

EB-5 Update

Monitoring EB-5 Program Changes on Form I-526 Receipts



U.S. Citizenship and
Immigration Services

Office of Policy & Strategy
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EXECUTIVE SUMMARY

U. S. Citizenship and Immigration Services (USCIS) implemented the first major regulatory update to the EB-5 Immigrant Investor Program in almost three decades on November 21, 2019. The new rule applied to all Form I-526 petitions filed on or after that date.

The new rule intended to modernize the EB-5 Immigrant Investor Program by:

- Providing priority date retention to certain EB-5 investors filing a new petition;
- Increasing the required minimum investment amounts to account for the cumulative increases in inflation that have occurred since the initial minimum investment amounts were established in 1990:
 - The standard minimum investment amount is \$1.8 million (up from \$1 million);
 - The minimum investment in a targeted employment areas (TEA) is \$900,000 (up from \$500,000); and
 - Future adjustments will also be tied to inflation (per the Consumer Price Index for All Urban Consumers, or CPI-U) and, beginning on October 1, 2024, will occur every 5 years;
- Reforming the designation standards and process for TEAs;
- Clarifying USCIS procedures for the removal of conditions on permanent residence; and
- Making other technical and conforming revisions.

On June 22, 2021, the U.S. District Court for the Northern District of California, in *Behring Regional Center v. Blinken*, 20-cv-09263-JSC, vacated the EB-5 Immigrant Investor Program Modernization Final Rule. Unless that decision is stayed or overturned, USCIS must apply EB-5 regulations that were in effect before November 21, 2019.

This report tracks the monthly Form I-526, Immigrant Petition for Alien Investor receipts from fiscal year 2017 to year-to-date with a special emphasis to the effective date of the 2019 EB-5 Immigrant Investor Program Modernization Regulation¹ (2019 EB-5 Rule) publication and its vacatur.

Key Findings

Receipts of Form I-526 petitions show a spike in the period before the effective date of the rule, followed by a sustained significant drop in the months following the new effective date.

¹ EB-5 Immigrant Investor Program Modernization (2019 EB-5 Rule), 84 Fed. Reg. 35750 (Jul. 24, 2019), <https://www.federalregister.gov/documents/2019/07/24/2019-15000/eb-5-immigrant-investor-program-modernization>

In November 2019, USCIS saw a 369% increase (from 693 receipts to 3,248 receipts) over the previous month (October 2019) in the filing of Form I-526 petitions, followed by a noticeable decrease in filings in December (from 3,248 to 13).

The 12 month receipt average for Form I-526 prior to the effective date was 366, while average receipts for the 18 months after the effective date had declined to 22. However, in June of 2021 we start to see an uptick in receipts with 445 receipts. This uptick follows the vacatur of the rule and in anticipation of the sunset of the regional center program, which occurred on June 30, 2021.

Conclusion

Although the data suggest a strong correlation between the new rule, and the November spike followed by the continuous decline in receipts with an uptick in receipts in June after the rule vacatur, a definitive causal conclusion cannot be drawn with respect to the total or relative impact of the various factors at play affecting Form I-526 receipt levels in FY 2020 and FY 2021-Year-to-Date (YTD).

INTRODUCTION

This report tracks the monthly Form I-526, Immigrant Petition for Alien Investor receipts in relation to the publication of the 2019 EB-5 Immigrant Investor Program Modernization Regulation²(2019 EB-5 Rule) from October 2017, with specific attention on the 2019 rule's effective date and vacatur.

Background

Congress established the employment-based, fifth-preference (EB-5) immigrant visa classification in 1990 to stimulate the U.S. economy through job creation and capital investment by foreign investors. Section 203(b)(5) of the Immigration and Nationality Act (INA) allocates approximately 10,000 EB-5 immigrant visas per year. Three thousand of these visas are reserved for immigrant investors who invest in TEAs, defined as an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate. Enacted in 1992, Congress established a pilot program that requires the allocation of up to 3,000 EB-5 immigrant visas for foreign nationals who invest through DHS-designated regional centers.

