

Rush Is On To Apply For EB-5 As Lawmakers Debate Reforms

By **Nathan Hale**

Law360, Miami -- Investors and developers in South Florida are rushing to apply for the EB-5 Immigrant Investor Program ahead of the Sept. 30 expiration date as lawmakers in Washington debate changes that could increase investment minimums and exclude projects in many top markets, experts say.

Many are hoping they'll be grandfathered in if Congress opts for a short-term extension of the current system, which looked increasingly likely in recent days. But unease about the future of the program — which enables investors to obtain green cards if the projects meet certain job creation targets — continues as attorneys and other EB-5 professionals await word from Washington.

They say heightened reporting regulations also under consideration could add some needed transparency to the EB-5 program, but potential changes to geographic restrictions could stifle activity that has helped accomplish the program's goals of attracting foreign capital and creating jobs.

"The EB-5 industry is suggesting, recommending, analyzing that these are the thoughts of attorneys as well as other members of the EB-5 industry, but none of us is really sure if Congress is going to agree with our interpretation or not," immigration attorney Ed Bashara of Bashara PA cautioned the audience at an event held last week to promote the City of Miami Regional Center, established by the city under the program to help South Florida projects solicit EB-5 financing.

Here is a look at major changes Congress is considering for the EB-5 program and some potential effects on development opportunities.

Redrawing TEAs

The proposed revision that appears potentially most harmful to developers — and the one that drew the most opposition from EB-5 attorneys — is a movement to tighten regulations on the drawing of so-called "targeted employment areas."

Currently investors can put down a minimum of \$500,000, instead of the standard \$1 million minimum, on projects in these regions, which are defined as rural areas or metropolitan areas that have experienced unemployment at 150 percent of the national average for the most recent calendar year. But [U.S. Citizenship and Immigration Services](#) defers to states, for the most part, to draw the borders, and there has been criticism that they are essentially gerrymandering to include more desirable urban areas, such as upscale parts of Manhattan or Miami's downtown Brickell District, where high-end projects can be successfully built and marketed.

Sens. Chuck Grassley, R-Iowa, and Patrick Leahy, D-Vermont, sponsors of the Senate bill that has been the focus of Congress' debate so far, are backing the proposed changes to direct more EB-5 funds to rural or blighted urban areas, as intended when the program was enacted in 1992. They have run into considerable

push-back, however, from their colleagues from New York and other states with major urban real estate markets, attorneys said.

While not necessarily disputing that some manipulation of the TEA borders may be taking place, the attorneys involved in EB-5 projects said that the reality of the situation does not warrant a clamp down.

“I think that's a simple answer that really misses the real underlying narrative,” Julian Montero, a partner with [Arnstein & Lehr LLP](#), told Law360 after moderating another panel at the Miami event. “The fact it is being used in New York City does not mean it is being used to create lesser jobs than it being used in a rural area. These are very good construction jobs, and obviously the fact that you are building projects in these areas creates so many ancillary benefits.”

The loss of TEA status would be significant, Montero added, noting that the “overwhelming majority” of EB-5 participants invest in TEA projects.

“Miami would be virtually eliminated,” Ronnie Fieldstone, also of Arnstein & Lehr, said in an interview. “That is one of the stickiest issues of the whole program and will require more analysis.”

Raising the Stakes

While changing the TEA regulations would most affect developers, a proposal to increase the minimum investment requirements to \$800,000 for TEA projects and \$1.2 million for non-TEA projects would hit foreign investors in their wallets.

After nearly 25 years of the program, an adjustment of these levels is probably in order, several sources said in interviews, and this proposal might also be a response by Congress to the high interest in the program, which has an annual cap of 10,000 visas but saw far more applications last year.

“It's supposed to be a serious cost of entry for a serious investor,” observed Steve Klein, a partner at South Florida accounting firm [Gerson Preston Robinson & Co. PA](#).

