

Kate Kalmykov: Hello, everyone, and welcome to the Immigration Insights Podcast presented to you by Greenberg Traurig. My name is Kate Kalmykov, and I co-chair the Global Immigration and Compliance Group. Today I am joined by my colleague, Jennifer Hermansky, [00:00:30] a shareholder in our Philadelphia office, and we are going to be talking about the latest updates in EB-5.

Hi, Jen. Thank you for joining us.

Jennifer Hermansky: Hi, everyone, and thank you, Kate. I am very excited to be back on the podcast.

Kate Kalmykov: And Jen is going to give us a lot of insights today into what's happening in EB-5. She currently chairs the AILA EB-5 committee and works directly with USCIS to liaise for information [00:01:00] on the latest updates on EB-5.

So Jen, we are in September of 2025, and we are a year and 14 days away from the grandfathering provisions expiring that were provided under the RIA to investors when it was introduced and passed in March of 2022 and implemented in May of 2022. Tell us a little bit [00:01:30] about what the grandfathering provisions are.

Jennifer Hermansky: That is correct. So because so many times in the past the EB-5 program when it was temporary and being renewed, sometimes in several month increments, sometimes in a year-long increment, when Congress was passing the EB-5 Reform and Integrity Act, they sought to make a longer term extension and to protect those investors [00:02:00] who are investing and filing their cases. And they sought to protect them from a future expiration of the program.

Because prior to 2022, sometimes there was a lot of confusion about what would happen to investors if they were partially through the process. If they didn't yet have their two-year Green Card at the time that the program expired, what would happen to them? Could they be issued an immigrant visa? Could their conditional [00:02:30] Green Card be approved?

So Congress sought to fix that in the RIA, and there is a provision that says if you make an investment and you file your I-526E petition prior to September 30th, 2026, that you are grandfathered and protected under the law. Meaning that even if our US Congress does not further extend EB-5 beyond [00:03:00] September 30th, 2027, the actual expiration date, then you can continue going through the process. You can still get your immigrant visa. You can still get your conditional Green Card. So this grandfathering provision protects people who actually are filed one year prior to the September 30th, 2027 expiration of the regional center program.

Kate Kalmykov: And I think we agree that we expect that over the course of the next [00:03:30] year we're going to see a rush for filings as people go to secure their spot under the current rules because they don't know what's ahead, what it's going to look like when it's renewed by Congress, but we know what the provisions are now.

So as part of that rush, and we've been through many rushes in EB-5 because the regional center program traditionally was a pilot program that was renewed every three years. And so we have been practicing for 20 years, we've [00:04:00] been through a number of rushes, and every time we get into a rush, we get clients that decide to file at the last minute, and they haven't had time to adequately prepare their source of funds, and they are urging their attorneys to submit a skeletal filing saying just get it in, just secure my place in line. And now we have seen pushback from the USCIS on those kinds of incomplete filings.

Now the legal standard is an application has to be approvable [00:04:30] when filed. So can you tell us what members on the AILA EB-5 committee are reporting and what you guys are seeing in addition to what we're experiencing in our practice?

Jennifer Hermansky: Yeah, so there have been some recent reports about USCIS sending notices of intent to deny where individuals have filed an I-526E petition where they may have only partially [00:05:00] funded their \$800,000 investment, meaning they have not transferred the full amount of the 800,000, and they submitted a filing with very little information about the source of funds or potentially did not submit information on when they would remit the full amount of the \$800,000.

So there is a concept when you are filing a case that you can be in the process [00:05:30] of investing. Meaning you might not have to have invested your full \$800,000 at the time you file.

Now, I think Kate and I would agree that you need to have made some investment towards your capital contribution. A lot of regional centers might make you pay the administrative fee upfront. But there has to be some investment made towards the capital contribution prior to filing, and people should be documenting the source [00:06:00] of funds for that initial contribution.

So you can be in the process of investing, but USCIS is asking, in some recent cases, for documents to show when the investor is required to remit the rest of the \$800,000 investment. So I think for people who are going to be investing over the course of the next year before the deadline, it's really important to plan in advance. We fully recognize [00:06:30] it's hard for some individuals to maybe monetize their assets and get cash available to make an investment. Perhaps you have to sell a property or do some other things and prepare a source of funds. So it definitely is still possible to do installment funding, but I think you have to do that in a correct manner so that your case is still approvable when it's originally filed.