Foreign nationals may be eligible for an EB-5 immigrant visa if they have invested or are actively in the process of investing the required amount of capital into a new commercial enterprise and create at least 10 full-time jobs for qualifying employees.

The EB-5 regulations are found at 8 CFR 204.6 and 8 CFR 216.6.

2019 EB-5 Rule Overview

USCIS published a final rule¹ on July 24, 2019, that made a number of significant changes to its [EB-5 Immigrant Investor Program](#), marking the first significant revision of the program's regulations since 1993. The final rule became effective on November 21, 2019. The final rule provided priority date retention to certain petitioners, raised the minimum investment amounts, reformed the TEA designation standards and process, and clarified USCIS procedures for the removal of conditions on permanent residence.

The EB-5 visa is intended to encourage foreign investment to promote economic growth and job creation in the United States. This final rule modernizes the program and ensures it is operating as intended by increasing investment requirements, reforming certain TEA

² EB-5 Immigrant Investor Program Modernization (2019 EB-5 Rule), 84 Fed. Reg. 35750 (Jul. 24, 2019), <https://www.federalregister.gov/documents/2019/07/24/2019-15000/eb-5-immigrant-investor-program-modernization>

designation standards and processes, aligning it with statutory changes, and clarifying existing regulations.

1.1 Rule changes

The final rule made the following changes:

- The rule provided priority date retention and offers greater flexibility to immigrant investors who have a previously approved EB-5 immigrant petition. When investors with a previously approved EB-5 petition need to file a new EB-5 petition, they generally may now retain their priority date subject to certain exceptions (e.g. revocation based on fraud, misrepresentation, or material error);
- The rule provided that, in general, a petitioner with multiple approved immigrant petitions for classification as an immigrant investor is entitled to the earliest qualifying priority date;
- The rule increased the required minimum investment amounts to account for the cumulative increases in inflation that have occurred since the initial minimum investment amounts were established in 1990:
 - The standard minimum investment amount was increased to \$1.8 million (up from \$1 million);
 - The minimum investment in a TEA was increased to \$900,000 (up from \$500,000); and
 - The final rule also includes an automatic future adjustment to these investment amounts tied to inflation (per the Consumer Price Index for All Urban Consumers, or CPI-U) beginning on October 1, 2024, which will occur every 5 years;
- The final rule outlined changes to the EB-5 TEA designation process to ensure consistency across TEA designations. Previously, TEA designations of high-unemployment areas had been criticized as having been “gerrymandered.” That is, immigrant investors or regional centers combined a series of census tracts linking a prosperous project location to a distressed community to obtain the qualifying average unemployment rate for a high unemployment TEA, and in many cases to secure State designation. The final rule eliminated a state’s ability to designate certain geographic and political subdivisions as high-unemployment areas. Instead, USCIS now makes TEA designations directly based on revised requirements in the regulation limiting the composition of census tract-based TEAs;
- The final rule allowed that amendments or supplements to any offering necessary to maintain compliance with applicable securities laws based upon the changes in the rulemaking will not independently result in denial or revocation of a petition, provided the petition meets certain criteria.

On June 22, 2021, the U.S. District Court for the Northern District of California, in *Behring Regional Center v. Blinken*, 20-cv-09263-JSC, vacated the [EB-5 Immigrant Investor Program](#)

[Modernization Final Rule](#). Unless that decision is stayed or overturned, USCIS must apply EB-5 regulations that were in effect before November 21, 2019.

Monthly Receipt Statistics

Receipts of Form I-526 petitions show a significant spike in the period before the effective date of the rule, followed by a significant drop in the months following the new effective date.

In November 2019, USCIS saw a 369% increase (from 693 receipts to 3,248 receipts) over the previous month (October 2019) in the filing of Form I-526 petitions, followed by a noticeable decrease in filings in December (from 3,248 to 13) as shown in Table 1 below. November 2019 receipts were 10 times higher than the same month in 2018.

December's historical low was followed by receipts in January, February, and March in the single digits (less than 10) and receipts for the remainder of the 2020 fiscal year ranging only from 9 to 29. Receipts averaged approximately 331 petitions per month in the 10 months prior to November 2019, while receipts averaged approximately 13 petitions per month in the 10 months after November 2019.

