Kate Kalmykov (00:12):

Hello, everyone, and welcome to the Immigration Insights Podcast, hosted by the Global Immigration and Compliance Group at Greenberg Traurig. My name is Kate Kalmykov and I am your host and I also co-chair the Global Immigration Group at Greenberg. I'm proud to be joined today by my colleague in our Philadelphia office who often appears on our podcast to discuss the latest topics in EB-5, Jennifer Hermansky. Hi Jen, how are you? Welcome back.

Jennifer Hermansky (00:43):

Thank you. Happy to be here and excited to talk today about our important deadline coming up.

Kate Kalmykov (00:49):

Let's talk about the EB-5 deadline of September 30th today, but let's also talk about an amazing set of wins that we have gotten at the AAO for partial investments. And let's start with 9/30. So what is the 9/30 grandfathering deadline that everyone is now rushing to get their EB-5 regional center applications in for?

Jennifer Hermansky (01:20):

Sure. So when Congress passed the EB-5 Reform and Integrity Act in April of 2022, they put some important deadlines into the law and one which is coming up on September 30th of 2026. So we commonly refer to this as the grandfathering deadline because the law says if you file your I-526E petition before September 30th, 2026, that you can continue in the immigration process regardless if the regional center program is further extended by Congress past 2027.

(02:00):

So the RIA also extended EB-5 for five years through September 30th, 2027, but the grandfathering deadline happens one year before the sunset, on September 30th, 2026. So even if Congress were to allow the EB-5 program to sunset in the future, investors who file the I-526E before September 30th, 2026 can always feel confident that they can get their I-526E approved, that they can move forward either here in the US to get the two-year green card through adjustment of status, or if they're abroad, they can continue applying for the immigrant visa at the US Consulate in their home country. And of course the I-829 petitions can still be filed and still be approved for the 10-year green card. So again, a very important deadline coming up for investors to feel confident that they are going to move forward through the immigration process regardless of any congressional action in the future.

Kate Kalmykov (03:13):

So let's talk about exactly what is grandfathered. Top question, price. So right now, if you are investing in a rural area, a high unemployment area, or into a government infrastructure project, the price is 800,000. If you are investing into what we call an unreserved category, then the price is 1,050,000. Okay?

Jennifer Hermansky (03:39):

Correct.

Kate Kalmykov (03:39):

After September 30th, will the price go up immediately?

Jennifer Hermansky (03:44):

No, it won't go up immediately because in the RIA it says that the USCIS should and must readjust for inflation every five years. And the first time that that is going to happen is actually in January of 2027. So there will still be a few months time where the investment amounts will be 800,000 or 1,050,000 leading up to January of 2027 when USCIS will calculate the inflation that happened since 2022.

Kate Kalmykov (04:23):

And what is, I think, on everybody's mind is how high can it go? What is going to be the adjustment? And I think the answer is we don't know exactly because we don't know what the data is going to look like on January 1st, 2027. But I think we can estimate that it'll be brought up for the reserved categories up to between 900 to 950,000. I think it's safe to assume we'll be somewhere in that range. So it is a significant increase in price that is expected to occur for EB-5 investors.

(05:00):

Now, price is one thing, but what else can change with grandfathering? What about TEA designations?

Jennifer Hermansky (05:10):

So in terms of the time period between September 30th, 2026 and September 30th, 2027, most of the program remains the same because we're still operating under the EB-5 Reform and Integrity Act that Congress passed in April of 2022. So that law again is requiring the USCIS to adjust the minimum investment amounts, but it's not changing the way that we designate a TEA. So generally, projects can still file an I-956F and seek a TEA designation for investors who might file after September 30th, 2026. Not everyone will meet this deadline. So investors who are investing after September 30th, 2026 and before September 30th, 2027, generally they'll have their price adjusted, but the law is remaining the same, although they're not grandfathered.