And so there has to be something in the filing [00:07:00] with USCIS that shows when you're going to remit the second amount. We give some idea of what the source of funds will be for that second amount of funds that is going to be transferred later, and there must be something that binds the investor to

making an investment by that date. So whether that is a side letter with the regional center, which is an agreement that says you have to remit by this date or maybe the subscription [00:07:30] agreement deals with that, but in any event, something that shows you're going to be in the process of investing, and you're going to complete your investment.

Kate Kalmykov: I also would caution clients often it seems attractive I can invest not the full amount, I can hold onto my capital longer and make money on it. However, you're slowing down your case because if you're not investing the full amount, you're going to receive a request for evidence from USCIS for the information, Jen, you just exactly described, show us [00:08:00] where the rest of the source of funds is from and provide that documentation. So it's really a balance for a client whether they want to hold onto their capital longer, if they need to collect longer, if they're subject to currency restrictions, they can't transfer the full amount right away from their home country or they want their case processed faster with USCIS.

Now what happens post-RIA grandfathering? I think the answer is we don't know yet. Certainly [00:08:30] the RIA extends the EB-5 Regional Center Program to September 30th, 2027, so the program will be valid. But will there be changes for 526 investors? There very well may be, and we don't know what they are right now. We don't have indications yet from Congress about a legislative extension of the regional center program. And talk seems to have died down about the Gold Card that the administration was seeking to introduce [00:09:00] earlier this year.

Jennifer Hermansky: Kate, one interesting point that I think people aren't really talking about is that in this one-year timeframe in between September 30th, 2026 and September 30th, 2027 where we don't have any grandfathering, but technically people could file, in the middle of that time period, in January of 2027, the RIA gives the power to USCIS [00:09:30] to adjust the investment amount for inflation. Because believe it or not, 2027 will be five years already since the RIA was passed.

And so we know that the RIA allows USCIS to adjust for inflation that happened since 2022. So we do know that there will be some price adjustment in [00:10:00] that month of January 2027 by USCIS. I would be very surprised if they missed an opportunity to raise the investment amount through the inflation factor.

Kate Kalmykov: And that's a huge factor for investors to take into account. For 30 years, the program was 500,000 if you invest into a TEA. Then when the program was changed, it went up to 800,000, and that was the first adjustment for inflation that was introduced by Congress. [00:10:30] And yes, so we will definitely expect to see another one, and it gets more and more expensive. So if clients are interested in doing the EB-5, it's the relatively easiest way to self-sponsor for a Green Card compared to other categories where you either need an employer

sponsor or a family sponsor or a certain level of achievement to self sponsor yourself.

We may see an adjustment in the price, but in the interim, the USCIS and the administration are definitely keeping [00:11:00] us busy with the flurry of activity, changes, announcements that touch all facets of business immigration and regular immigration, but in particular EB-5. So we wanted to discuss those today, and I think one of the biggest focuses that this administration has is party membership in the Communist Party, and this is really a reflection of what they're doing politically.

But essentially in [00:11:30] the immigration context, they are basically saying in new guidance that if you have been a Party member in the last five years, you are not going to be eligible to process for a Green Card. And they are also reopening sources of funds, even where they were previously approved at the EB-5 stage, and now the investor and their family are in the US, living in conditional permanent residence status, and they go to file their 829, [00:12:00] and they're re-examining where did the investment money come from retroactively. Which is really shocking because it is a big issue, and they're denying cases that they had previously approved if the source of funds came from proceeds from a state-owned enterprise.

So Jen, let's talk about the issue of the Party membership, what we're seeing at the consulates versus USCIS, and what we're seeing at the source [00:12:30] of funds stage and the 829 stage.

Jennifer Hermansky: Yes. So for new investors, if we go stage by stage, for people who are at the I-526E stage where you're considering making an investment and you're preparing the source of funds and you're preparing for how you're going to make your investment, it's important to note that the USCIS is focused on funds that may have been [00:13:00] obtained through employment at various government entities that are connected with the Communist Party.