As noted above, receipts were very high in November 2019 (3,248 receipts), followed by a significant decline in receipts in subsequent months, where receipts averaged approximately 13 petitions per month in the 10 months after November 2019. Trends of a similar nature have been seen in the past with increases in receipt numbers and subsequent declines in December 2017, April 2018, December 2018, and September 2019 (see Table 1 below). These spikes can lead to a front-loading effect for Form I-526 receipts; that is, rather than a steady number of Form I-526 petitions being submitted over a longer period of time, there will a high number of receipts the month of or before a program change and a near-to-medium term decline in receipts during the subsequent months. The front-loading effect occurs as petitioners who would have otherwise submitted their petitions over a longer period of time, make efforts to submit their petitions more quickly before the program change takes effect. Often, receipt levels stabilize and return to historical levels over the long-term, after the boom-bust like front-loading cycle has run its course. The front-loading phenomenon is not unique to the EB-5 program and occurs in other immigration contexts as well, such as the Temporary Protected Status program.

It is important to view these trends in a larger historical context. For fiscal years 2017 – 2019 there were consecutive declines in Form I-526 receipts from 11,752 in fiscal year (FY) 2017 to 4,015 in FY2019. However, comparing FY 2019 receipts of 4,015 to FY 2020 receipts of 4,076 there is a slight increase in total receipts for the current fiscal year (see Table 1 below). The FY

2019 to FY 2020 receipts comparison indicates that a significant level of front-loading surge in receipts likely occurred for Form I-526 petition filings in November 2019. While it is reasonable to conclude, as noted above, that the new rule likely had an impact on the November receipt spike and subsequent receipt decline, other factors are also likely at play including increasing visa wait times and the worldwide impact of the COVID 19 pandemic. The longer term decline seen since FY 2017 may also reflect changes in the business cycle for the construction industry, as well as the monetary policy of the United States. In keeping interest rates at historically low levels, developers now have competitive alternatives to soliciting investment through low-interest EB-5 channels.

Although the data suggest a strong correlation between the new rule and the November spike followed by the continuous decline in receipts, and the slight uptick in June 2021 after the rule was vacated, a definitive causal conclusion cannot be drawn with respect to the total or relative impact of the various factors at play affecting Form I-526 receipt levels in FY 2020 and FY 2021-YTD. For example, another factor could be the anticipated sunset of the regional center program which occurred on June 30, 2021. Additionally, given that major development projects typically funded by immigrant investor funds pooled by a regional center can take a year to develop and prepare (including the investigation and selection of locations, drafting of offering documents, confirmation of any additional financing, and promotion to investors), it is possible filings will increase from their current lower monthly levels in the upcoming fiscal year as new development picks up after a pause due to the COVID 19 pandemic.

Table 1 below shows the number of Form I-526 receipts by month for fiscal years 2017-2021 (YTD).

