

## Kicking the can on EB-5

Congress holds off on tightening rules for controversial visa program

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By C. J. Hughes

**N**ew York developers who rely on the widely popular EB-5 visa program to fund their projects are likely breathing a collective sigh of relief as October kicks off.

Although a key provision of the federal program expired at the end of last month, Congress put on hold tough new standards that could make it more difficult to qualify for overseas capital through the program, which trades visas for investments that create jobs.

Federal lawmakers instead decided to kick the can down the road and revisit the legislation in the next few months, but keep the program intact in the meantime.

Few analysts expect the status quo to be preserved for long.

"It may be business as usual for now, but changes are definitely coming down the pike," said Kate Kalmykov, an attorney with Greenberg Traurig who represents developers who use the EB-5 program, including the Related Companies.

### New York City could lose out

One possible change could be in where foreign investment is directed.

In a bid to push more EB-5 investments toward rural areas and away from cities like New York where they have clustered recently, Democratic Sen. Pat Leahy of Vermont and Republican Sen. Charles Grassley of Iowa proposed tightening the rules that govern the EB-5 program.

Under current law, investors in the program are required to create 10 jobs within two years of applying for a visa, in exchange for a loan that is paid back at a low interest rate. Most investors, who are predominantly from China, are less concerned about their payout on the loan, however, than they are about getting visas and eventually permanent resident status, more commonly called a green card.

Since the program began in 1990, the investment required has been \$500,000, if the money is spent on a project that's located in a neighborhood called a "Targeted Employment Area," which has an unemployment rate that is 150 percent of the national average.

But state officials often stretch the boundaries of those areas to lump in impoverished communities with wealthy ones, effectively boosting the unemployment rate. To make Related Company's Hudson Yards project eligible for the program, for example, state officials cobbled together census tracts along the Hudson River, from West Chelsea north to Harlem, which pushed the average unemployment in the new district higher.

In fact, according to a recent report in the Wall Street Journal, at least 80 percent of EB-5 money is flowing to projects that wouldn't qualify without gerrymandering districts.



The Leahy-Grassley bill would do away with that practice, and require just a single census tract be used to identify a targeted employment area.

That would be a huge blow to many New York developers, analysts said, and to projects they aim to build in affluent neighborhoods like Tribeca, West Chelsea and the Upper East Side.

Two other bills offered in the House this year, from Rep. Zoe Lofgren of California and Rep. Jared Polis of Colorado, both Democrats, would preserve the status quo and allow contiguous tracts to be combined, as states see fit. None of the bills have yet moved through committee, but many observers think the Leahy-Grassley measure is more likely to see action.

For projects that are in targeted employment areas, the Leahy-Grassley bill would also raise the minimum investment amount to \$800,000, arguably to keep up with inflation, since the dollar amounts have not changed in the decades since the EB-5 law was created.

But what really makes some New York developers anxious is what could happen with projects in areas with lower unemployment rates that can no longer be gerrymandered. Right now, the investment threshold in those locations is \$1 million. That would climb 20 percent, to \$1.2 million, under the Leahy-Grassley proposal.

In other words, the price of investing in many New York real estate projects in order to obtain a visa could soar to \$1.2 million from \$500,000, a huge swing that is sure to make some foreign investors rethink their visa needs.

Eric Orenstein, an attorney with the firm Rosenberg and Estis who represents regional centers, which act as intermediaries between developers and investors, said he's hopeful that there will still be enough demand out there that any change in the price tag won't hurt business. He noted that higher thresholds also mean it would require fewer

investors to hit the same dollar amounts. “It won’t really change the equation,” Orenstein said.

### Grandfathering in applicants

What does worry Orenstein is the timing of any changes to the law, he said. Among his concerns: Will an immigrant investor who has applied for a visa and spent months waiting for a background check be required to pay the old amount or the new amount?

He added that if handled sloppily by Capitol Hill, Chinese investors could actually wind up with a choice between low-cost visas and more-expensive ones. If enough pick the cheaper option, pricier developments could lose their financing.

“The snag is, what will be grandfathered?” Orenstein said. “It could create a lot of confusion in the marketplace, which is not good for anybody.”

As it is, sources say, a flood of applications are now pouring into the United States Citizenship and Immigration Services, the federal agency that regulates visas, before any changes to the law are made.

