



PROGRAM MATERIALS
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Understanding the EB-5 Immigrant Investor Program

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EB-5 Petitions under the EB-5 Reform and Integrity Act of 2022

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Introduction

- Overview of the EB-5 Reform and Integrity Act of 2022
- New I-526 Petition Requirements
- EB5 Direct Investments
- EB-5 Petitions filed prior to June 30, 2021

Introduction to the EB-5 Immigrant Visa Category

- 10,000 immigrant visas annually for investors and their immediate family members.
- Foreign nationals can get a green card if:
 - Invest \$800,000 or \$1,050,000 (depending on geographical area)
 - Investment creates full-time jobs for 10 U.S. workers
- Investor starts by filing Form I-526 Petition with USCIS
- Generally once approved, the investor then processes for the 2-year conditional green card at the US Consulate/Embassy in the home country
- Green cards are conditional for 2 years
- At the end of the 2-year conditional green card, investor files Form I-829 Petition. The conditions on the green card are removed if investment sustained and jobs created – permanent green card issued

Benefits of an EB-5 Green Card

- Live indefinitely in the U.S.
- Employer Mobility – self sponsored petition
- No Family Sponsorship Required
- Derivative Applicants – also get permanent residence
 - Spouse
 - Unmarried son or daughter under the age of 21 at time of I-526 petition filing

EB-5 Reform Act of 2022

- Previous EB-5 Regional Center (“RC”) law expired as of June 30, 2021
 - Direct EB-5 Program did not lapse; was not temporary
 - EB-5 Regional Center vs. EB-5 Direct Program – what is the difference?
- USCIS and the State Department paused EB-5 RC adjudication as of July 1, 2021
- March 15, 2022, President Biden signed into law the EB-5 Reform and Integrity Act of 2022, Section 2, Division BB of the Consolidated Appropriations Act of 2022
 - Affected Regional Center EB-5 Petitions and Direct EB-5 Petitions

EB-5 Reform Act of 2022 – Investments

- EB-5 Regional Center program reauthorized through September 30, 2027
- Made sweeping change to EB-5 law
- Investment Amounts:
 - \$800,000 for a Targeted Employment Area (“TEA”)
 - \$1,050,000 for a non-TEA investment
 - On Jan. 1, 2027, and every five years thereafter, investment amounts adjust for inflation
 - Applies to both direct and RC cases

EB-5 Reform Act of 2022 - TEAs

- What counts as a TEA now?
- High Unemployment Area - Project must be located in a census tract – or any “contiguous” census tracts that “touch” the project’s tract – where average unemployment rate for the tracts is 150% of the national average unemployment rate
- Rural Project - In areas outside a Metropolitan Statistical area, or within the outer boundary of any city or town with a population of 20,000 or more (No change from prior law)
 - Priority Processing for Rural Projects, but what does this mean?
- Infrastructure Projects - A “capital investment project” administered by a “governmental entity” that serves as the “job-creating entity” which receives capital from EB-5 investors, and contracts with a regional center (new category)
- Only USCIS can determine a TEA now, no more State designations – through project pre-approval or I-526 petition approval (valid for 2 years from the time of filing)

EB-5 Reform Act of 2022 – Visa Set Asides

- Visa Set Asides: Set-asides are a percentage of the 10,000 EB-5 visas available every year
- 20% for rural projects
- 10% for distressed urban area projects
- 2% for infrastructure projects
- Unused visas “carry over” in the same category in the immediately following year
- Unused visas in any category made generally available for any project, in the year immediately following the “carry-over” year
- These visa set asides likely are not available to anyone filed before June 30, 2021

EB-5 Reform Act of 2022 – Job Creation

- Job Creation: 10 jobs must be created per investment (same as prior law)
- One job must be a “direct” job; the other nine can be modeled, estimated “indirect” jobs
- It appears the “direct” job can still be an economically direct modeled job through expenditures and revenues, however USCIS may clarify through regulation
- Construction jobs that last less than two years can satisfy 75% of estimated “indirect” jobs
- Economist still will determine job creation through:
 - Construction Expenditures
 - Ongoing project revenues

EB-5 Reform Act of 2022 – Source of Funds

- Gifts remain OK, but a gift must be fully sourced and traced (same as previous law)
- Unsecured loans are OK, but if the loan comes from a source that is not a licensed banking or loan institution, then the loan must be fully sourced (i.e. third party funds must be sourced)
- Must source the administrative fee charged by the EB-5 Project