So for individuals who are nationals of Mainland China, nationals of Vietnam, we've seen many investors from those countries over the years. So for new investors at the I-526E stage where the investor or maybe one family member, if we have a husband and wife [00:13:30] and children, perhaps the husband worked at a state-owned enterprise in one of those countries or there is some prior military service, those are going to be looked at very carefully.

And we do know, through a number of requests for evidence or notices of intent to deny, that USCIS is focused on where employment income has come from one of those entities. They [00:14:00] are saying the investor cannot meet their burden of proof to show the lawful source of funds. So this is really important in the planning process for where are your investment monies come from.

Maybe there's another option. Maybe they can get a gift from another family member who had no connection to the Party and whose source of funds are different. So that would be something that investors [00:14:30] would need to plan to do because that is an area of focus for USCIS.

We also know that at the second stage of the process where an investor has an approved I-526E petition and the investor has moved on to process for an immigrant visa at a US consulate abroad, mainly in Guangzhou, in China, in Ho [00:15:00] Chi Minh City, Vietnam or other consulates around the world, it is a focus of questioning at the interviews to get the immigrant visa whether or not you've been a Communist Party member. And they are now asking people routinely, "Are you a Communist Party member now," which actually is a question on the form, so you have to answer that.

But interestingly [00:15:30] the form asks, "Are you currently a Party member?" But now the consulates are asking, "Have you been a member in the past five years," because you may be ineligible for the immigrant visa if you've been a party member for the past five years.

Kate Kalmykov: And I think it's important to point out here that many people join the Party because it's expected in the home country. They're not active, but it's a box that they chuck off. And [00:16:00] previously, the standard was we show that there was no meaningful membership and they're able to process. And now the change is if you've been a member, we don't care how involved you were, you may not be able to process.

Jennifer Hermansky: That is correct. On June 10th of 2025, the State Department updated its foreign affairs manual to say that whether or not your membership in the Communist [00:16:30] Party was meaningful, that question of meaningfulness is no longer part of the analysis to whether or not someone may be eligible for the visa.

So in the past, many individuals were able to get an exception for Party membership because they had to join because of their employment, and they wouldn't get opportunities at work or things like that unless they were a Party member. That exception [00:17:00] is not an option anymore. And so it is a very strict yes/no scenario at the consulate, "Have you been a member in the past five years?" If yes, then you might be denied. So this is a very good time when you're starting out to plan who should be the investor in the process. If one spouse was or is a Communist Party member, the other spouse should be the investor, [00:17:30] potentially.

And there is a waiver available for people where your spouse is a permanent resident, you can obtain, potentially, a visa waiver, a waiver for this Communist Party membership, and you might be able to join your family in the United States. We have to show things about the hardship that your family will experience if you [00:18:00] are separated. So this is very important to plan with your family and your lawyer in advance as to who should be the investor.

And finally I'll say about that, a lot of people are confused and they think that this line of questioning doesn't come up in the adjustment of status in the United States in the I-485 process, but that is not the case. The USCIS is going to look at the same factors, and the same [00:18:30] rules apply even if you're here in the United States filing the I-485.

Kate Kalmykov: It's interesting, before we close out this topic, but I just want to say where there reopening the source of funds, there's nothing that says in the statute or in the regulations that the funds cannot come from a state-owned enterprise.

When we do a source of funds analysis, we have to show that the funds come from a lawful source. [00:19:00] That is arguably not a source that should be considered unlawful. Sure we have a political issue right now and there's a matter of public policy, but we have definitions in the US federal code, in state laws of what constitutes unlawful funds, what constitutes criminal activity, and funds and proceeds coming from a state-owned enterprise do not fall under that definition.

So I [00:19:30] do think at some point we will see federal court litigation on this issue. I would love to be part of that because I feel strongly about it that the definition right now as being really stretched. But from a practical point of view, many people get tired. How much money do they want to throw at the process and to go to federal court and to be put into removal proceedings takes a huge emotional toll from a human standpoint, from a family standpoint.

Jennifer Hermansky: That's right. And it is [00:20:00] unfair for the government to have approved a source of funds at the I-526 stage many years ago and allowed individuals to become permanent residents only to eight or 10 years later decide at the I-829 stage that they believe the funds are now unlawful.

