

**USCIS is Poised to Increase the EB-5 Investment Amount with or without Congress:
Are You Ready?**

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In 2015 the U.S. Congress considered several bills which would have increased the required EB-5 investment amount from the current \$1 million (or \$500,000 in a TEA), to as high as \$2 million (or \$1 million in a TEA). Although those bills did not pass, and the investment amounts remain unchanged, many people now speculate that the investment amount will go up in 2016 or early 2017. This article discusses two ways the minimum investment amount could go up: (1) with a change in the law by Congress and (2) by the promulgation of new regulations from the Department of Homeland Security (“DHS” or the “Agency”). Although predicting changes coming from Washington is nearly impossible, it is my belief that DHS will increase the minimum investment amount in late 2016, to become effective no later than early 2017, as is discussed more fully below.

Increase in Investment Amount by Congress.

Congress must re-authorize the EB-5 Regional Center program (the “EB-5 Program”) before the program sunsets in September 2016. Some people speculate that if Congress re-authorizes the program, Congress may also raise the amount of the minimum EB-5 investment. But that is far from certain. Congress has repeatedly re-authorized the EB5 Program since 1990 and has never increased the investment amount. In 2015, when faced with time running out to re-authorize the EB-5 Program, Congress made no changes and simply reauthorized it.

Expecting Congress to increase the investment amount before the needed re-authorization on September 30, 2016 seems unfounded. Although many in Congress have expressed their desire to reform the program, the political reality in an election year and with the short legislative calendar make it more likely that the first opportunity for Congress to enact significant reform (including an increase in the minimum investment amount) will have to wait until a lame duck session following the Presidential election, or more likely, into 2017 or beyond.

Also, Congress likely does not want to spend time on thorny EB-5 reform issues which can be adequately addressed by the Agency (see discussion below). If the Agency addresses the issues over which it already has the authority, Congress will happily be left with fewer thorny EB-5 issues to address.

As a result, it seems far more likely that if Congress extends the EB-5 Regional Center program by September 30, 2016, any extension will likely be a short term, clean extension with no further changes to the program and no increase in the investment amount.

Increase in Investment Amount by Agency Regulation.

Any near term changes to the EB-5 program aren't likely to come from Congress, but rather are more likely to come from the Agency. Specifically, the Secretary of DHS, the director of USCIS and Members of Congress have all stated that the Agency is planning to issue regulations which will include an increase in the minimum investment amount. But, can the Agency unilaterally raise the amount, and if so, by how much, when is it likely to raise the amount and will a higher amount be applied retroactively or prospectively?

Does the Agency have the Authority to raise the Investment Amount? The first issue is, does the Agency, on its own, have the authority to increase the investment amount. The statute plainly states that the Agency can increase the investment amount by regulation:

(C) Amount of capital required. -

(i) In general. - Except as otherwise provided in this subparagraph, the amount of capital required under subparagraph (A) shall be \$1,000,000. The Attorney General, in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified under the previous sentence.

(ii) Adjustment for targeted employment areas. - The Attorney General may, in the case of investment made in a targeted employment area, specify an amount of capital required under subparagraph (A) that is less than (but not less than 1/2 of) the amount specified in clause (i).¹

During the House Judiciary Committee Hearing on February 11, 2016 (“House Judiciary Committee Hearing”), as though to remind the Agency of its statutory authority and to prod the Agency to act, Committee Chairman Bob Goodlatte emphatically stated to USCIS Director Colucci that “DHS has the authority to increase the minimum investment amounts.”²

Does the Agency Intend to Increase the Investment Amount? With or without pressure from Congress, it is clear that the Agency intends to increase the investment amount by regulation. In his April 27, 2015 letter to Senate Judiciary Chairman Grassley and Ranking Member Leahy, Jeh Johnson, Secretary of the U.S. Department of Homeland Security wrote:

¹ INA Section 203(b)(5) (emphasis added). Note: References in the statute above to the Attorney General are now the Secretary of Homeland Security.

² U.S. House of Representatives Judiciary Committee Hearing, “Is the Investor Visa Program an Underperforming Asset?,” February 11, 2016 (“House Judiciary Committee Hearing”) (recording on the House Judiciary Committee website at <https://judiciary.house.gov/hearing/is-the-investor-visa-program-an-underperforming-asset/> (“House Judiciary Committee Recording”) at 35:56) (Note: all times listed are approximate).

