Siskind Summary: Proposed EB-5 Program Modernization Rule
By Greg Siskind

Comments must be received on or before April 11, 2017

I. Public Participation

DHS invites comments on the following proposals:

- Priority date retention for EB-5 petitioners;
- Increases to the minimum investment amount for targeted employment areas (TEAs) and non-TEAs;
- Revisions to the TEA designation process, including the elimination of state designation of high unemployment areas as a method of TEA designation;
- Revisions to the filing and interview process for removal of conditions on lawful permanent residence.

DHS is also seeking comments on the economic analysis supporting the rule and proposed form revisions.

II. Executive Summary

A. Purpose of the Regulatory Action

DHS proposes to update its regulations governing EB-5 immigrant investors and regional centers to reflect statutory changes and codify existing policies and to also change area of the program needing reform.

B. Summary of Major Provisions

DHS proposes the following reforms.

(1) Priority Date Retention

DHS proposes to allow certain EB-5 petitions to retain the priority date of an approved EB-5 petition for use with any subsequent EB-5 petition. This would come in to play if a petitioner needs to file a new EB-5 petition due to a circumstance beyond their control (e.g. terminated regional center) or for other reasons (such as the petitioner wishing to change aspects of his or her investment). DHS believes this will be of greater importance as backlogs develop in the EB-5 category.

(2) Increases to the Investment Amounts

DHS is proposing to increase the minimum investment amounts for new EB-5 petitions to amounts that, adjusted for inflation, reflect the amounts set by Congress in 1990. The standard investment would increase from $1,000,000 to $1,800,000. The targeted employment area (TEA) amount would increase from $500,000 to $1,350,000 which is 75% of the standard amount.

DHS is also seeking to make adjustments for inflation based on the Consumer Price Index every five years.

(3) TEA Designations

DHS is proposing TEA designation process changes to ensure consistency and adherence to congressional intent.

- DHS proposes to allow any city or town with high unemployment (at least 150% of national average rate) and a population of 20,000 or more to qualify as a TEA. Currently, designations are not available at the city or town level unless a state designates as a TEA.
- DHS proposes to eliminate the ability of a state to designate certain geographic and political subdivisions as high-unemployment areas and DHS would make designations directly using standards described in this proposed rule.

(4) Removal of Conditions

DHS proposes to revise the rules to clarify that derivative family members must file their own petitions to remove conditions on their permanent residence when they are not included in a petition to remove conditions filed by the principal investor.

DHS is also proposing to provide flexibility in interview locations and to update the rule to conform to the current process for issuing green cards.

(5) Miscellaneous Changes

DHS is proposing to update rules to reflect statutory changes that have occurred since the rule was written in 1991.

C. Legal Authority

DHS cites to various sections of the Immigration and Nationality Act and bills passed relating to the EB-5 program.

D. Costs and Benefits

DHS notes it has no way to assess the potential reduction in investments either in terms of past activity or forecasted activity and cannot estimate any impacts concerning job creation, losses or other downstream impacts driven by the proposed investment amount increases.

DHS has provided a detailed table with three columns: current policy, proposed change and impact of the change broken out in rows for each policy change in the rule.

III. Background

A. The EB–5 Program

DHS summarizes how the EB-5 program works (green cards are available to foreign nationals who invest at least $1 million in new commercial enterprises creating at least 10 full-time jobs in the US. Investments in high unemployment or rural areas (TEAs) have a $500,000 investment threshold. 9,940 green cards are made available each year and not less than 3,000 are reserved for TEAs).

B. The Regional Center Program

In 1992, a pilot program was established to allow investments in DHS-designated regional centers. The program expires in May 2017. In this program petitions are based on investments in new commercial enterprises located within public or private “regional centers” that promote economic growth, regional productivity, job creation and increased domestic capital investment. Job creation may be shown based on economic projections of either direct or indirect job creation rather than only on jobs directly created.

Regional center designation requests are made using Form I-924 and designated RCs must continuously provide information to DHS. DHS may terminate an RC’s designation if it no longer qualifies or fails to submit required information or pay the associated fee. There are 864 RCs as of November 1, 2016.