And the interesting part is that, to my knowledge, I don't believe that the USCIS has [00:20:30] come out and said explicitly that funds earned at a state-owned enterprise are unlawful. They take a lot of effort and time by trying to make an argument that the investor has not met their burden to show that it was lawful, which I think is maybe something different, maybe not so harsh of a finding. And maybe they're doing that to avoid litigation. We don't [00:21:00] know. But certainly it is political, and we think that this line of questioning will continue in the future.

So again, it's very important to plan the source of funds carefully with the lawyers to have an understanding of whether or not a case is approvable when it is being filed.

Kate Kalmykov: Okay, so let's talk about some good news. We've seen a big jump in processing times, particularly for cases [00:21:30] filed post-RIA. So the 526s are being adjudicated at a very quick pace compared to the adjudications that were taking place pre-RIA.

And 829s, Some of the older ones seem to be pending a long time, but new filings we've had approved in as little as several months. For the older filings, we have had success in filing mandamus actions, [00:22:00] which is a lawsuit in federal court to compel the government to adjudicate a long-delayed case. And I think we've really been pushing the envelope with what long-delayed is, and we have been met with success in the courts. The courts are much more sympathetic. They want to decision on these cases, and investors are getting relief that way. Likewise, we also represent many regional centers that have been getting their applications [00:22:30] for project approval approved quicker through the filing of a mandamus post-I-956 filing.

So with the filings going faster, one would think that we are inching closer to retrogression and visas being exhausted, but there seems to be somewhat of a disconnect between 526 approval and immigrant visa issuance. There is a lag [00:23:00] in immigrant visa issuance. We are seeing some posts just not calling anybody in for appointments at all. Abu Dhabi comes to mind where we have clients pending for years, and we are sending them, if they have a second residence or a second passport, to another country to process. But we are going to lose visa numbers again this year, which seems like such a shame.

So Jen, can you talk to us a little bit about that? And I know AILA has [00:23:30] been involved in trying to liaise with the government on this issue.

Jennifer Hermansky: Yes, so when the RIA was passed a few years ago, particularly for the set-aside visa categories, so the visas that are available for rural project applications, for high unemployment applications, as well as infrastructure applications, there are provisions in the law that say where those [00:24:00] visas or a portion of those visas go unused during the fiscal year, they will roll over to the next fiscal year to be used.

But after that second year, if they are not used, then they are lost to those categories. And there is a process where the State Department then shuffles around where the lost visas go. But they don't end up in the EB-5 category, which is unfortunate.

[00:24:30] So we know that the State Department, generally since the RIA has passed, has been slow to interview immigrant visa applicants, and they seem to be working through the older pre-RIA cases, and there's not many visas scheduled for the post-RIA cases. And we know that there has been some visa [00:25:00] waste that has been happening each year. And around June or July, AILA attempts to send communication to both USCIS as well as the State Department to identify those cases that can be issued visas so that the visas are not wasted by the end of the year.

However, I think this year we're coming to the end of our fiscal year, so we're already at September 16th, [00:25:30] as of the date of the taping. So we only have two weeks left to the fiscal year and then there's going to be new visa

numbers available. So again, we believe that there will be visa waste at the end of the year, which goes against the congressional intent in the RIA, and that is unfortunate.

And I think the reason why there hasn't been any announcement to say that there's going to be a visa backlog for people in maybe mainland [00:26:00] China or India, I think they have not needed to say that because the number of visas issued is still low just because they're not interviewing people.

So we're not sure what the motivation there is. If it is a staffing problem or if it is intentional, we do not know, but unfortunately, we think there will be more visa waste again this year. But the good news is that, again, people who are grandfathered [00:26:30] can continue each year to process for visas even beyond September 30th, 2027.

Kate Kalmykov: And the other piece of good news is that the RIA gave us concurrent filing, and so many clients are coming to the US whether as a business visa holder or a student or even as a tourist, their intent changes after 90 days in their filing for adjustment of status, whether it's post-526 [00:27:00] filing or concurrently. And those are being approved again relatively quickly.

We've also seen a spike in processing times for EADs and advanced parole. So people are getting the work authorization and the travel document within about four to six months.

Jennifer Hermansky: Yeah, I think that's right. And there are people who are here in the US and who are taking advantage of the concurrent filing, [00:27:30] and they're moving forward to get the EAD and the advanced parole so that they can work and travel while their applications are pending. And we're seeing many of those being filed.