Increase Minimum Investment Amounts. Because the minimum investment amounts have not been adjusted since the program was created 25 years ago, the statutory minimums should be increased both for investments into TEAs and for investments in other areas. USCIS intends to exercise its authority to raise the minimum investment by regulation...³

The Secretary's intent to raise the minimum investment amount by regulation was reinforced at the recent House Judiciary Committee Hearing. During the hearing, Chairman Goodlatte stated that "the Department of Homeland Security now plans to take the long overdue step of adjusting the levels to account for inflation."⁴ Likewise, during the Senate Judiciary Committee Hearing, in response to Senator Jefferson Sessions' question about whether the Agency would increase the minimum investment amount, Director Colucci stated:

Senator, that is something that the Secretary did include in his letter, and as he also mentioned in the letter, that is something that we can do through regulatory action so long as we consult with the Bureau of Labor Statistics and the State Department and it is something that we will include in a regulation we are putting together.⁵

But if the Agency can increase the investment amount, and in early 2015 the Secretary said the Agency would increase the investment amount, why hasn't the Agency done so to date? Simple. In his letter to the Senate Judiciary Committee, Secretary Johnson stated that it would be better if Congress were to increase the minimum investment amount because a statutory change by Congress "would ensure that these increases endure."⁶

USCIS had been working on new regulations but paused when Congress seemed ready to pass new law in 2015 which would include an increase the investment amount. However, because Congress did not legislate an increased investment amount in 2015, the Agency now states it is reviving its efforts to draft new regulations to do so.

As Director Colucci explained in his testimony before the House Committee,

³ Letter to Chairman Charles E. Grassley and Ranking Member Patrick J. Leahy, U.S. Senate Judiciary Committee, April 27, 2015, by Jeh Charles Johnson, Secretary, Department of Homeland Security ("Johnson Letter"), p. 3-4, (emphasis added).

⁴ House Judiciary Committee Recording at 36:26

⁵ U.S. Senate Judiciary Committee Hearing, "The Failures and Future of the EB-5 Regional Center Program: Can it be Fixed?," February 6, 2016 (recording on the Senate Judiciary Committee website <http://www.judiciary.senate.gov/meetings/the-failures-and-future-of-the-eb-5-regional-center-program-can-it-be-fixed> (and directly to the recording at <http://www.judiciary.senate.gov/hearings/watch?hearingid=01EB14A9-5056-A066-6032-9118E935B2E9>) at 1:29 minutes (Note: all times listed are approximate).

⁶ Johnson Letter, p. 4.

[w]e were working on a regulatory reform in 2014 and when Congress signaled its intent to pass a comprehensive bill with respect to EB-5, we moderated our efforts in 2015. However, now that the bill did not pass we are reengaged on our efforts.⁷

Director Colucci further stated that:

Although these regulatory changes were eventually set aside in anticipation of reform legislation, USCIS is renewing its efforts to publish a new EB-5 regulation.⁸

And if his statements leave any doubt that the Agency intends to raise the investment amount, Director Colucci stated that although the Agency indicated it was preferable for Congress to raise the amount:

If that is not something Congress is able to do, we are prepared to increase this amount through regulation.⁹

How High Will the Agency Raise the Minimum Investment Amount? The next question is, by how much will the Agency increase the investment amount. It appears the Agency has not yet determined the minimum investment amount to include in the regulations. When pressed on this issue by Chairman Goodlatte, Director Colucci stated the Agency has not decided on the higher minimum investment amount. Rather, Director Colucci stated the Agency is still considering the appropriate amount and has reviewed the amounts included in the 2015 bills.¹⁰

Regarding the increased amount, some have argued that the minimum investment amount should be raised by the rate of inflation. In his letter to Congress, Director Johnson encouraged Congress to tie increases to the rate of inflation (“we encourage Congress to consider linking minimum investment thresholds to widely accepted inflation indices”).¹¹ Chairman Goodlatte also referred to increasing the investment amount by the rate of inflation:

Over the last quarter century, the minimum amounts have never been adjusted for inflation. As a result, the real value of each investment has fallen by almost 50% depriving the U.S. economy of billions of dollars a year.¹²

If the Agency were to increase the investment amount to account for the rate of inflation since the program started in 1990, the increase would be substantial. The total rate of inflation from 1990 to

⁷ House Judiciary Committee Recording at 1:39

⁸ Nicholas Colucci, Chief, Office of Immigrant Investor Program, U.S. Citizenship and Immigration Services Director, Prepared Written Testimony for the House Judiciary Committee Hearing, February 11, 2016, p. 4.

⁹ House Judiciary Committee Recording at 1:21:30

¹⁰ House Judiciary Committee Recording at 1:21:30

¹¹ Director Johnson Letter, p. 4.

¹² House Judiciary Committee Recording at 35:56

2016 was 91.34%.¹³ Therefore, if increased by the total rate of inflation since 1990, the current \$1 million (or \$500,000 investment in a TEA) in 1990 dollars, would be raised to \$1,913,460 (or \$956,730 in a TEA) in 2016 dollars. Raising the investment amount to these levels is nearly as high as the highest investment amount in 2015's legislative bills, drafts and discussions (which was a minimum investment amount of \$2 million, or \$1 million in a TEA).

