

EB-5 Regional Center Program and Foreign Investors

May 2, 2022

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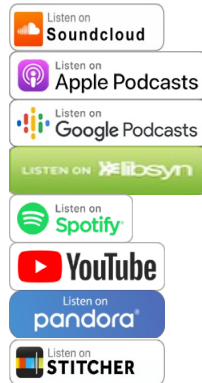
Immigration

Details

May 2, 2022

Congress recently passed Omnibus spending legislation that includes reauthorization of the EB-5 Immigrant Investor Regional Center Program which has been suspended since June 2021. The EB-5 program has provided foreign direct investment to the U.S. while providing green cards to foreign nationals in return. The reauthorization of the program will help U.S. developers access capital from overseas while continuing to create jobs for U.S. workers domestically.

Jackson Lewis P.C. · EB-5 Regional Center Program and Foreign Investors



Transcript

Alitia (00:06):

Welcome to Jackson Lewis' podcast, We Get Work. Focused solely on workplace issues everywhere and under any circumstances, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate a workforce that is engaged, stable, and diverse. Our podcast identifies the issues dominating the workplace and its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted?

The EB-5 program, which is the only investment-based immigrant program in the U.S., has been called one of the greatest job creation engines in modern U.S. history. On this episode of We Get Work, we discuss what the EB-5 program entails, recent trends within the EB-5 industry, and the complex process and careful planning needed when choosing the appropriate project and insourcing an investor's funds.

Our hosts today are Ahmed Khan and Zain Abidi, associates, respectively, in the White Plains and Los Angeles offices of Jackson Lewis and members of the firm's immigration group. Having known each other even before law school, they have much in common professionally and personally, including their enthusiasm for all things immigration law. Ahmed focuses his practice on all aspects of corporate immigration

and assists everyone, from Fortune 500 companies to newly formed startups, in developing robust internal immigration policy. Zain's practice is focused exclusively on federal immigration cases for large corporations, startups, and high-net-worth individuals in a variety of employment and investment based immigration matters.

Ahmed and Zain, the question on everyone's mind today is, what is the EB-5 Regional Center Program and how does that impact my business?

Zain Abidi (02:04):

Hey, everyone. My name is Zain Abidi and I'm an immigration associate with Jackson Lewis at the Los Angeles office, and I specialize in corporate immigration.

Ahmed Khan (02:12):

Hey, everyone. My name is Ahmed, I am also an immigration associate in the New York Metro area. Together, Zain and I, we work in the corporate immigration practice group here and we filed hundreds of EB-5 petitions for investors all over the world. For someone who is looking into this visa category for the first time, it's really important that you work with an immigration attorney who really knows what they're doing, because as we'll talk about today, it's an ever-changing landscape and there's a lot of nuance that goes into making sure that your application is put together in the correct way.

Zain Abidi (02:45):

For those new to EB-5, you might be wondering, what is EB-5, right? EB-5 is essentially a program created in the early 1990s and it's an investor immigration program. So you essentially invest money into the United States, you create 10 jobs, and in exchange you get a green card. There's two vehicles for investment. You can either do the direct investment, or you can go through a regional center. The vast majority of investors, I would say about 98% of investors in the program, have gone through the regional center route. However, over the last year, the Regional Center Program lost authorization and investors were left to wonder about the future of the program. Congress has recently reauthorized the program and now investors can look to the EB-5 visa as a viable option to move themselves and their families to the United States. So, Ahmed, what's been going on with the EB-5 industry over the last three years?

Ahmed Khan (03:33):

Yeah, Zain. This program really started back in the 1990s, like you mentioned, and it had two main focuses. One was to drive foreign investment into the United States. But the second really was to create jobs here for the U.S. economy. The program took off in the mid-2000s, and especially after the 2008 financial crisis, because developers were having a hard time finding money here in the United States from traditional financing sources. And one of the creative solutions to that was to get money from abroad and keep our economy afloat, more or less. I think people are always kind of surprised to find out just how much of the development in the United States has come from EB-5 lending that is sourced from overseas money. With that being said, the program did really, really well. I mean, super popular between 2014, I would say, or actually 2012, even, all the way up until November 2019.

Now, what happened then is basically USCIS updated its policy. This was a departmental change, not necessarily something that came down from Congress, and they basically upped the investment amount from \$500K to \$900K. This is something that had been discussed by law makers and USCIS kind of took it upon themselves to enact this change.

