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EB-5 Update Could Pump The Brakes On Investor Numbers

By **Allissa Wickham**

Law360, New York (January 18, 2017, 9:58 PM EST) -- The U.S. Department of Homeland Security rolled out a rule last week aimed at updating the EB-5 visa program, and while it may combat gerrymandering in the program, attorneys say the regulation may also have a chilling effect on the number of immigrant investors who can apply for the visas.

Exactly one week before the end of the Obama administration, the **DHS released** a new regulation that would make major changes to the popular EB-5 visa program, which gives green cards to foreign residents who invest hefty sums of money in a U.S. business.

The proposed updates come after attempts to reform the EB-5 program repeatedly stalled in Congress, despite a recent rash of fraud lawsuits over the program from the U.S. Securities and Exchange Commission. With the legislative progress hitting a wall, the buck has been passed to the agency, said Douglas Hauer of Mintz Levin Cohn Ferris Glovsky & Popeo PC.

"Lawmakers have been unable to change the rules for EB-5," Hauer said. "The EB-5 industry and lobbyists have gotten in the way, rejecting change. Lawmakers have therefore passed the ball to DHS, which is going to use rulemaking power to change the law and to modernize EB-5."

Two of the biggest changes in the rule are also some of the most contentious: increases to the required investment amounts, and the designation of certain geographical areas where immigrants are allowed to contribute less money.

Right now, the EB-5 program provides green cards to foreign residents who invest at least \$1 million in the U.S., or \$500,000 if the investment is in a rural area or place with high unemployment, known as a "targeted employment area."

But under the new regulation, the DHS is proposing to increase the minimum investment amount from \$1 million to \$1.8 million, and from \$500,000 to \$1.35 million for those who invest in a TEA. And according to some immigration attorneys, the proposed increase to the investment amounts could have a definite chilling effect on the amount of EB-5 investors, who have flocked to the program in recent years.

"From having reviewed many, many investor petitions — our firm has filed about 6,000 of these — I can report that for a good number of these investors, it's about mortgaging their homes," said Carolyn Lee of Miller Mayer LLP. "So certainly there will be a number of investors who will be precluded [under the proposed investment amounts]."

Those investment amounts also came as a surprise to some attorneys, because they fell outside of the proposed increases floated in **some legislation**, which called for raising the minimum required investment from \$500,000 to \$800,000. But rather than using those figures as a benchmark, the DHS opted to "account for inflation" by upping the investment amount "consistent with increases" in the consumer price index. Since the investment amount was set in 1990, when the program was founded, there was plenty of catching up to do.

"All of the legislative discussions have been revolving around somewhere between \$800,000 and a

million, some have said \$1.2 million, if it's not a TEA," said Ronald Klasko of Klasko Immigration Law Partners LLP, who argued that the proposed change is "totally inconsistent with what's being discussed on both the Democratic and the Republican side of the aisle."

Additionally, under the new rule, the DHS is seeking to end the designation of "high unemployment areas" by states, and instead have the agency figure out which locations count as TEAs. The agency is proposing that a TEA "may consist of a census tract or contiguous census tracts" in which the business is mainly operating if the "weighted average of the unemployment rate" for the tract is at least 150 percent of the national average.

The new TEA definition suggested in this rule would likely combat some of the gerrymandering that **has been alleged** in the EB-5 program, according to Lee.

"[A] major change is having [U.S. Citizenship and Immigration Services] designate these TEAs, rather than states," Lee said. "A simple way of administering TEA designations was an important objective, according to the agency itself. So it certainly would address gerrymandering."

Of course, whether the proposals in the rule make it into the final version depends on the incoming Trump administration. And then there's the fact that the EB-5 regional center program is due to expire in April, meaning the program may soon see more action in Congress yet.

"The new administration will have to determine whether they're even going to let this rule go forward," said Laura Reiff of Greenberg Traurig LLP. She added that "if they do let it go forward, there's going to be legislation at some point about EB-5 and it probably will happen before April 28. So this could be mooted out by legislation before the comments are even reviewed."

Although the future of the regulation is still murky, U.S. Sen. Chuck Grassley, R-Iowa, recently released a statement saying he expressed a "strong desire" for the rules to go forward while meeting with Gen. John Kelly, President-elect Donald Trump's pick for Homeland Security chief. Attorneys will also want to take note of a **recent notice** of possible regulatory updates to the EB-5 program's "regional center" component, adding one more ball for EB-5 stakeholders to keep their eye on.

--Editing by Mark Lebetkin and Jill Coffey.