So, while it appears the Agency is still considering the appropriate amount, any increase in the minimum investment amount could be significant.

When Will the Increase Happen. It is normal for Agencies to issue Regulations soon after a Presidential election in November and before the inauguration of the next President. Regulations issued late in an Administration are referred to as "Midnight Regulations."

It has become increasingly common for outgoing presidents to preside over late-term bursts of rules, as they look to cement their marks on Washington and accomplish remaining policy goals before they exit the White House.

Presidents Bill Clinton and George W. Bush, for instance, each issued flurries of regulations in the weeks between the election of their successor and their departure from office.¹⁴

Every President since Jimmy Carter has issued Midnight Regulations, and although the incoming President nearly always objects to his predecessor's Midnight Regulations, that new President will issue Midnight Regulations at the end of his or her term. Midnight Regulations are commonplace, and are promulgated relatively quickly.

Since the Agency has the authority, and indicates it is working on regulations, it is fair to assume that new regulations will be issued not later than soon after the Presidential Election in November 2016. These new regulations would likely go into effect before the next President is sworn in on January 20, 2017.

One occurrence which might delay the issuing of regulations would be Secretary Clinton's election as President. President Obama might defer to Mrs. Clinton and not promulgate the new regulations.¹⁵ On the flip side of the coin, even if she were elected, President Obama might promulgate new regulations to resolve unfinished business and allow the new President to focus on more pressing issues when she starts her term.

¹³ According to "Calculator.net," using the Consumer Price Index, \$1 in 1990 has the same purchasing power as \$1.91346 in 2016. The total inflation rate from 1990 to 2016 is 91.34623%, and the average annual inflation rate from 1990 to 2016 is 2.52723%. See <http://www.calculator.net/inflation-calculator.html>

¹⁴ Devaney, Tim, "Republicans fret 'midnight regulations' from Obama," The Hill, July 20, 2015 ("Midnight Regulations") (<http://thehill.com/regulation/248411-gop-frets-midnight-regulations-from-obama>)

¹⁵ Ibid.

Would any Increase be Applied Retroactively or Prospectively? Assuming the promulgation of new regulations, the most significant question is whether any increase in the minimum investment amount would be applied retroactively to pending EB-5 petitions and petitioners, or only prospectively to petitions filed after the regulations are in effect. In 2015 Chairman Goodlatte (and others) worked for the retroactive application of changes to the EB-5 program. As recently as February 2016, during the House Judiciary Committee Hearing, Chairman Goodlatte reiterated his desire that new regulations of the EB-5 program, be applied retroactively to pending EB-5 petitions and petitioners. Chairman Goodlatte argued that with the long retrogression of Chinese investors, any change in the program that was not applied retroactively would effectively be delayed for as long as 7 years. Apparently, Chairman Goodlatte was referring to the estimate by industry leaders that the retrogression for Chinese investors who file an I-526 petition today, is likely at least 6 years or more,¹⁶ despite the U.S. Department of State's published shorter retrogression period.¹⁷

Although some Members of Congress pushed for the retroactive application of changes, it is not clear that DHS could apply regulatory changes retroactively to pending I-526 petitions. Furthermore, Director Colucci's testimony indicates that the Agency is currently considering only the prospective application of an increase in the minimum investment amount. In his testimony, Director Colucci stated:

Any regulations that we would implement would likely be forward facing or prospective increases.¹⁸

However, Director Colucci's testimony contains troubling ambiguity. The operative word which causes concern is the word "likely" – the Agency is "likely" to apply regulatory changes prospectively to petitions filed after the effective date of the regulations. A rational reader must interpret his statement to mean that although it is unlikely, it is nonetheless possible that the Agency would apply the changes retroactively. The mere possibility that the Agency would apply the changes retroactively should cause everyone in the industry, and truly in the U.S. government generally, to be extremely concerned and highly vigilant.

There are powerful policy reasons not to apply the regulatory changes retroactively to investors who prepared a petition in good faith, paid a significant fee to the Agency (in addition to their other expenses of investing and filing their I-526 petition), and otherwise followed existing U.S. law and regulation in support of their petitions with the U.S. government. There are also extremely damaging practical implications of retroactively applying an increase in the investment amount.

¹⁶ See Divine, Robert (of Baker Donelson), "The Realities and Implications of Chinese EB-5 Investors' Wait for Visa Numbers, January 5, 2016, at:

<http://www.bakerdonelson.com/files/Uploads/Documents/Divine%20The%20Realities.pdf>.

