

EB-5 Legislative Update

As Congress continues to roll rapidly toward the impending September 30, 2015, expiration of the EB-5 Regional Center program, various legislators are still trying to put together something workable that will extend the program (or in some cases make it permanent), along with additional changes the legislators believe will improve the integrity, security, and effectiveness of the program in creating jobs for U.S. workers. In addition, the large group of legislators who insist that no significant changes be made to any immigration program unless included within an overall comprehensive immigration reform (CIR) package, which would address the ten million or so undocumented foreign nationals currently residing in the USA, do not seem to have moved from their position of CIR or nothing. On top of this, Congress is still trying to address many other major issues, such as the federal budget, before the September 30 end of the federal fiscal year.

Within this overall context, it is helpful to see what has already come along and what is expected or rumored to be coming along in the remainder of this fiscal year. It is also helpful to consider the likely outcome caused by the tight deadline. The latest intelligence is that various members of Congress will ultimately introduce at least four different bills addressing EB-5. Two have already arrived.

First, Senate Judiciary Committee Chairman Charles Grassley (R-IA) and Ranking Member Patrick Leahy (D-VT) introduced the first bill, S.1501 on June 3, 2015. Among other things, S.1501 calls for a 5-year extension of the EB-5 Regional Center program, raising the minimum investment amounts to \$800,000 for businesses located within a Targeted Employment Area (TEA) and \$1.2 million in other areas, changing job-creation rules for regional center-affiliated investments, and increasing government vetting and oversight of regional center-affiliated projects.

S.1501 is important because it is bipartisan and introduced by the two leaders of the senate committee having primary jurisdiction over such legislation. Potential difficulties include its length--79 pages--and complexity, which make it difficult to consider sufficiently and promptly enough to pass as written. Apparently, some relevant senators are also disappointed for not having been asked to participate in the drafting of the bill, potentially causing some friction in moving it forward.

Second, Rep. Zoe Lofgren (D-CA-19), who is the Ranking Member of the Subcommittee on Immigration and Border Security within the House Judiciary Committee, and Rep. Luis Guterrez (D-IL-4) introduced H.R. 3370 in the House of Representatives on July 29, 2015. Unlike S.1501, this bill covers other proposals as well as EB-5. With respect to EB-5, the bill would make the EB-5 Regional Center program permanent, raise the minimum investment amounts to \$1 million (TEA) and \$2 million elsewhere, provide for TEA determinations to remain in effect for at least 5 years, and make 10,000 additional EB-5 visas available each year in which the annual cap of 10,000 is reached.



H.R. 3370 is not expected to go anywhere because it is not bipartisan and mixes EB-5 with the creation of entirely new visa categories. It is important, though, in that it provides new ideas on how to potentially resolve various concerns that competing interests have expressed about TEAs.

Of the two other bills expected in the coming weeks is a senate bill expected to be introduced by Senator Rand Paul (R-KY). Senator Paul, who is also running for President of the United States, is expected to be a positive bill seeking to make the program permanent. It is also expected include integrity measures and perhaps other provisions. Although not expected to go anywhere, this bill is important because the sponsor is very supportive and is also a presidential candidate who will be going on record as a solid supporter of the EB-5 Regional Center Program. He would be expected to express support for the program when asked about in during presidential debates.

The fourth bill expected is a bipartisan bill to be sponsored by Rep. Bob Goodlatte (R-VA-6), Chairman of the House Judiciary Committee, Rep. Darrell Issa (R-CA-49), Rep. Zoe Lofgren (D-CA-19), and Rep. Jared Polis (D-CO-2). This bill is expected to be largely positive with some integrity measures and perhaps some TEA ideas. This bill is very important because it is bipartisan, sponsored by top people, etc. it is largely expected to be the bill that matches up with S.1501 in the overall effort to achieve reasonable and workable changes to the EB-5 Regional Center Program.

With the four bills expected to be in play as Congress approaches the September 30, 2015, deadline for expiration of the EB-5 Regional Center Program, the question is what is likely to happen. Logically speaking, there are two potential options from a timing perspective: either Congress extends the program or they let it expire.

Since creating the EB-5 Regional Center program in 1992, Congress has extended the program numerous times, most recently until September 30, 2015. Preceding the program sunset dates, U.S consulates have done their best to ensure that as many pending cases for visa issuance as reasonably possibly move through toward completion before the program expires. During the most recent extension, perhaps in recognition that the program has already been in existence for more than two decades, Congress finally removed the word "pilot" from the title of the program. (This extension was for three years.)

