

## **A Look Forward: FY 2014-2015 & Possible Retrogression Effects**

Article By:

Dillon R. Colucci

---

On [September 9, 2014](#) the U.S. State Department (the State Department) issued the October 2014 Visa Bulletin which reflected the EB-5 visa category as “current” for mainland-born Chinese EB-5 investors. However, there is speculation and anticipation that the EB-5 visa for mainland-born Chinese EB-5 investors will become unavailable during the U.S. government’s 2014-2015 fiscal year (the U.S. government’s fiscal year runs from October 1 to September 30). If this occurs, there will be impacts felt throughout the EB-5 industry.

### **Child Status Protection Act**

As we have discussed [here](#), a “child” is defined in the Immigration Nationality Act as an individual who is unmarried and under the age of 21. Once a child reaches the age of 21, he or she is no longer eligible for immigration benefits based on the relationship to the parent, which is known as “aging out.” Prior to the enactment of the Child Status Protection Act (the CSPA) in August of 2002, a derivative child applicant of an EB-5 investor who turned 21 at any time prior to receiving permanent residence was no longer considered a child for immigration purposes. The CSPA is designed to protect a beneficiary’s immigration classification as a child when he or she ages out because of adjudication delays at USCIS. The child’s age essentially freezes on the date the I-526 Petition is filed until the date the I-526 Petition is approved, which helps protect the child of an EB-5 investor from aging out as long as the I-526 Petition was filed prior to the child’s 21st birthday. Once the I-526 Petition is approved, the child’s age unfreezes and he or she must seek to acquire permanent residence within one year of a visa becoming available.

However, the CSPA only allows the time an I-526 Petition was pending to be subtracted from the child’s biological age at the time an EB-5 visa becomes available (ensuring the child is not penalized for the time the I-526 Petition was pending with USCIS). If an I-526 Petition is approved but there are no EB-5 visas available to an EB-5 investor due to visa retrogression, this could result in the children of EB-5 investors “aging out” of their eligibility to receive permanent residence through their parents I-526 Petition.

### **Length of an EB-5 Loan**

The majority of EB-5 developers prefer to exit their EB-5 financing as quickly as possible. This is

---

especially true when the EB-5 financing comes into a project entity (also known as a job creating entity) as a loan (the EB-5 Loan) from a pooled investment vehicle (the new commercial enterprise) (the EB-5 Loan Model). In the EB-5 Loan Model, EB-5 developers would prefer not to have the EB-5 Loan outstanding for an extended period of time. However, this desire to repay the EB-5 Loan quickly conflicts with 8 C.F.R. 216.6(c)(1)(i)-(iii). Those regulations require an EB-5 investor to demonstrate in his or her I-829 Petition that the investment was sustained through the EB-5 investor's period of conditional permanent residency. Additionally, the May 30, 2013, EB-5 Adjudications Policy Memorandum (the Policy Memo) stated that an EB-5 investor must demonstrate in his or her I-829 Petition that "... (1) that the required funds were placed "at risk" throughout the period of the petitioner's residence in the United States... (3) that this "at risk" investment was "sustained throughout" the period of the applicant's residence in the United States..."

Because USCIS has not provided firm guidance regarding the definition of "at risk," USCIS may determine an EB-5 investor's investment not "at risk" or "sustained throughout" the period of conditional permanent residency if the EB-5 Loan has been repaid to the new commercial enterprise. Accordingly, USCIS may take the position that in order for an EB-5 investor's funds to be "at risk" and "sustained throughout" the period of conditional permanent residency (and for the EB-5 investor's I-829 Petition to be approved and his or her conditions on permanent residence removed), the EB-5 Loan must remain outstanding with respect to that EB-5 investor's investment. If there are no EB-5 visas available to an EB-5 investor due to visa retrogression, the beginning of his or her period of conditional permanent residency will be delayed, which in turn, will delay the date upon which he or she will obtain approval of his or her I-829 Petition. Because the EB-5 Loan may have to remain outstanding with respect to that EB-5 investor's investment until his or her I-829 Petition is approved, the term of the EB-5 Loan will need to be increased or extended to account for an EB-5 investor affected by visa retrogression. This will increase the timeframe of the EB-5 Loan Model and result in developers being unable to exit an EB-5 Loan within desired timeframes.

## **Job Creation**

Generally, the ability to create the required number of jobs prior to an EB-5 investor filing his or her I-829 Petition will increase with visa retrogression. This is primarily due to (1) EB-5 investment funds are generally released from escrow upon I-526 Petition approval and (2) the majority of EB-5 investments are Regional Center sponsored real estate construction projects. In a Regional Center sponsored real estate construction project, jobs are deemed created as the project's budget is spent (in accordance with the economic report). Therefore, if a project receives EB-5 investment funds upon I-526 Petition approval, and there are no EB-5 visas available to an EB-5 investor due to visa retrogression after his or her I-526 Petition approval, the project will likely have a greater time frame to construction the project and create the requisite jobs for its EB-5 investors.

Additionally, if a real estate construction project also is utilizing jobs creating through stabilized operational revenues once construction is complete, the likelihood that stabilized occupancy will occur prior to an EB-5 investor filing his or her I-829 Petition increases. However, due to the current uncertain nature of visa retrogression, EB-5 developers should not depend on visa retrogression to meet job creation figures.

## **Conclusion**

The possibility of visa retrogression looms over the EB-5 industry. However, properly anticipating these issues will ensure EB-5 developers and EB-5 investors remain successful. Indeed, the issues discussed above can easily be accounted for through proper planning and document drafting.

National Law Review, Volume IV, Number 270

Source URL: <https://natlawreview.com/article/look-forward-fy-2014-2015-possible-retrogression-effects>