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Can USCIS Raise EB-5 investment Amount Without Congressional Intervention?

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Since its inception as part of the ***Immigration Act of 1990***, the *EB-5 program* has had a $1,000,000 threshold capital investment requirement, with that minimum decreased to $500,000 for projects in targeted employment areas. Last year, legislation was introduced and circulated on Capitol Hill that would raise this investment amount in varying proposals and conditions.

Some have argued that raising the amounts is necessary given inflation: $1 million in 1990 has the same buying power as $1,813,443 in 2015. Others argue the investment amounts should remain at their present level to compete with other countries' investment programs and maximize EB-5 visa usage –which has been quite low for most of the program's history, spiking to fulfill the ~10,000 annual quota allocation only relatively recently.

Suppose, though, that USCIS wanted to change the investment amount without waiting for Congress to agree on a new bill. Could it do so?

The answer is clearly yes, and there are several ways of so doing. INA § 203(b)(5)(C) provides:

Amount of capital required.–

(i) In general.–Except as otherwise provided in this subparagraph, the amount of capital required [...] shall be $1,000,000. The Attorney General, in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified under the previous sentence.

(ii) Adjustment for targeted employment areas.–The Attorney General may, in the case of investment made in a targeted employment area, specify an amount of capital required [...] that is less than (but not less than 1/2 of) the amount specified in clause (i).

(iii) Adjustment for high employment areas.–In the case of an investment made in a part of a metropolitan statistical area that at the time of the investment–

(I) is not a targeted employment area, and

(II) is an area with an unemployment rate significantly below the national average unemployment rate, the Attorney General may specify an amount of capital required under [...] that is greater than (but not greater than 3 times) the amount specified in clause (i).

The statute, written in 1990, utilizes the antiquated term "Attorney General;" however, immigration regulatory functions now fall under the purview of the Secretary of the Department of Homeland Security following the dissolution of the INS. Nevertheless, it is clear that Congress has delegated the power to increase the minimum investment amounts in several ways that would not require a statutory amendment:

1. USCIS, in conjunction with Labor and State, could increase the default $1,000,000 capital amount. Since $500,000 would be less than the increase, the TEA minimum would also need to be increased;
2. USCIS could change the TEA amount, provided that it remains at least 1/2 of the non-TEA investment amount; and/or

3. USCIS could increase the investment amount to $3,000,000 presently for projects which are:

a. In metropolitan statistical areas;
b. Not in TEAs;
c. Have unemployment rates which are “significantly below” the national average.

It is worth noting that Form I-526 already takes into consideration investments made in such “upward employment areas” even though they do not presently exist – see Part 2.b.

It is difficult to predict the likelihood of any of these events occurring. Any increase would likely create significant market disruption unless adequately anticipated and planned. Stakeholders would also need to understand and have input on the terms of grandfathering for pending filings, securities offerings, and initial investments so that the transition does not shutter the program.

Finally, it is worth noting that while Congress has delegated the ability to raise the EB-5 investment amount to DHS (through consultation with other agencies were required), its ability to do so is tempered somewhat. The Supreme Court’s *Chevron* test requires that regulations be “permissible construction(s)” of the statute. Could USCIS legally raise the minimum investment amount to $10,000,000 overnight, or change the TEA minimum investment so that it is only $1.00 less than the base amount? Potentially, but such actions would likely draw a federal court challenge to the limits of USCIS authority on the matter given the underlying legislative intent of the EB-5 program.

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