

Targeted Employment Area Policy Can Maximize EB-5 Job Creation: An Analysis of Current Legislative Proposals

Thursday, September 3, 2015

Introduction

The Government Accountability Office wrote in its report of August 12, 2015 that 90 percent of EB-5 investments are made in Targeted Employment Areas (TEA). Under current EB-5 law, a Targeted Employment Area is an area that qualifies for a reduced investment amount of \$500,000. To be designated a TEA, a geographic area must either be rural, or be experiencing a level of unemployment that is 150 percent of the national average unemployment rate. Section 203(b)(5)(B)(ii) of the Immigration and Nationality Act (INA) defines a high unemployment area as “an area which has experienced high unemployment (of at least 150 percent of the national average rate).” Current regulations permit state officials to make TEA designations that encompass multiple census tracts and which take into account commuting patterns in a given region. In other words, current TEA policy reflects economic reality in the sense that most Americans do not live where they work and that unemployment in one area can be reduced by those residents’ employment in a geographically distant but economically linked area. The statute’s broad and non-restrictive language clearly permits this approach. Policy concerning TEAs is crucial to the EB-5 industry and, depending on how legislators resolve the issue, it has the potential to either maximize job creation through the EB-5 program, or severely constrict its potential.

This article will look at the high unemployment TEA provisions contained in three pending bills in Congress: H.R.616, the American Entrepreneurship and Investment Act, H.R.3370, the Entrepreneurial Business Creating Jobs Act (EB-JOBS), and S.1501, the American Job Creation and Investment Promotion Reform Act.

H.R.616, the American Entrepreneurship and Investment Act (Reps. Polis and Amodei)

In H.R.616, Representatives Polis and Amodei make two refinements to current TEA policy, but leave the current INA definition of “high unemployment” intact. The bill would codify current regulations that permit the states to have a role in determining the economic needs and conditions of their localities. Specifically, in section 2(a)(2)(B), the bill would require the Secretary of Homeland Security to “defer to a state’s designation as conclusive.” The clause, however, would require the state determination to be made using “acceptable data sources” to ensure that the determination reflected economic conditions fairly and accurately. H.R.616 contemplates no change to current law and regulation concerning high unemployment TEA definitions, but recommends that Congress formalize in statute the important role that the state leaders currently play in making economic decisions in the best interests of their communities.

H.R.3370, the Entrepreneurial Business Creating Jobs Act (Reps. Lofgren and Gutierrez)

H.R.3370 presents a new definition for high unemployment: “an area, comprised of one or more contiguous census tracts within one Core Based Statistical Area, that has an unemployment rate that is at least 150 percent of the national average unemployment rate.” The U.S. Census Bureau describes a Core Based Statistical Area (CBSA) as a “core area containing a substantial population nucleus, together with adjacent communities having a high



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degree of economic and social integration with that core.” By permitting contiguous census tracts within a CBSA that meet the unemployment threshold Representatives Lofgren and Gutierrez recognize the significance of commuting patterns and the economic reality of an integrated metropolitan area. In simpler terms, H.R.3370 takes the view that where workers who commute from a higher unemployment area to an area of lower unemployment (which may be less residential) to work, the policy underlying the TEA designation is being honored. This is an especially important consideration in light of the fact that the Federal Government measures unemployment rates based upon where people live, not where they work.

S.1501, the American Job Creation and Investment Promotion Reform Act (Sens. Leahy and Grassley)

In S.1501 Senators Leahy and Grassley take a narrower approach with respect to the definition of high unemployment area for purposes of TEA designation. S.1501 defines a high unemployment area as “a census tract that has an unemployment rate that is at least 150 percent of the national average unemployment rate.” By limiting to a single census tract the geographic area that may qualify using an average unemployment rate, and discounting commuting patterns in urban and suburban areas across the country, S.1501 would preclude TEA eligibility for urban or suburban projects that can reduce unemployment in areas that are economically linked to an area where EB-5-financed economic development is occurring.

TEA Policy Should Promote Job Creation in Urban and Rural Areas Alike

Congress created the EB-5 visa with an eye toward harnessing foreign investor dollars to spur national job creation and avoided regional favoritism by establishing TEA eligibility for both rural and urban areas. In light of the GAO’s finding that 90 percent of EB-5 dollars are invested in TEAs, and the practical reality that investors will continue to do so, Congress should seek to modernize the TEA rules in a way that will maximize, not stifle, job creation in areas where a project in one area employs residents of another area within the same economically interlinked area. The program’s history has demonstrated that investors will seek the best value for their investment and federal policy should capitalize on that.

In creating the EB-5 visa and the targeted employment area designation, Congress focused on both rural and high unemployment (urban) areas. Overly restrictive definitions for high unemployment will exclude countless urban areas of the country that are currently using EB-5 to put Americans to work. Dramatically limiting the high unemployment definition will have the practical effect of turning the EB-5 program into a program whose benefits flow exclusively to rural areas—a result that Congress did not intend and a result that would likely diminish participation in the program. The EB-5 program should complement, rather than be redesigned to replace existing federal programs that are targeted directly to rural and high poverty area economic development such as the USDA’s Rural Business Development Grant program and the New Market Tax Credits program.

In considering optimal TEA policy, Congress should look to policies that serve the national interest, and which reflect the economic needs and realities of both urban and rural areas. Currently, EB-5 is financing projects in diverse locations across the country including energy exploration in North Dakota, winter sports resort development in Utah, and the rebuilding of the World Trade Center site in New York, to name only a few. Policy that promotes the economic well-being of urban and rural areas alike is policy that serves the national interest. Sound TEA policy will not only maximize program participation—and thus foreign investment—but will serve all Americans equally regardless of geography.

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