

Filing EB-5 exemplar petitions before September 30, 2015: strategic considerations

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Change is on the EB-5 horizon. With the Regional Center Program nearing its expiration and recent legislative efforts coming from lawmakers, we may see some action by Congress or the Senate before the end of September. But with the Iran deal taking center stage on Capitol Hill, how much time lawmakers will spend on EB-5 changes is simply up in the air.

One issue that we are asked about every day is whether a project or regional center should consider an exemplar filing for a new deal before September 30th, which is when a new law might take effect. The issue is relevant because any changes to the law will impact the already saturated and competitive EB-5 marketplace. Regional centers and projects are concerned that any new EB-5 legislation that is ultimately enacted might very well contain provisions regarding an increase in minimum per investor amounts for projects. This is a real concern.

This brief alert addresses strategic considerations of filing an exemplar petition for a new EB-5 project with United States Citizenship and Immigration Services (USCIS) before substantive changes to the EB-5 Program take effect on the legislative front, perhaps as early as the end of September.

What's at stake with changes to the per investor EB-5 investment amounts?

The [American Job Creation and Investment Promotion Reform Act](#) (the "Act") proposed by Senators Grassley and Leahy provides for an increase in minimum investment amounts by EB-5 investors. Specifically, the increased minimum per investor amounts under the proposed statute would be \$800,000 (up from \$500,000) for a project in a Targeted Employment Area (TEA), and \$1.2 million (up from \$1 million) for a project in all other geographic locations. These proposed changes to the minimum investment amounts would take effect only after the enactment of the legislation.

In its current incarnation, the Act has a carve-out exception to the take-effect date. Specifically, as currently written, the Act provides that "applications for business plan approval for regional center investments in actual projects" filed or approved before the date of enactment would be able to use the current per investor minimums of \$500,000 and \$1 million for TEA and non-TEA locations, respectively. Hence the push to file an exemplar petition right away to secure possible marketing advantages later.

What is an EB-5 exemplar petition?

For those readers with less familiarity, an exemplar petition is not a USCIS pre-approval of an EB-5 project. Rather, an exemplar is a filing by a regional center that contains a project's core documentation – including a business plan for the actual project, an economic study, an investor prospectus and other related documents. USCIS adjudicates a nameless representative “exemplar” EB-5 petition in a determination that the facts as presented are sufficient to meet the core project-related criteria for investors seeking EB-5 classification. This is a project specific process. USCIS has never been crystal clear about what is required of an exemplar, but I think of it as a blended immigration and securities law filing that USCIS adjudicates. Exemplars take a lot of work. An issuer in a deal has to know their business plan to make an exemplar a productive exercise.

To file an exemplar or not is extremely fact specific—what questions should you ask before proceeding?

Regional centers, developers and project sponsors need to exercise some caution before jumping into an exemplar process. For some, filing an exemplar is the best strategy. For others, racing to the USCIS exemplar finish line may not be the best move. Here are considerations that should be weighed in assessing options; if you are uncertain about whether you can answer these questions, think carefully about whether racing to the exemplar finish line is sensible:

1. Are there sufficient facts to support an exemplar case? Specifically, how far along are the owners of the project in drafting the core business plan?
2. Is the deal feasible from a job creation and TEA standpoint?
3. Does the project have sufficient time to arrange for securities and corporate counsel to follow the preparation of a business plan and to prepare offering documents?
4. Has corporate counsel been engaged to ensure that the proposed capital structure and overall deal terms are feasible and properly represented in a project's business plan?
5. Is there clarity about deal structure with respect to where EB-5 investors will stand if a project defaults? Stated differently, do you have sufficient information to know where EB-5 investors will stand in terms of liquidation preference?
6. Is the deal structure formed sufficiently for the issuer to be able to identify risk factors properly in a private placement memorandum or investment prospectus?
7. For many debt deals, proper disclosure of how senior debt will impact the rights of an EB-5 investment partnership is material. Do you have sufficient information about how this form of debt will work in a project? Will consents from senior lenders or lien holders be required to proceed?

These are just representative questions for issuers and regional centers, as every project is different. The point is that achieving an exemplar filing with USCIS in the span of a few months may not be realistic for some projects. Additionally, there is no certainty that there will be any retroactive benefits secured through an exemplar. The statute proposed by Grassley and Leahy does not contain the word exemplar at all, and we do not yet know what changes will be implemented to the program after legislation is enacted.

Conclusion: Short-cuts in securities offerings don't pay off

Circling back to where we started, any regional center or issuer needs to review the exemplar filing process and the facts in a possible deal on a case-by-case basis. No one size fits all, and right now no legislative changes have been enacted. Balance the market advantages you may secure with a

\$500,000 per investor project with potential costs later of needing to re-structure your offering. If you file an exemplar now and change your project's structure or business plan later, the benefits of filing an exemplar before enactment of a new statute may very well disappear. There is no regulatory process with USCIS that facilitates amendments to an exemplar. We are in uncertain territory on this front, with USCIS providing only scant guidance about exemplars generally.

Most importantly, don't take short-cuts on important project issues. Skipping over important issues in a business plan, glossing over how a project will be structured from a capital and lending standpoint and spending inadequate time on ensuring that material risk factors will be presented to investors are traps when you rush a deal. Have several advisors weigh into the decision to accelerate an exemplar filing. And remember that filing an exemplar requires substantial planning and effort.

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