

What Will Happen to the EB-5 Regional Center Program on December 11, 2015?¹

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As the EB-5 Regional Center program's new expiration date of December 11, 2015 creeps closer without any significant updates from Capitol Hill, stakeholders continue to wonder about the likely fate of the program come December. Although no one can know for certain until Congress takes action, we know that members of Congress are actively working on a legislative solution. Below are some general thoughts on the possibilities.

The Legislative Bills Under Creation or Consideration

Overall, the legislative effort is best visualized as a pair of bookends on the shelf with a few magazines in between. One bookend (on the U.S. Senate side) is S.1501, a bipartisan EB-5 bill that Senator Charles Grassley (R-IA) and Senator Patrick Leahy (D-VT) introduced on June 3, 2015. S.1501 is a very important bill because Senator Grassley (Chair of the Senate Judiciary Committee Committee) and Senator Leahy (Ranking Member of the Senate Judiciary Committee) are the top Republican and top Democratic Senators on the most important Senate committee related to immigration law.

The other bookend (on the House side) has not yet been introduced. In fact, the bill is being worked on essentially in secret among some of the key players, including Republicans Rep. Bob Goodlatte (R-VA-6) and Rep. Darrell Issa (R-CA-49) and Democrats Rep. Zoe Lofgren (D-CA-19) and Rep. Jared Polis (D-CO-2). Similar to S. 1501 on the Senate side, this upcoming bill on the House side is being drafted by a key bipartisan group, which gives it greater weight than other, individually sponsored bills.

In between S.1501 at one end and the upcoming House bill at the other end are several minor bills in between. On the Senate side, on October 1, 2015, Senators Rand Paul (R-KY) and Jeff Flake (R-AZ) each introduced their own bills related to EB-5 Regional Center program authorization (S. 2122 and S. 2115, respectively). Senator Paul's bill takes a generous view toward EB-5 and the Regional Center program, providing for the program's permanent reauthorization and other changes beneficial to EB-5 investors, along with several program integrity measures. Senator Flake's bill focuses just on the targeted employment area (TEA) issue and generally provides for a more expansive definition of TEAs, for example by making high unemployment area TEA designations valid for 5 years and allowing certain census tracts within metropolitan statistical areas to qualify as "rural areas."

On the House side, there are also two minor bills. Although introduced by U.S. Representatives who are very important to the overall discussion about the future of EB-5, these two bills are considered relatively minor, because they are essentially individually sponsored bills. The legislators appear not to

¹ We wrote this article in early November 2015. Legislative action or inaction could supersede this article at any time if it has not already done so by the time you read this article.



have crafted these bills in compromise with others in the House, nor were these two bills submitted jointly with other players.

First, on January 28, 2015, Rep. Jared Polis (D-CO-2) and Rep. Mark Amodei (R-NV-02) introduced H.R. 616. This bill seeks to make the EB-5 regional center program permanent and contains various provisions to enhance program efficiency, such as requiring USCIS to adjudicate I-526 petitions and I-924 applications within 180 days, and establishing an optional project preapproval procedure for regional center projects that would require USCIS to defer to its prior favorable determinations regarding the project. In addition, on July 29, 2015, Rep. Zoe Lofgren (D-CA-19) and Rep. Luis Gutierrez (D-IL-4) introduced H.R. 3370, which not only addresses the EB-5 regional center program (focusing mainly on increased oversight) but also creates brand new “EB-6” and “EB-7” immigrant visa categories to spur innovation and job creation by foreign entrepreneurs who would not otherwise qualify for EB-5 visas.

Whereas S. 1501 is the major book on one end and is already available, the major bookend on the House side is only expected based on discussions with various members of Congress and their respective staffs. It has not yet been released to the public. In fact, it has not even been shared with other members of Congress—even those with significant interest in having a say in how the EB-5 regional center program is going to be changed.