(06:19):

It is unusual for the government to try to impose new requirements after the fact on people that have already filed. So I don't know that they will experience a lot of changes in that regard, but it certainly will be more expensive for them to do and they won't have the protection if Congress lapses the EB-5 program after September 30th, 2027.

Kate Kalmykov (06:46):

And I think that one thing that is really on the mind of many investors is they do the EB-5 so that they and their children can derive the green card. And I think a lot of questions that we're getting at least in consultations and meeting with investors is can the CSPA protections that protect my child from aging out after I file if, say, they're 18 and they're 19 and a backlog develops in my category, which is something that investors from India, from China, because they have so many applicants, are afraid of that they may exhaust their quota number. So can CSPA protection lapse or change?

Jennifer Hermansky (07:33):

No. The CSPA is a completely different law. It's the Child Status Protection Act. It's been the law for many years now. And although we never got regulations by the government, we don't have a lot of examples about how it works other than what's in the USCIS policy manual. The CSPA is a separate law entirely and that's a permanent law. So subject to Congress changing the way that it works in the future, that's not going anywhere.

Kate Kalmykov (08:06):

Absolutely. We can see though the following changes, greater reporting requirements imposed on regional centers and projects. The entire crux of the RIA was to give investors more comfort in making the EB-5 investment, to give more transparency to the investment, and to really monitor how regional centers and project principles were administering the EB-5 projects and the use of investor funds. So certainly, I think we can see an increase in requirements related to integrity measures.

Jennifer Hermansky (08:47):

That's true. I mean, Congress can make changes. When they are extending the EB-5 law on or around September 30th of 2027, they can make changes at that time and it could be that they have more changes surrounding how they audit projects or audit regional centers. They could make further changes about how TEAs will be designated. They could take certain categories away or maybe add new preferred types of projects that they want investments to focus on.

(09:24):

So when Congress is going to extend the EB-5 program, at that time they can modify pretty much anything that they want. And it's important to recognize though that generally, they can't retroactively apply those changes to people that have already filed. So that's just a general legal principle that moving forward, if investors wait and they think about applying after the grandfathering deadline and they're waiting to see what Congress does, then they could be subject to those changes after Congress passes a new law.

Kate Kalmykov (10:04):

Absolutely. And I think one of the most common questions that we get is can they impose certain processing times on USCIS for different application types, especially if you're investing in, for example, a rural project which is supposed to receive priority processing? How come there's no set adjudication time?

(10:23):

And the answer is, of course, Congress can work that into the law. We have that in other immigration categories. And in factwe do under the old program application should be adjudicated in a certain period of time, which is 180 days. So that can definitely happen. And if it does happen, it could be very advantageous for investors who now have to resort to filing mandamus actions in federal district court and spending money and bringing the federal district courts into it because some applications take so long to be processed.

(11:00):

Now, in terms of getting your case in by 9/30, we are recording this on July 1st. It will probably be published next week after our 250th birthday of the United States. And that's not a lot of time to prepare an EB-5 case. It's totally doable, but it means that investors really have to get their source of funds documents in order. And the source of funds is how the government will verify if the funds come from a lawful source, it's their version of a KYC. They're reviewing it, they're using information from other government agencies to verify who the investor is, their background, and the information presented to them. They have AI tools now that they're using to verify the information presented against other government agency databases, but also international government agency databases, as well as public information. So for example, if your earnings come from a specific business, they're going to use available data in places like Dun & Bradstreet and through [inaudible 00:12:10] to confirm whether what you are presenting is correct.

(12:13):

So it is very important to submit a very thorough case and one that is well documented. That's not always easy to do, particularly when the source of funds comes from a long time ago or there have been many transfers or it's coming to the US from multiple sources. So Jen, what are the recommendations we're giving to clients looking to file and initiate a case now?

Jennifer Hermansky (12:42):

Very important to get started as early as possible. So we're coming close to the deadline, as you stated. We only have July, August, and September, and we don't want to be filing anyone right at the end of September. The government sometimes will have a hard time receiving large number of cases in a timely manner that are coming in on or around the same date. And we don't want a case to be erroneously rejected by the USCIS and therefore miss the grandfathering deadline because it is very hard to change the date on a case that's been filed even if it was erroneously rejected by the government. So it's important to not wait until the last minute. You shouldn't be wishing to send your case overnight on September 29th. That's taking on a lot of risk there.

