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Examining Goodlatte's EB-5 Bill, As Deadline Looms

By **Allissa Wickham**

Law360, New York (September 16, 2016, 11:08 PM EDT) -- With the EB-5 visa regional center program slated to expire at the end of the month, House Judiciary Committee Chairman Bob Goodlatte, R-Va., has introduced a reform bill just weeks before the reauthorization deadline, and its proposals could have a serious impact on foreign investors if passed.

For those who have worked with EB-5 visas, this fall may present a serious case of déjà vu, as the regional center program is once again up for reauthorization amid calls for reform on Capitol Hill.

The EB-5 program provides green cards to foreign nationals who invest at least \$500,000 in the U.S., and the regional center program allows investors to pool funds for specific projects. The centers are a huge part of the larger visa program, as roughly 90 percent of EB-5 investments go through them, according to an immigration agency spokesman.

But despite the program's popularity, EB-5 reauthorization efforts have seen plenty of drama in recent years, as the visa program has proven itself to be somewhat of a scandal magnet. In 2015, the U.S. Securities and Exchange Commission accused an oil company of targeting EB-5 investors in a "Ponzi-like" **\$68 million scheme**, and it launched a **similar case in Washington** over an alleged \$136 million EB-5 fraud.

Despite proposed reforms for the program last year, Congress simply opted to extend the regional center component until Sept. 30 as part of the omnibus bill. Now, lawmakers are back at it again with proposed reforms, although attorneys aren't bullish about any reform happening before the regional center program's expiration deadline on Sept. 30.

"I think that there is serious concern about the EB-5 program, and people want to make reforms. But I think that people realize that it's too much to expect that Congress can make those reforms by Sept. 30," said Steve Yale-Loehr, an attorney at Miller Mayer LLP and a professor at Cornell Law School.

Indeed, Sen. John Cornyn, R-Texas, has indicated the EB-5 visa program would likely be part of a possible short-term spending bill, known as a continuing resolution, according to a Sept. 12 report from The Hill. And on top of that, the markup of the EB-5 reform bill introduced by Goodlatte was **abruptly canceled** Tuesday night.

But whether reforms could occur after a potential short-term reauthorization is still open to debate. For instance, Yale-Loehr said he thinks that between Sept. 30 and the middle of December, there will be "serious negotiations behind the scenes to come up with reforms."

Yet even if chances are slim for major EB-5 reform happening in the next two weeks, Goodlatte's bill — known as the "American Job Creation and Investment Promotion Reform Act of 2016" — may offer the best current road map for eventual reform, especially since Sens. Patrick Leahy, D-Vt., and Chuck Grassley, R-Iowa, have issued statements supporting it.

Notably, Goodlatte's bill is companion legislation to a bill **introduced last year** by the two senators, according to Leahy's office.

"I think Goodlatte clearly is taking the lead now, in the sense that Grassley and Leahy have both lined up with Goodlatte formally in press releases," said Doug Hauer, a partner at Mintz Levin Cohn Ferris Glovsky & Popeo PC. "That's significant, because it means that we're not going to see a turf war over EB-5."

So, what are some of the major proposals in the Goodlatte bill? Importantly, it extends the regional center program through 2021, putting an end to the yearly cycle of uncertainty that's become the new normal for EB-5.

The bill would also raise the required minimum investment amounts to \$1.2 million, or \$800,000 for investments in an infrastructure or manufacturing project, or projects located in a "targeted employment area." Currently, while the general minimum investment is \$1 million, immigrants who invest in a high-unemployment or rural area, known as a TEA, only need to pay \$500,000.

TEAs could potentially get a revamp under the Goodlatte bill, as the legislation defines TEAs as either a "priority urban investment area," a rural area, an area involving a military installation that was closed, or an area made of a "census tract or contiguous census tracts" that is not located inside a metropolitan statistical area.

Notably, the U.S. Department of Homeland Security would be given the power to determine an area's eligibility for being a TEA, a shift from the current practice of letting states figure that out. The proposed changes follow concerns that developers have been gerrymandering TEAs, which were meant to drive investment into economically struggling areas.

Hauer, however, argued that if Goodlatte's TEA proposal is passed, then we will likely see "the EB-5 program severely trimmed down, in terms of its ability to be a source of financing in major urban areas."

"I think that lawmakers need to be cognizant that states have historically decided the definition of a TEA," he added. "So, I think involving state agencies in the hearings on a bill is very important."

The bill would also make the changes retroactive to June 2015, according to Yale-Loehr, who noted that "thousands of pending petitions would have to comply with the new provisions," and there's a legal concern regarding "changing the rules midstream."

"The problem is that investors ... they would retroactively be required to throw in another \$300,000," said Robert Divine of Baker Donelson Bearman Caldwell & Berkowitz PC. "And a lot of these projects have already closed and been done ... Where would that \$300,000 be used?"

And these are just some of the larger changes. The bill also contains a new age restriction for investors under the program, as well as clauses setting aside visas for immigrants who invest in rural and "priority urban investment" areas. It's a lot for lawmakers to chew on in the fall, or even into next year.

As such, it remains to be seen whether legislators can hash out a passable EB-5 reform bill in the coming months, especially as massive EB-5 fraud cases like the Jay Peak suit **simmer in the background**.

--Additional reporting by Kelly Knaub, Bonnie Eslinger and Natalie Rodriguez. Editing by Philip Shea and Mark Lebetkin.