Instead of a single-census-tract solution, many New York developers prefer a standard that factors in where workers live. The same people who work, say, in West Chelsea, at the Hudson Yards development, may live in an impoverished part of Brooklyn like East New York. So the spirit of the EB-5 law — to create jobs for people who need them — would be honored, Kalmykov said.

If some provision like that is not made, the Leahy-Grassley bill “would have a very adverse impact if implemented as drafted,” she said.

For its part, the Real Estate Board of New York, which is closely monitoring the issue, says that it supports the reauthorization of the program to protect against fraud, but “opposes changes that would disadvantage urban areas, and we are working to ensure that whatever program modifications do take place are phased in reasonably,” John Banks, the group’s president, said in a statement.

### Job creation monitoring

Other changes proposed by Sens. Leahy and Grassley are less controversial in the New York real estate industry, like making the jobs requirement slightly more rigid.

Presently, the 10 required jobs can come in all shapes and sizes. In fact, a general formula usually determines how many jobs are created at certain levels of development spending, according to Gary Friedland, a New York University lecturer who has extensively researched the EB-5 program.

The Senate bill would require more. A project could create only 9 indirect jobs — for instance, in a store that opens in the retail base of a new condo building. One job would be required in which the person is employed directly by the landlord, like a security guard, or more commonly, a construction worker; in the last few years, after a provision of the law was loosened, long-term construction jobs began to be counted as direct jobs. But if the project takes less than two years to build, construction jobs are not counted.

That would seem easy to satisfy.

Take, for instance, 101 Tribeca, a 63-story, 130-unit condo tower at 101 Murray Street being built by Fisher Brothers and Witkoff Group. Its \$735 million development cost is being defrayed by \$175 million from EB-5 funds, according to “A

Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects,” published in May by Friedland and NYU professor Jeanne Calderon.

The report says that the site must generate 3,500 EB-5 jobs, though with 4,548 overall jobs, including indirect jobs, expected to result from the project, it should easily hit its target.

In terms of job creation, a developer usually makes an effort to ensure there are about 20 percent more jobs than may be required, just in case anything goes wrong and positions are eliminated, Friedland said. Falling short could lead to investors not getting their visas.

Other major EB-5-funded projects under development include Eos, a 375-unit rental tower from the Durst Organization at 855 Avenue of the Americas, near Herald Square at West 31st Street. It raised \$80 million in EB-5 funds, toward its \$423 million cost, according to Friedland’s report.

There’s also the Bryant, a 33-story condo-hotel from HFZ Capital Group with 57 apartments and 230 hotel rooms at 16 West 40th Street in Midtown, with \$53 million in EB-5 funds out of \$253 million total, the report says. And the Charles, a condo with 28 full-floor units at 1355 First Avenue, on the Upper East Side, from Bluerock Real Estate and the Victor Group, with \$22 million out of \$157 million.

But Related is by far the largest recipient of EB-5 money in the city, with \$1.2 billion so far for its Hudson Yards mixed-use project on the far West Side, according to the Journal report. More broadly, Related controls one-third of the EB-5 market nationwide, The Real Deal reported in June.

Overall, more than \$3.7 billion in EB-5 money has flowed to several dozen New York City projects over the past several years, a TRD analysis found.

The Leahy-Grassley bill, for all its proposed changes, has other features that New York developers embrace, like an effort to clamp down on regional centers, the for-profit bank-like intermediary organizations that bundle equity payments from overseas, then lend the money to developers at about a 5 percent interest rate, a much lower rate than on a typical development loan. The legislation creating the regional centers is what expired on Sept. 30.

Existing law required these centers pay a one-time launch fee of about \$6,000; that amount would swell to \$20,000 and become an annual fee under the bill, which would also subject the centers, about 60 of which are in New York City, to more oversight.

It’s not entirely clear if changes to the law would hurt the B-5 market in New York. However, if the thresholds change and investors seek projects outside of New York in order to obtain visas at a lower cost, that could have a negative impact on the regional centers here. It is not certain that every center would survive, Friedland said.

Other proposed changes in the EB-5 law seem less controversial. The United States Citizenship and Immigration Services, the oversight body, would have more control over the process, which would depend less on self-reporting and more on documentation turned over to the Securities and Exchange Commission, according to the Leahy-Grassley bill. “It will prevent bad actors from operating in the system,” Kalmykov said.

*Editor’s note: The text regarding Friedland’s view on the potential impact on regional centers from changes in the EB-5 law has been clarified.*