

Proposed Framework for EB-5 Reform – Headed for Omnibus in December?

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With all eyes in Washington focused on tax reform, let's not forget that there is a hard deadline approaching to address funding of federal activities with the current continuing resolution (CR) set to expire soon. The CR has been in effect since the start of the current fiscal year on October 1 and runs through December 8. This CR is the current vehicle for extension of the EB-5 Immigrant Investor Program, and is a temporary measure.

Senator Grassley (R-IA) and Representative Bob Goodlatte (R-VA), Chairs of the Senate and House Judiciary Committees, have developed a framework to reform and reauthorize the EB-5 program. So far, this proposal is the result of GOP-only discussions – with key players also including Senators Cornyn (R-TX) and Flake (R-AZ). One aspect of the proposal that is of concern to EB-5 projects in rural areas is a \$100,000 difference in investment amounts between targeted employment areas (TEAs) and high employment areas. The proposed framework has a minimum investment amount of \$1,025,000 for high employment areas, and a downward adjustment to \$925,000 for projects in TEAs. This \$100,000 differential represents a significant departure from the current law, which has a 50% downward adjustment from \$1 million to \$500,000 for qualified investors flowing capital into rural projects. These proposed investment amounts are not final but are included in the framework that is currently under negotiation. A very narrow gap in investment amounts could spell problems for rural projects seeking EB-5 capital, even with the proposed framework's additional visa number set asides for rural and distressed areas. We expect the issue of investment amounts to be debated even if the GOP reaches a consensus on investment amounts proposed in this framework.

So, what's next?

Under "regular order" the Fiscal Year 2018 appropriations process would have been completed by September 30 with the 12 annual spending bills approved and signed into law, funding the federal government for the next year. However, it has been a number of years since appropriations operated under regular order, and the CR – or a series of CRs – has become the norm. This year is no different.

While federal activities, including the EB-5 program, are currently operating under a short-term CR, appropriators and leadership may work to assemble an omnibus spending bill that can be passed by December 8. Unlike the CR, an omnibus would go through the remainder of the current fiscal year and, relevant to EB-5, could potentially include legislative policy items unrelated to appropriations. Along with appropriations, an omnibus could include language to address DACA and the border wall, and perhaps also a long-term reauthorization (and reform) of the EB-5 program. Whether or not Republicans can come together in support of an EB-5 reauthorization by December 8 is unclear, but stakeholders with an interest in the specifics of reform and reauthorization of EB-5, particularly relating to investment amounts and visa set asides, should be engaging with Congress now to ensure that their voices and concerns are heard.

We should also be aware that unlike in the House where a bill needs only a simple majority for passage, the omnibus will need 60 votes for passage in the Senate, a threshold that is not guaranteed should increasingly controversial issues such as DACA and the border wall fall into the mix.

Since there is some possibility that Congress will be unable to move an omnibus bill, that leaves the alternative of passing another temporary CR that could run through the end of the year to buy time, or into some date in early 2018, or even through the end of the current fiscal year in September 2018. In those scenarios, the existing extension of EB-5, and current law, would presumably be included. A CR in December may also clear the way for the DHS to publish final regulations on EB-5 in early 2018.

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