(13:34):

So be prepared and we need to be prepared to submit a lot of documents, like you said, in support of the petition. So I don't think it's going to be acceptable from the USCIS's viewpoint to file a case and just give them minimal information about the source of funds or minimal documents because you didn't have time to put it together. We call these sometimes skeletal filings where there's just a few pieces of information submitted because a deadline is coming up.

(14:11):

This USCIS is very strict about what they want to receive in the I-526E petition. Part of that stems from the actual RIA itself. And the RIA says that the investor should be submitting seven years of tax returns, submitting business registrations and other important business documents for any businesses that you own or that are a part of the source of funds. They also want to know that no one involved in the source of funds has any criminal or civil sanctions against them. So the statute itself lists out key documents that the immigration service thinks are very important to receive. And at a minimum, we need to be giving those to the USCIS in the petition.

(15:01):

And importantly, I know we're going to talk about doing sort of installment method of funding and whether or not that's acceptable, but one thing that's very clear is even if you're going to file a case and you haven't invested the full $800,000, then you still need to present the full documents on the full 800,000, even if the final transfer won't happen maybe until after the deadline. So because of that, it is very important to start now and start documenting the full source of the funds.

Kate Kalmykov (15:37):

And for individuals in the US filing adjustment of status, which we're going to talk about the adjustment of status memo shortly, but for individuals that are proceeding with concurrent filing or filing the adjustment, if you have time to file concurrently, great. But if you don't, then you can always submit the adjustment of status after 9/30. It's the EB-5 in order to be grandfathered that has to be submitted prior to 9/30, but the adjustment can be submitted after.

(16:10):

And that might be the case, especially as we are in the height of summer travel right now. You have to allow 90 days to elapse in certain categories like B or F before filing an adjustment if you enter and you decide to proceed with an adjustment. So you might not even be eligible to file by September 30th, and that's fine.

(16:34):

Now, a little bit of a wrench in many plans was the Memorial Day adjustment of status memo that was issued by USCIS basically saying after 70 years of precedent, adjustment of status is an extraordinary form of relief and everyone has to go process for their green cards at the consulate. Now, just to be clear for our listeners, in 2022, USCIS, because of the RIA, started to accept concurrent filing cases for the first time, EB-5s and adjustment of status filed at the same time because the RIA introduced concurrent filing. They wanted to give investors in the US, with no specification as to what status they needed to be in, the ability to file for a green card.

(17:24):

And this makes sense because you have entrepreneurs investing into US projects, significant amounts of capital that are creating jobs in the United States, and many times they're already in the United States. So maybe they are students who have been studying in the US and have decided they want to stay here permanently. They may be H-1B professionals. They may be L-1 multinational managers. There's a whole host of categories that file for the EB-5 that may not want to leave the US to process at a consulate overseas because maybe it'll disrupt their studies, maybe it'll disrupt their employment, maybe it'll separate them from their immediate relatives who are already in the US.

(18:08):

So I would say since the adjustment of status memo was released, initially there was a sense of panic amongst many people. But we have continued to get approvals for individuals who applied for the adjustment of status based on an EB-5 investment across a variety of statuses. We are also, for those concerned, filing adjustment of statuses where they want to, but also reserving the right in the adjustment filing to apply for a visa abroad if necessary. So then clients sort of have a backup plan in case the administration decides to pivot on how they're adjudicating these adjustments in relation to EB-5 investors.

(18:54):

Jen, you chair the AILA EB-5 committee. What have you heard directly from the government on this topic? And what are other practitioners reporting?