Now, this really slowed the program down and there was a lot of contention as to whether or not USCIS had gone about this the right way and whether or not this was really a decision that Congress should have made. And so what happened in 2021 was the program actually went ahead and sunset the Regional Center Program. And what that allowed lawmakers to do was sit down, really go through the program, and come up with a bunch of different changes that they envision would make this program a lot better.

And that brings us to basically today. The program was recently reauthorized, they've raised the minimum investment amount, and they've made a bunch of other changes that I think make this program even better. And what's best is that they've done it for a longer period of time, for at least five years, and that gives us continuity and just the opportunity to really take advantage of this program for investors.

Zain Abidi (05:43):

And so is it safe to say that the program is more stable than it's been in the last five, six years at this point now?

Ahmed Khan (05:50):

For sure. We've really ushered in an era of continuity and just knowing what to expect, right? I think the turbulence has led to a lot of investors being unsure whether or not they want to put their money into a program that was constantly kind of up in the air and up in the news about reauthorization and changes that were coming. Now that Congress has sit down and basically put forth a bill and said, "This is what we expect this program to be for the long term," they really have some comfort in knowing what they're going to be expecting for the next several years.

Zain Abidi (06:24):

Yeah. And I think that's why so many people were upset with the sunset of the Regional Center Program, because the EB-5 program has arguably been one of the most successful job creation engines in the United States, especially in areas that need job creation. So, investors looking to invest less than a million dollars should obviously take into account the target employment areas and the new definitions of target employment areas.

We're starting to see some clarity behind these new regulations. And while we won't have a definitive idea of what they're going to look like until USCIS issues guidance, we do have a general overlay of what these changes entail. One of them is that petitions filed on or before September 30, 2026, will be grandfathered in if the Regional Center Program lapses.

So, as Ahmed touched on, in June of last year, of 2021, the Regional Center Program lapsed and all petitions held by USCIS, all I-526 petitions, were held in

what's called abeyance, where they weren't being processed or adjudicated. Now, the government has essentially provided protections for those investors in the event that the Regional Center Program lapses again in five years.

A second thing, and this kind of ties into the targeted unemployment area, is that the government has set aside visas for rural high unemployment and infrastructure projects. So, 20% of EB-5 visas will be set aside for those that invest in rural areas, 10% will be set aside for those that invest in areas of high unemployment, and 2% will be set aside for those who invest in infrastructure projects. What are some other changes we're looking at, Ahmed?

Ahmed Khan (08:04):

Yeah. So, in addition to those, one of the big changes that they made was that you could now concurrently file an adjustment of status application. If you're familiar with the way that the immigration process works in the United States, if you're here in some other status, it could be a B-1, B-2 tourist, but for an extended period of time, if you are here on an E visa, on an H visa, on an L visa, and basically you want to go through this EB-5 process, before you'd have to file the 526, which is the first form in this process, and then wait for it to be approved before you could adjust your status to a Green Card holder. Now, what USCIS is basically going to allow is for you to file both of those forms at the same time and get your Green Card process underway.

Now, it kind of remains to be seen how they're exactly going to adjudicate this. Will they still go through the 526 adjudication before they start issuing the underlying work authorization and travel documents that come along with an adjustment of status? We won't know until the first few investors go in and see how USCIS plays it out. But this is a pretty big step because it allows for people in the United States to kind of have an idea of a timeframe for their future. And that's huge whenever you're putting in this amount of money, and something that's really turned people off from the program in the past. So this is a great step that Congress has taken.

Another one of the changes that they've made is grandfathering old petitions in. So, bringing in folks... And really just giving clarity that if this lapse again happens in the future, investors who are going in between now and when the program is currently set to expire will not have to worry about that whatsoever. Their petitions, like you said, Zain, the ones that were held in abeyance, that won't be to concern in the future.

Zain Abidi (09:57):

Yeah. I think that was one thing that turned a lot of people off to the program in the last three years, is just the uncertainty. Why would you invest half a million dollars or a million dollars in the United States, or \$800,000 at the current levels, when there was no certainty as to whether you're petitioned to be adjudicated, and you're kind of at the whim of Congress, right? You're at the mercy of Congress.

Ahmed Khan (10:16):

Right.

Zain Abidi (10:16):

And I know there's some changes regarding redeployment. Can you give us a quick definition of redeployment and what these changes are?