And those individuals do have somewhat of an advantage because if there is a visa retrogression in the future, they will still be able to remain in the United States while their applications are pending. So they still will be able to live [00:28:00] and work here, travel internationally using the advanced parole and also maybe attend school or whatever their other plans are. So we're still seeing a lot of people taking that action to file those cases.

Kate Kalmykov: And by the way, if and when retrogression happens, more of a question of when, not if, and it's going to be for Chinese and India nationals, if you filed an adjustment of status, even if your Green Card [00:28:30] can't be approved, you continue to be eligible to renew your EAD and your advanced parole to remain in the United States for the pendency of your application regardless of how long it is, and the CSPA protects the child at the filing of the adjustment of status.

Jennifer Hermansky: Yes, that's correct. And right now, especially while the I-526E priority dates in the set-aside [00:29:00] categories remain with no backlog, they remain current

in the visa bulletin. So people are filing an I-485 application where they are eligible to and locking in the age of the child by filing the I-526E and the I-485 while cases are current under chart A.

We did have a change recently where USCIS previously [00:29:30] allowed a child's age to be locked in when the I-485 was filed under chart B of the visa bulletin. That's the dates of filing chart. And that was an effort by the prior administration to protect more children under the CSPA because where a backlog does develop, the chart B filings happen more quickly [00:30:00] than the final action dates under chart A. So it expanded protections for children.

The current administration has removed that rule, and in their policy manual now a child's age can only be locked in under chart A. But quite frankly, the State Department never changed the rule from the immigrant visa side. They always use chart A as the basis for locking in a child's age under the CSPA. So right now, [00:30:30] the two agencies are back to being aligned and locking in a child's age under chart A of the visa bulletin.

So again, this is another area for investors to talk with their lawyer about and their children's age and whether or not their child would be protected under the CSPA.

Kate Kalmykov:

Okay. Another new change that the administration has introduced is the travel ban. So this was introduced [00:31:00] as a Muslim ban under the first Trump administration. It was struck down. And now it was introduced simply as a travel ban against certain countries that are either state sponsors of terrorism, Communist countries and countries where we fear that individuals coming from there are a national security threat. So this includes countries such as Iran, such as Yemen, and there's very limited exceptions that [00:31:30] the State Department just recently introduced to the travel ban.

So one exception was noted initially when it was passed that if you have dual citizenship with a country that is not banned, you can process for either an immigrant visa or a non-immigrant visa. The new factors I think really want to focus on national interest, not on hardship and on [00:32:00] certain minorities. So Jen, do you want to expound on that?

Jennifer Hermansky:

Yes. So unfortunately for investors coming from the 12 countries with the full ban, there's not many exceptions at all for individuals to get even the EB-5 immigrant visa. And those countries would be Afghanistan, Burma, Chad, Republic of Congo, [00:32:30] Equatorial Guinea, Eritrea, Haiti, Iran, Libya, Somalia, Sudan, and Yemen. So for those individuals, there's going to be limited opportunity if you don't already have an EB-5 immigrant visa issued to you. As of June 9th when this policy went into effect, there's not much that can be done.

For those individuals that already had [00:33:00] the EB-5 visa issued to them, then they're free to travel to the US on it and enter the US. And of course, it does not affect permanent residents who already received their conditional residency prior to this going into effect.

And some guidance came out a little bit more recently about what exceptions [00:33:30] might apply to individuals. And the most common one that makes sense with the EB-5 category is the NIE waivers, so waivers that are in the national interest.

So what would those be? So there's not really a lot of guidance of what would qualify in the national interest, but the State Department has said that [00:34:00] this is a high standard to meet. And the perspective of this waiver is from an America-first perspective. So the reason why the individual needs to come to the US has to be in the national interest.

And for most EB-5 investors, that would be probably arguments surrounding the type of project that you've invested in. They have said that routine travel, including [00:34:30] routine business travel or employment or study in the United States, is not going to be considered to advancing a US national interest. So routine projects, routine real estate projects are probably not going to qualify for that.

However, perhaps there is a national interest component in some projects. Maybe in some rural projects [00:35:00] or some infrastructure projects might have a better argument for things that might be national security related. So critical infrastructure, advanced technology things, national security related investments are the types of things the State Department is focused on.

