PENG & WEBER
PLLC
ATTORNEYS AT LAW

USCIS's January 13, 2017 Proposed Amendments to EB-5 Regulations Include Sharp Increase in Investment Thresholds

In a Notice of Proposed Rulemaking (NPRM) published on January 13, 2017, USCIS announced proposed amendments to the EB-5 regulations that include sharply increased minimum EB-5 investment amounts of $1.8 million and $1.35 million, which would replace the current levels of $1 million and $500,000 for regular and Targeted Employment Areas, respectively. (See DHS Docket No. USCIS 2016–0006, published in Federal Register Vol. 28, Issue 9.) The NPRM represents the first EB-5 regulatory updates sought by USCIS since the agency, then named INS, promulgated the existing EB-5 regulations in 1991. The recent proposed amendments do not come as a surprise, as Immigrant Investor Program Office Chief Nicholas Colucci and other USCIS staff publicly announced numerous times last year that the agency was working on new regulations regarding TEAs, minimum investment amounts, and other issues. The proposed changes relate to the EB-5 program generally, not just the Regional Center program.

In summary, the NPRM proposes to "modernize" the EB-5 program by revising the EB-5 regulations at 8 C.F.R. Parts 204 and 216 as follows:

1. Raise the investment thresholds to $1.8 million for regular areas and $1.35 million for Targeted Employment Areas (TEAs) to adjust for inflation since 1990. The new levels are based on increases in the unadjusted all items CPI-U (Consumer Price Index for All Urban Consumers) for the relevant period.

2. Overhaul existing rules and policy regarding high unemployment area TEA designations. Specifically:

    a. Eliminate state TEA designations completely and give USCIS sole authority to make TEA determinations, to ensure consistency in TEA adjudications; and

    b. Limit designations of geographic or political subdivisions (i.e., customized areas) to (1) the census tract in which the EB-5 funded project is located, if that census tract has a qualifying unemployment rate; or (2) a contiguous area consisting of the project census tract and *directly adjacent* census tracts, if the weighted average of the unemployment rate for all census tracts qualifies. (Per the NPRM, this limitation would remove the possibility of gerrymandering and reserve the reduced investment threshold for areas experiencing significantly higher unemployment levels.)

3. Allow priority date retention in the EB-5 category—i.e., let EB-5 petitioners use the priority date of an approved EB-5 immigrant petition for any subsequently filed EB-5 petition, so they can preserve their place in the visa queue if they need to refile an I-526 as a result of unexpected regional center termination (in the case of regional center-affiliated investors) or project failure.

4. Clarify the rules regarding removal of conditions petition filings and interviews.

5. Update the regulations to reflect statutory changes made since the regulations were first published.

Of the proposed changes, the investment amount increases and new TEA designation rules would have the biggest impact on the EB-5 program if effected. The proposed investment thresholds far exceed the existing thresholds, and are much more aggressive than the levels proposed in EB-5 reform bills last year (e.g., $1.2 million for non-TEAs and $800,000 for TEAs). Thresholds of $1.8 million and $1.35 million would render EB-5 unaffordable for many prospective investors who are currently interested in the program, and could be expected to collapse the size of the EB-5 market considerably. The new TEA rules would not change the existing definition of a TEA (i.e., an area which, at the time of investment, is a rural area or area that has experienced unemployment of at least 150% of the national average rate). However, they would significantly limit which project locations could qualify as TEAs, which would drastically change the types of investment offerings in the EB-5 market.

The proposed amendments listed in the NPRM are not yet final. Under the federal Administrative Procedures Act, before any federal agency can create new rules, it must give the public notice and an opportunity to comment on such proposed new rules. USCIS will receive comments on the proposed changes until April 11, 2017. Thereafter, it will consider all comments and then publish a final rule, which will take effect 30 days after publication.

Any new rules ultimately published in connection with the January 13, 2017 NPRM would not take effect before April 28, 2017, when the Regional Center Program is currently due to expire. It remains unclear whether members of Congress will be able to come to agreement on a comprehensive EB-5 reform bill by April 28, 2017. If they cannot, they might either let the program lapse or agree to extend the program short-term again until they can agree on new legislation. Lawmakers will likely take USCIS's ideas into consideration as they work on EB-5 legislation, but will not necessarily follow USCIS's lead on the major issues of investment amounts and TEAs. If Congress does not enact new legislation before new USCIS rules take effect, then the new rules would be binding on the EB-5 program until and unless Congress overrides them with statutory amendments.

In addition to the NPRM, USCIS also separately issued an Advance Notice of Proposed Rulemaking ("ANPRM") on January 11, 2017 announcing its intention to propose regulatory changes specific to the Regional Center Program. (See DHS Docket No. USCIS 2016–0008, published in Federal Register Vol. 28, Issue 7.) The ANPRM seeks public input regarding the initial regional center ("RC") designation process, mandatory exemplar filings for all RC-sponsored projects, requirements for maintaining RC designation, and the process for RC termination. As with the NPRM, the comment period for the ANPRM closes on April 11, 2017.