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EB-5 Amendments Address “Stranded” Investors

By:

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The EB-5 Amendments in the 21st Century Department of Justice Appropriations Act provide for reopening petitions to remove conditions from lawful permanent resident status on behalf of those who obtained conditional residence through INA 203(b)(5) between January 1, 1995 and August 31, 1998.¹ Likewise, the amendments provide for the approval of Adjustment of Status Applications and Applications for Immigrant Visas based on an I-526 Immigrant Petition by Alien Entrepreneur approved within this same time frame.² This amendment and future regulations are designed to resolve the limbo-like status of hundreds of Immigrant Investor applicants who may have relied on governmental guidance that their investment met the statutory requirements at the time the investment was initiated but whose transition to permanent residency has stalled due to vacillating government interpretations about what is a qualifying investment for purposes of the Act.

By statute, regulations implementing the EB-5 amendments were to have been promulgated no later than 120 days after passage of the statute;³ however, at the time of this writing, almost one year after the statute passed, no regulations have yet been proposed to implement these amendments. In the absence of regulations this procedural outline addresses questions and procedural steps relating to the statutory EB-5 amendments in an effort to “walk through” the process for re-adjudicating the investor cases described above.

I.

Process for Those with I-526 Approvals and I-829 Denials

Who May File a Motion to Reopen?

Persons with I-526 approvals between January 1, 1995 and August 31, 1998 and who received conditional permanent resident status but were denied removal of conditions may file a motion to reopen the petition to remove conditions.⁴

What if Your Client Is Already Abroad?

¹ 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), §§11031-11033.

² *Id.*

³ 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), §11033.

⁴ *Id.* at §11031(b)(1).

The EB-5 amendments provide that such persons, if abroad, are to be paroled into the United States in order to obtain determinations on the petition to remove conditions, unless the petition was denied on the grounds of material misrepresentation.⁵ Parole is not available to those otherwise inadmissible.⁶

Reopening the I-829 Serves to Reopen Removal Proceedings

Where such persons were placed in removal or deportation proceedings, the motion filed to reopen the petition to remove conditions shall also be considered a motion to reopen the removal proceedings.⁷ The reopened proceedings are limited in scope to whether the removal should be vacated and the conditions removed and LPR status granted.⁸ This remedy is not available to those otherwise inadmissible.⁹

Once the I-829 is Reopened, In Order to Obtain Approval, the BCIS Must Agree That:

- (1) The petition contains no misrepresentations;¹⁰
- (2) The 10 full-time jobs for U.S. workers were created and exist or existed on any one of the following dates:
 - a. On the date on which the petition to remove conditions was filed;
 - b. On the date six months after the petition to remove conditions was filed; **OR**
 - c. On the date on which the determination with respect to the reopened petition is made.¹¹
- (3) The alien is or was in substantial compliance with the capital investment requirement on **any one** of the dates in number (2) above.¹²

What Are the Four Potential Determinations the BCIS May Reach, And How Do They Impact Status?

- (1) If the determination is: there was no fraud, the jobs were created, and the alien substantially complied with the capital investment requirement, then the conditions are to be removed.¹³

⁵ *Id.* at §11031(b)(2)(B).

⁶ *Id.*

⁷ *Id.* at §11031(b)(2)(C).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at §11031(c)(1)(A)(i).

¹¹ *Id.* at §11031(c)(1)(A)(ii), §11031(c)(1)(D)

¹² *Id.* at §11031(c)(1)(A)(iii).

¹³ *Id.* at §11031(c)(1)(E).

- (2) If the determination is adverse on any of the items in (1) through (3), then notice to the alien and opportunity to rebut the adverse determination is required. If rebuttal is successful, the conditions are to be removed.¹⁴
- (3) If the determination after rebuttal is: there was fraud, conditional status is to be terminated (subject to the right for appeal to the BIA and judicial review; conditional residence to continue during administrative or judicial appeal).¹⁵
- (4) If the determination after rebuttal is: the jobs requirement was not met and/or the substantial compliance with capital investment requirement was not met, then the conditional residence is continued for a 2-year period.¹⁶ The petitioner gets a second chance to meet these requirements and must file within 90 days of the second anniversary of the continuance of conditional permanent residence.¹⁷

If No Fraud, But If Determined Not Yet Eligible for Removal of Conditions, Conditional Residence Is Extended for Additional Two-Year Period

- (1) The petition for removal of conditions seeking a second determination must be made within 90 days before second anniversary of the continuation of conditional residence, except for good cause and extraordinary circumstances.¹⁸
- (2) The alien must submit a new petition for removal of conditions and state the facts and information required under statute relating to removal of conditions relating to any commercial enterprise which the alien wants to have considered under the second determination on removal of conditions. This is regardless of when the enterprise was created, whether it is a limited partnership, and whether the alien entered after its formation.¹⁹
- (3) When making the second determination with respect to removing conditions, the BCIS must consider any capital investment made by the alien in a commercial enterprise.²⁰ This includes limited partnerships, enterprises where the alien invested after its formation, enterprises which are different from those considered during the initial reopening of the petition to remove conditions, and enterprises wherein the investment was made either *before or after* the determination made during the initial reopening of the petition to remove conditions.²¹

¹⁴ *Id.* at §11031(c)(1)(F)(i).

¹⁵ *Id.* at §11031(c)(1)(F)(iii), §11031(c)(1)(F)(iv).

¹⁶ *Id.* at §11031(c)(1)(F)(ii).

¹⁷ *Id.* at §11031(c)(2)(B), §11031(c)(2)(C).

¹⁸ *Id.* at §11031(c)(2)(C).