Nobody can guarantee what will happen when the program extension question comes up this year, but based on informal reports of lobbying efforts of Invest in the USA (IIUSA), the American Immigration Lawyers Association (AILA), several themes seem emerge from consensus, including:

1. The EB-5 Regional Center is overall a positive program that benefits the USA and should be extended and changed.
2. The minimum investment should be increased for all EB-5 cases, including for the EB-5 Regional Center Program and for direct EB-5 investments.
3. Some steps must be taken to improve protections against national security risks and potential fraud against investors or the government.

In addition, many legislators have raised concerns about how the TEAs are designated, but this issue is a tug of war roughly between rural states and urban states, and despite various ideas floated, no consensus has emerged about what to do to change it. This issue is very important, because it creates strong feelings, which make compromise more difficult on this issue and the overall program extension itself.

Before trying to predict the ultimate outcome of any upcoming legislative negotiations on the EB-5 Regional Center Program extension this year, one must consider this question within the overall context of U.S. immigration politics. In particular, The EB-5 Regional Center Program is not an island on its own. It's actually one of four stars in a constellation of four (this year five) stars all scheduled to simultaneously burn out on September 30, 2015. In the past, these four stars have always been renewed simultaneously in the same legislation. During this time, Congress has never passed a standalone bill devoted solely to extending the EB-5 Regional Center Program.

(The four prior programs are the EB-5 Regional Center Program, the Conrad 30 program (regarding certain physicians), the "religious worker" program, and the E-Verify program, which is devoted to preventing undocumented foreign nationals from working in the USA. This year, a more recent, temporarily approved immigration program, one aimed at charging substantial extra filing fees for certain companies that employ a high percentage of their staff in either H-1B or L-1 status, also expires on September 30, 2015.)

Moreover, as mentioned earlier, a large contingent of legislators desires to support making significant changes to these four (now five) programs only as part of an overall package of CIR legislation to address completely different provisions. Although these legislators desiring CIR legislation have not been powerful enough to block significant changes to these other immigration programs, they have been largely successful in keeping these four (now five) programs from changing significantly or being made permanent. On the flip side, a largely different contingent of legislators strongly desires to see E-Verify made permanent.

Because of these crisscrossed desires to improve or make permanent one or more of these four (now five) programs, along with the competing desire by others to prevent significant changes to any immigration programs unless CIR legislation is also passed at the same time, Congress has repeatedly failed to find enough common ground to do anything more significant to these programs than simply to pass a single bill that merely reauthorizes these four (now five) programs for (typically) three years at a time. Frequently, Congress passes these program-reauthorization provisions at the very last minute before the programs would otherwise expire on September 30 of the applicable year.

Finally, two potentially significant factors arise this year that were absent when Congress passed the most recent reauthorization provisions in 2012. First, the Republicans now control both houses of Congress. Second, the USA is approaching a presidential election year. These changed dynamics might increase or decrease the ultimate likelihood that any one of these separate programs might be significantly modified instead of merely extended as part of broader extension-without-change package.

With only a brief period of time (only about 10 legislative days) left for Congress to act before all of these programs expire, it seems that Congress will have a difficult time making any significant changes to the program beyond merely extending it temporarily again, along with the other expiring programs. On the other hand, if there is substantial agreement on certain easy to understand, easy to implement, and less divisive issues, such as raising the minimum investment requirements, Congress may find it possible to extend all of these programs again, yet tweak the EB-5 Regional Center Program at the same time.

In the end, Congress seems to have the following reasonably possible outcomes:

1. Brief temporary extension without significant changes, such as 90 days, with the expectation that Congress will try again to find common ground on potential changes during that period.
2. Longer term extension, such as three years, without significant changes, with the same hope of finding common ground for changes in the future, albeit with much less time pressure.
3. Extension of some period of time with just the most agreeable changes included, such as raising the minimum investment requirements, with hopes of tackling more difficult issues in future. Pressure for future negotiations would depend on what Congress initially changed and on how the extension would be.
4. Allow the program to temporarily lapse if Congress simply cannot move fast enough to agree to extend it in time. If this happens, Congress would still be expected to address the extension again very quickly, likely within a few days after it lapses.

Lots of opinions exist about what might ultimately happen, but based on history and recent informal reports on this year's lobbying efforts, one would expect significant changes eventually, but initially some sort of interim extension with or without raising the minimum investment requirements or making other more uniformly supported changes. More divisive changes, such as how TEAs are determined, will likely take much longer to make.

All of this uncertainty makes planning difficult these days. Whether on the project side or the investor side, those in the EB-5 world have to think, plan, and communicate clearly about preferences, intentions, and backup plans in case things in Congress do not occur as expected.