Congressional Research Service
Informing the legislative debate since 1914

INSIGHT

EB-5 in Flux: Updates Regarding the Regional Center Program and Immigrant Investor Program Modernization Rule

January 13, 2022

In 1990, Congress established the EB-5 Immigrant Investor Program, the fifth employment-based immigrant preference category, to encourage job creation and foreign investment in the United States. The program provides a pathway to lawful permanent residence (LPR status, or green card) for foreign nationals who invest a specified amount of capital in a new commercial enterprise (NCE) and create or preserve 10 jobs for U.S. workers. Those who choose to invest in a *targeted employment area* (TEA)—a rural area or area of high unemployment—qualify for a reduced investment threshold.

The Immigration and Nationality Act (INA) requires foreign nationals applying for the program to have already invested or be actively in the process of investing the required capital. EB-5 investors are initially granted *conditional* permanent residence. After two years, to remain in the United States, investors must apply to remove the conditions on their status: if they have sustained the investment and met job creation requirements, they become LPRs (applicants undergo background and security checks for initial petitions and when filing to remove conditions). Under the INA, 7.1% of all employment-based visas (typically, 10,000) are made available to EB-5 investors, their spouses, and children each year.

EB-5 offers two pathways for investors. In the standard, or standalone, pathway, foreign nationals invest in an enterprise that uses the capital for direct job creation. This pathway is permanent and does not require reauthorization. The second, the Regional Center Program, allows investors to pool their investments into an NCE. The NCE typically uses those pooled investments to fund a separate job-creating enterprise. Regional center investors may count indirect job creation (jobs created outside the NCE) instead of or in addition to direct job creation. Regional centers must be approved by U.S. Citizenship and Immigration Services (USCIS). In FY2019 (the most recent data), 96% of EB-5 admissions were through the Regional Center Program. The Regional Center Program requires congressional re-authorization (for more information, see CRS In Focus IF11848, *EB-5 Immigrant Investor Regional Center Program*).

In 2021, certain legislative and legal developments left some aspects of the EB-5 program in flux. In June, authorization lapsed for the Regional Center Program, leaving only the standalone option. The same month, a federal court decision vacated the 2019 EB-5 Immigrant Investor Program Modernization rule, a

Congressional Research Service
https://crsreports.congress.gov
IN11838

federal regulation that had implemented major changes to the program, applicable to all investors (both pathways). As a result, the regulations from prior to November 21, 2019, including lower investment thresholds, are currently in place. Both developments are described below.

Regional Center Program Authorization Lapse

Congress established the Regional Center Program as a five-year pilot in 1992 (P.L. 102-395, Title VI, §610) and has since extended its authorization in short-term increments in annual appropriations bills. The most recent reauthorization (P.L. 116-260, Division O, Title I, §104) extended the program through June 30, 2021. Congress has not yet reauthorized the program since that date.

As a result, USCIS has stated that as of July 1, 2021, it is rejecting new receipts of the following:

- Form I-924, Application for Regional Center Designation Under the Immigrant Investor Program, except for amendments to the regional center's name, organizational structure, ownership, or administration;
- Form I-526, Immigrant Petition by Alien Investor, associated with a regional center; and
- Form I-485, Application to Register Permanent Residence or Adjust Status, Form I-765, Application for Employment Authorization, and Form I-131, Application for Travel Document, which are based on a Form I-526 filed by a regional center investor.

USCIS had stated it would hold forms already pending but would reevaluate whether to keep that hold in place at the end of 2021. As of the new calendar year, USCIS now states it is reevaluating this hold and will soon provide additional guidance. The agency is currently accepting Form I-829, Petition by Investor to Remove Conditions on Permanent Resident Status, including forms filed on or after July 1, 2021.

Legislation has been introduced in the 117th Congress that would extend the Regional Center Program through FY2026 (S. 831/H.R. 2901). Congress may also reauthorize the program in its FY2022 appropriations bill, or it may choose not to reauthorize the program.

Status of the Immigrant Investor Program Modernization Rule

The Department of Homeland Security (DHS) implemented the EB-5 Immigrant Investor Program Modernization rule on November 21, 2019. The regulation made substantial changes to the EB-5 program (applicable to both the standard and Regional Center programs), including the following:

- increasing minimum capital investment amounts to $1.8 million, or $900,000 in a TEA;
- removing states' authority to designate areas of high unemployment as TEAs; and
- allowing applicants to retain priority dates of approved I-526 petitions for a subsequent application (e.g., if the investor's application was approved but the regional center in which they invested was terminated for reasons outside their control).

In December 2020, the Behring Regional Center, LLC, sued DHS alleging in part that then-Acting Secretary Chad Wolf was improperly appointed and, therefore, the rule was in violation of the Administrative Procedure Act (*Behring Regional Center, LLC v. Wolf et al.).* On June 22, 2021, the U.S. District Court for the Northern District of California granted plaintiffs' motion for summary judgement and vacated the rule. As a result, as of that date, the regulations that were in place before November 19, 2021, apply. These include the following:

- minimum capital investment amounts of $1 million or $500,000 in a TEA;

- state government agencies may designate a geographic or political subdivision as a high unemployment TEA; and
- petitioners may not use the priority date of a previously approved Form I-526 for purposes of a subsequent application.

USCIS appealed the court's decision in August 2021. In January 2022, USCIS moved to dismiss the appeal. The motion was granted by the Ninth Circuit Court of Appeals. The agency may choose to issue a new regulation but has not yet done so.

Author Information

Holly Straut-Eppsteiner
Analyst in Immigration Policy

Disclaimer