

## EB-5 Industry Eyes Legislative Fixes To USCIS Struggles

A 2022 revamp brought the EB-5 investment visa program a boost in interest and respectability, but as frustrations continue with [U.S. Citizenship and Immigration Services](#), industry players are hoping new legislation is a better alternative than litigation.



On March 15, 2022, President Joe Biden signed the Reform and Integrity Act as part of the Consolidated Appropriations Act. (Photo by Beata Zawrzel/NurPhoto via AP)

Despite much commiserating over the inability to get federal officials on the phone, a positive vibe ran through the Advanced EB-5 Industry Conference, co-hosted by JTC Group and [Saul Ewing LLP](#) last week in Miami. During the daylong event, attorneys, investors, regional center operators and other professionals shared thoughts, tips and forecasts on the program, which reserves green cards for foreign investors in U.S. projects or companies that create at least 10 jobs.

"I think all in all it's been a great success. If you compare where we are today to the program eight years ago, it was the Wild West," said Daniel J. Topple, a senior vice president in the private and commercial banking division

at [Customers Bank](#). "Now, with all of the regulations and requirements that USCIS has put out there ... most participants in the program are really in it for the long haul."

## **A More Robust Program**

The clear consensus among speakers was that reauthorization of the program through 2022's EB-5 Reform and Integrity Act has produced a more robust industry and achieved many of Congress' goals, including better due diligence, recordkeeping and transparency for investors, as well as a more national impact, particularly in rural areas.

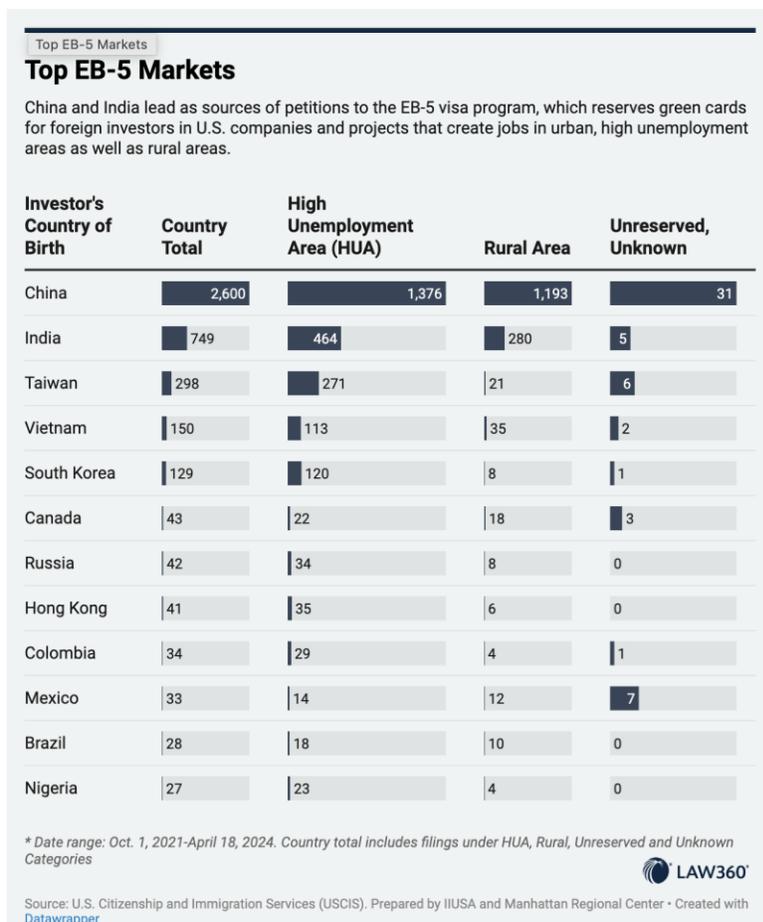
"I think we've seen a lot of people who were not in it for the long haul step aside, and you've seen those who've been in it for years move to make it institutional, really step up and do some wonderful projects and put out to the market that there's a best practice here and a way to do things that's going to give EB-5 the good name that it deserves," said Jill Jones, general counsel of Institutional Client Services USA for JTC Group, which provides independent fund administrator services to EB-5 regional centers, one of the post-RIA requirements.

The increase in rural EB-5 projects, which the RIA achieved by setting aside a certain percentage of visas for those projects and offering expedited processing, has been one of the most notable recent developments. But many speakers also said they have observed an overall improvement in the quality and variety of projects in urban, high unemployment areas that have been the more traditional focus.

"Just once you start expanding your thinking about where projects can be or should be, you can change the mindset about what's possible," said Lulu Gordon, general counsel of EB5 Capital.

"I think what this has done is allow for an investor to be able to identify a type of project, to decide what's important for them and their family, how quickly they want to move, and then look at the underlying strengths of the projects that are available to them, which is just way more diverse than they've been before," said Tom Martin, chief operating officer of EB5 United regional centers. "It used to be hospitality was the most common type of project in the industry, and I'd say that's shifted quite a bit."

