AMERICAN IMMIGRATION LAWYERS ASSOCIATION

A Call for a Workable Effective Date in New EB-5 Legislation

Congress is currently drafting new EB-5 reform legislation in connection with extending the EB-5 regional center program. AILA advocates for an effective date in this new legislation that avoids retroactive application of the new laws to the over 13,000 Form I-526 petitions currently pending with USCIS.

The attached memorandum from AILA's EB-5 Committee shows the length of time typically involved from EB-5 project conception to USCIS adjudication. Given the many months and sometimes years an EB-5 case takes from initial contemplation to USCIS adjudication, legislation requiring application of new laws to pending I-526 petitions would be grossly unfair and contrary to our notions of due process. We would anticipate that such retroactive application of new laws would result in petition denials in volume.

In addition to the important fairness and due process concerns, U.S. project developers will experience economic harm if new laws are applied retroactively to pending cases. Many of the pending Form I-526s represent EB-5 capital already deployed in projects – that is, capital already released from escrow. Petition denials typically trigger contractual refund obligations. Projects may be unable to refund EB-5 capital *en masse*. These events may trigger litigation as investors sue to regain their capital, without which most will be unable to re-invest in another EB-5 project.

Projects holding EB-5 capital in escrow conditioned on petition approval will also experience harm. The capital may be returned to investors upon denial from escrow, but projects will suffer shortage of anticipated capital. The time required to restructure a project under the new laws and re-market may be too lengthy for some projects to viably use EB-5 capital.

Effects of denials on investors are also harsh. Investors will lose priority dates; dependents will age out of derivative benefits; and investors may be precluded from a return of the initial capital for re-investment.

At a time when the EB-5 program needs to attract institutional-quality, risk-adverse participants, these upheavals will undermine confidence in the EB-5 program. The history of harmful retroactive application of rules in the EB-5 area – in 1998 and more recently with "tenant occupancy," "indebtedness" and other failures of USCIS to accord deference – imparts greater sensitivity to retroactivity in the EB-5 area than perhaps other areas of civil law. Reforms to the EB-5 program must avoid these sensitivities when establishing the effective date of any new law.

In support of adopting an effective date no earlier than the enactment date, it should be noted that USCIS has plenary authority to deny filings that were ineligible at the time of filing under the precedent decision *Matter of Katigbak* and published USCIS policy. USCIS may exercise this authority to dismiss ineligible cases filed at any time, whether before or after enactment of new legislation. Resting on existing established authority allows the new legislation to uphold U.S. developers' and investors' reasonable reliance and avoids undermining program integrity.

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Introduction. To illustrate the impact of any proposed effective date, we present the lifeline of a hypothetical EB-5 regional center project. Based on our experience, these hypothetical facts are representative. A discussion and recommendations follow.

Hypothetical EB-5 regional center project. A mixed-use development project costs $250 million to build over 27 month period of construction. Developer explores possible funding options to design a plan of finance to pay for total construction costs, as follows:

Project: Source of Financing		
1	$150 million	Bank Loan (first position lender)
2	$75 million	Mezzanine Loan (second position lender) - **EB-5 Funds**
3	$25 million	Developer Equity
	$250 million	Total Cost

Below is a normal timeline of major events:

