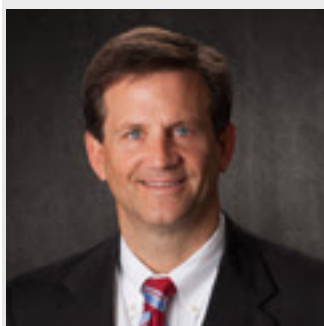


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IIUSA VP Robert C. Divine on Saturday's Announcement of EB-5 Visa Unavailability for China for Remainder of FY-2014

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Saturday's dramatic [announcement](#) of EB-5 visa unavailability for China for the remainder the fiscal year provides a low impact "dry run" for a process that will have more "bite" next fiscal year. (For the record, Saturday was August 23, 2014). First, let's remember what Saturday's announcement does NOT do: It does not affect any I-526 or I-829 processing at all, does not delay immigrant processing for people not born in mainland China, and does not even affect mainland Chinese after next month. But let's think about what it portends.

The announcement reflects that for the first time ever the full annual allocation by Congress of almost 10,000 visa numbers will have been given out by the end of next month-the end of the fiscal year. The August 2014 USCIS "performance data" on I-526 petitions reflects that in the first three quarters of this fiscal year USCIS approved about 4,000 petitions. That probably fits pretty well with the demand of up to 10,000 visas including the investors' family members. That same report reflects that petitions filed have increased to 3,000 per quarter, or 1,000 per month, which is a pace that at least doubles the annual allocation of visa numbers. USCIS reports a whopping 10,375 petitions pending, about 75% of which are likely to be approved, so as USCIS ramps up

its capacity to adjudicate I-526 petitions, the State Department will have to take action earlier in each fiscal year to avoid USCIS and consular offices from giving out too many EB-5 visas and green cards. So far the excess demand for EB-5 visa numbers has been “hidden” in the USCIS I-526 adjudication backlog. But as USCIS volume of adjudications increases, it becomes the State Department’s job to stem the tide.

As everyone knows but needs to remember, for the foreseeable future the visa number problem only affects investors born in mainland China (and who do not have an immigrating spouse born elsewhere, under special “chargeability” rules). This is because (1) China has been accounting for 80% of the demand and (2) the law limits any one country to 7% of the numbers by right. China’s 7% allocation is already essentially used up by the Chinese Student Protection Act of 1992, which required that visa numbers allocated to Chinese nationals under that law be taken out of future allocations for China EB-5 at 700 per year, so mainland Chinese essentially get only whatever numbers are not used up by people born elsewhere. Last year less than 1,700 visas were used by the rest of the world, leaving lots for mainland China, and that does not seem to be changing fast. So the State Department has to guess how many visa numbers the rest of the world will use in the year and allocate the rest in an orderly way to applicants from mainland China in the order in which the investor filed the Form I-526 that was approved.

This year the phenomenon of using up the world’s EB-5 numbers seems to have sneaked up on the State Department, so that it had to suddenly say “no more for mainland China” for the one month left in the rest of the year. Everything re-sets on October 1, when visas may be issued again freely, but maybe as early as January but probably later we can expect the State Department in its monthly “Visa Bulletin” at <http://travel.state.gov/content/visas/english/law-and-policy/bulletin.html> to post a “cut-off date” for mainland China that essentially says that only those applicants whose approved I-526 was filed before that date may be approved by USCIS for adjustment of status or scheduled by a U.S. consulate for immigrant visa interview. Given that most people with approved I-526 petitions filed more than a year before, reflecting USCIS processing times, we can expect the cut-off date to be more than one year earlier than the Visa Bulletin being published. Here is what we can expect in the Visa Bulletin:

Employment-Based	All Chargeability Areas Except Those Listed	CHINA - mainland born	INDIA	MEXICO	PHILIPPINES
5th	C	<p>Was “C” for “Current” meaning no wait</p> <p>Now “U” for “unavailable,” meaning wait til next fiscal year (October 1)</p> <p>Will be “C” for a while starting October but will become a “cut-off date” based on approved I-526 filing date.</p>	C	C	C

We should not expect the cut-off dates next year to have drastic effect, but the effects will increase over time if demand for visa numbers going forward continues to exceed supply. When a visa number cut-off is earlier than the person’s I-526 filing date, it only delays when they can use the approved I-526 to process for the conditional permanent residence. It does not affect USCIS processing of I-526 and I-829 petitions at all for anyone. Delaying the acquisition of conditional residence can have the following effects:

- **Age-Outs:** This is complicated, but the bottom line lessons are for Chinese investors to pick their EB-5 investment and file I-526 well before any child reaches age 21 (not at the last minute) and to have everyone in the family who is immigrating to pursue the next steps after I-526 approval as soon as they can.
- **Maintenance of Investment and jobs:** delaying when Chinese investors obtain conditional residence also delays when they can remove conditions two years later, and that delays the point to which mainland Chinese must maintain their investment and any operational jobs claimed for I-829 purposes. This creates some thorny questions that USCIS has not clearly answered, particularly concerning the effect of a liquidity event in the job creating enterprise before the end of an investor's conditional residence.
- **Material changes:** delaying the date of conditional residence leaves the Chinese investor more vulnerable to revocation of petitions arising from material changes to the project occurring before that point.
- **I-526 expedites:** These are rare anyway, and they become less useful for investors from mainland China, because they don't expedite visa availability which is based on the date the I-526 was filed.
- **Escrow practices:** No effect, since even when escrow is used it must release in full upon I-526 approval (if not in part or in full before that point), which is not affected.
- **TEA:** No effect, since I-526 filing "locks in" TEA qualification for an investor.

Robert C. Divine is an immigration attorney at Baker Donelson Bearman Caldwell & Berkowitz, PC, who served as Chief Counsel and Acting Director of USCIS from 2005-2006. He has been Vice President of the Association to Invest in the USA (IIUSA) since 2010.