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# Federal Court Decision Strikes Down $900,000 EB-5 Investment Threshold

Article By:

Dillon R. Colucci

As discussed on this blog previously, a lawsuit challenging certain EB-5 regulations was successful on June 22, as Magistrate Judge Jacqueline Scott Corley of the U.S. District Court for the Northern District of California ruled that the regulations were not lawfully promulgated because then-acting Department of Homeland Security (DHS) secretary Kevin McAleenan was not properly serving in his position.

The regulations at issue, which were enacted Nov. 21, 2019, had increased investment amounts from $500,000 to $900,000 for investments in a targeted employment area (TEA), restricted the ability for investments to be considered within a TEA, and made other changes to the EB-5 visa category. The judge's conclusions in this matter are consistent with numerous other federal court rulings finding that Mr. McAleenan was not lawfully appointed, and therefore did not possess statutory authority to serve as acting secretary of DHS. Furthermore, despite the DHS' attempts to ratify Mr. McAleenan's promulgation of the regulations years after the fact, the judge found conclusively that this argument is "foreclosed by the [Federal Vacancies Reform Act's] plain and unambiguous language: An action that has no force or effect under paragraph (1) may not be ratified."

As the judge noted in her ruling, because the regulations have no force or effect, they must be "set aside" as an "action taken in excess of statutory … authority" and the government made no specific showing of harm, vacating the regulations is the appropriate remedy. Accordingly, the minimum investment amount for an investment located in a TEA is now $500,000, and the other changes noted above are no longer in effect. The long-term impact is yet to be fully understood, as DHS may appeal and seek a stay of this ruling and/or decide to embark on new rulemaking.



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