

## Big Law Redefined Podcast – Immigration Insights Series – Episode 10

- Intro: Hello and welcome to today's program, Greenberg Traurig's briefing on President Trump's announcement on the EB-5 Visa program and proposed gold card.
- Kate Kalmykov: Hi everyone. My name is Kate Kalmykov and I co-chair the Global Immigration and Compliance Group here at Greenberg Traurig. We have a very large EB-5 practice and we have been working in the field of investment immigration for 20 years, working with clients from all over the world, investors [00:01:00] coming to the US, regional centers, projects and developers looking to raise funds under the EB-5 program. And we also have a robust business immigration practice where we work on various types of employment-based green cards and work visas. Likewise, we work on various outbound golden visa programs around the world, and we hope to share our insights with you today. I'm [00:01:30] joined today by my partner, Jennifer Hermansky, and I'll let her introduce herself.
- Jennifer Herman...: Hi, everyone.. I'm Jen. I work in the Philadelphia office of Greenberg Traurig. I'm also the chair of the American Immigration Lawyers Association EB-5 committee. So we've been following all of the recent statements and we're happy to present to you today and give you our insights on what the future of EB-5 is [00:02:00] and investment immigration in the US.
- Kate Kalmykov: Okay, so we can get started. So obviously, many of you have joined us today because you heard the president's announcement earlier this week that he is intent on introducing something called the Trump gold card, which will be an investment-based green card plus at a price point of \$5 million. And in the initial announcement [00:02:30] he said that, or rather, Secretary Lutnick said that they wanted to do away with the EB-5 program. Later statements weren't clear whether they want to do away with the EB-5 program or introduce the Trump gold card concurrently as another investment immigration option. The idea with the gold card, we have been told we will get more information on in the next [00:03:00] two weeks, but it's intended to be a green card plus benefits, which includes a path to citizenship. It's important to note that the EB-5 also includes a path to citizenship as do all green cards in the United States. Typically, to apply for citizenship, once you have attained permanent residency, you have to show five years of permanent residency in the US to apply for citizenship.
- [00:03:30] And as part of the application for citizenship, you have to prove your tax compliance that you filed as a US resident, that you've maintained your residency in the US and that you've met the good faith and moral character requirements of the United States as well as an English and civics exam. So what the gold card would actually have, we don't have clarity on right now, but we are expecting an imminent announcement. The [00:04:00] announcement also stressed the involvement of the Department of Commerce in any kind of gold card program. So this is something that we found very interesting because it's not the first time that in discussions of revamping the EB-5 program and introducing a new investment immigration regime in the US, the Commerce Department has been mentioned.

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There has been a push previously in the past when we have come up [00:04:30] on EB-5 re-authorizations to move the program out of USCIS into the Department of Commerce because it is an investment program, because it brings foreign direct investment to the US, because it's done at no cost to the US taxpayer. And in vetting the source of funds for investors, there has been previously a push, as I said, to move it to the Commerce Department, which may have more experience [00:05:00] with vetting something of that sort than USCIS, which typically adjudicates traditional immigration benefits, employment, employment-based benefits, asylum, and family benefits. Secretary Lutnick did mention that they may introduce a license to transfer money to the US for this purpose. And once we get more clarity on this, we will work hand in hand with our international trade group to [00:05:30] offer guidance on what a license process through the secretary's announcement and through the Department of Commerce would look like because we certainly do, as GT, we're a multi-practice firm.

We do work with our trade group on obtaining different kinds of licenses through Commerce, through Treasury, through OFAC. And then as I said, it was unclear whether EB-5 would remain in this proposal or [00:06:00] the suggestion would be to do away with it. And that is something that we will seek clarity on as well. We can go on to the next slide. And I think the biggest question that is on everyone's mind is, is this possible to do in the way that it has been proposed? And so the answer is it may be possible to do it. It's probably going to be done through Congress rather than the executive [00:06:30] branch. But we wanted to give you a little overview of how immigration laws are made, how they're implemented, and what the division of powers is between the executive branch, the legislative branch, and the judicial.

So EB-5 was introduced in 1990 through IMMACT 90, and it was a way to try to spur the economy at the time by having investors come to the US, open businesses and [00:07:00] create 10 jobs for employees. In 1992, the regional center program was introduced and it was implemented in 1993. The regional center program for the first time allowed businesses to get a license from the immigration agency to accept funds from foreign investors and to count indirect jobs towards that 10 job per investor requirement. And the program [00:07:30] was continually reauthorized until 2021 without change. At that time, we had a regulation introduced that sought to raise the price of the program to adjust it for inflation. GT was instrumental in getting that regulation struck down, because it was not properly passed. And instead in 2022, in March of 2022, Congress passed the Reform and Integrity Act, which [00:08:00] was implemented in May of that year.

