30, 2015, sunset date.

Enhanced Oversight of Regional Center Program

In his opening remarks, IPO Chief Nicholas Colucci highlighted how IPO is stepping up its oversight of the growing EB-5 regional center program. Among other things, Mr. Colucci announced the formation of a new stand-alone team within IPO whose mission is to increase compliance using a variety of tools including I-924A reviews, interviews of regional center applicants and EB-5 investors, stakeholder engagements, site visits, and audits of financial records to ensure EB-5 investor funds are being spent in accordance with the relevant offering documents, business plans and economic analyses. The compliance team will also pursue actions against regional centers and their promoters for engaging in inappropriate marketing activities such as claiming guaranteed returns, guaranteed approvals and guaranteed expedited treatment of petitions, and falsely implying endorsement by USCIS, DHS, or the U.S. government, Mr. Colucci said.

With regard to site visits, Mr. Colucci specified that IPO would conduct both domestic and overseas site visits to ensure documents are authentic and projects are proceeding as planned. He reported that both he and the head of USCIS's Fraud Detection and National Security (FDNS) EB-5 fraud unit recently met with officials from China's Ministry of Public Safety and Security in Beijing to explain how the EB-5 program works, and to learn from the Chinese officials what mechanisms USCIS could use to augment its procedures for verifying questionable Chinese tax, income, identification and other documents. He also reported meeting with USCIS staff in Guangzhou who conduct site visits at the IPO's request when there are questions about project legitimacy and documentation, and noted that site visits are "very worthwhile" for enhancing on-the-ground due diligence. "One of the things we seek to do is expand our footprint there [in China] so we can do even more of that," he said.

Domestically, Mr. Colucci said that IPO staff has recently met with its SEC, FBI and ICE counterparts in Los Angeles and collaborated with FDNS officers to conduct site visits of various projects in the area, in preparation for the IPO's random site visit program that FDNS expects to implement in Fiscal Year 2016.

EB-5 Protocols

In addition to vigorous enforcement efforts, Mr. Colucci said USCIS has developed internal "EB-5 Protocols" dictating how DHS employees and contractors are to handle contacts with EB-



5 petitioners, applicants and other stakeholders; members of Congress and their staff; other elected officials; and the White House. The protocols address when and how department and agency officials may intervene in specific EB-5 cases, and require all substantive case inquiries to be memorialized and placed in the relevant USCIS file. The IPO plans to post the protocols publicly on its website.

GAO Recommendations

Mr. Colucci also discussed the four recommendations made by the Government Accountability Office (GAO) in its most recent report on the EB-5 program, publicly released on August 12, 2015. (See <http://www.gao.gov/products/GAO-15-696>.) The GAO report, which focused on USCIS's fraud prevention efforts and its reporting of EB-5 program outcomes, recommended that USCIS (1) plan and conduct regular future fraud risk assessments of the EB-5 Program; (2) develop a strategy to expand information collection, including considering the increased use of interviews at the I-829 phase as well as requiring the additional reporting of information in applicant and petitioner forms; (3) track and report data that immigrant investors report, and the agency verifies on its program forms for total investments and jobs created through the EB-5 Program; and (4) include a discussion of the types and reasons any relevant program costs were excluded from the Commerce study of the EB-5 Program. Mr. Colucci said IPO concurs with and plans to implement the GAO's recommendations.

Mr. Colucci and IPO Deputy Chief Julia Harrison provided the following updates for the EB-5 program as a whole:

Staffing Increases

- IPO currently has 112 employees, with an additional 4 in the hiring pipeline.
- By September 30, 2015, IPO expects to be at its target staffing level of 121.
- By the end of calendar year 2015, it hopes to hire an additional 20 or so employees.
- With respect to petitions that were filed in 2012 and 2013 and still remain pending, existing staff have been prioritizing those cases with the aim of clearing their backlog by the end of calendar year 2015.

Filing Statistics, October 1, 2014 to June 30, 2015

- Form I-526 petitions (Immigrant Petition by Alien Entrepreneur): 7,723 received (5% increase from last year), 6,498 approved, and 663 denied.
- Form I-829 petitions (Petition by Entrepreneur to Remove Conditions): 2,268 received (47% increase from last year), 606 approved, and 5 denied.
- Form I-924 (Application for Regional Center Under Immigrant Investor Program): 252 received (30% increase from last year), 187 approved, 31 denied.
- IPO has been picking up its rate of adjudications, e.g. averaging more than 1,000 Form I-526 adjudications per month between March and June 2015, but is still working on bringing processing times down as it continues to add new staff.

Upcoming Policy Changes

IPO staff also discussed the draft policy memo USCIS posted for public comment on August 10, 2015, titled “Guidance on the Job Creation Requirement and Sustainment of the Investment for EB-5 Adjudication of Form I-526 and Form I-829,” and encouraged stakeholders to submit their feedback for consideration by September 8, 2015. (See <http://www.uscis.gov/outreach/feedback-opportunities/draft-memoranda-comment/draft-memorandum-comment>.) The draft memo seeks to clarify how USCIS will analyze the requirements of job creation and sustainment of investment when adjudicating I-829 petitions of Chinese EB-5 investors affected by visa cutoff dates/visa retrogression.

During the live Q&A segments of the stakeholder meeting, numerous participants asked IPO staff to further explain the draft memo’s pronouncements about “redeployment” of EB-5 investor capital. The redeployment issue comes up when an EB-5 investor places his/her capital into a new commercial enterprise (“NCE”), the NCE then loans the capital to a separate job creating entity (“JCE”) to finance a project, and the JCE subsequently completes the project before the investor’s conditional residence period ends. Although the JCE would be in a position to repay the loan to the NCE upon completion of the project, the NCE would not be able to immediately return the capital to the investor because the investor is required to sustain the investment through his/her entire conditional residence period.

The draft memo states, “to extent that all or some portion of the new commercial enterprise’s claim against the job-creating entity is repaid to the new commercial enterprise during the sustainment period, the new commercial enterprise must continue to deploy such repaid capital in an ‘at risk’ activity for the remainder of the sustainment period.” Several participants asked whether deposit of repaid capital in a money market account or stocks and bonds would be sufficient “at risk” activity to satisfy the sustainment requirement. IPO staff declined to respond, stating only that USCIS is considering this scenario and the final policy memo will provide more clarification on what level of risk is sufficient to evidence sustainment.

Regional Center Program Sunset

Ms. Harrison clarified that IPO will continue to receive, process and adjudicate regional center-affiliated forms as usual until the close of business on September 30, 2015, the current sunset date of the EB-5 regional center program. In the coming weeks, she said, USCIS will publish guidance on how it will handle impacted cases in the event that legislation to extend the program is not passed before September 30, 2015.

Other Topics

IPO staff addressed a variety of other questions from stakeholders, such as whether petitioners may submit evidence in the form of digital records on a CD in lieu of paper (answer: no); and whether a JCE may maintain a “sinking fund” to set aside operating profits that later will be used to repay the NCE (answer: yes). IPO also announced that it will hold an EB-5 Interactive session on September 17, 2015, to discuss the I-924A annual reporting process for USCIS-designated regional centers.

For a complete transcript of IPO staff remarks courtesy of Peng & Weber, PLLC, go to <http://www.greencardlawyers.com/news/Newsletter/8-13-2015 EB-5 call transcript.pdf>
(Note: The live Q&A segments were not transcribed.)