Analysis of new EB-5 Reform Bill Destined for Omnibus by March 11, 2022

By Robert Divine of Baker Donelson

March 11, 2022

Last night (March 10, 2022), the Senate passed an omnibus spending package that included an EB-5 bill that provides a 5-year reauthorization of the Regional Center Program and other substantial changes. The omnibus was passed in the House of Representatives the day prior but still needs to be signed by the President before midnight on Friday, March 11. All indications point to that this will happen, marking an achievement long-awaited by the Regional Center industry.

The EB-5 bill included on the omnibus has major implications for existing and future investors, regional centers, developers, and promoters. A summary of these changes is below:

"Grandfathering." The bill preserves the eligibility of all pre-enactment investors as of the time they filed their I-526, for both I-526 and I-829 adjudication. The immediate repeal of the prior regional center (RC) law does not prevent adjudication and visa allocation for pre-investment RC investors. This would "moot" pending litigation about the "lapse" of prior law.

***Investment Amounts*.** For all new filings, the minimum investment is $800,000 in a Targeted Employment Area (TEA), either rural (same definition as before, but now they receive priority in USCIS processing) or high unemployment (using narrower "bullseye" definition from the 2019 regulations). High unemployment TEAs are determined only by USCIS and are valid for two years from project request filing, renewable in two-year increments. The $800,000 amount can also be used "infrastructure projects" in which a government entity contracts for EB-5 financing to develop public works (something like a private municipal bond deal) even if not located in a TEA. Otherwise, the minimum is $1,050,000 (a $250K spread). Amounts increase with inflation every 5 years.

Reserved Visas. As a separate issue from investment amounts, visas are "reserved" each fiscal year: 20% for rural, 10% for high unemployment, and 2% for infrastructure; unused reserves carry over to add to reserves for the next year, but in the third unused year go without reservations. The 20% for rural might matter. The other reserves probably won't.

Investment Arrangements. Numerous USCIS interpretations under prior law are locked in by statute, including prohibited redemption and debt arrangements, and gifted and loaned investment funds. Purchase of publicly available bonds (municipal or for profit) no longer can qualify.

Adjustment of Status. Investors and family already legally in the U.S. and eligible for a visa number may concurrently file applications for adjustment of status (avoiding consular visa processing) along with or while awaiting adjudication of the investor's I-526 petition. EB-5 investors now join other employment-based immigrants in enjoying, under INA section 245(k), forgiveness of up to 180 days of status violations when they apply for adjustment.

RCs for all Pools. Post-enactment I-526 filings about any pooled investments (2 or more EB-5 investors) must be sponsored by a RC and meet lots of new RC requirements including the RC's filing of an exemplar about the project (not required to wait for exemplar approval before I-526 filing). Simple, "direct" pooled investments will not be allowed, even among friends who would all be active in the

business. And solo investors will not be able to use indirect arrangements and indirect job creation even if sponsored by an RC.

RC Program Expiration. The bill provides that "visas" under the RC program—the only path on which any pooled investors may travel— "shall be made available through September 30, 2027." By itself, this language creates the specter of investors who have not obtained conditional permanent residence by that date dangling in limbo subject to subsequent legislative renewal, just as investors who filed up to June 30, 2021 have been dangling up to now. Happily, the bill's final section requires the immigration agencies to continue adjudicating petitions and allocating visas to RC investors who file I-526 petitions up to September 30, 2026. In effect this means the RC program expires on September 30, 2026, because RC investors subscribing and filing after that date would need legislative renewal to avoid unreasonable risk of losing the opportunity for a visa.

Indirect Job Limits. Indirect jobs for RC investors can count for no more than 90 percent of the jobs, and only 75% of jobs can be from impacts from construction lasting less than 2 years (and those count only to the extent of the fraction of a two-year period). Tenant occupancy can count if the jobs are not relocated. Purchase of bonds no longer qualify. Otherwise, the bill does not require any changes to key USCIS interpretations that had driven interest in regional center projects in the past, including that EB-5 investors can receive job creation credit arising from expenditure of all of the capital by the job creating entity (JCE) from all sources and that EB-5 capital can replace bridge financing and thereby receive job credits from activity that preceded the EB-5 investment.

Confusion for Existing RCs. Prior regional center law is repealed upon enactment and the new RC law takes effect 60 days later. Apparently, no new RC filings (including investor's I-526 sponsored by RC) may be filed within 60 days after enactment. It is not clear, but possibly every RC must start over with a new RC application, or at least an amendment to confirm the identity of all persons "involved with" the RC and to provide policies and procedures reasonably designed to ensure compliance with a host of new integrity rules. It is not clear if USCIS would allow project request or investor filings before RC (re)approval.

Project Requests. A RC must file an application for project approval ("project request"), but investors can file I-526 petitions once the required project request is filed. Project requests must contain the kinds of documents typically included in responsible offerings, but they also must disclose fees to marketing agents and brokers and certify and describe securities law compliance. Investor petitions can incorporate project request papers by reference. Project requests must be amended within 30 days after changes to be identified in Agency guidance, but it is not whether material changes would trigger denials of pending investor petitions. USCIS must perform a site visit to each project, giving at least 24 hours' notice.