C. EB–5 Immigrant Visa Process

EB-5 process steps:

- I-526 Immigrant Petition by Alien Entrepreneur filed with USCIS
- If visa number available, petitioner files for immigrant visa at a consular post or with USCIS via adjustment of status
- Petitioner is granted permanent residency on a conditional basis.
- Within 90 days of the second anniversary of receiving permanent residence, the petitioner must file an I-829 Petition by Entrepreneur to Remove Conditions on Permanent Resident Status showing that the enterprise was established, that the investment was made and that the investment was sustained and that job creation requirements were met or will be met in a reasonable time.

- If approved, the green card conditions are removed

IV. The Proposed Rule

DHS has not comprehensively adjusted the rules for EB-5s since 1993 and has relied on policy guidance.

A. Priority Date Retention

DHS proposes to allow EB-5 petitioners to use the priority date of an approved EB-5 petition in a subsequently filed EB-5 petition for which the petitioner qualifies. This is not applicable if the prior petition is revoked for fraud, willful misrepresentation of a material fact, or a determination that DHS approved the petition based on a material error. It also can't be reclaimed if a person has already obtained conditional green card status. Denied petitions will not establish a priority date and priority dates cannot be transferred to another investor.

The new rule would make EB-5 like EB-1, EB-2 and EB-3 where priority dates can be retained in new petitions even when petitions are revoked (except if based on fraud, misrepresentation or material error).

Priority dates may be retained in order to: (1) address situations in which petitioners may become ineligible through circumstances beyond their control as they wait for their EB-5 visa priority date to become current; and (2) provide investor with greater flexibility to deal with changes to business conditions (such as when investors are involved with an underperforming or failing investment project).

DHS noted that retaining a priority date is important as the program becomes more popular. Fewer than 600 applications were received per year before FY 2008. Between FY 2014 and FY 2015, 25,000+ applications received [though no mention is made of the possible massive reduction in demand if investment thresholds are raised as much as proposed.] The backlog for China is particularly serious with 16,000 petitions for Chinese currently pending. DHS believes the rule will also help resolve the market distorting practice of people sticking with bad investments because of the fear of losing a priority date.

B. Increasing the Minimum Investment Amount

DHS has not adjusted investment amounts since the program was created in 1990. DHS has discretion to raise the amount and has never done so. DHS is proposing to adjust from 1990 using the Consumer Price Index (CPI) and to adjust every five years from now on. Other indices like the Producer Price Index were rejected because they were too narrowly focused.

The oversubscription in the EB-5 category is evidence that it is too easy and that people can afford larger investments and that the program will remain extremely competitive with other countries even at the higher thresholds.

Adjusting every five years will also avoid a repeat of the current problem where a quarter century passes without change. Every five years rather than annual changes will make the program more predictable and make it easier to adjudicate.

DHS also proposes requiring the contribution of the minimum investment amount that is designated at the time of filing the initial petition (either by having made the investment prior to the petition being filed or by being in the process of investing at the time of filing.

DHS is seeking comment on the proposed increases, the inflation adjustment period, and the proposed requirement that the required minimum investment amount be set at the time of filing the EB-5 immigrant petition.

C. Increasing the Minimum Investment Amount for High Employment Areas

DHS notes that statute permits it to raise the investment for standard filing to up to 300% of the $1,000,000 threshold in the statute in "high employment areas." DHS has never tracked what are high employment areas. It has recently started tracking this, but is not ready to make any changes. DHS is seeking comments on adding a new high employment area threshold.

D. Increasing the Minimum Investment Amount for TEAs

DHS notes that $500,000 has become the norm and TEAs are getting almost all the investments, not just the 30% reserved for them. DHS is assuming Congress wanted there to be a "balance" and DHS is therefore proposing to reduce the differential. DHS also believes the current differential is "distorting" the market. Also, the impact will be lessened because the differential is still $500,000.

E. TEA Designation Process

Current rules allow investors to show a TEA by 1) providing evidence that the metropolitan statistical area (MSA), the specific county within the MSA, or the county in which a city or town with a popular of 20,000 or more is located, had an unemployment rate equal to 150%+ of the national unemployment rate; or 2) by submitting a letter from a state certifying smaller TEAs – areas within an MSA or within a city or town with a population of 20,000 or more.

