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Optimism And A Few Frustrations Voiced At EB-5 Conference

By [Nathan Hale](#) · 2023-11-09 23:35:55 -0500 · [Listen to article](#)

The EB-5 investment visa program, which faced an uncertain future less than two years ago, looks primed to capitalize on a series of favorable developments and despite some notable pain points, industry leaders said at a conference Thursday in Miami.

The consensus at the Advanced EB-5 Industry Conference, co-hosted by JTC Group and [Saul Ewing LLP](#), was that Congress' reauthorization through 2022's EB-5 Reform and Integrity Act has delivered a more robust regulatory structure that should curtail incidents of fraud that previously damaged the reputation of the program, which reserves green cards for foreign investors who commit capital to U.S. projects or companies that create at least 10 jobs.

The program's revival is also coming amid a tighter real estate financing landscape, which is positioning EB-5 as a more affordable source of project funding. Meanwhile, years of EB-5 inactivity and COVID-19 restrictions have also resulted in a buildup of visas that should be available in the current 2024 fiscal year.

"There is a new energy, and the energy comes from the fact that we finally have a real extension of the regional center program," JTC general counsel Jill Jones said, referencing the entities at the heart of the process that pool and deploy the immigrant investors' funds.

But conference participants also voiced frustration with the refusal of [U.S. Citizenship and Immigration Services](#), which administers the EB-5 program, to engage with industry players.

"They're adamant about not having any dialog about EB-5 issues," said Ron Klasko of [Klasko Immigration Law Partners LLP](#). "The only way to challenge [agency decisions] is through litigation. That's a big cloud over EB-5 that we're stuck with."

A major focus of concern was a policy guidance USCIS issued last month that laid out a shorter required sustainment period in which EB-5 investors must maintain their investment at risk. Speakers called the agency's position potentially misleading and counterproductive to investors and the overall program.

Substantial Regulations

While speakers said there are many points of uncertainty in the revamped EB-5 program, the government got good grades overall, especially in regard to provisions in the RIA and the USCIS' own efforts aimed at protecting investors.



"They're almost eliminating fraud," Saul Ewing partner Ronald R. Fieldstone told Law360. "There are so many checkpoints, and if you do something wrong, the government will go after you. There's no playing around, especially with fraud. The [[U.S. Securities and Exchange Commission](#)] jumps in right away."

Among the notable changes is a requirement to have an independent fund administrator, one of the services provided by event host JTC.

"It really helped weed out a lot of unethical stuff, like [someone] would just make up a project and run away with the money," Allan Cao of the American Development Center told Law360. "As a developer, when we need the money, we [now] need to come up with all of the invoices, all the bidding contracts and all of this stuff before we see a penny."

John M. Baker of [LCR Capital Partners](#) said increased disclosure requirements have elevated the quality of offering documents "to what you would see in private equity," and he credited an increase in the required investment to \$800,000 from \$500,000 for an increase in the sophistication of the investors and services provided to them by the industry.

Good Timing

Recent events have also created favorable conditions for EB-5 to build back its popularity. With interest rates having climbed substantially and ongoing fears of a potential recession, EB-5 has become a more affordable and available lending source.

"If EB-5 dollars are coming into the project at a cheaper rate than the senior debt, then technically, the more EB-5, the merrier," Roberto Contreras IV of the Houston EB-5 Regional Center said. "It's kind of like we're at an interesting nexus here where I think you're going to start to see EB-5 take up more and more of the capital stacks as banks are tightening up."

EB-5 also has "runway" to build momentum before it, Robert W. Kraft, CEO and chairman of [Firstpathway Partners](#), said, with thousands of visas rolling over into the 2024 fiscal year after going unissued in the past two years during the program's dormancy and USCIS' shuttering of operations in China and elsewhere due to COVID-19.

In a presentation, Lee Li of the nonprofit EB-5 industry association Invest in the USA put that figure as high as 18,000 available between now and the end of September 2024.

Several speakers also highlighted new rules in RIA that allow individuals already lawfully in the U.S., such as on a student visa, to concurrently file a Form I-485 to adjust their status to conditional permanent resident status and a Form I-526 to petition for a green card through the EB-5 program, as well as forms for travel authorization and employment authorization, greatly speeding up the process and providing the ability to work and travel freely while adjudication of their I-526 petition is pending.



Federal Friction

For such a complex policy area, ambiguities and issues are inevitable, but participants expressed exasperation over USCIS' approach to implementing RIA and dealing with the industry.

Lulu Gordon, general counsel of EB5 Capital described the process so far as "the most inefficient implementation you can imagine."

"USCIS doesn't seem able to — I'm not saying they're not willing — but able to actually step back and figure out a regulation scheme that makes sense within the different parts of RIA ... and it's kind of a mess," Gordon said. "So, we do basically have implementation through litigation, forcing them to implement or arguing with them for not doing a good job implementing, and that's very inefficient."

Gordon and Klasko also pointed out that RIA prevents parties from directly challenging individual denials directly in court, requiring them instead to go through USCIS' [Administrative Appeals Office](#), "which is both very long and very unlikely of success," Klasko said.

That also has led to some problematic litigation that Gordon said is based on facts that result in results that end up harming the rest of the industry.

Misguided Guidance?

Numerous speakers pointed in particular to USCIS' guidance last month saying the sustainment period for EB-5 investors is two years from the date of investment.

Speakers said this does not line up with text in the law or Congress' intent and is still ambiguous in terms of when the clock starts to run.

They also said it does not line up with the reality of most EB-5 projects, which tend to be large-scale developments and can take much more than two years to reach completion, stabilization and payout.

"If people are being told that this is now a two-year program, I fear there is going to be a lot of upsetment in the future when they realize that's not the case," Klasko said. "This is, in my opinion, potential fool's gold for investors that will hurt investors and potentially hurt the industry."

The guidance could lead to challenges managing overseas agents who may want to market the shorter timeline to potential investors, and JTC's Jones said she is aware of some infrastructure-focused regional centers that have had some investors withdraw already to seek out a two-year deal.



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Jones also said she fears a two-year timeline could make EB-5 a target for money laundering, something its traditional time frame did not fit.

And while there might be some projects that can meet a two-year timeline, Gordon expressed concern that the pressure for shorter windows could lead to offerings for projects that are further along in development, where jobs have already been created.

"How is that an EB-5 program project if the jobs are already created?" she said. "And I think down the road, USCIS is going to start to feel the same way."

Should the guidance be overturned, either through litigation, legislation or by USCIS itself, several speakers said there is a risk that investors and regional centers who entered into such deals could find themselves embroiled in a messy situation.

"This is a policy pronouncement. It is not law. It could change. We don't really know," Saul Ewing partner Rohit Kapuria said during a session focused on compliance and regulations. "EB-5 always has new things, and that's what makes what we do so much fun."