Table 1: Form I-526 Receipts

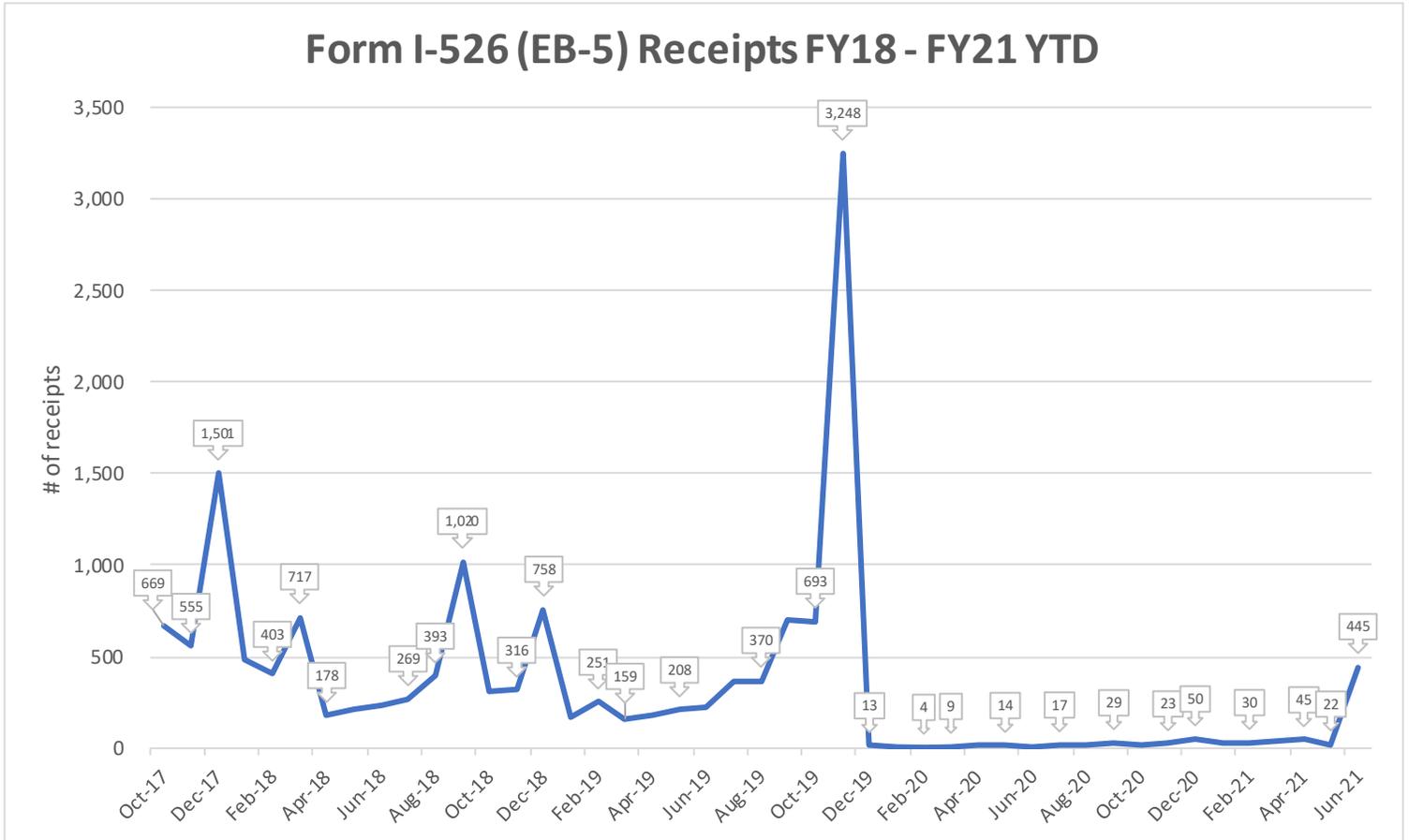
| Form I-526 Receipts, by Fiscal Year (FY 2017-2021 YTD) | | | | | | | | | | | | |  U.S. Citizenship and Immigration Services | |
|--|-----|-------|------|-----|-----|-----|-------|-----|-----|-----|-----|------|---|--|
| FY | Oct | Nov | Dec | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sept | Total | |
| 2017 | 493 | 739 | 2863 | 317 | 370 | 838 | 3,652 | 452 | 250 | 356 | 550 | 872 | 11,752 | |
| 2018 | 669 | 555 | 1501 | 483 | 403 | 717 | 178 | 211 | 232 | 269 | 393 | 1020 | 6,631 | |
| 2019 | 315 | 316 | 758 | 166 | 251 | 159 | 182 | 208 | 225 | 361 | 370 | 704 | 4,015 | |
| 2020 | 693 | 3,248 | 13 | 8 | 4 | 9 | 15 | 14 | 9 | 17 | 17 | 29 | 4,076 | |
| 2021 | 18 | 23 | 50 | 25 | 30 | 43 | 45 | 22 | 445 | | | | 701 | |

Note(s): 1) The report reflects the most up-to-date estimate available at the time the database is queried.
 2) Counts may differ from those reported in previous periods due to system updates and post-adjudicative outcomes.

Source: C3 Consolidated; USCIS Office of Policy & Strategy

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