Ahmed Khan (10:24):

Sure. So redeployment occurs, and this really only applies to a certain subset of investors, and basically this program was just so popular in certain countries, most specifically China, Vietnam, India being the big ones, where there were so many investors that came through and were approved, that we actually ran out of Green Cards to give to them. So what that creates is a backlog and essentially a line, if you will, for people who are waiting for their Green Card.

Now, the way the regulations are written is you have to put in your initial investment, but if your immigration process takes longer than the investment life cycle itself, the investment needs to be redeployed or put back in and reinvested somewhere else. This has been historically a very interesting part of the EB-5 program because there wasn't a lot of guidance and there was quite a bit of consternation between both investors and Regional Centers on how best to do this. So, USCIS has now, or actually Congress now, has given us a little bit more clarity in terms of where you can redeploy. And the where and the what has really changed to... Before you could only redeploy into a very similar geographical area as an initial investment, now they've eliminated that kind of language. So you can, if you initially invested in a project in New York, you could now, essentially, redeploy into a project in California if the right opportunity arose.

So what it does, it really gives Regional Centers a lot more flexibility in terms of finding investments that their investors are going to be enthusiastic about and be able to get behind. And it eliminates them kind of being, basically, pigeonholed into one geographical area where there may or may not be great projects at this specific timeline that they're looking at.

Zain Abidi (12:19):

Yeah. And despite the success of the program, I think when most people Google EB-5 there's a few high level cases of fraud, even though it's a small part of the program. In these new regulations, it looks like Congress is taking steps to kind of ensure Regional Center compliance. Could you break down some of those steps for us, Ahmed?

Ahmed Khan (12:40):

Absolutely. I think the biggest effect of this legislation really, other than extending the program and raising the amounts, has been the steps that Congress has put in to really just make sure that investors feel comfortable putting their money into this program and just knowing that their money is... There's oversight, basically, from the government. So there's going to be some pretty stringent new requirements that Regional Centers have to undertake, everything from reporting, record keeping, just making sure that they are getting the initial approvals from the SEC as necessary. All of that stuff will... There's now set milestones that Congress has put in place. Each of these will be audited at least once every five years. I think that's a great point to bring up.

There's also this Integrity Fund that's been created and that basically... Every

Regional Center, depending on their size, will have to contribute at least \$10,000 to \$20,000 annually, and all that funding will basically go towards USCIS overseeing... DHS and USCIS, essentially, overseeing these Regional Centers, making sure they're doing what they meant to, making sure their investments are being deployed in the correct way, and really just eliminating the chances for fraud that we've seen very early on in this program, before people really knew how big it could get and how useful it could be for the U.S. economy.

Zain Abidi (14:08):

Yeah. I think both of these initiatives that you touched upon are really speaking to the longevity of the program and it's clear that Congress sees this as a job creating engine and they want to minimize the downsides of the program through these new regulations. But there's a few things investors, our perspective investors, should take a look at before they invest into any project. And an important thing is pre-planning the source of funds.

A common issue attorneys may see is that investors don't really think through what their source of funds is going to be or what their path of funds is going to be. When attorneys do a source of funds analysis, we also do a path of funds analysis, so we also trace those funds from their source all the way up into the actual bank account of the investment entity, right? So pre-planning essentially entails talking to an attorney early on to get an idea of what your source of funds is going to be, and to make sure that the path of your funds is clean.

And now that we're on the subject of source of funds, Ahmed, can you talk about some common source of funds issues that you've seen throughout your experience?

Ahmed Khan (15:14):

Yeah, Zain. I mean, you definitely hit the nail on the head there. I think planning is really the key to making sure you have a very clean source of funds. If we think about what an EB-5 petition looks like when it's submitted to the government, there's two main parts. The first part is really just details about the project and making sure that that project is in line with the regulations around EB-5 offerings. Most of that work is done by the Regional Center, right? They're kind of putting together the investment, they're putting together... They have their own immigration counsel that basically puts together the immigration side of the documents, and they create this sort of template that all of the investors will be using for their filings.

The second part of this, and this is really where you need your own representation; one, to separate the representation that the Regional Center has, and to advise you on the best way forward for your money, your source of funds and your immigration process, and secondly, like I just said, to basically go through your source of funds, because that is the second piece of the EB-5 petition.