Jennifer Hermansky (19:06):

So in terms of the adjustment of status memorandum, it doesn't really appear that this has made any impact on EB-5 investors at this time. So there are not reports that EB-5 investors are being selected for I-485 adjustment of status interviews. We have not seen any requests for evidence on an I-485 asking for an EB-5 investor to justify why they filed an I-485 application in lieu of processing for an immigrant visa at the consulate. So it doesn't appear to be impacting the EB-5 investors.

(19:50):

That might be intentional on the part of the USCIS because these investors have made a very large investment to the US. There was some discussion at USCIS that you could potentially justify the filing of an adjustment of status by showing that you're making an economic impact on the US through your job or through other reasons. And certainly, the EB-5 investment is a huge foreign direct investment creating at least 10 jobs for every investor. So that would seem to resonate as a reason that your adjustment of status and staying in the US is an economic benefit to the US.

(20:35):

And certainly, many investors might want to be here in the US to go and visit their investment, to see the status of the project. And they have filed the Form I-485. So right now we don't think that there's really much impact on the EB-5 investors from this memorandum. And again, people who are interested in filing for the adjustment of status, to just speak with their lawyer to make sure that they're otherwise eligible for it and when is the appropriate time to file that application.

Kate Kalmykov (21:10):

And I would just add, when you apply for an adjustment of status in the US, you're also applying for work and travel authorization. And we haven't seen issues, which we initially feared would occur after the introduction of this memo, where people with pending adjustments traveling on an advanced parole travel document are being in any way questioned or prevented from reentering the country after international travel. So that is all good news.

(21:40):

And one of the issues that we had to deal with in the past year was an adoption of a new policy through adjudication, which shouldn't be done, but sometimes happens. And as counsel, we have to push back and remind the USCIS of what legal standards are in place. So there was a period of time and we've done a podcast about it, we've written about it, where the USCIS was denying EB-5 cases that were submitted with a partial investment. Now, the regulations, the EB-5 regulations say you can be in the process of investing. There is nothing that says you have to invest the full 800,000 upfront. However, in denials, the USCIS said, "We're not required to issue an RFE, a request for evidence or a notice of intent to deny. Our position is if you didn't make the full investment by the time of filing and you didn't submit an interfiling proving to us that you made the complete investment, we are going to deny your case."

(22:52):

And we appealed those cases to the AAO because we felt strongly that that was incorrect. There was absolutely no affirmative legal requirement to make an inter-filing. The regulations expressly allow you to be in the process of investing so you don't have to be fully invested. And Jen, tell us a little bit about how the AAO responded to us, which I think many investors are going to be glad to hear, especially right before 9/30.

Jennifer Hermansky (23:21):

Yeah, so the USCIS Administrative Appeals Office, which is the appellate body that hears appeals of USCIS denials, they took up a series of cases, as Kate mentioned, that were denied because the investors had only invested part of their $800,000 investment and then filed their case. And the USCIS had said, "Well, you didn't give us any of the documents. We don't know the full source of funds," things like that.

(23:58):

The AAO actually took a different position and they said that, "No, you can be in the process of investing. So it is fine to file a case where you're actively in the process of investing." And secondly, where USCIS said they did not need to send a request for evidence or a notice of intent to deny, they explicitly relied on the fact that, well, maybe the investor didn't give the full seven years of tax returns or the investor didn't give a business registration document for every single employer or things like that. And the AAO said, "No, that these items say that the investor, that the actual law, the RIA says the investor may provide seven years of tax returns, things like this to document the lawful source of funds and that it is permissive."

(24:59):

So generally, the AAO said that the investor should provide what is relevant to their case. So for example, if I am owning and operating a very successful business and maybe I make $2 million a year from that business and I'm able to save enough money to do the EB-5 after just two years of working, then the relevant two years of tax returns may be sufficient to meet my burden.

(25:31):

So really, the AAO came back to no, this is a decision on the facts of the individual cases. It's not rigid like the USCIS was thinking the statute was. It should be an analysis based on what is the source of funds and what are the documents that are required to show that source of funds.

