

Settlement Agreement Provides Clarity and Stability for the Recently Reauthorized EB-5 Regional Center Program

August 30, 2022

Key Points

- USCIS' deauthorization of previously approved EB-5 Regional Centers has been rescinded, and the EB-5 program is once again active.
- EB-5 investors will no longer be required to wait several months for USCIS to issue a receipt notice for the project filing (Form I-956F) before filing their immigrant investor petition (Form I-526E).
- USCIS will deem the newly released EB-5 program forms as "interim" until the agency undertakes the notice-and-comment process and finalizes the forms.

Background

The EB-5 visa classification is a distinct type of U.S. permanent residence (a "green card") issued through the Immigrant Investor Program. In order to qualify for an EB-5 visa, immigrant applicants must "make the necessary investment in a commercial enterprise in the United States; and plan to create or preserve 10 permanent full-time jobs for qualified U.S. workers."¹

Congress established the EB-5 visa program in 1990 as a strategy for revitalizing the U.S. economy. In 1992, the regional center program began issuing EB-5 visas for participants who invested through U.S. Citizenship and Immigration Services (USCIS)-approved regional centers based on proposals for promoting economic growth.² Since the program's inception and until the end of 2020, Congress continued to reauthorize the EB-5 regional center program— sometimes one year at a time— as part of the appropriations process.

In December 2020, the program was decoupled from the appropriations process and was authorized only through June 30, 2021. Over the years, there had been allegations of instances of fraud and abuse by regional centers, and following multiple failed efforts to reform and implement integrity and oversight measures for the program, it ultimately lapsed on June 30, 2021.

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After a lapse of approximately eight months, Congress was finally able to reach an agreement on legislation that would provide stability with a long-term reauthorization for the regional center program and implement significant integrity measures and increased oversight. On March 15, 2022, President Biden signed the EB-5 Reform and Integrity Act (“Integrity Act”) into law as part of the Consolidated Appropriations Act, 2022 (Public Law 117-103).

Litigation

The law included a 60-day implementation period to enable USCIS to begin processing EB-5 filings that had been on hold since the beginning of the lapse. Inexplicably, however, during the 60-day period, USCIS stated that “all previously approved regional centers” (those authorized by USCIS prior to enactment of the Integrity Act), were categorically deauthorized.³ The agency’s sudden decision to deauthorize all existing regional centers resulted in a legal challenge. Behring Regional Center filed suit contending that the “agency wrongly interpreted the Integrity Act as deauthorizing existing regional centers and that the agency’s announcement was arbitrary and capricious within the meaning of the Administrative Procedure Act.”

On June 25, 2022, Judge Vince Chhabria granted the plaintiff’s motion for a temporary injunction enjoining USCIS “from treating as deauthorized the previously designated regional centers.” In his order granting the temporary injunction, Judge Chhabria suggested that the plaintiff was “exceedingly likely (if not certain) to prevail on the merits of its claim that the agency’s decision is arbitrary and capricious under the Administrative Procedure Act.”

Attorneys for USCIS did not appeal to have the temporary injunction lifted, and subsequent filings in the case noted that the parties were in negotiations to settle the case.

Settlement Terms

A settlement agreement was filed with the court on August 24, 2022 and is pending final approval. The settlement agreement confirms that previously approved regional centers remain authorized to operate. However, to maintain authorization in the future, all previously approved regional centers, that have not already done so, must submit a Form I-956, Application for Regional Center Designation (as an amendment) and the filing fee by December 29, 2022. Previously authorized regional centers do not need approval of their Form I-956 before filing a Form I-956F, Application for Approval of an Investment in a Commercial Enterprise.

Moreover, in light of USCIS’s ongoing delays with issuing receipt notices yet requiring a receipt notice for a Form I-956F before an investor could file their Form I-526E, Immigrant Petition by Regional Center Investor, the issue was raised in court and addressed in the settlement agreement. If a receipt notice is not issued within 10 calendar days of filing a Form I-956F, an immigrant investor may file their Form I-526E with alternate evidence that the Form I-956F was indeed filed, for example, proof of USCIS cashing the check for the filing fee.

The settlement agreement also confirms that previously approved regional centers will be governed under the terms of the Integrity Act and are required to file a Form I-956F for previously approved projects (for which they had previously filed the Form I-924, Application for Regional Center Designation Under the Immigrant Investor Program,

also referred to as “an exemplar”). However, the settlement explicitly notes that the purpose “is to assimilate the project’s information and documents consistent with the Integrity Act” and not to re-adjudicate any aspect of a project previously approved in the exemplar.

Finally, the new forms that USCIS has published in furtherance of implementing the Integrity Act will now be deemed as “interim” until USCIS undertakes notice-and-comment rulemaking. This will allow for genuine input from stakeholders and interested parties.

Conclusion

The EB-5 program has been a significant source of private investment in the United States for many years. According to an analysis conducted by Invest in the USA (IIUSA), the national trade association whose members are EB-5 regional centers, “between 2008 and 2021, the EB-5 program helped generate \$37.4 billion in foreign direct investment to create and retain U.S. jobs for Americans, all at no cost to the taxpayer.”⁴ Judge Chhabria noted that, in its original interpretation of the new law, “USCIS thought itself compelled by the Integrity Act to treat the existing regional centers as deauthorized, even though the Act does not require that outcome,” but this settlement restores the program and allows regional centers to continue facilitating investment in the United States with the goal of creating more American jobs.

¹ <https://www.uscis.gov/working-in-the-united-states/permanent-workers/eb-5-immigrant-investor-program#:~:text=This%20program%20is%20known%20as,capital%20investment%20by%20foreign%20investors>

² <https://www.uscis.gov/working-in-the-united-states/permanent-workers/eb-5-immigrant-investor-program#:~:text=This%20program%20is%20known%20as,capital%20investment%20by%20foreign%20investors>.

³ <https://behringeb5.com/wp-content/uploads/2022/08/Signed-SETTLEMENT-AGREEMENT-DOJ-Signed.pdf>

⁴ <https://iiousa.org/blog/iiousa-and-5-regional-center-members-file-a-lawsuit-against-uscis-regarding-regional-center-re-designation/>

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