

AN INVESTMENT WORTH MAKING: HOW STRUCTURAL CHANGES TO THE EB-5 PROGRAM CAN ENSURE REAL ESTATE DEVELOPERS BUILD A GOOD FOUNDATION FOR THEIR CAPITAL PROJECTS

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The United States has made major changes to the rules governing its EB-5 program through the enactment of the EB-5 Reform and Integrity Act of 2022 (RIA). The RIA was a component of H.R. 2471—the Consolidated Appropriations Act, 2022—which President Biden signed into law on 15 March 2022. And while the RIA made many sweeping changes to the EB-5 landscape, including establishing an EB-5 Integrity Fund comprised of annual funds collected from regional centers to support auditing and fraud detection operations, two changes in particular are pertinent to developers funding capital investments. First, the RIA altered how developers calculate EB-5 job creation. Second, the RIA prioritizes the processing and adjudication of EB-5 investment in rural area projects, and it tweaked the incentives for high unemployment area and infrastructure projects. Paying careful attention to each of these two areas will enable developers to maximize the benefits afforded to it through the changes enacted by the RIA.

THE RIA MODIFIES JOB CREATION CALCULATIONS

New commercial enterprises under the EB-5 program must create full-time employment for no fewer than 10 United States citizens, United States nationals, or foreign nationals who are either permanent residents or otherwise lawfully authorized for employment in the United States. The RIA made three major changes to how regional centers measure job creation to meet this 10-employee threshold:

- First, the RIA permits indirect job creation to account for only up to 90% of the initial job creation requirement. For example, if a developer invests in a small retail-residential complex that will eventually create 30 new jobs with the retail stores that will move into the shopping spaces, the developer could count only nine of those jobs toward the 10-employee threshold.
- Second, the RIA permits jobs created by construction activity lasting less than two years to account for only up to 75% of the initial job creation requirement. The RIA does allow for these jobs to count for direct job creation, however, by multiplying the total number of jobs estimated to be created by the fraction of the two-year period the construction activity will last. For example, if construction on the small retail-residential complex will last only one year and create 100 new jobs, then the RIA would calculate 50 new

jobs (100 total jobs multiplied by one-half (one year of a two-year period)) but the developer could count only 7.5 of those 50 jobs toward the 10-employee threshold.

- Third, while prospective tenants occupying commercial real estate created or improved by the capital investments can count toward the job creation requirement, jobs that are already in existence but have been relocated do not. Therefore, if a restaurant is opening a new location in the small retail-residential complex, the developer could count toward those new jobs toward the job creation requirement. If the restaurant is just moving out of its current location into a space in the retail-residential complex, however, the developer could not count those jobs toward the job creation requirement.

THE RIA CREATES NEW EB-5 VISAS RESERVED FOR TARGETED EMPLOYMENT AREAS AND INFRASTRUCTURE PROJECTS

Under the previous regime, the U.S. government would set aside a minimum of 3,000 EB-5 visas for qualified immigrants who invested in targeted employment areas, which encompassed both rural areas and areas that experienced high unemployment. Now, the RIA requires the U.S. government to set aside 20% of the total number of available visas for qualified immigrants who invest in rural areas, another 10% for qualified immigrants who invest in high unemployment areas, and 2% for qualified immigrants who invest in infrastructure projects. Therefore, at a minimum, the RIA reserves nearly a third of all total EB-5 visas issued by the U.S. government for rural projects, high unemployment area projects, and infrastructure projects. Furthermore, and most significantly, the RIA provides that any of these reserved visas that are unused in the fiscal year will remain available in these categories for the next fiscal year.

The changes to the reserved visa structure create significant incentives for qualified immigrants to invest in rural, high unemployment area, and infrastructure projects. If, for example, the United States government calculates that it should issue 10,000 visas in Fiscal Year 1, then the RIA mandates reserving 2,000 visas for rural projects (20% of total), 1,000 for high unemployment area projects (10% of total), and 200 for infrastructure projects (2% of total). These numbers are significant when considering the RIA's roll-over provision because it pushes projects in these categories to the front of the line for the green card process. If only 500 of the 20,000 visas for rural projects are used in Fiscal Year 1, then the 1,500 unused visas set aside for rural projects roll over to the next fiscal year. Therefore, if the United States government issues 10,000 new visas in Fiscal Year 2, then 3,500 visas will be reserved for rural projects in the new fiscal year (the 1,500 rollover visas from the previous year plus a new 20% of the total number of visas per the RIA), and the high unemployment area and infrastructure project reserved visas would have a new 1,000 (10% of total) and 200 (2% of total) visas in reserve, respectively.

The RIA changed the structures for investing in both targeted employment areas and non-targeted employment areas, however. The RIA raised the minimum investment amount for a targeted employment area by over 50%, increasing the sum from its previous level of US\$500,000 to its new level of US\$800,000. The RIA similarly raised the non-TEA, standard minimum investment amount from its previous level of US\$1 million to now be US\$1.05 million. Additionally, the RIA modified the process for the creation of targeted employment areas: While under the previous regime, the state in which the targeted employment area would be located could send a letter in support of efforts to designate a targeted employment area, the post-RIA EB-5 regime now permits only U.S. Citizenship and Immigration Services to designate targeted employment areas.

IMPLICATIONS AND RECOMMENDATIONS

The new developments resulting from the RIA will have tangible effects on developers seeking to fund new capital investments. The percentages caps imposed on indirect job creation, relocated jobs, and other categories toward the job creation requirement will likely lengthen the amount of time spent on project creation and completion. These changes also likely should incentivize developers to focus their job creation metrics toward directly created jobs rather than through indirectly created ones. While these changes might increase the length of projects, the broadening of visa reserves through both the percentage caps and the creation of the rollover provisions will likely increase the number of projects in rural areas and high unemployment areas. Developers should carefully consider the composition of their job creation goals and calculate workforce sizes in line with these new requirements. Additionally, developers seeking to ensure they are able to succeed in obtaining visas for their desired employees by avoiding the typical backlog of visa applicants through the EB-5 program should consider investing in rural and high unemployment area projects to take advantage of the broadened application pool.

For more information about changes to the EB-5 program and other immigration issues, please contact the K&L Gates Immigration team.

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