Step	Date	Running Months	Actions
1	August 2013	0	• Developer meets with potential banks for first position loan terms • Developer meets with Regional Center (RC) to explore EB-5 funding as potential Mezzanine/Second Loan
2	September 2013	1	• RC completes financial/immigration underwriting • Developer signs Term Sheet/Commitment with RC for $75 million • Developer signs Term Sheet/Commitment with bank for $150 million
3	October 2013	2	• RC engages legal, financial, immigration, other experts to write Private Placement Memorandum (PPM) to raise $75 million
4	January 2014	5	• RC files Form I-924 (Exemplar) for project pre-approval with USCIS
5	February 2014	6	• RC starts overseas marketing to qualify/subscribe 150 foreign investors
6	March 2014	7	• Developer closes $150 million first loan with bank and bridge financing waiting for EB-5 loan fund • Construction of project starts and will take 27 months to complete
7	April 2014	8	• RC files Form I-526 Petitions with USCIS for immigrant investors who funded to escrow
8	September 2014	13	• RC subscribes 150 foreign investors; • RC escrow account holds $75 million
9	October 2014	14	• USCIS has received Form I-526 Petitions from all 150 foreign investors, • All cases pending/awaiting review. Current USCIS processing time is 14 months
10	November 2014	15	• EB-5 funds are released from escrow; RC closes $75 million loan with Project • Developer uses EB-5 loan proceeds to pay for ongoing construction
11	June 2015	23	• USCIS begins issuing initial Form I-526 approvals notices for earliest investors that filed cases in April 2014 (USCIS reported processing times are 14 months)
12	December 2015 *[new legislation enacted]*	29	• USCIS has now issued 90 approvals for I-526 cases • USCIS denies 10 petitions for I-526 cases • Given denials, RC recruits 10 replacement investors to make up $5 million shortfall relied upon by Developer to finish Project) • USCIS still has 50 petitions awaiting decision
13	February 2016	32	• RC files 10 more petitions (I-526) for replacement investors of the 10 denied
14	June 2016	36	• USCIS decides final 50 petitions (I-526) pending for 14 months. *Which laws are applied?*

Discussion. We assume that the new EB-5 legislation will be enacted December 12, 2015. The hypothetical shows that at the time of enactment, an EB-5 project originally conceived over 2 years before enactment with its first USCIS filing nearly 1 year before enactment will still have cases pending.

This is due to the preparation time involved in finalizing an EB-5 project filing coupled with lengthy USCIS processing times.

This lifecycle is unique to U.S. immigration filing. No other immigration benefit has a filing period this protracted. In the hypothetical, from preparation of the Form I-526 to the last Form I-526 adjudicated is 36 months. Of course, the Form I-526 filing period will vary depending on the length of time actually taken to finalize the EB-5 project filing, the capital raise (and hence the number of investors) involved, and the pace of placing investors. However, the hypothetical shows the complexity and duration of the EB-5 lifecycle, even when limited to the first phase, the Form I-526 filing period. Accordingly, the approximately 15,000 Form I-526 cases currently pending represent in most instances efforts by U.S. project principals and foreign investors initiated long before S. 1501 was introduced.

As such, any effective date that would result in new laws being applied retroactively to pending cases would result in unwinding in some cases years of effort and loss of costs incurred by all parties – regional center, developer, investor, banks. The costs and loss involved cannot be quantified. If there are substantive changes in the new legislation resulting in disqualification of pending cases, those pending cases may be denied. Denial of such petitions may result in permanent loss of the capital represented. In the above hypothetical, the regional center would be required to find 50 new investors over 2 years after the deal was finalized, assuming that the developer would agree to wait and assuming that the project could be restructured under the new laws.

The effects are more dire on the investor side. After a year of USCIS processing times, added to the months taken to liquidate assets and document the lawful source of funds for investment, and the time invested to find a suitable EB-5 project, the investor and family receives a denial because either the project, the source of funds, or both no longer qualify under the new laws. If the investor had a child who would have narrowly escaped aging out, the family now has catastrophe. With visa backlogs, a Form I-526 denial means loss of priority date and place in line. Even assuming a new project and a new project will ultimately be approved, they will lose all that time and the time the first petition was pending as they start the entire two year wait process anew.

An effective date that would result in new laws applied to pending cases would therefore have vastly harmful and in innumerable cases, irreparable impacts.

Recommendation.

(1) At minimum, new laws should be applied to cases filed after enactment. Cases filed before enactment should be decided under laws in place at the time of filing. Any other result would be manifestly unjust and cause irreparable harm.
(2) Allow a reasonable time after enactment before imposing an effective date to allow projects with pending project adjudication or pending Form I-526s (“pending projects”) time to progress toward full subscription and acclimate to the new laws. Not all projects will achieve full subscription. However, a reasonable time before the effective date would allow the project principals, investors, and advisors to absorb the new laws and structure work-arounds where possible.