(25:57):

For example, again, if I'm just a normal employee and I'm working at a big company, I might not have access to the business registration document or the business tax returns, I'm just an employee. Those items, even though they're listed in the statute, are not necessarily relevant to me. What is relevant to me are my own tax returns and my own forms W-2 to show how much money I was making there. So again, the AAO took it back to an individualized analysis, which we believe is correct. That is the way that the USCIS should review the source of funds.

Kate Kalmykov (26:37):

And we're really delighted that they made the decision the way they did because it really impacted a lot of investors and it's the right thing to do. Now, that can change in a post-RIA world where the program needs to be reauthorized. That's another one of those changes. Maybe we'll see, maybe we won't, but as it is right now, it is permissible and it's going to be permissible for people filing before 9/30.

Jennifer Hermansky (27:07):

And ironically, Kate, today on July 1st, the USCIS has finally released the long anticipated regulations for public comment. And they have finally given us the notice of proposed rulemaking for how the agency is implementing the RIA. So we had to wait four years for it, but here we are.

(27:32):

And guess what? One of the first things that I saw in the notice of proposed rulemaking is that the USCIS is going to define what actively in the process of investing is. And they do confirm in their proposed rulemaking that they believe the investment amount should be fully invested by the time you start your two-year conditional green card status. So there it is, the agency recognizing in full effect that the statute says you could be actively in the process of investing and what does that mean? So now they're putting a full definition to it.

Kate Kalmykov (28:11):

But interestingly, that's still not at the time of filing. That's at the start of your two-year conditional residence period, so there is a significant difference in timing nonetheless.

Jennifer Hermansky (28:23):

I think they're still going to take the position that you have to tell them upfront what your full source of funds is. I do not think that this regulation will give people the ability to just wire $50,000 before

September 30th and then not tell the USCIS what the source of their other $750,000 investment is or get away with not submitting source of funds documents. I don't think that the agency will allow that. I think they will still take the position you need to know at the time of filing what the full source of funds will be for the $800,000 investment, and you need to meet your burden of proof with that and submit all of the documents in your I-526E, even though the path of funds, the very last part of the case might happen later up and until you are granted the two-year CPR card.

Kate Kalmykov (29:22):

Absolutely. And let's not forget, they want to vet the source of funds because they want to make sure that the money coming into the US is lawful, that taxes, if required, have been paid on it. And that's reasonable and fine, but we still need to do it within the way the law is drafted.

(29:42):

Now, it's interesting they released the regulations. That will probably be the topic of a subsequent podcast once we get the chance to review them thoroughly. But on the cost of the program being reauthorized with possible changes, it is definitely interesting timing that they released the notice of proposed rulemaking today.

Jennifer Hermansky (30:06):

Now, we do know that they've been working on it for a very long time. It is over 350 pages long. They really did a lot of work on it and they're really trying to put into regulation all of the important rules about EB-5. So I saw a lot of things in there. They're talking about everything, regional center investments, business plans, redeployment, process of investing, source of funds. There's a whole host of topics covered in that regulation.

(30:37):

So overall, this is good. We want the agency to be transparent and to tell us what it's thinking. Tell us how you're going to adjudicate the cases so we can present these materials upfront. We have been filing cases now for four and a half years without this important guidance from the agency. So it's well past due and we will see what kind of implementation that brings to the process.

Kate Kalmykov (31:04):

Absolutely. And we will also provide, as I said, a podcast and a detailed blog post once we have the chance to review the 350 pages in detail and offer an analysis to our viewers and our listeners.

(31:20):

Thank you so much for joining me, Jen. It's always a pleasure to have you on and I look forward to discussing the proposed regulation with you.

Jennifer Hermansky (31:30):

Yes, thank you for having me today and thank you to all of our listeners. And I just want to encourage everyone to go ahead and if now is the time that you wish to move forward, to start talking with someone now because it is a lot of preparation and that takes time to get a case that is thoroughly prepared and properly filed with USCIS before September 30th.

Kate Kalmykov (31:55):

Wonderful. Thank you.