

Will the EB-5 program survive past its expiration date?

A prime source of capital for real estate developers since the Great Recession has been EB-5 money. The EB-5 program provides a method for foreign nationals investing money in the United States to obtain a green card by investing \$500,000 in a Targeted Employment Area (defined as an area of high unemployment or a rural area) or \$1 million outside a Targeted Employment Area. The investment must create or preserve at least ten jobs for workers in the United States.

The EB-5 program has received significant attention in the general news media in recent weeks, mainly due to efforts by the family of President Trump's son-in-law to obtain capital for the Kushner Companies' nearly \$1 billion residential and commercial project in New Jersey. Jared Kushner's sister was in Beijing in early May seeking investors at an event in which advertisements stated, "Invest \$500,000 and immigrate to the United States." Nicole Kushner Meyer spoke at the event, mentioned her brother's position as a senior advisor to President Trump, and used a photograph of the President in her presentation. This has created a firestorm of criticism from ethics watchdogs who view this as a blatant attempt to leverage family ties to the President by Kushner Companies.

What does this renewed attention mean for the future of the EB-5 program? The program was scheduled to expire on April 28; however, Congressional action has extended the EB-5 Regional Center statute with the continuing resolution to September 30. President Trump has not yet taken a position specifically on the continuance of EB-5 program beyond its statutory termination date (although his companies have raised capital in the past through the program), but he did take an anti-immigration stance during his campaign and has vowed to severely tighten the use of work visas for immigrants.

In addition, both Republican and Democrat members of Congress have criticized the EB-5 program as being opaque in its administration because the government does not adequately monitor how the invested money is used until far too late in the process, if at all. Another frequent critique is the claim that real estate developers abuse the program by promoting projects in wealthy areas as opposed to in Targeted Employment Areas, thus defeating the program's original purpose of using EB-5 money as a catalyst to increased economic activity in depressed communities. A third critique is that the EB-5 program amounts to selling United States citizenship to high net worth foreign nationals at the expense of other, poorer would be immigrants.

At this time it is uncertain if the EB-5 program will survive, and if so, in what form. Various suggestions have been made by critics and supporters alike to fix the perceived flaws in the program. Among the suggested cures are a call to include a new requirement that a third-party administrator monitor how EB-5 money is used. Presumably, this would be a governmental appointee, perhaps operating out of an approved EB-5 Regional Center. Another frequent suggestion is to require much greater transparency with respect to the sources and uses of all EB-5 funds, coupled with mandated disclosure to investors and the United States Citizenship and Immigration Services (USCIS).

USCIS issued proposed regulations earlier this year to increase the EB-5 investment amount in Targeted Employment Areas to \$1.35 million and in other areas to \$1.8 million. In addition, if enacted, the new proposed regulations will give the federal government more control over where the investments are deployed and steer more investments to economically troubled areas. Unless Congress continues to extend the EB-5 Regional Center statute with further continuing resolutions, some level of reform will likely come this year. The White House did say that it wants to ensure that all EB-5 money is "used as intended and that investment is being spread to all areas of the country." Thus, there is some reason for optimism that the EB-5 program will survive in some form. However, the real lesson is that the smart move is to take advantage of the existing program with its \$500,000/\$1 million minimum investment limits prior to September 30.

Date Created

June 9, 2017