

# PUBLICATION

---

## Court May Invalidate 2019 EB-5 Regulations While Regional Center Legislative Expiration Looms

Authors: Robert C. Divine

May 14, 2021

**A magistrate judge in federal court in California seems likely soon to issue an order invalidating the 2019 EB-5 regulations despite current DHS Secretary Mayorkas' recent ratification of same. The probable results: (1) immediate stagnation of EB-5 investments while the dust settles on court cases and pending legislative process, even though proceeding with existing plans to invest might be wise before June 30; and (2) a scramble by project developers to prepare offerings that could take advantage of a narrow window of opportunity to take in investors at the \$500,000 level in a wider range of locations.**

In late 2019, the U.S. Citizenship and Immigration Services (USCIS) finalized regulations exercising its legislative authority to increase the minimum EB-5 investment amount to \$900,000 from \$500,000 in "targeted investment areas." The regulations also tightened economic methodology to narrow the places that could claim high unemployment justifying the \$900,000 investment instead of the new "normal" investment of \$1.5 million. A regional center has challenged the regulations on several grounds. According to reports [here](#) and [here](#), the magistrate judge to whom the case was assigned indicated in a recent hearing that she is likely to rule the regulations invalid on the basis that the officials in the Department of Homeland Security who issued them were not properly appointed under the Succession Act. The USCIS/Department of Justice would seem likely to appeal an invalidation to the Court of Appeals for the Ninth Circuit, and maybe even on to the Supreme Court, seeking a stay of the invalidation order in the meantime. During that time, USCIS might run a parallel "fix it" rulemaking process to get to the same result as the 2019 regulations. So, nothing may change.

But there does seem to be at least the prospect of a window of time when investors could pour in with \$500,000 investments and in areas with state designations of high unemployment areas under the old broader rules (but using the newest available data). Issuers may wish to "gear up" for this with fully documented projects and offerings.

To cut down on governance confusion, in most cases it would seem most prudent to establish a "new commercial enterprise" (NCE) and loan to the project separate from any NCE already offering \$900,000 investments in a project that qualifies under the 2019 regulations.

The most radical, seemingly temporary, game-changing opportunity would be for money center projects, currently inactive in EB-5 recruiting, to rake in a slew of \$500,000 investors during the crack in time between court invalidation (once an order became final through exhaustion of appeals) and the effective date of newly issued regulations (if any).

Meanwhile, the law enabling regional center projects at all expires June 30, and Congress could take one of three actions:

1. Nothing, which would prevent any new filings into regional center projects but leave open the prospect of \$900,000 or maybe \$500,000 "direct" EB-5 investments. These could even encompass pooled investments in money center areas, but with severe limits on how financing can be structured

and job credits taken. This would also cancel the immigration progress of up to 100,000 investors currently in the pipeline for initial adjudication or even waiting for a visa number, unless Congress enacted a special law to save them out of fairness to their prior commitments.

2. Extend the existing regional center law without any changes, as has happened many times, which would allow the judicial and regulatory scenarios to unfold as discussed above.
3. Extend the law with changes, which might include not only such "integrity measures" long championed by Senators Grassley and Leahy, but also changes to the statutory rules about the amounts and location of qualifying investments that would trump the old or new regulations.

The immediate result is likely to be stagnation of further investments at the \$900,000 level while prospective investors wait for dust to settle on the legislative front and on the judicial process that could yield an opportunity to invest suddenly at a much lower level and in a broader range of geographical areas. It seems unlikely that an opportunity to make and file based on \$500,000 investments actually will materialize. It seems unwise for investors in the process of investing now to hold off, because if Congress lets the regional center legislation die (itself an unlikely event), it probably would enact a law to protect those who invested and filed before June 30.

The development of EB-5 law and policy has had many twists and turns, but now the industry faces some radical shifts or crash landings – never dull!

If you have any questions, contact [Robert Divine](#) or any member of Baker Donelson's [Immigration Team](#).