Major Elements Expected in Any Final Agreement that Congress Might Pass

All of the bills introduced or to be introduced are different from each other, so it is difficult to explain exactly what the bills do until they appear, and it is certainly extremely difficult to guess what the final bill will look like. Nonetheless, as a broad overview, it seems that if Congress ultimately passes anything new on EB-5 during this Congress (i.e., during the next year or so), it will likely have the following items in it in one form or another:

- *TEA*. The new law is expected to limit what can qualify as a “high unemployment area” TEA (i.e., an area with an unemployment rate that is at least 150% of the national average unemployment rate at the time of investment). In particular, Congress will most likely restrict a state’s ability to designate a collection of contiguous census tracts as a “high unemployment area” on the basis of aggregated unemployment data, for example by limiting the number of census tracts that may be included in a single designation. This change would apply to the EB-5 program as a whole, not just the regional center program.
- *Minimum investment*. There will likely be an increase in the minimum investment amount for Targeted Employment Areas (TEAs) from \$500,000 to some higher amount, such as \$800,000. Likely also an increase in non-TEA areas from \$1 million to some other higher amount, such as \$1.2 million. This change would apply to the EB-5 program as a whole.
- *“Integrity” measures*. Any new legislation will likely enhance EB-5 laws aimed at ensuring that EB-5 investors comply with “lawful source of funds” and other requirements and also ensuring that U.S. entities, such as EB-5 regional centers, new commercial enterprises (NCEs), and job-creating entities (JCEs), comply with U.S. securities laws requiring full disclosure to EB-5 investors of all material risks and facts associated with the project or entity the U.S. company is promoting. Another set of “integrity” measures is expected to address how USCIS officials

interact with entities involved with EB-5 to ensure that USCIS officials treat everyone the same way and do not play favorites.

- *Preapproved business plans.* Current EB-5 rules do not require “exemplar” filings—they are currently just *optional*—but future rules are expected to *require* all projects to obtain exemplar approval before moving forward.
- *Job creation methodologies.* Current EB-5 regional center program rules require a regional center to predict job creation using “reasonable methodologies,” but do not set forth detailed guidelines on how jobs impacts should be measured. The new EB-5 law will likely include some clarification on how jobs should be counted under the regional center program.
- *Grandfathering.* The new law will specify whether and under what circumstances EB-5 investors may be grandfathered under the current EB-5 rules.

Possible Courses of Action That Congress Might Take

Given the brief period of time between now and the pending December 11, 2015, expiration date of the EB-5 regional center program, it seems that it would be very difficult for enough legislators to come to a timely agreement on how best to change the EB-5 regional center program. Congress will have to choose among several courses of action by December 11, 2015:

- 1) Approve another short-term temporary extension of the program without any changes.** This option would buy Congress more time to negotiate a longer-term extension with substantive changes. Although some members of Congress are rumored to oppose another extension of the program without changing it first, they may concede to a bare short-term extension in lieu of halting the program altogether. The biggest question attached to a short-term extension would be how long Congress would be willing to extend the regional center program—for another few months, or until after the next Presidential election concludes in November 2016?
- 2) Fail to come to an agreement and allow the program to lapse.** If this were to occur, there potentially could be a significant gap between the EB-5 regional center program’s termination on December 11, 2015, and the enactment of a new reauthorization bill. USCIS and the Department of State would have to suspend processing of regional center-related EB-5 cases until Congress restarts the program.
- 3) Approve a longer term (several-year) extension with minor changes.** It is highly unlikely that Congress would agree to extend the EB-5 regional center program on a long-term basis with only minor tweaks simply because there is not enough time to work out all of the issues by December 11, 2015. In addition to those Congress members who want any meaningful extension of the program to be conditioned on significant substantive changes, even U.S. Senators and U.S. Representatives who support the program want to see it improve dramatically.
- 4) Approve a longer term (several-year) extension with major changes.** It seems that this is the target Congress is aiming for. With December 11, 2015, just around the corner, however, there

is likely not enough time for members of Congress to come to an agreement on all of the issues expected to constitute a major legislative update to the EB-5 regional center program.

- 5) Permanently reauthorize the EB-5 regional center program with major changes.** Given the finality of a permanent reauthorization and the political dynamics surrounding the program, it is not very likely that a majority of the U.S. Senate and House of Representatives would agree to make the EB-5 regional center program permanent any time soon. Even if they were amenable to permanent reauthorization, such reauthorization would not be granted without major changes to the program. As discussed above, December 11, 2015, is fast approaching and Congress will not likely have enough time to iron out a final agreement on all of the issues before then.

With several other major (non-EB-5) bills that need to be passed related to the federal budget, the federal debt ceiling, federal transportation budget, and so on, EB-5 program stakeholders can only hope that lawmakers will agree on how to keep the EB-5 regional center program moving forward.