So, there's a lot of different issues that can come up with source of funds. Zain, I'm sure you've come across some yourself, but some that I've seen over the years and depending on where you are in the world, this can be a huge problem. Getting your money to the United States has become, over the years, different countries have seen a lot of capital leave and they want to restrict that. Everyone wants to keep their wealth

within their country.

Some of the things you have to worry about are if there's any export restrictions. Usually it's a per person, per year basis. Other things can also include breaks in the trail, right? So, if you have some of those currency export restrictions, you may be using a third party facilitator to get those funds to the United States. And often that break will trigger USCIS to issue a request for more evidence or even ask for that intermediary to prove their source of funds when you're sending that over. So a lot of different issues can come up with that.

Another thing that I've seen a lot is people who have legacy money. Money that's coming from years and years ago that's basically now being used for the investment. And we think of this as fungible cash, but often this can just be in the form of property, right? Maybe we see someone whose family bought a property way back in the 1960s, and it's very hard to find documentation of that initial property purchase, but we do need to be able to go all the way back to that initial purchase and show how that was possible. And there's a number of different ways that we can counteract that and provide the necessary documentation to USCIS, but it really does become a case by case basis and something that an experienced immigration attorney who's been dealing with EB-5 will have really solid advice and solutions for. And that's why it's always best to consult an attorney before making any kind of decision on whether or not you want to move forward with EB-5.

Zain Abidi (18:24):

Great, Ahmed. And for a long time, I think a very common source of funds were loan proceeds, right? And for most of the history of EB-5, USCIS took the position that the loans must be secured by personal assets. Is that still the case?

Ahmed Khan (18:40):

Not necessarily, anymore. There's been some litigation over the last few years that has really tried to clarify this exact issue. And there's been a lot of challenges over the years from USCIS about third party intermediaries, where the loan came from, how it was secured, and essentially where we're at today is it can actually be an unsecured loan. Now, would I say that that's the best practice? Absolutely not. I think at the end of the day, the cleanest source of funds will involve some sort of collateral.

But if you're using debt to finance your EB-5 petition, I think that there are, again, some very creative ways that you can get debt financed and it doesn't necessarily have to be collateralized in the traditional sense. But because of relationships or because of a personal track record, things like that can be very, very conclusive in determining whether or not someone has a lawful source of funds. So, again, it's a very case by case kind of deal, but there's definitely a lot more clarity now, thanks to litigation, that's been going on over the last few years in terms of what money can and what money cannot be used. So I encourage everyone to reach out to an EB-5 experienced attorney, like myself or Zain, to really understand the different problems and come up with a creative solution for anyone's personal predicament.

Zain Abidi (20:08):

Yeah. To piggyback off Ahmed, there's countless things that can go wrong in an EB-5

petition, whether it's source of funds issues or issues with the Regional Center, so it's important to understand number one, your source of funds and how that relates to the approvability of your petition, and also number two, the new regulations and how they pertain to you. So, if you have any questions, feel free to reach out to your attorneys at Jackson Lewis.

Ahmed Khan (20:33):

Yeah. And I think, just one final thought on that is, what gets lost in the EB-5 context a lot is that it's not just EB-5, you are still immigrating to the United States and there's other immigration concerns that do come up. There's an interplay between different visas, your immigration history itself, any admissibility issues that may come up over time. So it really helps to have a full-service immigration team at your disposal, while at the same time, someone who's experienced in the EB-5, specifically the EB-5 category, and can guide you through both at the same time, because after the initial EB-5 process you still have to go through the traditional route for consular processing or adjustment of status in the United States.

So, a lot to think about, and we're ushering in a whole new era of financial instruments as well. Bitcoin, and other cryptocurrencies, have really changed the way we think, I think, internationally about money and how it can be used. So, this is going to be a changing landscape for the next several years, but one of the things that we can definitely be a little bit more certain about is the EB-5 program is around, it's going to stick around, it's going to create jobs, and it's going to be at an \$800,000 level if you go into a TEA. Using these absolutes, I think now is the best time to really go in and see if this is the right visa for you.

Zain Abidi (21:58):

Well, thank you, Ahmed, for breaking down the new regulations that were implemented by Congress last month. We're looking forward to a period of stability in the EB-5 industry and it's important that you pre-plan and talk to an experienced immigration attorney prior to investing in the United States. Thanks for listening.

Alitia (22:15):

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