¹⁹ *Id.*

²⁰ *Id.* at §11031(c)(2)(A).

²¹ *Id.*

- (5) Within 90 days of the filing of the new petition to remove conditions, the BCIS shall determine **whether**:²²
- a. The petition contains any material misrepresentation with respect to any enterprise included in the petition;²³
 - b. All such enterprises, considered together, create the 10 full-time jobs, and those jobs exist on the date the determination is made;²⁴
 - i. But this only applies if the adverse determination was based on failure to meet the jobs requirement.²⁵
 - ii. Regional Center and troubled businesses count in making the determination.²⁶
 - c. Considering all such enterprises together, the alien is in substantial compliance with the capital investment requirement on the date the determination is made.²⁷
 - i. But this only applies if the adverse determination was based on failure to meet the capital investment requirement.²⁸

What Are the Three Potential BCIS Determinations Regarding the Second Petition to Remove Conditions?

- (1) If the determination is: there was no fraud, the jobs were created, and the alien substantially complied with the capital investment requirement, the conditions are to be removed.²⁹
- (2) If the determination is adverse with respect to any of the requirements, the alien must be notified and given the opportunity to rebut the adverse findings.³⁰ If the rebuttal is successful, the conditions are to be removed.³¹
- (3) If the rebuttal is not successful as to any one or more of the requirements, the alien is to be notified and status terminated, subject to review of such determination in removal proceedings.³²

²² *Id.* at §11031(c)(2)(E).

²³ *Id.* at §11031(c)(2)(E)(i).

²⁴ *Id.* at §11031(c)(2)(E)(ii).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at §11031(c)(2)(E)(iii).

²⁸ *Id.*

²⁹ *Id.* at §11031(c)(2)(F).

³⁰ *Id.* at §11031(c)(2)(G)(i).

³¹ *Id.*

What is the Consequence for Failure to file I-829?

If the alien fails to file a petition to remove conditions, permanent residence is terminated. In subsequent removal proceedings, the burden is on the alien to prove all elements for removal of conditions.

No Age Out Concerns

Persons who were a “child” on the date the petition to remove conditions was filed retain their “child” status regardless of subsequently turning 21 or marrying.³³

II.

Process for Those with I-526 Approvals, but Who Were Never Admitted to Conditional Permanent Resident Status in the United States (Either Adjustment Application Was Never Acted on or Petitioner Is Outside the United States)

Who Is Eligible for Automatic Approval of Adjustment Application or Immigrant Visa Application Based on New Amendments?

Persons with I-526 approvals between January 1, 1995 and August 31, 1998 and who applied for but never received conditional permanent resident status are to have their Adjustment of Status or Applications for Immigrant Visas approved, so long as they are not otherwise inadmissible.³⁴ (This was to have occurred no more than 180 days after enactment of the amendments on November 2, 2002.)³⁵

What if Your Client’s I-526 Has Been Revoked?

Persons whose I-526 was approved but revoked for failure to meet the requirements under INA 203(b)(5) are to have such revocations disregarded for purposes of approving the Adjustment Application or Immigrant Visa Application.³⁶

What if the Adjustment Application or Immigrant Visa Application Is No Longer Pending?

For purposes of granting the conditional permanent resident status, the fact that an Adjustment Application or Immigrant Visa Application is not pending must be disregarded and the application deemed reopened if either of the following caused the application not to be pending:³⁷

- (1) Determination that the alien failed to meet the requirements under INA 203(b)(5)(A)(ii) with respect to capital investment;³⁸ or

³² *Id.* at §11031(c)(2)(G)(ii).

³³ *Id.* at §11031(e).

³⁴ *Id.* §11032(b).

³⁵ *Id.* §11032(a).

³⁶ *Id.* §11032(c)(1).

³⁷ *Id.* §11032(c)(2)(A).

³⁸ *Id.*

- (2) The alien departed without Advance Parole.³⁹

What if Your Client Is Already Abroad?

Adjustment Applicants, if now outside the United States, are to be paroled into the United States in order to obtain adjustment of status.⁴⁰

Which Enterprises & Investments May Be Considered in Petition for Removal of Conditions?

The petition to remove conditions may contain the facts and information required to remove conditions with respect to *any* commercial enterprise in the United States in which the alien has made a capital investment at *any* time.⁴¹ This is to include limited partnerships, regardless of whether the alien entered the enterprise after its formation.⁴²

In Order to Obtain Removal of Conditions, the BCIS Must Agree That:

- (1) The petition contains no misrepresentations with respect to any enterprise included in the petition;⁴³
- (2) All such enterprises, considered together, create the 10 full-time jobs, and those jobs exist or existed on either of the following dates:⁴⁴
 - a. The date on which the Adjustment Application or Immigrant Visa Application was filed; **OR**
 - b. The date on which the determination with respect to the petition to remove conditions is made.⁴⁵
- (3) Considering the alien's investments in all such enterprises, whether the alien was in substantial compliance with the capital investment requirement on one or both of the dates in number (2) above.⁴⁶

No Age-Out Concerns

Persons who were a "child" on the date the Adjustment Application or Immigrant Visa Application was filed retain their "child" status regardless of subsequently turning 21 or marrying.⁴⁷

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³⁹ *Id.*

⁴⁰ *Id.* §11032(c)(2)(B).

⁴¹ *Id.* §11032(e)(1).

⁴² *Id.*

⁴³ *Id.* §11032(e)(3)(A).

⁴⁴ *Id.* §11032(e)(3)(B).

⁴⁵ *Id.* §11032(e)(3).

⁴⁶ *Id.* §11032(e)(3)(C).

⁴⁷ *Id.* §11032(f).

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