



Chinese Investors Sue U.S., Say Visa Program Hurts Jobs

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A State Department policy is preventing a visa program from creating the 100,000 jobs annually that it was intended to, according to a lawsuit filed by Chinese investors and a regional center that receives investor funds.

The case, filed in federal district court in Washington, challenges how the agency is counting the number of visas issued under the EB-5 immigrant investor program. It seeks to represent a class of potentially 20,000 Chinese investors who are caught in a backlog that could last as long as 16 years.

The law says the roughly 10,000 visas available each year are supposed to go to investors, but instead most visas go to investors' spouses and children per the State Department policy of counting them toward the annual cap. The resulting backlog could upend the entire program, Miami attorney Ira Kurzban told Bloomberg Law July 30.

"If we're not successful" in getting the agency to count only investors against the annual cap, "it will be very difficult going in the future for the EB-5 program," said Kurzban, who heads up immigration for Kurzban, Kurzban, Weinger, Tetzeli & Pratt.

"The Department of State does not comment on ongoing litigation," agency spokeswoman Pooja Jhunjhunwala told Bloomberg Law July 31.

Renewed Despite Debate

The EB-5 immigrant investor program awards a green card to foreign nationals who invest at least \$500,000 in a commercial enterprise that creates at least 10 U.S. jobs. Under the regional center portion of the program, investors can pool their money and count indirect job creation toward the visa requirements.

The program has come under fire in Congress, with lawmakers on both sides of the aisle blasting its potential for fraud. Some complain that the minimum investment amounts are too low and that money isn't being funneled into rural areas as originally intended. Others simply want it abolished.

The program currently is dominated by Chinese nationals. In fiscal year 2015, when the backlog first developed for Chinese EB-5 seekers, they made up 84 percent of all EB-5 visas.

There's also a per-country cap on all employment-based visas, which contributed in part to the backlog for China.

Backlog Due Mostly to Counting, Suit Says

But the main reason for the backlog is the way the visas are being counted, the lawsuit says.

Between fiscal years 2014 and 2016, the number of dependents who got EB-5 visas was larger than the number of investors who were put on the wait list, according to David Bier, an immigration policy analyst with the libertarian Cato Institute.

In FY 2016, for example, 3,430 investors and 6,433 dependents received visas, he said in an affidavit filed with the case. An estimated 4,202 investors were waitlisted that year.

If dependents weren't counted against the cap, about 1,466 investors would have been in the backlog at the end of FY 2017, and they would have gotten visas in early FY 2018, Bier said.

Vietnamese investors also saw a pileup develop this year, and Indians aren't far behind.

But their potential wait times are dwarfed by the estimated 16 years that Chinese investors must wait for their EB-5 visas, Mitch Wexler of Fragomen, Del Rey, Bernsen & Loewy in Los Angeles told Bloomberg Law July 30.

The exact holdup for India "will depend on future demand," but "the market in China is just so much bigger than any other market," he said. It will be "a while" before India or any other country will develop such a long backlog.

Impact on Children

Many Chinese investors want the visas so their children can be educated in the U.S. and become residents, Kurzban said. It's the impact of the backlog on their children that is driving them to file the lawsuit, he said.

Under the Immigration and Nationality Act, offspring can only get visas as dependents if they're unmarried and under 21. The Child Status Protection Act "freezes" their age at the time a visa petition is filed, but only while the government is processing it, the complaint says.

If a petition is approved but the EB-5 applicant is waiting in a backlog, child dependents are likely to "age out" of eligibility, the lawsuit says.

The situation "reached a critical peak when it became apparent that so many children of the investors were aging out," Kurzban said.

"The ball is going to be in the administration's court," Kurzban said, adding that the White House can either change how it counts visas on its own or be forced to do so by the courts. If not, "another program creating jobs will be destroyed," he said.

Win for Investors Called Win for All

Resolution of the lawsuit in the investors' favor "should be a win-win for everybody," Wexler said. The EB-5 program "doesn't cost the taxpayers a dime," so "why put a lid" on the number of investors allowed in? he asked.

At the same time, Wexler said he doesn't believe that continuing to count dependents against the annual cap will sound the death knell for EB-5.

"I still think there's going to be demand" in India, where more and more immigrants are turning to the EB-5 program because of more severe backlogs in other employment visa categories, he said.

In a separate Cato study, Bier estimated that the wait time for Indian nationals for an EB-2 visa for workers with advanced degrees is 151 years. The wait for EB-3 visas, for workers with bachelor's degrees, is 17 years, he found.

"The marketing infrastructure of a lot of these regional centers and projects are pretty sophisticated," and there's still a drive to come to the U.S., Wexler said. If the backlog winds up driving potential Chinese investors away from the program, "every country has its wealthy class" that will be willing to invest in U.S. projects, he said.