The origin of petitions has also evolved. China and India have maintained their positions as the primary sources of petitions and continue to see growth, but China's share is down from about 85% to below 60%. Speakers noted increased activity from a variety of countries, including Vietnam, South Korea, Brazil, Colombia, Bolivia and even Canada, where tax hikes have increased the cost of living.



"It's really become a more global program, which I think is great," Consumer Bank's Toppole said. "I think the RIA has influenced that, because as people are out there marketing their projects, there is a certain level of certainty behind the project, a certain level of comfort, because they know that there is more regulation behind it."

Interest in coming to the U.S. has also remained strong.

**"As much as we, let's say we have our issues politically in our country, we're still one of the most popular countries in the world to come to,"**

said **Ronnie Fieldstone**, partner at **Saul Ewing**.

## **A Different Role**

All of these changes have resulted in the EB-5 program finding its position and reputation in the real estate financing world shifting, too.

"Where pre-RIA, we might have seen projects that were nearly 100% EB-5 money ... now, we see that be a smaller piece," said JTC's Jones. "And we're seeing the investors demanding that developers have skin in the game. It gives them a comfort level in the projects they're choosing ... and it makes EB-5 still an important piece and an alternative funding source that's valuable, but it's not the main one."

Donald Braun, president at developer Hall Group, who oversees the company's structured finance operations, backed up that view.

"Developers and real estate providers are always going to seek out and find whatever the most efficient capital source is at any time," he said. "I think the thing about EB-5, though, is there is way more discipline in the post-RIA world, regarding how the deals are being structured, where they sit in the capital stack than pre-RIA."

As a source of capital, EB-5 investment does take more time to fundraise, so it's not the right fit for every project. But the recent tight capital environment has helped attract more developers, said Peter Calabrese, CEO for CanAm Investor Services LLC.

"It's still not going to work for everybody, but much higher-end borrowers have come to realize that this is a viable opportunity to get some alternative financing," he said. "There has definitely been curiosity, and it's brought a higher end of developer into the market, which is certainly a good thing. And I don't think that is something that should completely go away if the interest rate environment starts to go down."

## **Issues with USCIS**

One issue that does not appear to have improved much in the past year is communication between the industry and regulators at USCIS, which was not represented at the conference.

**Saul Ewing's Fieldstone compared USCIS to a black hole and said it seems the agency is confused and doesn't know what is really going on in the industry.**

"They don't," responded EB5 Capital's Gordon, who also serves as co-chair of the public policy committee for Invest in the USA, or IIUSA, the national nonprofit trade association for the regional center program. IIUSA has often taken on the role of suing the government when issues have arisen.

"That's the least effective method of creating policies, but sometimes necessary," Gordon said.

In several instances, USCIS has chosen to terminate regional centers or deny petitions over missed fees or appointments without allowing a chance to cure, even though it hadn't interpreted the law that way before, conference participants said.

But there was also talk of shifting away from the courtroom, in part as acknowledgment that the agency's processing times have generally been much better after the RIA.

"At a point, [litigation] was the only way to get approvals. But right now, I don't see the case being that," Eren Cicekdagi, managing director of the [Golden Gate Global EB-5](#) investment fund, said during a panel focused on litigation issues.

"This constant being at odds with the agency is taxing," Cicekdagi added.

### **Looking to Legislation**

Many in the industry are also looking to legislation as an alternative to more litigation.

IIUSA has helped lobby in Congress for H.R. 7220, the EB-5 Regional Center Program Advisory Committee Authorization Act, which would create an advisory committee to consult with the director of USCIS on issues with the EB-5 program and make recommendations on improvements.

"It's designed to require USCIS to talk to us, so we don't always have to sue

them," said Bill Gresser, president of both IIUSA and EB-5 New York State LLC. "The objective is to make the program work better to make it easier for them to make it easier for you."

Gresser said the IIUSA has several House members on board, including co-sponsors Reps. Greg Stanton, D-Ariz.; Brian Fitzpatrick, R-Pa.; Lance Gooden, R-Texas; and Dwight Evans, D-Pa. It's also working on building support in the Senate.

The committee would have up to 35 members, drawing from leaders of regional centers across the country as well as local officials, including mayors, and state and county economic development officials, according to IIUSA.

Industry members are also supporting the bipartisan immigration reform legislation known as the Dignidad (Dignity) Act, which features several provisions that would affect the EB-5 program. Bill sponsor Rep. Maria Elvira Salazar, R-Fla., whose district includes downtown Miami, attended the conference to promote the measure.

Under the bill, a cap on visa backlogs would automatically grant a green card to a petitioner who has been in the program and awaiting adjudication for 10 years. An increase in the cap on per-country visas from 7% to 15% would make more visas available for EB-5 investors and help ensure that one country does not dominate the program. Visas for dependent children included in EB-5 petitions would no longer be counted, freeing up those visas to go to additional investors, and families would no longer have to worry about their dependent children "aging out" of that eligibility during the review process.

**Saul Ewing partner Rohit Kapuria summed up the current state of the EB-5 program: "On the one hand, yes, we get a lot of controversy from USCIS ... but at the same time, we are seeing more speed, rural [projects] has been proven, it's a proven concept, you've seen faster adjudication on our petitions, so give credit there. Does it mean the work is finished? No, there still is a lot to do."**