¹⁷ U.S. Department of State Visa Bulletin at <https://travel.state.gov/content/visas/en/law-and-policy/bulletin.html>

¹⁸ House Judiciary Committee Recording at 1:25:29 (emphasis added).

A retroactive application of an increase in the minimum investment amount would be catastrophic to the more than 21,000 petitioners with pending I-526 cases, and to the more than 16,000 petitioners with approved I-526 petitions who are currently awaiting a U.S. visa. Any retroactive increase in the investment amount would require these investors with filed (or possibly even those with approved) I-526 petitions to invest additional capital (with appropriate documentation of the legitimate source of these additionally invested funds) or risk the denial of their pending petitions or the revocation of their approved petitions, despite having complied with the laws and regulations as of the date the petitions were filed.

Even if we assume that all the EB-5 investors could raise the additional capital then required, the resulting imbalance in the amount of EB-5 capital available versus that required by the projects into which it must be invested, would turn a catastrophic ripple into a calamitous tsunami. EB-5 investment projects would suddenly have more capital from more investors than the projects might accommodate under the filed (or approved) business plan. Because there would then be too many EB-5 investors, EB-5 investment projects would be forced to “reject” some of the investors with pending or approved I-526 petitions in order to reduce the amount of EB-5 capital raised and preserve the immigration benefits of a select few EB-5 investors. King Solomon would be hard pressed to decide which stay and which investors (and their families) would be forced to go (quite literally).

There is a further likely and more extreme ramification which would be caused by the imbalance in capital, when: (1) the EB-5 capital had already been released to the project and (2) the project had used all the investors’ capital and could not use any more. In this scenario none of the investors’ required additional capital would be used by the Job Creating Entity. Because the EB-5 program requires that all of the investor’s capital (including the additional capital) must be invested into the project, in this likely scenario, none of the investors would be capable of meeting the requirement that all their capital be invested, and therefore none of the EB-5 investors would meet the requirements of the EB-5 program.

In addition to losing their immigration benefit, the tragic effect would be further exacerbated for the investors who are “rejected” or made ineligible due to the retroactive application, but whose funds had already been released to the Job Creating Entity. In these instances, Projects might not be in a position to return the investment. The end result would be a loss of the immigration benefit and potentially the inability to have the return of their capital. The thousands of lives and billions of dollars effected by the retroactive application would result in untold litigation.

Finally, because USCIS has not defined “material change” in any meaningful way, projects will not know if the actions they take in an attempt to mitigate the damage caused by the retroactive application of new regulations, will result in a “material change.” Such a change would make even those with an approved I-526 petition, ineligible for a visa (assuming these investors were able to make the additional investment).

Obviously, the Agency could issue additional regulations in an attempt to mitigate many of the disastrous effects of the retroactive application of regulations. However, it is not conceivable that the Agency or the industry experts, could identify all of the disastrous effects, and ways to mitigate them, in the time frame discussed above (*When Will the Increase Happen*).

In a nutshell, the retroactive application of an increase in the minimum investment amount, whether by statute or regulation, would be absolutely catastrophic to the investors, the projects, the EB-5 program and to the reputation of the United States for playing fairly and by its own rules. The industry must hope that the Agency chooses the right decision, and makes any increase in the investment amount apply only prospectively.

What is the Industry to Do?

In 2015 the Agency and industry anticipated that Congress would reform the EB-5 Program, including raising the minimum investment amount. The only way to definitively influence the regulations issued by the Agency is for the industry to work together to encourage Congress to legislate and preempt actions by the Agency, but that seems extremely unlikely for several reasons.

First, as stated above, Congress does not have the time in 2016 to spend considering the EB-5 program. Second, the only possible way to get Congress to preempt the Agency with new law, is for the industry to be united and to speak in one voice, and there is currently no unified voice speaking for the industry. Finally, it is no secret that Congress would likely prefer the Agency to dispose of many of the major headaches, requiring Congress to make fewer reforms in future legislation.

Another avenue to influence the eventual regulations is for the industry to work together with the administration or to encourage the administration to issue regulations early enough that the regulations can be given a sufficient review and comment by industry and government agencies. But then we're back to the issue of whether the industry can speak with one voice.

Conclusion

It is far from certain that the Agency will issue regulations to increase the investment amount in the time frame outlined above. But it is clear that the Agency (1) has the authority to do so, (2) has stated its desire and intent to do so and (3) there is historical precedent to issue Midnight Regulations. At this unique moment in the history of the EB-5 Program, the industry is not able to easily influence the process, and only with a united voice does the industry have any hope of insuring that any regulatory changes are sound and benefit the program in the long run.

All things being equal, it seems that USCIS is prepared for the promulgation of new regulations, including an increase in the minimum investment amount, and as a result, the industry needs to be prepared as well.