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Investment-based government visa program survives, with an uncertain future

By Chase DiFelicianonio

A popular investment-based visa pilot program is likely to be extended as part of the federal spending bill passed by Congress earlier this week. Ongoing uncertainties around the future of the program have led business immigration attorneys to advise clients to file applications as soon as possible.

Known as the EB-5 Immigrant Investor Regional Center Program, it allows foreign investors to contribute funds to capital pools throughout the U.S. in exchange for permanent residency. Investments are made with public or private entities known as regional centers and are required to create at least 10 full-time jobs for American workers.

Under language in the current federal spending bill, the program would be extended to Sept. 30 if signed by President Donald J. Trump.

Originally set to expire last Friday, the program was extended through the end of this week as part of the stopgap spending bill passed by Congress.

The stop and start nature of the process has affected how business immigration attorneys advise their clients.

"We've gone through this series of temporary extensions and every time it happens there's a lot of concern," said Robert P. Gaffney, founding attorney of The Law Offices of Robert. P. Gaffney in San Francisco.

Gaffney added that uncertainty around the program generated questions from some of his clients regarding whether changes to the rules of the program would nullify future or already-filed petitions for the visa.

Created in 1993, the regional center pilot program has been routinely renewed by Congress, typically in three-year increments.

"We had it expire in September 2015. They kicked the can down the road to December 2015. Then they kicked it down the road to December 2016, then to April 2017," said C. Matthew Schulz, a Palo Alto-based partner at Dentons US LLP.

Schulz also said that some of his foreign EB-5 clients who are considering investing through the regional center program were concerned that the rhetoric of the new administration could affect the program.

"We're advising the investors to file now to lock in under the current rules," said Martin Lawler, an immigration attorney with Lawler & Lawler Law Offices in San Francisco. Minimum investment levels could be increased by future legislation or federal immigration authorities, he added.

"The tension in timing is that once the extension is approved through Sept. 30, there is some likelihood that there would be some intervening EB5 legislation that would increase the investment amounts, among other things," wrote Mitch Wexler, a Los Angeles- and Irvine-based partner at Fragomen, Del Rey, Bernsen & Loewy LLP in an email.

This uncertainty also has the potential to imperil larger, longer-term projects partially funded by regional centers, according to Jonathan Bloch, a shareholder at Brownstein Hyatt Farber Schreck LLP in Los Angeles.

"Borrowers are not going want to go out there and regional centers are not going to start raising money if they are unsure about what the dollar amount is going to be or if they are unsure the deal's going to stretch beyond Sept. 30," Bloch added.

A notice of proposed rulemaking was published by the Department of Homeland Security in January that would raise investment minimums, among other provisions. Multiple pieces of legislation also exist in the House and the Senate that range from tweaking investment amounts to cutting the program entirely.

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