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SOME HIGHLIGHTS OF THE EB-5 REAUTHORIZATION: CSPA PROTECTION AND HOW 245(K) AND CONCURRENT FILING COMBINE TO CREATE A NEW OPTION FOR SOME APPLICANTS WHO HAVE RECENTLY DROPPED OUT OF STATUS

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The recently enacted Consolidated Appropriations Act of 2022, which was signed into law on March 15 after the House and Senate resolved their differences earlier in the month, reauthorized the EB-5 Regional Center program and made some other changes to the EB-5 program in the "EB-5 Reform and Integrity Act of 2022", included as Division BB of the appropriations bill (at pages 1022 to 1061 of the PDF version of the bill). Others have already produced summaries of the bill, such as one drafted shortly before the President signed the bill by Robert Divine of Baker Donelson and posted by Invest in the USA, and I will not here attempt an exhaustive list of all of the changes contained in almost 40 pages of statutory text, but there are a few highlights that seemed particularly worth mentioning.

Section 203(h)(5) of the Immigration and Nationality Act, as added by section 102(b) of Division BB (at pages 1026-1027 of the PDF version of the bill), provides additional protection under the Child Status Protection Act for some children of investors who would otherwise age out of their derivative status. If a child becomes a Lawful Permanent Resident (LPR) on a conditional basis through a parent's investment, and the parent's conditional resident status is later terminated because of, for example, failure to create the requisite number of U.S. jobs, there will be a one-year window after the termination during which the parent can file a new EB-5 petition and the child (if still unmarried) will continue to qualify as a child under the new petition even if then over age 21.

Likely of relevance to more people are two provisions of Division BB which can have a particularly powerful effect in combination: the addition of EB-5 petitions to those covered by INA § 245(k), and the addition of a new section § 245(n) allowing concurrent filing of an application for adjustment of status where approval of an EB-5 petition would make a visa number immediately available. Both of these are contained in section 102(d) of Division BB (at page 1027 of the PDF version of the bill).

Under previous law, EB-5 petitions and applications for adjustment of status could not be filed concurrently, and INA § 245(k) did not apply to EB-5 petitions. The former meant that it was necessary to file an EB-5 petition and wait for it to be approved before filing an I-485 application for adjustment of status, and the wait could be very long: current posted USCIS processing times indicate that an I-526 Petition by Alien Investor under the EB-5 program can take anywhere from 35 months to 71.5 months to adjudicate. During those three to six years, the investor/petitioner would have to either maintain status in the United States, or (if already here) leave the country. And when the time finally came to apply for adjustment of status, the inapplicability of section 245(k) meant that absent some rare exceptions, the investor/petitioner would have to prove that they had maintained status continuously, without even small gaps, and had never worked without authorization. This is in contrast to most employment-based green card categories, where section 245(k) provides for limited forgiveness of up to 180 days of time out of status or employed without authorization since one's last admission into the United States.

Under the former law, therefore, the EB-5 program was not a useful option for people who wanted to remain in the United States, but lacked access to a long-term nonimmigrant status or had briefly fallen out of status for whatever reason. With these amendments, on the other hand, it can be.

Imagine, for example, a well-off L-1A nonimmigrant manager or executive sent to open a new office in the United States who runs into trouble after a year because the sponsoring company's business operation has not yet developed to the point that USCIS acknowledges it to be able to support his or her continued efforts as a manager or executive. If an L-1A extension is denied, and an EB-1C I-140 petition for a manager or executive is not a viable option because USCIS would deny it for the same reason, the previous law would not have allowed the nonimmigrant to remain in the United States while pursuing the EB-5 process after falling out of L-1 status. An I-526 petition would have

had no direct impact on the nonimmigrant's status until years later.

Under the newly amended version of the law, however, assuming no previous time out of status or unauthorized employment since the last time that our hypothetical L-1 nonimmigrant was admitted to the United States, there would be a window of 180 days after the L-1 extension denial when the nonimmigrant could utilize the EB-5 process to remain in the United States. If the requisite investment were made and an I-526 petition were concurrently filed with an I-485 application for adjustment of status within that time, then the I-485 application would be protected by amended INA § 245(k). (According to USCIS guidance, it would also be necessary for the applicant to refrain from unauthorized employment after filing and before receiving employment authorization; the legal correctness, or not, of that guidance is outside the scope of this blog post.) The applicant would then be protected from the accrual of unlawful presence by the pendency of the I-485 application for adjustment of status, and could be issued an employment authorization document (EAD) while the application was pending, pursuant to 8 C.F.R. 274a.12(c)(9). Thus, while the I-526 and I-485 were pending, the applicant would effectively remain able to live and work in the United States, ultimately transitioning to LPR status if the petition and application were approved.

