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Author:

**Debbie A. Klis**

Shareholder

202.791.8788

dklis@polsinelli.com

What's Next for the EB-5 Program?

by Debbie Klis

Congress recently passed and President Trump signed a comprehensive two-year defense spending budget agreement for fiscal years 2018 and 2019 to prevent an extended federal government shutdown. The legislation also contained a short-term continuing resolution ("Continuing Resolution") to fund federal programs further, including the EB-5 Program, through March 23, 2018. The Continuing Resolution contained a framework of a long-term budget accord, and thus, an omnibus spending bill is expected ahead of the March 23 deadline. In fact, a group of Republican senators on Sunday night released a version of President Trump's immigration proposal ahead of a floor debate on immigration this week.

With regard to the EB-5 Program, the continuing resolution marks another "kicking of the can down the road" by a short-term resolution without change, something we have seen continually since September 2015. Indeed, the last long-term extension occurred in September 30, 2012, when President Obama signed S.3245, which extended the EB-5 Program for three years through September 30, 2015.

What will happen to the EB-5 Program during these ensuing six weeks and thereafter? The short answer is: it is not entirely clear. Numerous reform bills to the EB-5 Program in the House and Senate have circulated between 2015 and 2017; most of these have grown stale. Several Congressional proposals on the topic of immigration have emerged in 2018, but none of them have addressed the EB-5 Program.

Still Relevant Pending EB-5 Legislation

Participation in the EB-5 Program by direct investment in a job-creating enterprise has not required renewal since created by Congress in 1990 as a permanent program. What has been a greater debate in recent years is the Immigrant Investor Pilot Program ("Pilot Program") that Congress created in 1992 to stimulate additional interest in the EB-5 Program, which involves investing through "regional centers" rather than directly in a job-creating enterprise. The appeal of the Pilot Program is the ability to include indirect and induced jobs as well as direct jobs, which allows a greater number of worthy projects to utilize funding from the EB-5 Program, such as the construction of residential housing, solar and wind farms, infrastructure construction and improvements and other beneficial projects that do not command many on-site direct jobs.

With the Pilot Program's profound growth, especially in the years following the Great Recession, concern grew in Congress of inadequate governance. With the approaching sunset of the Pilot Program's three-year renewal in September 2015, numerous House and Senate bills proposed either major overhaul or minor reform measures, certain of which caused quite a commotion in the EB-5 community though ultimately none were enacted. Since then, many more proposed bills have surfaced to reform the Pilot Program and many of these have faded away as well, though a few bills proposed in 2017 remain relevant in terms of what happens next to the EB-5 Program:

- **The American Job Creation and Investment Into Public 4 Works Reform Act of 2017** (H.R.3471) introduced by Representatives Brian Fitzpatrick (R-Pennsylvania) and Dwight Evans (D-Pennsylvania) on July 27, 2017, would extend the Pilot Program until September 30, 2022, increase the minimum investment amounts from \$500,000 and \$1 million to \$800,000 and \$1.2 million. The new minimum amount of \$800,000 would apply to projects in a targeted employment area ("TEA") and investments in an infrastructure project or a manufacturing project.
- **The American Job Creation and Investment Promotion Reform Act of 2017** introduced by Senator Grassley (R-Iowa) and Senator Leahy (D-Vermont), circulated as draft legislation in April 2017, would increase the minimum investment amounts from \$500,000 and \$1 million to \$800,000 and \$1 million and would extend the Pilot Program to September 30, 2022, create EB-5 visa set asides for rural and priority urban projects and redefine TEAs to cover rural and priority urban areas and closed military bases.
- **The EB-5 Immigrant Investor Visa and Regional Center Program Comprehensive Reform Act of 2017** introduced in April 2017 by Senator Cornyn (R-Texas) would extend the Pilot Program to September 30, 2023, would increase the minimum investment amounts from \$500,000 and \$1 million to \$800,000 and \$925,000, create EB-5 visa set asides for rural projects and redefine TEAs to create three categories (i) distressed rural; (ii) distressed urban; and (c) closed military bases.

The foregoing represents only a handful of the bills pending but are germane because they were more recent and may influence the outcome.

What Happens Next for EB-5?

While most eyes are following the activity of the omnibus immigration bills circulating in Congress, including Mitch McConnell's (R-KY) initiating of the Broader Options for Americans Act (H.R. 2579) to proceed to the Senate, a more compelling prospect to the EB-5 community that could lead to assorted changes to the Pilot Program arises from meetings Senator Grassley (R-Iowa) and Representative Bob Goodlatte (R-Virginia), Chairs of the Senate and House Judiciary Committees had last fall with United States Citizenship and Immigration Services ("USCIS"). Senator Grassley explained his impatience with the delays in enacting reform to the EB-5 Program and the urgency to pass a rule by February 2018, which would become effective within 30 to 90 days later. USCIS has likewise announced that if Congress does not enact reform by April 2018, USCIS will enact its own changes.

Among the changes sought by Senators Grassley and Representative Goodlatte include modification of the TEA concept to include rural and urban distressed/high employment areas utilizing a single-census tract analysis. The proposal would increase the minimum investment amount to \$925,000 for projects in the new definition of TEAs and increase all other projects by \$25,000 to more than \$1 million. Other rumored proposals include visa set-asides for rural projects, minimum direct job requirements, and permission for EB-5 petitioners to retain their original priority date in the event of a petition amendment, among other sundry amendments to the EB-5 Program's filing and interview procedures.

Further discussions have been limited to a tight circle thus it is unclear what the final rules will contain but they are expected not to be sweeping and to be released sometime between the coming two weeks and April with a transition time of 30 to 90 days thereafter. The inner circle of EB-5 stakeholders have been advocating intensely behind the scenes with lawmakers with the hope that the reform measures result in increased visa set asides and modest minimum investment



amount increases or a gradual phase-in to avoid impairing this vital program. We will keep on top of developments and provide additional alerts as news develops.

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