A higher minimum would concentrate the program on more wealthy investors, but David T. Schubauer, a partner at Miami law firm [Bilzin Sumberg Baena Price & Axelrod LLP](#), noted that it is already expected that the downturn in China's economy will impact participation by its citizens, who have dominated the EB-5 program to date.

“If it is increased to \$800,000, it would be that much more difficult for them,” Schubauer said.

Fieldstone also noted new projects applying for \$800,000 investments would likely face delays if the current backlog of \$500,000 applications — which continues to grow in advance of the sunset date — is grandfathered in.

Increasing Transparency

A third area where it appears likely that Washington will ramp up its regulation of the EB-5 program is in reporting requirements and efforts to reduce fraud.

The U.S. [Department of Homeland Security](#) could gain greater authority to deny or terminate visas, and Fieldstone said new requirements could be implemented for filings to show compliance with U.S. securities laws and to disclose compensation to anyone involved in the offering process, including professionals.

“There has been criticism that there has been a lack of disclosure in marketing documents,” Fieldstone said, adding, “Requiring more transparency is a good thing.”

While such changes might add new layers to an already complex process, they garnered support from EB-5 attorneys.

“The [U.S. [Securities and Exchange Commission](#)] is concerned there are commissions being paid to unlicensed broker-dealers and other intermediaries that are bringing in investors,” Montero said. “And the EB-5 industry, as a whole, we're proponents of increasing that regulation to have more transparency.”

Beating the Sunset

Not everyone reported seeing the same volume of recent EB-5 application activity that prompted Fieldstone to describe it as almost a “run on the bank,” but it is clear that the looming Sept. 30 sunset date and potential for significant changes to the program have spurred would-be investors and developers to file their EB-5 paperwork before month's end.

For investors, that means getting in their project-specific 526 application forms. Meanwhile, developers have been filing what are known as “exemplars” through the regional centers. These are forms that they believe will protect a specific project and all of its investors from any changes brought about by future legislation, Montero explained.

“There has been a push for developers to get their projects together so that investors can invest before this sunsets, with the hope that those projects would then be protected from any change, but it remains to be seen how that plays out,” he said.

At this point, no guarantees have been made by Congress to honor filings made before Sept. 30 under the requirements existing at the time, but there is an expectation in the industry that at least some acknowledgment will be made, especially for investor applications, attorneys said.

“That is one of the open issues because there are thousands of petitions pending,” Fieldstone said. “Those

people have relied on the program guidelines and should be protected. It would be a legal issue if [lawmakers] can retroactively change the requirements. That would be an immediate lawsuit.”

A **short-term spending bill** unveiled by Senate Republicans last Tuesday proposed reauthorizing the EB-5 regional center program until Dec. 11, and Montero said that industry sources were distributing reports citing that same date.

“We're hopeful that the interim extension will be 'as is,' so there will be no change, and that will give project developers some time to really digest what they need to do,” he said.

A Silver Lining?

If stricter regulations do come into play, short of pushing EB-5 funds exclusively to the countryside, some sources suggested that the program has the potential to help address the affordable housing crises facing many American cities.

While agreeing that even the luxury condominium projects are creating jobs that go to the nonwealthy, Gerson Preston's Klein pointed out that EB-5 investments could be well-suited to affordable housing projects because the primary benefit to investors was intended to be a green card, as opposed to a high return on investment, which those projects cannot produce.

“Knowing it won't require a high return lets developers direct it to blighted areas,” Klein said.

But the pursuit of higher profits may still dominate. The city of Miami had affordable housing in its sights when it formed its regional center, according to Bilzin's Schubauer, but he said it has struggled so far in that sector and pushing the TEAs to blighted areas would not necessarily increase the number of affordable housing projects.

“It is also conceivable that people would stop using the EB-5 program,” he said, noting that while the program has been around since 1992, before the economic downturn most people had not heard of it. “It was only when bank loans kind of dried up that people realized it as an alternative to finance projects.”

--Additional reporting by Allissa Wickham and Jacob Fischler. Editing by Jocelyn Allison and John Quinn.

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