Redeployment. The bill specifically recognizes "redeployment" of capital that gets paid back to the "new commercial enterprise" (NCE) before the end of the investor's conditional residence. It continues some existing policy requirements (all the required jobs were initially created, and redeployment is at risk in commercial activity), relaxes one requirement (allow redeployment throughout the U.S. rather than in approved RC area), and sets some new demanding requirements (that the original project was implemented without material change, and the job creating entity has repaid the capital). Shockingly, the bill requires USCIS to terminate a regional center if one of its NCEs violates the above redeployment

requirements. USCIS regulations must address these issues, including where only part of the capital was repaid and the rest was lost.

RC Burdens. Running a regional center will be much more demanding. Amendments about RC administration must be filed 120 days ahead of changes unless there are "exigent circumstances," but while awaiting USCIS approval the RC still may file project exemplars and investors still may file I-526 petitions. RCs must keep records and undergo USCIS audit every five years. Demanding applications and annual reports must include broad certifications of securities and other compliance and conditions including all marketing fees paid. RCs face draconian sanctions for misstatements or noncompliance including suspension, fines up to 10% of capital raised, debarment of individuals, or termination. RCs must share relevant portions of annual statements with investors. Only citizens and permanent residents may be "involved with" a RC, and people with checkered pasts are barred. Foreign governments are barred from any aspect of EB-5 except ownership but not administration of an arm's length job creating entity. To support a new "integrity fund," in addition to all filing fees for application, each RC must pay an annual fee of $20,000, or $10,000 for those with 20 or fewer investors per year, and each RC investor must pay $1,000 with I-526 petition.

These new obligations will cause regional centers and NCEs to assert more contractual control over developers and charge more for their services and risk. Every NCE will need to establish new administrative policies and procedures and follow them more methodically. Investors will need to be increasingly concerned about the structure and functioning of the regional center sponsoring its project to decrease chances of termination that could ruin the investors' immigration chances. A huge question is the extent to which new RC compliance standards will apply to existing projects that were established without awareness of strict requirements and sanctions.

Promoters. Promoters, including migration agents abroad, must register with USCIS, show they do not have bad actors, follow USCIS guidelines for immigration and securities compliance, have written agreements with issuers, and fully disclose all fees to investors in writings that will be filed with investor petitions.

***Innocent Investor Protection*.** The bill adds some protection for innocent investors who suffer termination or debarment of their RC, NCE, or JCE. As long as their investment arrangements were generally qualified, within 180 days of such adverse action (and notice) they can associate with replacement entities and even make additional investment (which may include proceeds from claims or recoveries) to meet investment and job creation requirements without losing priority date or child status protection. Children of investors who gained conditional residence and then lost it by entity termination or debarment or got I-829 denied may keep their child status in connection with a second petition filed by the parents within one year.

Material Change. Regional centers must report material changes to projects in their annual report including any disclosures to investors about them. The bill reinforces USCIS policy that a "material change" to business plans can require denial or revocation of investor petitions, without defining what is a material change. The industry will need to promote reasonable interpretations in any rulemaking that arises from the bill: most importantly, changes to conditions that continue to meet EB-5 requirements should not be deemed material. Nevertheless, investors will tend to gravitate to RCs and developers who have a clear project plan, solid capital stack, and track record of completing projects as planned.

Fund Administration. In the absence of audited financial statements shared with investors, NCEs must maintain EB-5 capital in "insured" separate accounts and retain a third-party fund administrator to ensure that the capital properly flows to the job creating activity.

I-829 Changes. Applicable only to investors who file I-526 after enactment, the bill makes a few changes to the standards and process for I-829 petitions to remove conditions from an investor's permanent residence. While at I-526 stage the investor may be "in the process of investing," upon admission as a conditional resident the investor must already have invested and may not still be in the process of investing. The investor filing I-829 still may be "actively in the process of creating the employment required," but the investor must make an additional filing a year later showing that the jobs have been created. Even "Acts of God" such as hurricanes and pandemic might not justify a longer delay in job creation.

AAO and Judicial Review. Except for national security and public safety denials, there is judicial review of most adverse EB-5 decisions, but only after exhaustion of appeal to the USCIS Administrative Appeals Office. It appears that I-829 denials remain subject only to motion to reopen or reconsider, and appeals are only in the context of removal proceedings in Immigration Court. It can be argued that the bill makes I-526 petition revocations newly reviewable by courts.

Filing Fees. The bill tells USCIS to charge what it takes to process various filings between 90 and 240 days, with the shortest times for investors filing I-526 petitions after project requests by RCs.

Agency Transparency. Preferential treatment or communications for parties are prohibited.

Baker Donelson is a full-service law firm with immigration, securities, and other business attorneys working closely to advise regional centers, issuers, developers, and investors in taking the most advantage of swiftly developing EB-5 law and policy.