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Countdown to EB-5 Program Expiration: Amended EB-5 Draft Legislation Circulates on Capitol Hill

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On Dec. 2, 2015, a revised discussion draft from both the Senate and the House of Representatives proposing to reform the EB-5 program and extending the program until Sept. 30, 2019, was redistributed amongst a limited group in the Senate and House. The key provisions of the discussion draft are outlined below that will serve to change and reform the program:

Job Creation Methodology: Allows for 90 percent indirect jobs, which means that 10 percent of jobs must be direct. An employee of both the job-creating entity and the new commercial enterprise may be considered a direct job. The discussion draft includes a provision that the Bureau of Economic Analysis (BEA) must accept the job creation methodology. It also includes provisions for relocated jobs, publicly available bonds, and construction jobs that have not been included in the introduced bills. Notably, if enacted, it permits tenant occupancy under certain circumstances determined by an economically and statistically valid methodology. On the other hand, if enacted, there is a provision that explicitly prohibits alien investor capital for purchase of municipal bonds or other bonds. In addition, the length of any full-time construction jobs that last less than 24 months may be aggregated to satisfy the job creation requirement.

Targeted Employment Area (TEA): A TEA is defined as the following: 1) priority investment area; 2) rural area; 3) special investment zone; 4) BRAC; or 5) an area consisting of a census tract, or contiguous census tracts, not located within an MSA and has a poverty rate that is at least 20 percent or a median family income that is not more than 80 percent of the statewide median family income.

There are 2,000 visas set aside for immigrants who invest in rural areas and 2,000 visas set aside for immigrants who invest in priority urban areas (definitions below.) At the end of each fiscal year, any unused visa within either category will remain available for only that category for the following fiscal year, but if the visa still remains available following the second fiscal year, it will be made generally available for other categories. The authority for TEA designation rests within DHS, and is not bound by Federal or State governmental or nongovernmental entity.

Definitions:

Priority investment areas: Defined as an area consisting of a census tract or contiguous census tracts, each in an MSA, and has: 1) unemployment rate at least 150 percent national average, which may include any census tract or tracts contiguous to one or more of the tracts that have the



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requisite unemployment rate; 2) a poverty rate that is at least 20 percent; or 3) median family income that is not more than 80 percent of the greater of the statewide median family income or the MSA median family income.

Special Investment Zone: Defined as an area, consisting of a census tract or not more than 12 contiguous census tracts, that 1) has an unemployment rate at least 150 percent of the national average; AND 2) may not include any census tract, or tracts that encompass special land use census tracts or cover bodies of water, unless the project is physically located in such census tract.

EB-5 Integrity Fund: The discussion draft includes a provision that provides a fee differential dependent on the size of the Regional Center- a \$25,000 annual fee is imposed on all Regional Centers, except for Regional Centers with less than 20 investors, in which case the annual fee is \$10,000. In addition, the Regional Center will be responsible for an additional \$1,000 fee per each investor petition.

Increase in Investment Amount: The discussion draft includes provisions that would raise the minimum investment amount to \$1,000,000 for non- TEAs, and \$800,000 for TEAs, manufacturing, or infrastructure or BRAC. The minimum investment amount is adjusted every five years, or can be annual as well, based on CPI.

Effective Dates: The discussion draft includes specific language on effective dates. Specifically, job creation, source of funds provisions, TEA definitions, and minimum investment amount provisions will be in effect from the date of enactment of the act and after. All other provisions within the draft will either be effective as of the date of enactment, or up to, but no later than, 90 days after the date of enactment. This also applies to I-829 petitions for investors submitting applications to remove the conditions on their green cards if the underlying I-526 petition was filed prior to the date of enactment. In other words, even if an I-829 petition is submitted after the date of enactment, so long as the underlying I-526 petition was submitted prior to the date of enactment, changes to job creation, source of funds, TEA definitions, and minimum investment amounts will not apply.

This discussion draft amends some of the language that appeared in the first discussion draft that was circulated in early November 2015. With the program currently extended until Dec. 11, 2015, there is a possibility this discussion draft will be included in the omnibus budget bill and passed prior to the expiration. It is possible the program will be extended to give Congress more time to work out many of the details that are still contentious.

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