The above scenario is only possible when, at the time of filing, a visa number is immediately available in the EB-5 category without the need for an earlier priority date. However, as things now stand, the State Department's Visa Bulletin indicates that this will be true in almost all scenarios, with only one exception. In the April 2022 Visa Bulletin, the non-regional-center EB-5 Final Action cutoff dates are Current for all countries, meaning that visa numbers are available for any priority date and so concurrent filing is possible. Although the regional-center EB-5 Final Action Dates were Unavailable at the time of Visa Bulletin publication because the Bulletin was first authored on March 10 before the Consolidated Appropriations Act reauthorized the regional center program (though there has since been an update referencing the reauthorization), the regional-center Dates for Filing were Current for all countries but China, and the same will likely be true of the Final Action cutoff dates next month. For those born in mainland China and unable to exercise cross-chargeability based on birth of a spouse or (under certain rare circumstances) parents elsewhere, however, regional-center EB-5 numbers will not be available without a priority date much earlier than concurrent filing would produce: the Dates for Filing

cutoff as of April 2022 is December 15, 2015. Thus, concurrent filing will not be possible for such investors born in China and pursuing a regional center investment. It will, however, still be possible for them in connection with a direct investment.

The Act raises the minimum required investment thresholds, so taking advantage of this new opportunity will require a larger investment than was necessary in the past. For investments in Targeted Employment Areas (that is, either rural areas or areas of high unemployment) or particular infrastructure projects defined by a new provision in the bill, a minimum amount of $800,000 is now required, a significant increase over the previous $500,000 threshold for Targeted Employment Areas. For investments elsewhere, the requirement is $1,050,000, a more modest increase over the previous $1 million threshold. The amounts will be further adjusted for inflation in 2027 and every five years thereafter. (See page 1024 of the PDF version of the bill.)

It is also important to note that only the Secretary of Homeland Security or "a designee of the Secretary who is an employee of the Department of Homeland Security" will be able to designate high unemployment areas for Targeted Employment Area purposes, while state or local officials will no longer be able to do so. (See page 1023 of the PDF version of the bill.) This is presumably an effort to counter what current Senate Appropriations Committee chair Senator Patrick Leahy (D-VT) previously described as "gerrymandering" of purported high-unemployment areas by states. Thus, to take advantage of the lower $800,000 threshold, the investment projects of Regional Centers and others may need to be located in different kinds of places than they previously were.

The new law also indicates, at section 203(b)(5)(E)(ii)(I) of the INA as added by section 103(b)(1) of Division BB (at page 1027 of the PDF version of the bill) that in the regional-center context, DHS "shall prioritize the processing and adjudication of petitions for rural areas". Even true areas of high unemployment in an urban or suburban context, therefore, may be disfavored under the amended program relative to rural areas.

One other, more esoteric portion of the new law, which may be of interest primarily to attorneys (like this author) who practice federal litigation, is what one might call an anti-*Darby* provision. New section 203(b)(5)(P) of the INA, as added by section 103(b)(1) of Division BB (at pages 1049-1050 of the PDF version of the bill), provides for administrative appellate review of various

USCIS decisions in the EB-5 context by the USCIS Administrative Appeals Office (AAO), and then states:

> *Subject to subparagraph (N)(v) and section 242(a)(2), and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review a determination under this paragraph until the regional center, its associated entities, or the alien investor has exhausted all administrative appeals.*

That is, one will be required to first appeal to the AAO before going to federal court. This is in contrast to the general rule set out by the Supreme Court's decision in *Darby v. Cisneros*, 509 U.S. 137 (1993), which held that under 5 U.S.C. § 704, judicial review of an agency action ordinarily need not await an administrative appeal of that action unless the agency has both required an appeal and made the administrative action inoperative pending that appeal. However, *Darby* specifically recognized that an exception exists when an appeal is "expressly required by statute," and Congress has chosen to create such an express requirement here in the new statute. In this context, therefore, unlike many other contexts, it will not be possible to bypass the AAO and seek review of a USCIS decision directly in federal court. (The referenced exceptions in subparagraph (N)(v) and INA section 242(a)(2) relate to removal proceedings, where there would generally still be an administrative appeal required at least to the Board of Immigration Appeals, if not the AAO, before judicial review could be sought.)

As flagged by IIUSA, USCIS has indicated that it intends to provide "additional guidance" regarding the changes to the EB-5 program made by the Consolidated Appropriations Act, so we can expect that further details regarding the USCIS interpretation of the provisions mentioned above, and others, may become available in the future. Even before such guidance comes out, however, it is already clear that things have changed in some interesting ways.