The Reform and Integrity Act reauthorized the EB-5 program for five years. It introduced new integrity measures to the program. So now where there weren't previously, there's reporting requirements. You have to involve a fund manager in the raise of money. You have to provide audited financials if you are not working with a fund manager. There are site visits by the USCIS [00:08:30] to projects to make sure they're actually being built. There's annual compliance

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filings that have to be submitted to USCIS that include detailed reports of expenditures and requisitions to prove to the agency that funds are being spent as investors expect them to according to their offering documents, according to their business plan. And all of that was done to ensure integrity and transparency in the program.

[00:09:00] Now, the RIA did not in any way adjust visa numbers. Under the Immigration and Nationality Act, we call that the INA, there's 140,000 employment-based green cards given annually across the five employment-based visa categories. EB-5 gets 10,000 of those immigrant visas. So it's really 3,000. Why? Because people file with their spouse, [00:09:30] with their children. And so what we usually see annually is about 3,000 investors plus their dependents getting a green card through the EB-5 program. Within those 10,000 green cards, we have special set-asides where Congress wanted to prioritize investment. That includes rural areas, high unemployment areas, and government infrastructure projects. The 10 job per investor requirement [00:10:00] continues. Excuse me, we can go to the next slide.

Thank you. So one of the important provisions of the RIA was grandfathering. And previously, the regional center program, although it was introduced in 1992, it was a pilot program which required Congress to continually reauthorize it. So when [00:10:30] the RIA was passed, Congress wanted to give investor certainty, and they said, "We are reauthorizing EB-5 for five years. You get it until September 30th, 2027." And any individual investor, any project, any regional center that is involved in the program will get the benefit of having their I-526E, that's the actual EB-5 petition that is filed before September 30th, [00:11:00] 2026, be grandfathered. So a lot of the questions that we've been getting since the announcement came in is, is this program gone in two weeks? Are we losing our place in line? And the answer is no. You are grandfathered if you file before September 30th, 2026. Now, what if the program is not later extended past September 30th, 2027?

[00:11:30] And a lot of the discussions about the introduction of the gold Visa and the announcement about EB-5 certainly have implications for reauthorization and what that's going to look like. And it may be very different than the program that we have now, but you will be grandfathered under the old program. And if there is an attempt to repeal the law, to cancel it by executive order, most likely that will be met with legal [00:12:00] action to enjoin any such action. So there may be a pause in processing of the application, but legally, you are grandfathered and you can't retroactively change that. We can go on to the next slide. Jen, tell us a little bit if the decision is made to repeal the legislation and we know that the executive branch can't cancel a [00:12:30] law passed by Congress. Congress passes laws, the judicial branch interprets the laws, and the executive branch enforces the laws. So if there is an attempt to cancel the EB-5 law, how would that look and where does that begin?

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Jennifer Herman...: Sure. We're having a great civics lesson today, I think. So the short answer is that any repeal of a law looks exactly like when [00:13:00] we're trying to pass a law. So Kate had mentioned again that we went through a process leading up to 2022. It was actually quite lengthy where stakeholders gave feedback, many people in the industry lobbied, and the end result of that was a good law being passed, the Reform and Integrity Act of 2022. And that extended us through 2027 and it provided the grandfathering provisions that [00:13:30] Kate just discussed to give people some comfort that if Congress did not extend the program again beyond 2027, individuals who were in process could still move forward and have green cards allocated to them in the future. So the Reform and Integrity Act, it was incorporated into our Immigration and Nationality Act, which is our governing statute in immigration law, and Congress [00:14:00] is explicitly given the authority to pass our immigration laws in the US, so controlling the admission of foreign nationals, exclusion of foreign nationals.

So when we don't allow people in at the US borders or where we deny applications where people are seeking admission into the US in either temporary visa categories or permanent visa categories like the green cards. And also, Congress has authority over passing [00:14:30] laws that relate to naturalization and making people citizens of the United States. So that power is based in the Constitution. And the Supreme Court has been clear that generally Congress has what we call plenary authority over immigration laws. So they generally, they are the branch of government that has authority over passing our immigration laws. And that's why when we went through the process [00:15:00] to get the RIA passed, there was lobbying through Congress, both houses were involved, and eventually those that came together and was passed and signed into law in 2022. So another act of Congress would be required to repeal something that is passed statute.

So it's incorporated into the Immigration and Nationality [00:15:30] Act. It is our law through statute. The EB-5 law is not an immigration program that was created through executive actions like some of our other programs that are humanitarian-based. When we designate countries for temporary protected status and we give people work authorization, or various programs like DACA, the Deferred Actions for Childhood Arrivals. Those are [00:16:00] executive actions. They're not really creating categories or classes of visas. We're allowing people to maybe stay in the US because of certain things going on in the world or within our country, but they're not new green card programs, for example, like EB-5, or like the proposed gold card. So another act of Congress would be required in order to repeal the existing [00:16:30] law, which currently is the EB-5 Reform and Integrity Act. And interestingly enough, we've been having some discussions because we saw the Commerce Secretary was also involved in these announcements and we've been following how the Commerce Department might be involved in the future.