EB-5 Reform Act of 2022 – Other Changes

- Concurrent Filing of Form I-485: Investors can **concurrently** file their I-526 petitions (showing EB-5 compliance and investment) and their I-485 petitions (application for a “conditional” green card, which adjusts status from a “non-immigrant” to a conditional permanent resident if a visa is available). Issues:
 - Priority Date must be current
 - Nonimmigrant Status Issues + Date of Last Entry
 - Where is the Principal Applicant/Investor? When can dependents file?
 - Investors outside the U.S. must Consular Process after I-526 approval
- Redeployment of Capital - DHS to enact regulations that allow the new commercial enterprise to redeploy capital *anywhere* in the United States to keep the investment “at risk”

EB-5 Reform Act of 2022 – Integrity Measures

- New measures to prevent fraud and abuse and to provide tools to DHS to prevent national security breaches
- RC's must file a "project pre-approval" before any I-526 Petitions can be filed with USCIS
- Where the new commercial enterprise ("NCE") and/or the RC is an affiliate of the job creating enterprise ("JCE"), a Fund Administrator is required to sign off on transfers between accounts
- Annual compliance period requires RC's to certify compliance with securities laws
- Third party promoters and agents must register with USCIS – process not known yet; an area critical for notice and comment rulemaking and forms

EB-5 Reform Act of 2022 – Processing Issues

- The EB-5 Reform Act becomes effective May 14, 2022
- USCIS stated on April 29, 2022 that all previously approved RCs are no longer authorized; they must reapply for designation using USCIS Form I-956
- Only following designation by USCIS can RC's then file a project pre-approval so that investors can file Form I-526
- Not clear if the “redesignation” process on Form I-956 can be coupled with a project pre-approval application
- Form I-956 to become available on or after May 14 – notice and comment rulemaking?
- No timeline for notice and comment rulemaking by USCIS for new forms (Form I-526, Form I-829, or the annual compliance form)
- No timeline for USCIS to reissue guidance in the USCIS Policy Manual

EB-5 Reform Act of 2022 – Pre-existing Investors

- Grandfathering of Existing Investors: If Congress fails to reauthorize regional centers after the Act's expiration Sept. 30, 2027, DHS shall continue to process petitions filed on or before Sept. 30, 2026
 - Grandfathers existing RC investors who filed prior to the program's lapse on June 30, 2021
- USCIS stated on April 29, 2022 that all previously approved RCs are no longer authorized; they must reapply for designation using USCIS Form I-956
 - If the RC sponsoring the investor does not reapply for designation, USCIS will continue to adjudicate the I-526 Petition and I-829 Application
 - Investor can still take advantage of indirect job creation
- USCIS confirmed that petitions filed prior to June 30, 2021 will continue to be adjudicated based on the law in effect at the time of filing the I-526 Petition. Processing times are extremely lengthy (47-71 months)
 - Exception: Redeployment. USCIS confirmed on April 29, 2022 that a redeployment can occur anywhere in the U.S.
- See: <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-questions-and-answers-updated-april-2022>

Direct EB-5 Petitions

- “Direct EB-5” (not regional center based – expired program) – *e.g.*, business start-up, acquisition, investment in existing business (such as E-2)
- Investment in new commercial enterprise (NCE) – formed after 11/29/1990
- Investment amount – currently \$800,000 (TEA) or \$1,050,000 as of 03/15/2022 – USCIS still determines the TEA
- Source(s) of funds – must be lawful, also thoroughly documented and traced
- Nature of investment – must be equity contribution (not loan)
 - “At risk” – subject to loss or gain, funds cannot sit idle, no promise of return of or return on capital
- Job creation – cornerstone of EB-5 (10 jobs)
 - Jobs must be permanent, full-time (35 hrs/wk) for US Workers
 - “Troubled business” exception – maintain all jobs at time of existence, min. of 10 jobs.

Questions?





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Kate Kalmykov focuses her practice on business immigration and compliance. She represents clients in a wide-range of employment based immigrant and non-immigrant visa matters including students, trainees, professionals, managers and executives, artists and entertainers, treaty investors and traders, persons of extraordinary ability and immigrant investors.

Kate has deep experience working on EB-5 immigrant investor matters. She regularly works with developers across a variety of industries, as well as private equity funds on developing new projects that qualify for EB-5 investments. This includes creation of new Regional Centers, having projects adopted by existing Regional Centers or through pooled individual EB-5 petitions. For existing Regional Centers, Kate regularly helps to prepare amendment filings, file exemplar petitions, address removal of conditions issues and ensure that they develop an internal program for ongoing compliance with applicable immigration regulations and guidance. She also counsels foreign nationals on obtaining greencards through either individual or Regional Center EB-5 investments, as well as issues related to I-829 Removal of Conditions.



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Jennifer Hermansky focuses her immigration practice on employment-based immigration. Jennifer has experience serving health care, pharmaceutical and real estate industries, as well as entrepreneurs, scientists and researchers in scientific communities for a wide range of temporary visa options and permanent residence solutions.