EB-5 Deadline: Lower Investment Threshold Looms Large

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October 29, 2019 | **IMMIGRATION**

It is now less than a month until the U.S. EB-5 Immigrant Investor Program will experience some significant changes, based on new rules announced by the U.S. government in July that will be implemented after November 21, 2019.

As noted in this USCIS announcement, new developments under the final rule include:

- Raising the minimum investment amounts—raising the standard minimum investment level from $1 million to $1.8 million, and increasing the minimum investment amount in a Targeted Employment Area (TEA) from $500,000 to $900,000 ;
- Revising the standards for certain TEA designations;
- Giving the U.S. government responsibility for directly managing TEA designations;
- Clarifying U.S. Citizenship and Immigration Services (USCIS) procedures for the removal of conditions on permanent residence; and
- Allowing EB-5 petitioners to retain their priority date under certain circumstances.

The EB-5 program allows eligible individuals to apply for lawful permanent residence (commonly referred to as "Green Cards") in the United States if they make the necessary investment in a commercial enterprise in the United States and create or, in certain circumstances, preserve 10 permanent full-time jobs for qualified U.S. workers.

Many investors are scrambling to invest now, at the lower amounts. While this might be a savvy fiscal decision, it has both pros and cons as a business decision. Possible reasons why it makes sense to try to invest before the November deadline include:

1. Lower overall spend on the investment
2. Possible broader opportunities to invest currently at the lower amount, based on each state's designation of certain geographic and political subdivisions as high-unemployment areas (there may be fewer or less appealing TEA designated investment opportunities once the government takes over designating TEAs)
3. Certain predictability that comes with understanding the current system of adjudication and expectations based on past adjudications under the current standards
4. There is likely to be an influx of petitions prior to the November 21st deadline, increasing the possibility that the USCIS may not have sufficient resources to adjudicate EB-5 applications in a timely manner, at least for a period of time after November 21st. If this happens, EB-5 adjudications could become backlogged, with a "first in, first out" approach that would mean waiting a period of time—possibly, a significant one—before new cases are even looked at. As such, the sooner you can get your petition in, the better.

However, advantages of waiting to file might include:

1. Greater transparency as to how the new rule will be implemented from a policy standpoint. It's difficult to predict how the government will fare in taking over TEA designations, and whether the adjudication standard will become much stricter under the new rules. The one thing we do know is that there are usually a few bumps in the road whenever the federal government takes over a privately run or state-run program. As such, a "wait and see" approach might be prudent for investors who wish to avoid a Request for Additional Evidence (RFE) on their EB-5 petitions. Once we know more about the standard that the government will be holding petitioners to following the changes, investors will be better able to provide sufficient evidence to gain approval based on their initial petition.
2. Taking the time to put together a strong application positions investors more effectively for approval. Rushing to the finish line with a sub-par petition almost certainly will result in a RFE by the U.S. government. It's fair to assume that the government is likely to be overwhelmed by an influx of applications prior to the November 21 deadline; as such, they may give greater scrutiny to these applications, expecting and anticipating that investors will be willing to sacrifice accuracy and thoroughness to gain entrance under the lower investment threshold. If this is the case, they could be on alert for any sign of weakness in applications—and require more than usual to get these "last minute filing" applications through to approval.
3. The higher monetary investment threshold could very well thin the field of petitioners. Just as an influx of applications ahead of the deadline could slow adjudications, requiring more money to qualify investors could mean fewer petitions are going in after the November 21st deadline. If this happens, then EB-5 petition adjudications could actually speed up, whether that happens sooner or later.
4. There is also the possibility that the USCIS might be more lenient on investors if they are investing a higher amount of money. Let's be honest—in the U.S., money talks, and investment is nearly always good for the U.S. economy. If the government wants to encourage significant investment in its economy from outside the U.S., it would be smart to take a fair and balanced approach to future adjudications under the higher monetary threshold, in order to encourage (and not discourage) investors to put their money into the U.S. economy rather than into the economy of another country offering similar benefits from investment.

It's important to remember that the EB-5 option is frequently one of various options available to investors wishing to relocate to the U.S. full time. There may also be temporary nonimmigrant options that could permit foreign investors to live and work in the U.S. With strategic business planning alongside your LMWF immigration counsel, some of these options could get investors (and their families) to the U.S. faster than the EB-5 route—or allow them to live in the U.S. while their EB-5 case is pending with the U.S. government.

Our immigration team prides itself on offering business advisement and creative approaches rather than simple legal services. If you would like to discuss a strategic plan to accomplish both your long- and short-term goals for relocating to the U.S., please reach out to one of our qualified professionals.

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