DHS doesn't like the inconsistent approaches being taken by the states and some of the states are not fulfilling congressional intent. They specifically criticize "gerrymandered" TEAs. DHS is therefore eliminating state TEA designations and will make their own determination whether an area qualifies as a TEA.

DHS' new standards for TEAs are as follows:

1. The term “targeted employment area” would be defined, consistent with statutory authority, to mean an area which, at the time of investment, is a rural area or is designated as an area which has experienced unemployment of at least 150% of the national average rate.
2. DHS is proposing to amend the definition of “rural area” to mean any area other than an area within an MSA or within the outer boundary of any city or town having a population of 20,000 or more based on the most recent census.
3. DHS is expanding the definition of a TEA to add to a metropolitan statistical area (MSA), the specific county within the MSA, or the county in which a city or town with a popular of 20,000 or more is located, cities and towns with a population of 20,000 or more. All must, of course, have an unemployment rate of 150%+ of the national rate.
4. Census tracts or contiguous census tracts in which the new commercial enterprise is principally doing business if the weighted average of the unemployment rate for the tract or tracts is at least 150% of the national rate. Also, if a project tract doesn’t independently qualify, a TEA may also be designated if the and any or all additional tracts that are directly adjacent to the project tracts comprise an area in which the weighted average of the unemployment rate for all of the included tracts is at least 150% of the national average. Petitioners will need to submit a description of the boundaries and unemployment statistics and the method used to get the statistics.

F. Technical Changes

DHS is proposing three technical changes discussed below.

(1) Separate Filings for Derivatives

The proposed rule clarifies the process for spouses and children to file I-829s when they are not included in the I-829 submitted by the investor. This might be the case when the investor dies during the conditional period or when the immigrant investor decides not to remain a permanent resident. The current process doesn’t contemplate this situation. The proposed rule says that when dependents can’t be included in the investor’s I-829 because the principal investor is deceased, all dependents of the investor may be included on a single I-829. In all other situations, each must file a separate I-829.

(2) Interviews

DHS’ current procedures generally call for interviews to be scheduled in the location of the new commercial enterprise even though this is not required by the statute. Under the proposed rule, USCIS will have discretion where to schedule and may do so in the jurisdiction where the business is, where the investor resides in the US or where the Form I-829 is being adjudicated.

(3) Process for Issuing Permanent Resident Cards

The new rule recognizes the new process of collecting biometric data and eliminates the requirement to report to a district office for processing of a green card after the I-829 is approved.

(4) Miscellaneous Other Changes

DHS is proposing other technical changes to the EB-5 regulations.

- DHS is updating US Customs Service references to be US Customs and Border Protection.
- DHS is proposing to conform DHS rules to eliminate requirement to establish a "new commercial enterprise".
- References to "management" of a commercial enterprise as this is no longer strictly required in the INA under Public Law 107-273.
- DHS is proposing to remove the phrase "as opposed to maintaining a purely passive role in regard to the investment" as there are circumstances in which an investment may be essentially passive in nature.
- DHS is proposing to allow investors in any type of entity to show they are sufficiently engaged in a commercial enterprise through policymaking activities by virtue of being an equity holder with the rights of an equity holder of the same type.
- DHS is proposing to remove the requirement on USCIS to specify in the decision on an EB-5 petition whether the new commercial enterprise is principally doing business in a TEA.
- DHS is proposing revisions to replace the term "entrepreneur" with the term "investor."

Proposed Regulatory Amendments

8 CFR Part 204 – Immigrant Petitions

Section 204.6 is amended by replacing the terms "immigrant Investor Pilot" and "Pilot" with the term "Regional Center" and replacing the term "entrepreneur" with "investor"

204.6 Petitions for employment creation immigrants.

(d) Includes the new priority date retention language

(e) contains the new definition of "rural area" to include the outer boundary of a city and the new definition of "Targeted employment area"

(f)(1) contains the new investment amount of $1,800,000 for standard applications and the CPI adjustment process

(f)(2) contains the new investment amount of $1,350,000 for TEA areas and the requirement that adjustment amounts will be 75% of the standard threshold when the standard rate adjusts based on the CPI.

(f)(3) the high employment threshold is $1,800,000 and will adjust every five years based on CPI.

