**The EB-5 Immigrant Investor Program:**

**A Comprehensive Update Following the 2022 Reforms**

In 1990, the United States Congress created the EB-5 Immigrant Investor Visa Program as a mechanism to stimulate the U.S. economy through job creation and capital investment by foreign investors. This program has since served as a gateway for qualified investors and their immediate family members to secure lawful permanent residency in the U.S. The recent passage of the EB-5 Reform and Integrity Act of 2022 has introduced pivotal changes aimed at enhancing the program's efficiency, integrity, and overall impact on the American economy.

**Revised Investment Thresholds**

A foundational aspect of the EB-5 program is the investment requirement, which has been increased for the first time in over twenty years. Investors are now required to invest a minimum of $1,050,000 to eligible U.S. enterprises. However, a reduced investment amount of $800,000 is applicable for projects situated within Targeted Employment Areas (TEAs)—either rural regions or areas experiencing high unemployment rates. These adjustments aim to direct investment into parts of the country that would benefit most from economic infusion.

**Job Creation Mandate**

Central to the EB-5 visa's mission is the creation or preservation of 10 full-time jobs for American workers by the entity into which the EB-5 investment has been made. Under the new law, only a single EB-5 investor can invest in a 'direct' EB-5 project. For multi-investor or pooled projects, the project must be affiliated with a Regional Center, registered by USCIS. Direct projects count job creation by tracking the number of actual jobs created. Jobs must be full time (35 hours per week). Regional centers calculate jobs through the use of econometric calculations, which are primarily based on the amount of capital expenditures and resulting revenues of the project.

The job creation requirement must be fulfilled within two years of the investor's admission to the U.S. as a Conditional Permanent Resident.

**Targeted Employment Areas**

A significant update to the EB-5 regime was in the creation of set asides, or separate pools of visas, for those investing in targeted employment areas. This was first proposed by Matt Gordon during his 2016 testimony to the House Judiciary Committee.

Each year, 20% of the annual EB-5 visas are reserved for investments in rural projects, 10% are allocated for projects in high-unemployment areas, and 2% are set aside for infrastructure projects. These set-asides are designed to direct investment into regions and projects deemed as high-priority by the legislation, with the intention of supporting economic development and job creation in these specified areas.

Rural based investments are also afforded priority processing under the law. Currently, it appears that these projects and the investors are being processed faster, but it is uncertain whether it is a systemic improvement in processing times for these investors and projects, as many non-rural based investors and projects have also noted improved processing times.

**Concurrent Adjustment of Status**

One of the more important new benefits is that EB-5 petitioners, who are located in the United States (legally) at the time of their application, can file for adjustment of status, which includes work authorization (EAD) and advanced travel parole. Having the ability to work and travel freely provides the vast majority of the benefits conferred by the green card itself. Given the potential for significant processing delays due to retrogression (see below), the ability to adjust status and wait out the wait time, is tremendous. Note, those who are overseas at the time of filing, still must wait for their visa category to be current. Likewise, adjustment of status is only available if the visa category is current.

**Retrogression and Processing Delays**

Current processing times are very difficult to assess. Current cases are taking 12 months to process, both in our experience and as reported by others; however, the USCIS website reports 54 month processing times (for non-Chinese investors) and 89 months for Chinese. To make matter even more confusing, those who invested prior to the new law seem to take far longer than more recent investors.

For investors prior to the new law from China and India, the delays are due to 'retrogression'. This is where the number of visas sought from a country exceeds those allocated to that country. The wait times can become quite significant, extending the amount of time before a visa is available by many years if not a decade or more.

For those contemplating investing now from India and China, the set aside (TEA) categories are all current, so filing sooner than later can be critically beneficial. In particular for those who seek adjustment of status, as that is not available once the category goes into retrogression. For India and China, many in the industry believe that this will occur for High Unemployment TEAs shortly. Based on available data, Rural TEAs seem safe for the next

few years. For those in other countries, process time should be in the 1-2 year area. Over time, we'll see if the priority status granted Rural TEA petitions has a consistent advantage over other petitions.

**The EB-5 Process**

The EB-5 application has two parts. One part is documenting that the business into which the EB-5 capital is to be invested is credible and is likely to create the requisite jobs. If the project is 'direct', it requires a detailed business plan and job creation timeline. For a regional center affiliated project, in addition to the business plan, there needs to be an econometrics report (which establishes the job creation) and a relationship with a Fund Administrator (unless the project has audited financials). The regional center affiliated projects also must file for project approval (I-956F). The budget to prepare a regional center affiliated project can be $100,000 or more. The filing fees for the I-956F just increased to $47,695 (an increase of nearly $30,000).

The second part of the application process is the I-526 filing submitted by investors. Here, the investor is required to prove that the source of his or her funding is from legal sources. This is an exhaustive analysis of the funding going back to wherever the money came from. If the capital is from gifts or inheritance, the analysis jumps over to the 'donor' of the funds. Source of funds analysis are often hundreds (and even over 1,000) pages of analysis and supporting documentation. Current rates for a typical case is approximately $25,000. The filing fees for the I-526 petition is now $11,160 (up from $3,765). Other typical costs can include translation services for any non-English language documentation.

**Removal of Conditions – The I-829**

After approval of the I-526 petition and receipt of the investor's green card, the investor is technically a 'conditional' lawful permanent resident. The condition is that the company receiving underlying investment, the NCE, will create the needed jobs. Following the start of the lawful permanent residency status, the investor then must file a petition to remove the condition on Form I-829. At this stage the NCE provides the investor's immigration attorney with all the needed information to prove that the funds were spent according to the business plan and that the job creation has occurred.

**Structural Considerations of EB-5 Compliant Projects**

All EB-5 projects are subject to certain structural limitations. Most notably, the investment capital must be 'at risk'. This means that the investment is subject to total loss so all investments into the entity that accepts the capital (called a New Commercial Enterprise or NCE) must be equity investments. If the investment in the NCE is guaranteed or collateralized in some way, the structure would violate the regulations. Note, many regional

center projects utilize a more complex legal structure for the investment, due to their ability to prove labor creation through econometric formulas. Technically, the formulas are determining the indirect and induced labor created through the economic activity. This is the activity of firms other than the NCE. In these projects, the sponsors separate the NCE, which accepts the investor capital, from the job creating entity (JCE), which undertakes the project. The NCE, after receiving the capital as an equity investment, can then invest in the JCE as either an equity investment or a loan. The loan can and often is collateralized by the assets of the JCE. Often, sponsors and practitioners gloss over the structural distinction between the NCE and the JCE. It is always the case, if properly structured that the investment into the NCE will be an equity investment for which there can be no guarantee or rights to collateral owed directly to the investor. Any rights of these sorts will be owed only from the JCE to the NCE and not to the individuals.

The investment must also be irrevocable, meaning that the investor does not have the right to demand repayment at a particular time or upon a set of predefined events. Furthermore, the investment must remain invested (and at risk) for at least two years following the investment. This is a significant improvement over the prior (and confusing) timeline for keeping capital in a project. Keep in mind, most project sponsors will contractually require that the capital remain in the project for a longer period of time, which is perfect legal. The two year period is a minimum, not a maximum. Additionally, like under the old regime, investors cannot negotiate for a return of capital based on a previously agreed upon set of conditions.