So there might not be that many arguments for individuals from these countries, but I think historically the countries that are impacted have not [00:35:30] sent many EB-5 investors to the US.

Kate Kalmykov:

With the exception of Iran. I think there has been a good number of investors from Iran, and there's a specific carve out for Iran in that guidance from the State Department. So if you are a religious minority, the high Christian, Jewish, you can apply for that exemption. If you are an ethnic minority, like an [inaudible 00:35:59], or others that are listed [00:36:00] there, you can also try to apply. Obviously, they're going to be looking at good faith in these types of applications and making sure that it's well documented.

Now to finalize our podcast today, I wanted to talk about an issue that we really see a lot of, and it again relates to travel. We have clients that often get the Green Card but they are not ready to relocate to the US. They spend significant time overseas, [00:36:30] including their home country, because maybe the children are still in school, not all of the family can move and primarily because of business interests. And many times they're leaving without securing

permission to remain abroad for an extended period of time that would preserve their Green Card, which is called the reentry permit.

Now there are certain residence requirements that have to be maintained [00:37:00] for lawful permanent residence status, and then separately we have requirements to apply for naturalization. So Jen, let's talk about reentry permits, residence requirements and SB-1 returning resident visas.

Jennifer Hermansky: So I think it is a common misconception, Kate, about how much time people need to be spending in the US. A lot of people, for some reason, believe that you can just make one [00:37:30] quick trip into the US every 180 days and then be preserving your permanent residence, but that's not actually the rule.

The rule is that once you become a permanent resident, the US government expects that your primary residence is in the United States and that you will be spending generally at least 180 days in the United States each year. So we tell clients that [00:38:00] they should be maintaining ties to the United States, have residence established here, whether it's a lease or a home, have assets in the United States and things like that. Ties are very important.

But in addition, physical presence actually really matters, and spending just a few weeks or a month or two in the United States each year is generally not sufficient to maintain permanent residence in the United States.

[00:38:30] So your Green Card can be taken away from you. The government determine that you have abandoned your permanent residence status. So in order to protect that, if you cannot spend cumulatively at least half the days in the US, it is best to file for and obtain the reentry permit, which is, think of it as advanced permission from the US government to spend a significant period of [00:39:00] time outside the US. So we explain to USCIS why the investor, or the family members, have to spend some time outside the US, and then the government grants them that permission to be away. And generally the reentry permits are valid for a period of up to two years, and they are able to be extended. So people should get this.

This administration is more aggressive at the border. So we have been hearing [00:39:30] some indications of permanent residents who return after extended absences abroad, and they are questioned aggressively by the office airport about whether or not they have abandoned their status. So the reentry permit takes away that questioning and that aggressiveness because you've been pre-approved to stay away. So that's very important.

And in no circumstance should an investor be outside [00:40:00] the United States for more than 365 days without coming back to the US. Being absent for more than one year is a trigger, in the government's perspective, that you have abandoned your permanent residence. And so it's not going to be out that long. You should definitely be obtaining a reentry permit in that scenario.

And an SB-1 visa, because Kate mentioned that also, that is [00:40:30] actually a travel document where somebody has been outside of the US for more than a year and they have no valid travel document. So maybe they were outside the US, and they have been outside for more than 365 days, they have lost their original I-829 receipt notice or something, and they don't have a travel document to come back to the US. You need to apply [00:41:00] at the consulate for a returning resident visa, and it is very difficult to obtain. It's one of the hardest types of applications to be approved.

So we always are encouraging permanent residents don't leave yourself in that scenario, get yourself a reentry permit, plan for your absences from the US, and that will make international travel back to the US just so much smoother.

Kate Kalmykov: I would also add to that in the current climate anyone [00:41:30] who's had any sort of criminal issue in the past, even if they have a valid travel document, even if they have lawful permanent residence status, should consult with immigration counsel prior to travel because they may have issues re-entering.

Okay, well we are going to continue to monitor what's happening in EP-5, the numerous updates that we're getting on an almost weekly basis from the government and continue to report [00:42:00] them on the Immigration Insights podcast. If anyone has any follow-up questions for us, please feel free to contact Jen or I, and our information will follow at the end.

Thank you so much, Jen, for joining me today.

Jennifer Hermansky: Thank you for having me.