(g)(2) The total number of full-time jobs shall be allocated solely to those aliens who have used the establishment of the new commercial enterprise as the basis for a petition.

(i) USCIS designates areas as having a 150%+ unemployment rate and outlines the census tract formula noted above.

(j)(2)(iii) refers to the requirement to document to transfer property from abroad for use in the commercial enterprise and to document the fair market value.

(j)(5) refers to require that petitioner show he or she will be engaged in the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation

(j)(5)(iii) for proof of policy making activities, documentation the petitioner is an equity holder in the new commercial enterprise and the organizational documents of the new commercial enterprise showing the investor has the rights, powers and duties normally granted to equity holders for the particular type of entity in the jurisdiction where the commercial enterprise is organized.

(j)(6)(i) for rural areas, investors must provide proof the enterprise is principally doing business in a located not part of an MSA or in any city with more than 20,000 people or

(ii) in the case of a high unemployment area:

(A) Evidence the MSA, the county in which a city or town with more than 20,000 people is located, or the city or town with more than 20,000 people, has experienced an average unemployment rate of at least 150% of the national average rate; or
(B) A description of the boundaries of the geographic or political subdivision and the unemployment statistics for which designation is sought and the method by which the unemployment statistics were obtained.

(k) The petitioner will be notified of the decision and have the right to appeal a denial to the AAO .

Part 216 – Conditional Basis of Lawful Permanent Residence Status

4.d. Replaces “entrepreneur” with “investor” in paragraph (a)(4)(iv)

Section 216.6 Petition by investor to remove conditional basis of lawful permanent resident status.

(a)(1)(ii) The investor's spouse and children may be included in the I-829 petition. Where the spouses and children are not included, the spouse and child must each file his or her own petition to remove conditions unless the investor is deceased. If the investor is deceased, the spouse and children may be included in one petition or file separately. A child who reaches the age of 21 or married during the conditional residency period, or a former spouse who divorced the investor, may be included in the investor's I-829 or file a separate petition.

(5) Termination of status for failure to file petition. Failure to file the I-829 within the 90 day period preceding the second anniversary of conditional permanent residency shall result in an automatic termination of the green card status and trigger removal proceedings. This may not be appealed, but the investor can ask for a review of determination during removal proceedings. A late filing may be accepted if the investor can provide a good excuse.

(6) Death of investor and effect on spouse and children. The spouse can children can have conditions removed if it can be shown the requirements for removing the conditions have been met.

(b) Petition review. (1) Authority to waive interview. USCIS may review the I-829 and supporting documents and determine whether to waive the I-829 interview requirement.

(2) Location of interview. Unless waived, the I-829 interview shall be conducted by a USCIS officer at the office with jurisdiction over the location of the investor's commercial enterprise in the US, the investor's residence in the US, or the location of the adjudication of the petition, at the agency's discretion.

(3) Termination of status for failure to appear for interview. If the investor doesn't show up for the interview, permanent resident status will be automatically terminated as of the second anniversary of the date when permanent residence was obtained. A termination notice will be sent and a notice to appear placing the investor in removal proceedings will be issued. The investor may seek a review of the determination, but the burden is on the investor to show by a preponderance of the evidence that he or she complied with the interview requirements. If the investor has failed to appear, he or she may submit a written request to USCIS asking for a rescheduling or for the interview to be waived. If USCIS waives, it will restore conditional residency status and cancel the notice to appear. If USCIS reschedules, it will also restore conditional residency and cancel the notice to appear.

(c)(2) If USCIS obtains derogatory information, USCIS shall offer the investor the opportunity to rebut the information. If the investor fails to overcome the information or evidence, USCIS may deny the I-829, terminate green card status and issue a notice to appear.

(d) Decision. (1) Approval. If, after initial review or after the interview, USCIS approves the petition, USCIS may request the investor and derivative family members to appear for biometrics.

(2) If the petition is denied, USCIS will provide written notice and issue a notice to appear. Green card status will be terminated for the investor and family members. No appeal is permitted, but the investor may seek review of the decision in removal proceedings. The burden rests with USCIS to establish by a preponderance of the evidence that the facts and information in the I-829 petition were not true and the petition was properly rejected.