And interestingly enough, the EB-5 Reform and Integrity Act contains a lot of provisions where Congress [00:17:00] vests the authority to review EB-5 applications on behalf of regional centers and investors. That authority is vested

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in the Secretary of Homeland Security currently under that law. So probably if there is any shift in the future of an adjudication process from the USCIS, which is under Department of Homeland Security, to the Commerce [00:17:30] Department, that would likely require amending the statute that we have now, because right now through that act of Congress, these powers of deciding these types of applications and giving out these types of green cards are vested within Homeland Security. I think we can go to the next slide.

So I mentioned briefly before that the process for repealing a law looks exactly like when [00:18:00] we are passing a law. So a new bill would need to be introduced into one of the houses of Congress. It would need to explicitly state what laws it is repealing, so potentially repealing existing EB-5 and or some of the provisions contained in the INA that are involving the visa numbers that are available for this category. [00:18:30] So that bill would... Go ahead.

Kate Kalmykov:

And not just this category, right, Jen? Because there was a statement made during the announcement that they wanted to have a million gold visas. And that's an amazing sentiment, but the INA, as we said, only has 140,000 across all employment-based green cards. So that would involve drastically increasing the number of employment-based green cards, and maybe that would also result in an increase [00:19:00] in visa numbers and other categories. But that really is getting into comprehensive immigration reform. And I've been an immigration lawyer for 20 years, and for 20 years, there have been discussions and movements and a lot of lobbying done for comprehensive immigration reform.

But it is something very difficult to get Congress to agree on, and such a drastic increase in visa numbers can only be done by Congress. And it would be interesting [00:19:30] to see how long would that take, what kind of process that would involve, what the hearings would take. And we have a lot of questions in the chat about the timeline to do something like this. And I think both Jen and I can tell you, it's not going to be two weeks and we don't know how long it's going to take. It can take a year. It can take years.

Jennifer Herman...:

Yeah. Any suggestion of repealing the existing EB-5 law would certainly take a while. [00:20:00] It took a very long time for us to get the EB-5 Reform and Integrity Act passed. We started talking about EB-5 changes to the law more than a decade ago, and it took until 2022 to really get the ideas together to get that passed. And any legislative process, even where something [00:20:30] is attempting to repeal a law, it would need to follow the same process. It would need to go through committee hearings, it would need to be up for debate on the floor. It would have to go to both houses to be voted upon, and then it would need to be signed into law. That legislative process is a very long time. I would imagine it would not occur at a minimum of less than a year's time, [00:21:00] even if there was some consensus that the EB-5 Reform Act should be repealed.

So I think one thing that Kate and I really wanted to stress to everyone today is that these are, the EB-5 Reform Act is passed by law. It is statute, it cannot just

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go away. It needs to follow a legislative process in order to be taken away. And even if [00:21:30] a legislative process were to be followed to repeal the EB-5 Reform Act, later, courts would still need to be involved in interpreting what happens where applicants had applied beforehand. So protecting those individuals that had applied under the program where it was a validly existing law at the time that they filed. So rights cannot just be taken away [00:22:00] unilaterally from people. There would be legislative processes, there would be court processes. And again, we have those explicit grandfathering provisions that was passed by Congress and written into the law.

Kate Kalmykov: And I think the takeaway is if you have filed an EB-5 petition, you're grandfathered. If you're in the process of filing an EB-5 petition, you are also grandfathered. If there is executive action that will be taken, it may disrupt that [00:22:30] process while a court gets involved. But ultimately, we believe that that action would be enjoined.

Jennifer Herman...: Move to the next slide, I think. So can you touch a little bit on what would happen if we were going to increase visa numbers? So we talked about the legislative process for [00:23:00] removing the EB-5 law from the books, but Kate, maybe tell us a little bit a bit about what would happen if we were trying to make a change to the current EB-5 law to increase the visa numbers or create a whole new category of visa numbers for the gold card program.

Kate Kalmykov: So if we choose to do that, that has to happen with Congress again. So repeals happen with Congress of legislation and [00:23:30] it's not that common. And the passage of new laws goes through Congress. So again, we're back to committee hearings. We're back to economic studies to see the economic impact of the price that's being discussed, and also again, increasing the visa numbers. There was also a mention during the announcement of doing away with the diversity visa lottery, which was basically a random lottery that opens up every year that [00:24:00] gives 60, 55 rather, 55,000 numbers to individuals from various countries to get a green card that are underrepresented in the US. And it is something that is meant to increase diversity in our country. There have been discussions for the past 10, 15 years to do away with the diversity visa lottery, to give those numbers to employment-based categories which are very much overused and there's not enough. [00:24:30] If you are an Indian national with a bachelor's degree who's been sponsored by your employer for a green card, it is taking 60 years to get a green card in that category, which is not viable.

