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December Visa Bulletin Exposes a Tempting Option for China-Born EB-5 Investors

Authors: Robert C. Divine

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With regional center legislation expired for now, and almost all investors born in Mainland China having used a regional center sponsorship, there should be nearly zero Chinese investors waiting for an EB-5 visa number and qualified to proceed. Therefore, the State Department's Visa Bulletin for December 2021 has finally changed the non-regional center category for investors born in mainland China from a cut-off date of November 22, 2015 to "current." That looks tempting for new Chinese investors who previously have faced visa number waits of ten years or more and would like to take advantage of the current \$500,000 minimum investment level. But if and when Congress renews the regional center program, any investors who invest now will find themselves back behind all of the regional center sponsored investors already in the queue. Given the complexity of the legislative outlook, this presents an interesting gamble.

More than 95 percent of EB-5 investors have tended to use the regional center program, which has allowed developers to obtain the capital through loan from a special purpose entity (avoiding dilutive equity investment) and has allowed investors to take credit for direct and indirect jobs created through the impacts of construction expenditure of the entire capital stack and of revenues from operations toward the ten new jobs per investor requirement. This has tended to provide more "immigration safety" than most EB-5 investors have preferred over return on or even safety of return of investment. The popularity of the regional center opportunities developed over the last decade led investors born in mainland China to participate in such numbers that, given the "per country limit" on allocation of annual visa numbers under U.S. law, they came to be waiting behind each other for visas for periods estimated for new investors to exceed ten years.

In November 2019, new USCIS regulations took effect raising the minimum amount of investment from \$500,000 in "Targeted Employment Areas" to \$900,000. Between the already long expected wait for an immigration benefit from investment, the deluge of investors who jumped into the program leading up to the 2019 effective date of the advertised price increase, and the new higher minimum amount, the level of EB-5 investment from China and elsewhere fell off precipitously in 2021.

Then two unexpected events coincided: (1) the regional center legislation, always temporary but seemingly destined for continual renewal, expired on June 30, 2021 with a legislative stalemate; and (2) a judge declared the 2019 regulations invalid. Suddenly, the only game remaining has been "direct" investment arrangements crediting investors only with the full-time operational jobs of the very entity they invest in, which reduces immigration safety given the difficulty of creating ten such jobs per EB-5 investor, but investors can place as little as \$500,000 at risk again. This opportunity has awakened interest from investors who have limited available funds or who prefer to set up their own business anyway. EB-5 capital has started to flow into businesses that tend to create more jobs per capital dollar, such as restaurants, other franchises, and other less real estate-oriented ventures.

For investors born in mainland China, the calculation is complicated by the lengthy expected wait for a visa number. Yet, if the regional center legislation does not get renewed, all of the investors who used regional center sponsorship will end up losing their immigration benefit and falling out of the visa number queue. The

State Department's December 2021 Visa Bulletin makes that clear by re-setting the cut-off date for mainland China-born investors from 2015 to "current," which means that as soon as one receives I-526 petition approval he could proceed to visa issuance and admission to the U.S.

It seems likely that within the next six months Congress will pass legislation either renewing the EB-5 program altogether (with changes including to increase the investment amount) or at least "grandfathering" investors who already filed an I-526 petition. Importantly, the December 2021 Visa Bulletin also states, "If there is legislative action extending this category for December, the final action dates would immediately become "Current" for December for all countries except China-mainland born I5 and R5, which would be subject to a November 22, 2015 final action date." That means that if the regional center law gets renewed or existing investors are grandfathered, suddenly all of the tens of thousands of Chinese investors in the visa number queue become restored and are ahead of all of the "direct" investors who might have piled into the process after June 30, 2021.

There is a possibility that the regional center program will not get renewed anytime soon and that USCIS will decide that it must deny all pending petitions and revoke all approved petitions filed under the regional center program. There is also a slight possibility that new direct investors could get speedy adjudication (given the relatively small numbers who have filed) and get through the visa issuance process before Congress gets around to legislative renewal of the regional center program. These prospects provide temptation to Chinese investors waiting on the sidelines. The risk probably is best taken by families for whom \$500,000 is not a momentous sacrifice. If you have any questions, please contact Robert Divine or any member of Baker Donelson's [Immigration Team](#).