It's ridiculous, right? So there has been a lot of talk of taking diversity visa numbers previously, reallocating them to employment-based. But again, we have a problem with Congress actually agreeing to how [00:25:00] that would be done. And so it has not been implemented, and we do believe that this would definitely be a welcome change, an increase in visa numbers. Our employers want it. We want to attract the best and brightest to this country. We want to attract investors to this country. All of those things are positive, but they have to work through Congress, and the current visa numbers have not

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increased or changed since 1986 since the Immigration and Reform and Control [00:25:30] Act. So you can see how long it's been taking to get an agreement of any sort. Now, if we go to the next slide, we wanted to touch on something that's been mentioned in various discussions that the administration may choose to push through the gold visa and to either eliminate the EB-5 program or to make the EB-5 a side-by-side program with the gold visa through the use of national emergency powers.

[00:26:00] And these are powers that were used during the first presidency, and there's been a lot of discussion of using them during this presidency to move forward a lot of items that are deemed dire for the country to move forward. So emergency declarations grant the executive branch expansive powers, but they're not infinite. Not everything is truly an emergency. That being said, courts have traditionally [00:26:30] been reluctant to weigh in on whether something is an emergency or not, where the president has said that they are. However, they have opined on how emergency powers can be put into use and what they can be used for, and they have struck down and enjoying certain actions. So many of you may remember during COVID, President Biden tried to eliminate student [00:27:00] debt under the emergency powers and the court said that is not possible and they struck that down. So that's just one recent example of a president using emergency powers to try to do something and not being permitted by the court.

And certainly, we believe here that a court would be involved. There's a lot of stakeholders involved in the EB-5 program. If it is said that it's being struck down that are in the midst of arrays that have invested a lot of money in the program, [00:27:30] that would be likely to seek relief in the courts. And emergencies generally mean something unexpected, something that requires immediate action. Probably we could say that reducing the deficit requires immediate action, but it doesn't necessarily mean that we can change the legislative process with respect to immigration laws. It would be better to get the changes through [00:28:00] Congress. And we can go on to the next slide.

And certainly the gold visa program, it is something that other countries have, so us having an investment immigration program is not unique. Many countries have what they call golden visa programs, and they have tiered golden visa programs. So there's differing investment amounts, there are different types of investments. Portugal for example, you [00:28:30] can invest a million and a half euros, sorry, park a million and a half euros into a Portuguese bank account and get residency and EU citizenship that way. Or you can make a \$250,000 donation to the government for cultural causes and get a golden visa that way. You can also do a 500,000 euro investment into a fund. So it's not new that there's different tiers of investment. Panama has something similar. You can purchase real estate, you can purchase [00:29:00] government bonds, you can open a business. The UAE has a golden visa program.

That program focuses on either docking your yachts in their marinas or purchasing real estate. Saudi Arabia is introducing a golden visa program that's

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also tied to the purchase of real estate. Many Caribbean countries have golden visa programs also at different rates depending on whether you want to do a donation or an investment into a business. [00:29:30] So this is not something that is new. It is something that can appeal to a certain group of investors, particularly if there are investors who are looking for those plus benefits. And I think the administration would really need to work with Congress to define what are those plus benefits. As immigration lawyers, I think we can tell you one of the biggest challenges that our clients face is processing times. They are lengthy, and USCIS [00:30:00] is an agency that works off fees. It doesn't get money from Congress. There's always this sort of challenge with staffing and being able to issue decisions quick enough.

And so that may be something that is offered in a gold plus, gold card plus scenario. I would think maybe there could be a discussion on certain types of tax incentives, perhaps certain other things that will be worked out [00:30:30] in a proposal that hopefully we will see soon. We don't have a lot of details right now. We have the cabinet meeting, we have the initial announcement that was made, and there was an interview with Secretary Lutnick where there was a little bit more information given on the vision for the gold card. But definitely I think we will see more details and we will be here to help analyze them for all of you. [00:31:00] And we do understand that it is a way that the administration wants to use it to reduce the deficit, and that is certainly in line with what other countries have used their golden visa programs to do.

Now, we do encourage you to follow our blog. It's EB5insights.com. We do post regularly on updates to EB-5, investment immigration, and once the changes are introduced by the administration, we will analyze the proposal and its viability as well. So thank you all for joining us, and we will continue to keep you up to date.

Dawn: