S. HRG. 111–256

PROMOTING JOB CREATION AND FOREIGN INVESTMENT IN THE UNITED STATES: AN ASSESSMENT OF THE EB–5 REGIONAL CENTER PROGRAM

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

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PROMOTING JOB CREATION AND FOREIGN INVESTMENT IN THE UNITED STATES: AN ASSESSMENT OF THE EB–5 REGIONAL CENTER PROGRAM

WEDNESDAY, JULY 22, 2009

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:07 a.m., Room 226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Sessions and Franken.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Thank you. Thank you all for being here. I thank Senator Sessions and Senator Frank. Like everybody else, we all have about 12 things going on, but this hearing I think is very, very important. We are going to talk about the EB–5 Immigrant Investor Regional Center Program, which is quite a mouthful for something that really works.

It is nice, in this economy, to have something that does work. It has been responsible for the investment of hundreds of millions of dollars. It has created tens of thousands of jobs in American communities since 1993. It has paved the way for ski resort expansion in Vermont and dairy operations in Iowa, energy development in Oklahoma and Texas, the manufacture of hurricane-resistant housing in Alabama, which is something we would like to think that we do not need, but, unfortunately and tragically, we do need in our country.

Many of these things can be talked about as things that can bring about exporting. If somebody comes from another country to ski in Vermont, it is like an export. It is money to our state. If another country finds a need for the kind of housing you have in Alabama or the technology, then that is an export. But this is the nature of the projects financed by foreign investment through the Regional Center Program.

One of the frustrating things for investors is that it has been reauthorized on a temporary basis, currently set to expire in September. That is why earlier this month I offered, along with Senator Sessions' support, an amendment to the Department of Homeland Security appropriations bill to do just that, to make it perma-

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nent, and the amendment was adopted on July 8 and I hope it will become part of that bill.

I will be on that committee at conference and I hope to make sure it works. But I also want to make changes to improve the overall program. I have not yet introduced a broader EB–5 bill this Congress. So I invite the witnesses to suggest improvements that we might make to make it more workable for the agency, and for the communities and other stakeholders, for investors.

I really see this meeting as something that we can do as kind of a dialog that will help all of us. I thank the U.S. Citizenship and Immigration Services for testifying today. The agency does have a crucial role to play.

I welcome Bill Stenger from Vermont. He recognized the opportunities the Regional Center could bring to Vermont and used it to expand Jay Peak. Jay Peak is up in an area we call the Northeast Kingdom of Vermont, a very beautiful, very rural area. I am well familiar with it, especially because my wife was born there.

He has turned Jay Peak into a year-round resort. What had been just a resort for a few months a year, he has turned it into a year-round one. He is attracting foreign investment dollars. But what it has done is it has also made it possible for the ripple effect in a community which really needed jobs, and now they have them.

Sugarbush is another Vermont ski resort that took advantage of it to generate much needed capital. I know that resort well because every time I look out my living room window in Vermont, I am looking across the valley at it.

Just last week, my staff visited with a company in Windsor, Vermont, called Seldon Technologies, inventors of carbon nanotube water purification systems, and they are thinking of the EB–5 program to fund domestic manufacturing jobs here in the United States.

I also welcome—and I am sure the ranking member will be doing this later—Ron Drinkard of the Alabama Center for Foreign Investment and Stephen Yale-Loehr, who is actively involved in the EB–5 Regional Center Program, and Michael Dougherty, a former Ombudsman for USCIS.

This type of immigration program is not unique to us. We have seen how Canada and England and the rest of the United Kingdom have used this very, very effectively. In fact, in the current difficult economy, Canada has been promoting their immigrant investment program all around the world and grabbing these investments.

It is one of the reasons why we need to make sure, for investors, that it is permanent here in the United States, so we can do the same thing. We have a lot of foreigners who do want to invest here, and I will put my full statement in the record about the things they have to follow to do it. It is not just an easy given to get visas. They have to actually get actively involved. But we should look at what other countries do to get that investment.

I will put my full statement in the record.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Chairman LEAHY. Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman. I believe that this EB–5 program should be part of our immigration mix. It seems to me to meet the needs of people who like to come here and, quite significantly, it seems to me to be the kind of program that serves a legitimate interest of the United States.

Whereas some people who come to our country, I think it is no doubt, do take jobs that would go to Americans, this program would appear to be the kind of program that creates jobs. In a time of rising unemployment, in particular, I think that the program makes a lot of sense.

I was happy to accept Chairman Leahy's amendment, second degree amendment to my E-Verify amendment recently which made it permanent. I think perhaps this will lay the groundwork for more expansion of it. There are 60 approved regional centers in 24 states and in June of 2007, our Alabama Center for Foreign Investment, located in Montgomery, was approved. It is one of the only two statewide centers in the nation, and I am happy to work with Ron Drinkard working on that.

You have been a staunch advocate and you have taken a lot of time and effort to explain to us the details of the program and it gives me confidence that this is a sound program. It is the kind of thing I would like to see expanded.

It is estimated that 75 to 80 percent of all EB–5 green card petitions are filed through these regional centers and it has attracted more than $1 billion in foreign investment and created an estimate aggregate of 20,000 jobs for U.S. workers. The program has doubled between 2006 and 2007, but it does appear to be underutilized and could be more effective.

On March 18, our Ombudsman, Mr. Dougherty, published a report detailing the recommendations that could be implemented to make the program more efficient. According to the report, less than 1,000 of the allocated 10,000 immigrant visas per year were being used due to program instability, the changing economic environment, and more attractive immigrant investor programs in other countries.

So we look forward, Mr. Chairman, to hearing more about this. It seems to me Canada has proven the viability of these kinds of programs. If we think carefully and study this in the right way, I believe this program could be expanded and would benefit the American economy. Thank you.

Senator Franken, you had a couple of comments you wanted to make.

STATEMENT OF HON. AL FRANKEN, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator FRANKEN. I do, Mr. Chairman. Thank you, Chairman Leahy. Our country is experiencing the highest national unemployment rates in three decades. While Minnesota State unemployment rate has traditionally been lower than the rest of the country, we have a number of counties that have unemployment rates well below the national average.

Clearwater County, for example, had an average unemployment rate of over 19 percent in the first 5 months of 2009, more than double the national average in the same period. Clearwater County is no outlier. In the first quarter of 2009, 12 of our 87 counties had unemployment rates that were greater than 150 percent of the national average.

In times like these, any program that spurs investment in our economy should be strongly supported. I am particularly interested in the EB–5 Regional Centers Program, because it allows for foreign investment to concentrate in a particular geographic area and lowers requirements for rural regions or high unemployment areas, where an added stimulus is especially needed.

This is a win-win program, the kind I like. Our local economies benefit, as do skilled entrepreneurial foreign investors who can join our national community and who surely will make further contributions to our economy.

I am pleased that the program combats the old and false stereotype that immigrants take away our jobs. Immigrants add to and stimulate our economy. This program is an excellent showcase of just that trend.

I fully support Chairman Leahy's recent provision that will make the EB–5 Regional Center Program permanent. I will also support any measures to streamline and expand the program, particularly to states like Minnesota.

Although three of our neighbors—Iowa, Wisconsin and South Dakota—have EB–5 Regional Centers, as of yet, we do not in Minnesota and I want to find out how we can change that. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Franken. Our first witness is Robert Kruszka. He is the deputy chief of Service Center Operations for U.S. Citizenship and Immigration Services, an agency he has served for over 20 years. He previously worked in the Fraud Detection and National Security Division at USCIS headquarters. He also serves as a senior special agent for the Investigative Services Division.

Incidentally, all of you, your full statement will be placed in the record, but please go ahead, Mr. Kruszka.

STATEMENT OF ROBERT KRUSZKA, DEPUTY CHIEF OF SERVICE CENTER OPERATIONS, U.S. CITIZENSHIP AND IMMIGRATION SERVICES

Mr. KRUSZKA. Thank you. Chairman Leahy, Ranking Member Sessions, Senator Franken and your staffs, I am grateful for the opportunity to appear before the Senate to discuss various aspects of the EB–5 immigrant investor program. My name is Robert Kruszka and I am the deputy chief of Service Center Operations for U.S. Citizenship and Immigration Services.

I am extremely involved in the management and oversight of the EB–5 immigrant investor program. We want to thank the Chairman and the Committee for their support for this program, especially for the recent amendment to the Department of Homeland Security fiscal year 2010 appropriations bill to make the EB–5 Regional Center pilot program permanent.

USCIS has been working to improve the investor program by providing it with more dedicated resources, including more comprehensive training in the adjudication of this work to USCIS officers. All EB–5-related adjudications have been consolidated exclusively at our California service center. Previously, this workload was divided between two centers.

The California service center now adjudicates all regional center proposals and any associated petitions and applications. USCIS believes that this workload consolidation will result in more consistent and expeditious EB–5 adjudications.

Processing times have improved significantly as a result of these changes. One year ago, it took USCIS an average of 14 months to process a regional center proposal. It now takes 4 months. The average processing time for individual investor petitions has dropped from 7 months to 4 months and the processing time to remove the conditional status of permanent residents has dropped from over 18 months to 6 months.

There are currently a total of 60 approved and active regional centers present in 24 different U.S. states, inclusive of the District of Columbia. This is an increase from 23 regional centers a year ago. The list of active regional centers is posted on the USCIS Website and is updated anytime there is a change.

USCIS has developed an e-mail account at uscisimmigrantinvestorprogram@dhs.gov for external EB–5 stakeholders to use when seeking general EB–5 program information, inquiring about the status of pending cases, or requesting the expedition of a pending EB5 case.

USCIS has undertaken a series of initiatives to provide further transparency and streamline the adjudications process. Currently, there is no official application form for the regional centers' proposals or subsequent amendments, and, thus, no fee is charged for these filings.

Adjudications of regional center proposals are highly complex and time-consuming for USCIS personnel. USCIS has drafted a regional center application form which is in the process of being cleared for use. Further, a fee study is currently underway to determine the appropriate fee to collect for the adjudication of the regional center proposals.

USCIS believes that the transparency in the administration of this program is critical to its success. To this extent, USCIS is holding quarterly meetings with external EB–5 stakeholders, to include the gentlemen to my left, to discuss any pending EB–5 issues or concerns that have surfaced in the program and to provide additional clarification and guidance as needed regarding the adjudication and/or processing of EB–5 petitions and related applications.

USCIS notes that the uncertainty of whether the program is extended poses operational challenges for USCIS, as well as a troubling concern among the EB–5 stakeholder community. When the pilot program was scheduled to sunset without further legislative action by Congress, USCIS had to advise stakeholders of the steps it would take to hold pending regional center cases in abeyance for a finite period pending further congressional action.

USCIS also advised EB–5 stakeholders that it would have to reject any future regional center proposals and associated regional

center I–526 individual investor petitions submitted after the sunset date. The uncertainty as to whether the immigrant investor pilot program will remain a viable vehicle for immigration to the U.S. through investment hampers marketing efforts by regional centers to attract prospective immigrant investors and also creates unease and apprehension among the existing regional centers as to whether their business plans will come to fruition.

If the program is not permanently extended or, at a minimum, the President's budget request to extend the pilot program for three more years is not enacted, then further uncertainty would be created among the EB–5 stakeholder community.

Once again, thank you for the opportunity to be here today and for your support of this program. I am happy to answer any of your questions that you may have.

[The prepared statement of Mr. Kruszka appears as a submission for the record.]

Chairman LEAHY. Thank you. Thank you very much. Our next witness is Stephen Yale-Loehr. Stephen Yale-Loehr is the executive director of Invest in the USA, a trade association of EB–5 Immigrant Investor Regional Centers. Mr. Yale-Loehr has been practicing in the field of immigration law for over 25 years; author of a multi-volume treatise on immigration law; teaches at Cornell Law School. He is also counsel to Miller Mayer in Ithaca, New York.

Mr. Yale-Loehr, please go ahead, sir.

STATEMENT OF STEPHEN YALE-LOEHR, EXECUTIVE DIRECTOR, INVEST IN THE USA

Mr. YALE-LOEHR. Chairman Leahy, Senator Sessions, Senator Franken, thank you very much for inviting me to testify. I plan to do four things in the next 5 minutes.

First, I will summarize the EB–5 program. Second, I will summarize the economic benefit that the program is bringing to the United States already. Third, I will identify some problems that hamper the current EB–5 program. Fourth, I will offer some recommendations to improve the EB–5 program so it can achieve its true potential.

First, a short summary of the EB–5 program. Congress created the fifth employment-based preference category, which is why it is called EB–5, in 1990. Investors have to invest in a U.S. company and create or save 10 jobs for U.S. workers to be able to get a green card. They have to invest at least $500,000 in a rural or high unemployment area.

To encourage immigration through the EB–5 program, Congress set up a pilot program in 1992 that sets aside 3,000 of the 10,000 EB–5 green cards each year for people who invest in so-called regional centers. That part of the EB–5 program is very successful. The USCIS estimates that 91 percent of all people who get EB–5 green cards do so through regional centers, not in their own companies.

As the USCIS has just testified, there are 60 regional centers that are approved and 40 more that are pending. So within a year from now, there will be 100 regional centers around the country stimulating our economy.

Second, the economic impact of the EB–5 program. As Senator Sessions has already pointed out, in 2003, the GAO reported that the EB–5 program has been underutilized. Nevertheless, even though it has not been used very much, it still had managed to stimulate $1 billion of investments in the United States. That number has significantly increased in the last 5 years since that report.

My written testimony includes several examples of current projects that regional centers are doing around the country. Just those examples alone will create tens of thousands of jobs for U.S. workers in the next few years.

These examples illustrate that although the EB–5 program is small in terms of the numbers of people coming to the United States, it packs a powerful economic punch. If all 10,000 EB–5 green cards were used each year, that would be $5 billion that would be invested in the U.S. economy each year.

Yet, there is a lot more beneficial impact to the EB–5 program besides just the investment by the investors. EB–5 investors also buy houses here. They send their children to private universities here. They pay taxes here. They invest in the stock market. They make other investments. For example, I know one person who is bringing $15 million of his family wealth to the United States as an EB–5 investor.

EB–5 investments also fuel large projects that otherwise would not get off the ground. For example, one regional center in the District of Columbia is poised to prime $1 billion worth of real estate investments just here in the local economy. All these projects will produce thousands of jobs at no expense to the U.S. taxpayer.

Congress and the immigration agency should view the EB–5 program really as an economic stimulus tool, not primarily as an immigration program.

Next, I want to talk about some problems with the current EB–5 program. First, as the other witnesses have pointed out, we need to make the EB–5 program permanent. The lack of permanency deters investors from investing in the United States. They are not sure whether they are going to be able to keep their green card if the program goes away.

I thank Senator Sessions and Senator Leahy for their leadership in trying to make sure that we have a permanent extension and I hope that a permanent extension is included in the final DHS appropriations bill.

Second, USCIS should process EB–5 cases more quickly. As Mr. Kruszka has already pointed out, EB–5 processing times have improved recently, and I thank him for that. But they are still erratic.

One investor in a regional center may have his project approved in 2 months, while another investor in the exact same project may have to wait 6 months. This delays money getting to the project when it is needed.

The USCIS should allow immigrant investors to pay an additional fee to get their cases processed more quickly. When they are investing $500,000 to get a green card, they are happy to pay another $1,000 or $2,000 to get their green card more quickly.

Next, the USCIS should provide greater clarity on key issues. EB–5 regional centers are concerned that there is not a lot of clarity in the EB–5 process. Although the USCIS is working hard to

provide more clarity, there are still a number of issues that remain unresolved.

For example, even after the USCIS approves a regional center's job creation methodology as part of the regional center petition process, the agency nevertheless often issues requests for evidence to individual investors who are investing in that regional center questioning that same methodology.

USCIS should give regional centers the option to have their new projects in an already approved regional center an opportunity to sit down with the USCIS to go over the project and resolve project-general issues so that they can be resolved and out of the way before the first investor actually invests in that project. This would make EB–5 processing quicker and provide more certainty.

Next, the USCIS or Congress should resolve certain ambiguities in what we mean by rural or high unemployment. The immigration statute defines a targeted employment area as either an area that has an unemployment rate that is 150 percent of the national unemployment rate or is rural.

But a high unemployment rate may change over time and that can hurt large projects that take more than 1 year to try to get investors to go into that project. The USCIS or Congress should specify that if a project qualifies as high unemployment when it starts, it should be grandfathered as high unemployment throughout the project, until the last investor has invested in that project.

Lastly, the U.S. Government should promote the EB–5 program. It does little good to have a program if foreign investors do not know about it. The USCIS should work with the Department of Commerce to promote the EB–5 program overseas.

Thank you very much for your time and I look forward to your questions.

[The prepared statement of Mr. Yale-Loehr appears as a submission for the record.]

Chairman LEAHY. Thank you very much. Our next witness is Bill Stenger, William Stenger, whom I know well, along with his establishment. Many times, we have worked together on EB–5 matters, traveling abroad and educating investors about opportunities in the United States. He is currently the president and chief executive officer and co-owner of the Jay Peak Resort in Jay, Vermont.

He has been chairman of the Vermont Ski Area Association for the past several years, was chairman of the Vermont Travel Council from 1998 to 2007. He was instrumental in creating the Vermont Regional Center.

Looking in the Caledonian-Record, which is an area newspaper, yesterday, he was speaking about designing biotech jobs. He is quoted as saying Jay Peak is one of the most successful EB–5 developments in the country.

I am not saying anything different than I haven not said before, but I agree with that. Please go ahead.

STATEMENT OF WILLIAM J. STENGER, PRESIDENT, JAY PEAK RESORT, JAY, VERMONT

Mr. STENGER. Mr. Chairman, Senator Sessions, Senator Franken, it is a pleasure to be with you today and I am pleased to share with you my perspective of our EB–5 Regional Center Pro-

gram and how it has affected my employees, my community, and the State of Vermont.

My company, Jay Peak, was founded in 1955 as a winter-only ski resort. We are located three miles from the Canadian border. Mr. Chairman, as you said in your opening remarks, it is the Northeast Kingdom, a term that former U.S. Senator George Aiken coined many, many years ago as one of the beautiful parts of Vermont.

Jay Peak is one of the most significant employers in Orleans County, a place of great rural agricultural character, beautiful mountains and streams, but it is also the home of the most significant poverty and economic challenge of any region in the State. Every socioeconomic indicator that we measure is worst in our county. Unemployment, drug abuse, spousal abuse, child issues are most serious there, and it is all because of economic challenge.

However, despite these issues and the most profound economic issues that we have seen in generations in Vermont and the nation, I am very optimistic about the future of our community and its citizens.

We are seeing at our facilities the significant creation of the biggest positive life-changer a person needs—a job, a job that will sustain them and their families with benefits and a future that inspires and rewards their economic and human spirit.

We are seeing this employment creation at Jay Peak and our surrounding communities in this terribly troubled economy solely because of the EB–5 foreign investor program. In today's economy, what is strangling the small business community in Vermont and nationally is the lack of access to capital. Affordable capital is almost nonexistent in this marketplace.

However, through the EB–5 regional center pilot program, at Jay Peak, we are well on our way to raising $100 million of equity capital. This capital will help us build year-round facilities that we desperately need in order to be competitive, but, also, it helps us create full-time opportunities for so many citizens throughout the northeastern part of Vermont, where we have the highest unemployment communities.

Senator Franken, you mentioned that this is a win-win program. It certainly is. It is a win for Jay Peak because we can build the things we need. It is a win for the investor because they get to come to this country and find a new life. It is a win for the government because we are creating tons of jobs in our whole area. So it is truly a win-win-win situation.

I have personally met almost every investor that is participating in the Jay Peak program. They are a group of wonderful people. I can tell you that their equity investment is changing our region in a profound and positive way and once in the United States, they will continue to do so, being contributors to their communities and continuing to invest in their daily lives.

Without the EB–5 source of affordable capital, none of this significant economic growth would be taking place in Jay Peak or in our region of the United States. I have had the opportunity to travel around the world, visiting various countries in promotion of Jay Peak's program and I have had the opportunity to meet other business opportunities.

There are many, many small business opportunities in Vermont that can benefit from the EB–5 program. I met Alex Choi in Korea a couple of years ago and we are now working together on bringing a biotech research, development and manufacturing facility to the northern tier of Vermont, something that you would have thought a few years ago would be an impossibility. But it is a real possibility now and it is a tangible thing that we are working on right away.

Steve Yale-Loehr made some important points and I would like to emphasize one, and, of course, it is the permanency of the program. Mr. Chairman, I compliment you for the leadership and Senator Sessions, as well, for supporting the permanent aspect of this program.

Without that, programs will not be able to plan and investors will not be able to consider their futures correctly and, frankly, CIS will not be able to really address the issues on a continuous basis. If this program is made permanent, the projects will be better. They will be better planned. The investors will know how to plan their lives and focus on a program that they know can work, and CIS will be able to better plan its future from a staffing level and an administrative level.

So permanency is vitally important in this. A 3-year extension and a 5-year extension, that would help, but permanency is the answer to the success in the future.

In conclusion, Mr. Chairman, distinguished members of the Committee, this country needs all the equity investment it can get right now. The EB–5 program is a wonderful example of an economic stimulus that is tax-free, not a burden to anyone, and has nothing but good benefits for all involved.

I thank you very much for giving me the opportunity to be with you today. Thank you.

[The prepared statement of Mr. Stenger appears as a submission for the record.]

Chairman LEAHY. Well, thank you. Thank you for coming down. You have come down and helped before. You mentioned Senator Sessions' support. I cannot emphasize enough that in passing the extension on the Senate, it was essential that Senator Sessions was involved and was supportive of that, because it was as an amendment to a bill of his.

So I do want to applaud him on that. It was a bipartisan effort and we just want to now make sure we get it through both parties.

Michael Dougherty, do you pronounce it Dougherty?

Mr. DOUGHERTY. Either way is fine, Senator, Dougherty, Dougherty, it works.

Chairman LEAHY. Which do you prefer?

Mr. DOUGHERTY. I do Dougherty.

Chairman LEAHY. I have found, when I go to Ireland, that Leahy is pronounced about four different ways, depending upon where it is. He is the director of Immigration Control for Raytheon Homeland Security. Until recently, Mr. Dougherty served as the Ombudsman of U.S. Citizenship and Immigration Services.

Of course, all of us on the Committee know him because he used to be counsel to Senator Kyl and what was then called the Subcommittee on Terrorism, Technology and Homeland Security, if I

am correct. So we welcome you back. It is good to see you again. Thank you for joining us.

STATEMENT OF MICHAEL DOUGHERTY, FORMER OMBUDSMAN, U.S. CITIZENSHIP AND IMMIGRATION SERVICES

Mr. DOUGHERTY. Thank you. Chairman Leahy, Ranking Member Sessions, Senator Franken, it is a pleasure to be with you. I will clarify for you a little bit what the Ombudsman's office does. Congress created that office within the Homeland Security Act in order to look into U.S. Citizenship and Immigration Services and to determine where the problem areas were and to suggest solutions and make formal recommendations to USCIS, which would then be transmitted to Congress in an annual report.

The Ombudsman's office has recently done that. On June 30, the office gave a report to Congress that illuminated much of the work that it had done in the prior year and suggested new activities that USCIS could look into to improve benefits.

I am not appearing today as a Raytheon employee. I am currently working with Raytheon, but my testimony is limited to my role as a former Ombudsman and I should not be regarded as expressing the views or opinions of the Raytheon Company, affiliates or employees.

I respectfully request that the Ombudsman's EB–5 report from March of 2009 and USCIS' response be included in the record.

Chairman LEAHY. Without objection.

[The information appears as a submission for the record.]

Mr. DOUGHERTY. Thank you. One of the things that I learned when I was the Ombudsman is that USCIS is at its very best when it directly communicates with people. This includes individuals who are trying to come to the United States and obtain lawful permanent residence.

In this perspective, within the regional center program, it is going to be the ability to reach out to stakeholders and to explain to them clearly what the rules are. We need clear rulemaking to come out of USCIS to benefit the program, and USCIS should make every effort to engage the people who are putting significant amounts of money at risk in the EB–5 program to engage in that type of dialogue.

Folks who are putting $500,000 down would probably benefit from engaging the agency ahead of actually filing their petition. I think it would be good for the California Service Center to proactively engage those people so that they can understand what their plans are, how the financing is going to occur, and to eliminate doubt going into the application itself.

If USCIS is able to do that, I think it is going to reduce the overall work for USCIS. They will not have to send out requests for evidence to clarify what an application meant. They are not going to ask other questions that are going to slow the entire process down for both the Department and for the investor.

I think that is key and one of the things that I pointed out in my written testimony was that if you are going to engage in that type of communication, you are going to eliminate a lot of wasted time and money, both for the government and for the investor.

The integrity of the program is always going to be protected when you have clear, definitive rules that everyone understands. USCIS should engage in that type of rulemaking now.

I understand that USCIS is very taxed with other things that they have to do, they have other regulations to write, they have mandates coming out of the administration that they have to pursue, but I think now would be a very good time, if the amendment is successful, if we get it in the appropriations, that this becomes a permanent program, it is going to allow us to do that type of rulemaking. Now is the time to do that.

If folks are going to stake significant amounts of money on coming into the United States, they need to know clearly what the rules are.

Communications from the California Service Center have, in the past, been outstanding. I have talked to a lot of folks that are in the high end immigration business, trying to get foreign nationals of extraordinary ability into the United States, and they had great things to say about how California did business back in the day.

A lot of it, though, had to do with a customer's ability to pick up the telephone and to make a call and talk to some live person who has got subject matter expertise. I think that is the best way for an agency like USCIS to operate. I know that poses operational challenges for USCIS, but at the same time, I think it is a good way to do business.

In making these comments, I am aware that USCIS does a significant amount of work with customer outreach. Their customer service, I think, is outstanding. If they can just do more of it, it will benefit everyone.

One of the things that was observed by the Government Accountibility Office is that qualifying a person for EB–5 status is one of the most complicated subspecialties in immigration, because a sophisticated knowledge of corporate tax, investment and immigration law are required.

It is a complex area. It is complex for people to file these applications. It is also very complex to adjudicate them. The better your training is for your USCIS adjudications officers, the faster they are going to be able to work, with greater accuracy, to protect the integrity of the entire process.

If USCIS is going to rely on modeling to prove indirect job creation, USCIS employees should actually be trained in how models are put together.

Business modeling is very important. It is a growing area. It helps you avoid mistakes. It helps you to predict effects. If USCIS is able to put a modeling curriculum together for those adjudicators, that will benefit everybody in the long run.

Thanks again for the opportunity to testify today.

[The prepared statement of Mr. Dougherty appears as a submission for the record.]

Chairman LEAHY. Thank you very much. Senator Sessions and I were just commenting here. We both agree, if it is going to work, the need is there to make it permanent. If I am an investor in another country, I am not about to put my money in here if I think it may get yanked out.

I think it will be permanent, but if you are the one writing the checks, you may want more than that to go on. The United States is a great place to invest, but they may look at our neighbor to the north as a place to invest. I think we have to make it permanent if we want it to work, and most of us want it to work. That is a bipartisan feeling.

Ron Drinkard is the director of the Alabama Center for Foreign Investment. That was created under the EB–5 employment creation visa program. He has over 34 years of experience in economic development and banking; served both as vice president for Industrial Development AmSouth Bank and for Southwest Bank-Wachovia.

Glad to have you here and I will yield to Senator Sessions, who has some comments.

Senator SESSIONS. Thank you. Mr. Drinkard, we are glad that you are here. I know you have been very active an advocate for this program. You know it well. You know how it plays out in the real world. We are glad you are here, glad to have a Troy University graduate, even though you got a banking degree from LSU. We will forgive you for that.

I look forward to your testimony. You have got some suggestions for us and I look forward to those.

STATEMENT OF RON DRINKARD, DIRECTOR, ALABAMA CENTER FOR FOREIGN INVESTMENT

Mr. DRINKARD. Thank you, Senator Sessions. Mr. Chairman stepped out, but we appreciate the opportunity to be here. Senator Franken, I am a fan of yours in your prior life and we do appreciate the interest that you are expressing in the program by virtue of your presence here today.

As the Chairman mentioned, I am director of the Alabama Center for Foreign Investment, which is a regional center covering the entire State of Alabama. Senator Sessions, in the Chairman's absence, if you do not mind, I may deviate a little bit from the testimony I submitted and take maybe a less rigid approach in my comments.

Senator SESSIONS. That is fine. I am sure the Chairman will make your remarks a part of the record, and I think that would be appropriate.

Mr. DRINKARD. Thank you.

Senator SESSIONS. Tell us what you think.

Mr. DRINKARD. My partner, Boyd Campbell, is an immigration lawyer with 20 years experience. I have 34 years of experience in banking, economic development, and governmental relations. Between the two of us, we really thought that we could solve any problem that we ran into regarding the EB–5 program.

Not only were we wrong, but 2 years down the road, we are still learning something knew and important about this program virtually every week. It was pointed out by Mr. Dougherty, next to me, he mentioned difficulties and complex. That is so very, very true.

Mr. Kruszka pointed out the need for additional resources and more training; also, very, very important. The two fit together almost perfectly. Let me say this about Mr. Kruszka, too. We have

had a tremendous working relationship with Mr. Kruszka and his colleagues, Kevin Cummings and Joe Whalen. We could not ask for more support from these individuals than we have received.

In my opinion, we have got the best people we could have in those positions, but, unfortunately, there are some situations where, in my opinion, their hands may be tied where they may not be able to do some of those things that they would like to do to make this program more user-friendly, and I think the key to it is making it more user-friendly.

There is a tremendous misconception out there. There is a perception that this program is immigration related. It is really not. This is an economic development program. It virtually has nothing to do with immigration. It may be this much immigration, but it is this much economic development.

In addition to that, we have the greatest opportunity that we could ever have to play some role in the recovery of this nation's economy and the best part of it all, it does not affect our tax dollars. Our taxpayers do not have to spend one penny on this.

We are currently spending tax dollars doing many things that this program can do and can do very effectively at no cost. But there are some things that we could consider that would perhaps make it easier to do this. You have heard mentioned permanency of the program. Of course, it is difficult for anyone to consider getting into anything unless they know it is going to last. We do not get on a plane headed somewhere unless we think it has got enough fuel in it to get to the destination. Same thing with these investors.

The preapproval process, if we use that analogy with the plane, yesterday, when I was going through Atlanta, it occurred to me that the experience there was very similar to this program. When I go to the first checkpoint, I have to show a driver's license or a passport. Those are preapproved things that our government has provided, which gets me past that.

If we can have preapproved projects, we get past that first point quickly and it is going to save a lot of time and a lot of money on the part of the government regarding these adjudicators at the California Service Center. If that project can be approved, that proposal, that PPM, does not have to be reviewed in every case.

They can look it and they can see it has been approved and they can spend their time doing on something very, very important, checking out that individual. Just like going through that airport, none of us wants to get on a plane with someone that could be harmful to us or the other passengers. Same with this program.

None of us want anyone involved in this program that is going to do any harm to U.S. citizens. Look at it like this. When your baggage goes through that x-ray machine like mine did yesterday, they took a pretty close look at it and if there is anything in there suspicious, they are going to pull me aside and take a look at it.

The same thing will happen in this program. If there is anything in that documentation that throws up a yellow flag, they are going to stop them. They are going to take a look at it. None of us involved in this program have anything more on our mind than security and making sure this program works.

Now, I mentioned, in making it work, the permanency of the program. There are some other things, and let me also say this. There are a lot of opinions and things that are discussed here today from those of us representing very, very different roles in the EB–5 program, but every issue is uniform and it is across the board. We all are experiencing them.

As most of you know, this program has had some problems—had problems back in the 1990s. It had a terrible reputation. There were some people that got involved and we had a lot of problems as a result of that.

What we have got to do is make sure that we do not allow those problems to happen again. Not only do we know to overcome that, we have got to be extremely careful not to let it happen again.

It would be my recommendation that we have something out there in place to make certain that these regional centers, myself included, obviously, have the ability and the knowledge to run that center properly and stay within the guidelines and the regulatory environment of USCIS, extremely important.

I already mentioned project preapproval, something that we need. You have heard some of the individuals mention that we need a longer period of time for the creation of these employees, of this job creation. As you know, we have to create a minimum of 10 jobs, direct, indirect and induced, for each of these investors.

There are projects, large and small, where this is virtually impossible. There is a planning stage. There are so many things that have to be done. There are environmental studies in many cases that could take up to a year on some of these sites.

Chairman LEAHY. In fact, on that, let me pick up on that, because I have discussed this with Mr. Stenger and what you are talking about is for an investor to convert a 2-year conditional green card to a traditional green card, he or she typically has to show that they created 10 new jobs.

In Alabama, as you pointed out, there could be restrictions, hurdles you have to go through. In Vermont, along with the permitting factor, we can have severe weather. It can be 20 and 30 below zero during construction season.

So these delays can happen, notwithstanding good faith. Would you talk to that, Bill? I am thinking the challenges of the weather and other requirements, what Mr. Drinkard was talking about, too.

How do we get around some of those? You do not want an open ended process, but how do you get around it within that 2-year requirement? Are there other things we should be doing?

Mr. STENGER. Well, I would support what Ron said about the planning that has to go on in a project. The better a project is planned, the better its life is going to be. So often in business, you see projects that are too quickly planned. People do not think about the details that go with the project and failure is at the other end.

So proper planning and in our State and I think throughout the country, environmental permitting at the State and Federal level are substantial oftentimes. To conceive an idea, do the permitting, do the planning, build the project, hire the people, grow your business and meet some job level within a 24-month period, in today's world, I would say it is impossible, even for the smallest of businesses, to do it correctly.

We are talking about businesses that are not insignificant. They are small businesses in most cases, but they have to do the same planning and work that others do.

Now, the reality of the regional center pilot program regulations, as they exist today, is that there is no obligation to prove job creation after 24 months. In fact of law, there is no obligation to do that within a 24-month period.

What you do need to do is you need to do what you said you were going to do at the beginning. When we submit our programs to CIS, they look at them, they give us advice, they approve. In a sense, they give us direction. We build what we say we are going to build. We create what we say we are going to create and if we do that, those jobs are going to occur, because we have done the economic modeling in advance.

I think if there is an area that we can all work together, it is probably on making sure the economic modeling is something we are confident about and feel good about. But if we do that, the job creation will be there.

In our case, we are a big employer, in a sense, but we are a small employer in Vermont. But the indirect jobs of these projects are where so much emphasis really lies, and it is not easy to look at somebody along the road that is driving past you and say, "That is a job I created."

The indirect job creation of these EB–5 programs is profound. So I would say that within a 24-month period, very difficult to take a project from an idea to the employment levels that may be expected. It may take longer. The weather may affect you, the permitting may affect you, and the economy may affect you.

So those are my thoughts, Mr. Chairman.

Chairman LEAHY. Let me ask Mr. Kruszka about that, because we have been talking about the fact that a large number of the visas authorized are never used, but we know that there is substantial growth in popularity for the regional center program.

What is the biggest impediment to growing this program? I would like to see these visas used. What tools can we give you from the Congress to make it possible to move and create them? Do we have to look at the 2 years? What is your analysis?

Mr. KRUSZKA. I think the biggest impediment right now is the fact that the program is not permanent and that has sunsetted several times. That has created an operational problem for us, an unease in the stakeholder community, and it is hard to attract the investors that way.

I hear what Ron Drinkard and Bill Stenger are saying about the 2-year job creation memo. We set that limit at 2 years and I think that if that is an issue for the projects, and I hear that it is, we have been hearing it for a while, we think that it would help if Congress would actually clarify the language for us, because it seemed to be moot on that point.

Everything else in the immigration realm, you need to remove your conditional residence within 2 years and if you are filing within that 2-year period, we expect that you have to follow through with your investment, which the investment is one part and the other part of it is creating the 10 jobs. I think that causes some problems for everyone.

Chairman LEAHY. Mr. Yale-Loehr talked about business plans and the preapproval by the agency. The approval process for a given project would be, as I understand, separate than the immigrant investor petition process.

Did I state your position correctly?

Mr. YALE-LOEHR. Correct.

Chairman LEAHY. What kind of benefits do you see coming from that? I am thinking working from the stakeholder side of the equation. Does it result in USCIS adjudicating quicker?

Mr. YALE-LOEHR. I think, as the other witnesses have pointed out, it makes everything more efficient. If you have more talking, more dialog between the stakeholders and USCIS, then you can resolve problems up front. Right now, the regional center gets approved as a general regional center, but they do not necessarily have a project in mind when they are approved.

So then they put together a project. They look at the regulations. They try to anticipate what they think is going to work, but they do not have a chance to dialog with USCIS in advance. Instead, the first investor in that project is sort of the guinea pig as to whether the project itself meets the EB–5 program requirements.

That is an inefficient use of the regional center's time of USCIS' time. If you can have dialog up front and say, "OK, this is what we want to do. We want to do this building in the District of Columbia. We want to do this ski resort in Vermont, but we think we want to do it this way. Is this OK," and USCIS says, "Well, you ought to change something along these lines," the regional center is happy to change them up front.

They want to make it work. They are partners with the USCIS. If you get that taken care of up front, then the USCIS can spend its time, as Mr. Drinkard pointed out, looking at the individual investor and that he or she earned his money correctly.

So it makes everything more efficient if you have more dialog up front and the preapproval process is one way to do that.

Chairman LEAHY. Thank you very much. I will submit a couple questions for the record.

Senator Sessions.

Senator SESSIONS. Thank you. Mr. Drinkard, would you share for us the kind of inquiries you get and the nature of the investors and what their motivations might be and how this program ideally should work?

Mr. DRINKARD. Yes, sir. Thank you. Again, I will start out by saying it is an economic development program. In Alabama, we have numerous job clusters, which includes everything from agriculture, high technology, light manufacturing, heavy manufacturing, schools, resort amenities, hotels, golf courses, even cruise ship lines, virtually anything that can create jobs, employ people.

So we have a very wide variety. As a result of that, we look at numerous projects that would like to be considered for EB–5 funding. But the big problem or one of the biggest problems we have is these people, as has been pointed out and forgive me for just reiterating it, but these people, in so many cases, are hesitant to get involved if this thing is not going to last.

For the past year or so, we have been put on a CR, continuing resolution, for just a few months. Prior to that, we had been consid-

ered 3 to 5 years. This is something that needs to be made permanent in order for us to get more attention from these people.

Senator SESSIONS. Just to get a little more background, what is it that attracts, say, an investor to this program? Why would they like it?

Mr. DRINKARD. What attracts the best, our experience has been, first and foremost, is the green card. The second is the return of their initial investment at the end of a 5-year period, unless it is an equity investment, of which it would be a different term.

Third, any return on that investment during that time, those funds are invested in a regional center project.

Senator SESSIONS. So these provide incentives to make people be interested in the program. Mr. Kruszka, does it have any impact on a major CEO of a company, international corporation, that builds a plan in Alabama or any state? Can they access the benefits of the immigration provisions?

Mr. KRUSZKA. They can. Currently, though, it is difficult to do a large project the way the program is set up.

Senator SESSIONS. I just know an example of a major international corporation and the individual wanted to be an American citizen and was hiring 4,000 Americans, Alabamians, to work in his plant and it took a while to get it.

So this necessarily would be the vehicle that individual would use to become an American—green card, permanent resident, perhaps a citizen later.

Mr. KRUSZKA. Yes. They could do that.

Senator SESSIONS. They could use this program.

Mr. KRUSZKA. Yes, they could.

Senator SESSIONS. Mr. Yale-Loehr, did you have any comment on that, on whether that is a wise policy?

Mr. YALE-LOEHR. It is a wise policy. If the CEO is bringing that many jobs to Alabama, then certainly they should be able to get a green card and the EB–5 program is one way to do that.

But as you have seen from the various witness testimonies, it is not easy for anyone to get an EB–5 visa right now and the question is how can EB–5 regional center stakeholders work with the agency and with you to try to make the program achieve its true potential.

Senator SESSIONS. You do not seem to count in your numbers—I know one plant in Alabama recently, a few years, was a $1 billion investment, 4,000 employees at the main automobile plant.

You are not counting those as part of this program, obviously. Your numbers would be higher, I think, if you were counting that kind of foreign investment.

Mr. KRUSZKA. Well, it would have to be approved and it would have to—I am not sure which automobile plant you are talking about, but the investors would have to come forward and the way the program is set up right now, they would probably have to stagger the investors to be able to create that many jobs in the timeframe that is currently set up in the program.

Senator SESSIONS. Mr. Drinkard, do you have a comment?

Mr. DRINKARD. Senator Sessions, I agree with those comments. It is a little more complicated in that in a project that large, you are going to have a minimum of a 2-year construction period. Now, it gets a little fuzzy on how you include construction workers.

It is my understanding, and Mr. Kruszka can address this much better than me, but there is a possibility to include indirect and induced jobs that are created by those temporary construction workers.

There is also the possibility, if those construction workers have been there or if those positions have been there for 2 years or more, that those jobs can be included. For instance, if you have got a very large manufacturing facility that has 2,000 construction workers 2 years or more, then it gets a little hazy whether you count just those workers or whether you count those workers and the induced and indirect with them.

Those could help get the funds into the program quicker, but at the same time, take into consideration that these——

Senator SESSIONS. But apparently, when they make their decision, they do not access this program.

Mr. DRINKARD. They cannot get the funds, Senator. That is just it. The funds will go into an escrow account and until that I–526 petition is approved, the funds do not break escrow.

So these petitions could be approved at different times, which could hold up those funds for that project. That company may be very hesitant and unable to depend on those funds, not knowing when they are going to get them.

Senator SESSIONS. Mr. Kruszka, some critics have said that this program amounts to the selling of a national birth right or could allow people to abuse the system, have governmental moneys from foreign countries come in for spying or other intelligence interests that they might have.

Do you have any thought about that? I do not believe that is a legitimate complaint, but what would you say to those complaints?

Mr. KRUSZKA. We have heard those complaints before, Mr. Senator, but we have not been able to verify any of that being an issue in the program. We do verify where the money is coming from and that is an extensive process between the investor in the petitioning process, and we have not had a problem. I do not think that is an issue with this program.

Senator SESSIONS. Do you have a fraud rate and is there anything that can be done to reduce any fraud that might occur?

Mr. KRUSZKA. We do not have the same fraud that was mentioned in the early 1990s that somebody mentioned earlier today that we are aware of. We are looking for fraud. We do have fraud units in the center to review fraud, if fraud is apparent. But I am not aware of any large-scale fraud scheme in any of the EB–5 investment schemes.

Senator SESSIONS. Mr. Drinkard, you note that we need to make the regional center move from pilot program to permanent program. I would just note that I am glad Senator Leahy is going to be on the conference committee and maybe he can—that is really critical.

We have got to have some other folks come along on the House side to get this thing done. Mr. Chairman, I am glad you are there.

Chairman LEAHY. Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman. I would like to thank both you and the Ranking Member, Senator Sessions, for encouraging making this program permanent. I want to learn a little

bit about it. Basically, I understand there are 24 states that have regional centers and Minnesota is not one of them. Iowa, South Dakota and Wisconsin do.

So basically, I want to kind of know how to get in on this, because I do believe it is a win-win. How does an EB–5 regional center start? Does it start with a project? For example, how did yours start, Mr. Stenger?

Mr. STENGER. Actually, Senator, the Chairman and the then Governor of Vermont, Howard Dean, in 1997, we collaborated on a project for Jay Peak, but when we got to the point of determining what should the regional center be, "the Secretary of the Vermont Agency of Commerce and Community Development, a fellow by the name of William Shouldice, called me and he said," "Do you see any reason why the whole state should not be a regional center?"

I said, "I do not see any reason why it should not be." The entire State of Vermont is a regional center. Now, I am not here to give you advice, but that is one point I might suggest.

Senator FRANKEN. So it started with you and the Senator and the Governor saying, "Let us do this."

Mr. STENGER. Let us do this and, in our case, we are a statewide regional center and one of the few.

Senator FRANKEN. How did you attract your first investment?

Mr. STENGER. We put together a project that would be a job creator, that would help us create and develop services that we did not have. We put together a marketing plan. We started to reach out to places in the world where we knew people were interested in coming to the United States.

Our first market was the United Kingdom and I would say in our first project, about 60 percent of our investors are from the U.K. Many of them, frankly, just want to move to the United States where it is warmer, parts of the United States that are warmer.

Senator FRANKEN. So I take it they can live not in the regional center itself.

Mr. STENGER. They can live and work anywhere in the United States they wish.

Senator FRANKEN. Hence, a warmer place.

Mr. STENGER. The investment goes into our job-creating program and I recommend that you work with your state economic development department and you would do a lot worse by mirroring Vermont.

Senator FRANKEN. Professor Yale-Loehr.

Mr. YALE-LOEHR. I actually had a phone conversation with somebody from the Minnesota Economic Development Agency about 2 months ago inquiring about setting up a regional center in Minnesota. So I can put you in touch with him and we can see how we can get going a regional center in Minnesota.

Senator FRANKEN. Obviously, you are the kind of person, Mr. Stenger, who knows how to find these people. When you said we started looking where we knew there were people who wanted to come to America and had money to invest, how do you know that? How did you know that?

Mr. STENGER. Well, Senator Leahy was referring to Canada. There are immigration seminars around the world where Canada, New Zealand and Australia collaborate together and I went to Lon-

don to observe one of these seminars and I was amazed at the thousands of British citizens who attended this seminar to learn about immigrating to Canada, New Zealand and Australia.

It is a process. We did not go from knowing everything about where the market is to being there. It will take time. But believe me, Canada, New Zealand and Australia are in the business of finding capital and they are out there.

Senator FRANKEN. And what is a regional center physically? Is it an office within the state's economic development office? What is it?

Mr. STENGER. In our case, the Department of Commerce in Montpelier, our capital, they are responsible for overseeing the regional center and they are our go-to sponsor, so to speak. When we have a project, whether it is a biotech research idea or a hotel or some other small business, you would go to the Department of Commerce, run your ideas past them.

If they feel it is consistent with what the spirit of the regional center is all about, they may communicate with CIS and let them know that this is a bona fide project in their eyes and then you can move forward.

Senator FRANKEN. Thank you.

Mr. STENGER. Thank you.

Chairman LEAHY. I should note, when you mentioned the weather, Senator Franken and I are not concerned about the weather.

Senator FRANKEN. We have beautiful summers, lovely falls, and wonderful springs and Minnesotans have learned to adapt to winter by wearing warm clothes.

Chairman LEAHY. A lot of warm clothes.

Senator FRANKEN. Well, not necessarily. There has been a lot of technology in Thinsulate and other things that make Minnesota an incredible place to live and do business.

Chairman LEAHY. Let us ski Vermont.

Senator FRANKEN. We do not have mountains. We have other things. We have lakes, beautiful lakes, fish.

Chairman LEAHY. This could degenerate beyond one evening. Senator Sessions, unless you have further questions, I am going to put—I will close up. I do have submissions from both Mr. Stenger and Mr. Yale-Loehr. Mr. Stenger has asked that several letters from contractors and other businesses around Vermont be included, and they will be part of the record.

[The letters appear as a submission for the record.]

Chairman LEAHY. Mr. Yale-Loehr has asked that several letters from regional centers across the country be placed in the record, and they will be.

[The letters appear as a submission for the record.]

Senator SESSIONS. I would just note and observe that Canada, New Zealand and Australia have thought a lot about immigration policy and a more merit-based point system is what they use and they are, wisely, I think, looking for investors who will create jobs in their country, and we can do better about that.

Mr. Yale-Loehr, do you think that our program is competitive with, say, the Canada program that has been ongoing for quite a few years? I think they are very happy with it. Just how would you compare the two programs?

Mr. YALE-LOEHR. Well, I know the EB–5 program in the United States has not raised nearly as much capital as in Canada, for example. I am not an expert on the other immigrant investor programs, but I know, in Canada, they raised $6 billion coming into Canada in the same time period that we raised $1 billion.

I think based on the suggestions at this hearing today, there are a lot of ways that we can make this program in the United States run more effectively and I think that will do a lot to increase the number of investors who come to the United States and thereby help the EB–5 program achieve its true potential.

Senator SESSIONS. Thank you. I appreciate the entire panel. I believe you have provided valuable information to us. Thank you very much.

Senator FRANKEN. I just want to thank you all and I will follow up with Professor Yale-Loehr on the Minnesota contact. Thank you, Mr. Chairman.

Chairman LEAHY. We are adjourned.

[Whereupon, at 11:20 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Question#:	1
Topic:	investor
Hearing:	Promoting Job Creation and Foreign Investment in the U.S.: An Assessment of the EB-5 Regional Center Program
Primary:	The Honorable Orrin G. Hatch
Committee:	JUDICIARY (SENATE)

Question: When creating the EB-5 program, Congress enacted statutes providing that the initial period of permanent residence shall be for two years, at which time the investor must file a petition to remove the condition. The purpose of this initial period of conditional residence is to deter investment fraud.
With respect to the EB-5 Pilot Program, which features regional center affiliated investments, investors may use reasonable methodologies for estimating job creation.

U.S. Citizenship and Immigration Services (USCIS) may determine what is reasonable and, on that basis and assuming other eligibility requirements are satisfied, the investor becomes a conditional permanent resident.

In order to obtain removal of the condition, the investor must demonstrate the investment was made and that it has been sustained.

Does USCIS expect the investor to prove that the underlying expectations and assumptions of the job creation methodology have materialized by the time USCIS adjudicates the petition to remove the condition? To do so would impose an additional requirement that would unduly burden the EB-5 program and make it less attractive to prospective investors.

Response: Yes, a regional center affiliated EB-5 petitioner must comply with all statutory and regulatory requirements; with the exception that instead of the creation of ten direct jobs, the EB-5 petitioner may be credited with the creation of direct or indirect jobs. USCIS respectfully disagrees that this poses an additional requirement. The regional center proposal must demonstrate in verifiable detail that the business plan can be relied upon as a viable business model. It must be well-grounded in reasonable and credible estimates and assumptions for market conditions, project costs, and activity timelines. The business plan and associated economic analysis must persuasively show that the project's activities will generate sufficient economic activity in order to create the requisite jobs within the two year conditional residency time period.

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Question#:	2
Topic:	models
Hearing:	Promoting Job Creation and Foreign Investment in the U.S.: An Assessment of the EB-5 Regional Center Program
Primary:	The Honorable Orrin G. Hatch
Committee:	JUDICIARY (SENATE)

Question: The statutory law related to the EB-5 Pilot Program authorizes a regional center to use reasonable methodologies for determining the number of jobs created, including such jobs which are estimated to have been created indirectly. These reasonable methodologies include the use of economic analyses such as RIMS II and IMPLAN.

It is my understanding that USCIS finds these models acceptable. These models estimate the job opportunities that are created as a result of the new economic stimulus (such as increased sales that are driven by a new capital investment).

If a regional center proposal is based on a general plan for the promotion of economic growth, and includes general predictions concerning job creation and the jobs predictions are based on RIMS II or IMPLAN or another similarly-accepted model, why then would U.S. Citizenship and Immigration Services not approve such a regional center proposal? Does USCIS require detailed proof that indirect jobs will be of a specific nature and of the "Nine to Five" variety?

Response: No, USCIS does not require indirect jobs to be specifically identifiable. USCIS allows the petitioner to choose the basic economic model it wants to use to demonstrate the creation of indirect jobs. The number of indirect jobs created in the model can be expressed as a ratio of direct jobs that will be created, or as the result of the infusion of capital invested into the project or industry without the creation of direct jobs. In addition, the jobs created need not be of the "Nine to Five" variety and specific to a particular employee. By regulation, the full-time employment criterion may be satisfied by the creation of a full time *position* involving more than one employee, e.g. through a qualifying job sharing arrangement. 8 C.F.R. § 204.6(e).

Question: In other words, if the jobs estimates are focused on a sustained need for a sufficient number of total labor hours in the economy, as opposed to specific "Nine to Five" jobs of a particular duration, why would USCIS not approve such a regional center proposal?

Response: Please see USCIS' answer to the question above. The proposal must demonstrate in verifiable detail that the business plan can be relied upon as a viable

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Question#:	2
Topic:	models
Hearing:	Promoting Job Creation and Foreign Investment in the U.S.: An Assessment of the EB-5 Regional Center Program
Primary:	The Honorable Orrin G. Hatch
Committee:	JUDICIARY (SENATE)

business model. It must be well-grounded in reasonable and credible estimates and assumptions for market conditions, project costs, and activity timelines. The business plan and associated economic analysis must persuasively show that the project's activities will generate sufficient economic activity in order to create the requisite jobs within the two year conditional residency time period.

54559.003

Question#:	3
Topic:	links
Hearing:	Promoting Job Creation and Foreign Investment in the U.S.: An Assessment of the EB-5 Regional Center Program
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Question: Please clarify for the record the basis of the agency's purpose in linking the job creation requirement to the two-year conditional visa period, at both the I-526 petition stage, and the I-829 removal of conditions stage.

Response: INA § 203(b)(5) creates a class of immigrant visas (EB-5) for individuals who invest a specified amount of capital in the United States and who will "create full-time employment for not fewer than 10" qualified employees. INA § 216A places conditions upon the permanent resident status of aliens admitted in the EB-5 classification that must be removed at the end of a two-year period of conditional residency. In order to have the conditions removed, EB-5 visa holders must file a Form I-829 that demonstrates that the petitioner is, among other requirements, "conforming to the requirements of INA § 203(b)(5)." INA § 216A(d)(1)(B).

Consistent with the two-year period of conditional residency, a Form I-526 must be supported by evidence, including a business plan that demonstrates that jobs will be created within the two-year period of conditional residence in order to be approved. 8 C.F.R. § 204.6(j)(4)(i)(B).

USCIS regulations relating to the removal of conditions from the lawful permanent resident status of an alien entrepreneur provide that a petitioner must demonstrate that "the alien has created or can be expected to create within a reasonable period of time" the required jobs. 8 C.F.R. § 216.6(c)(1)(iv). The current statutory and regulatory structure of the EB-5 program only provides for the verification that the requisite jobs have or will be created two years after the EB-5 alien becomes a conditional permanent resident (CPR) through the filing of the Form I-829 petition.

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Question#:	4
Topic:	schedule
Hearing:	Promoting Job Creation and Foreign Investment in the U.S.: An Assessment of the EB-5 Regional Center Program
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Question: If a project is not on schedule at the end of the two-year conditional visa period due to legitimate delays related to weather, permitting, or other factors, and the investor cannot prove that he or she created 10 jobs, how would the agency rule on the investor's petition to remove conditions on his or her visa?

Response: As noted in a previous response, the current statutory and regulatory structure of the EB-5 program only provides for the verification that the requisite jobs have been or will be created two years after the EB-5 alien becomes a conditional permanent resident (CPR) through the filing of the Form I-829 petition. By regulation, USCIS provided some flexibility in adjudicating the Form I-829 petition and thus removing the conditions on the CPR's permanent resident status if there are legitimate delays that are not unduly long. 8 C.F.R. § 216.6(c)(1)(iv). However, if the job creating enterprise simply did not come to fruition and there is no assurance regarding the timeframe in which the jobs will be created, then the Form I-829 petition may not be approved.

Question#:	5
Topic:	flexibility
Hearing:	Promoting Job Creation and Foreign Investment in the U.S.: An Assessment of the EB-5 Regional Center Program
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Question: The regulations, and the agency's current field guidance, require that some flexibility be applied at the I-829 process. Please define the scope of this flexibility at the I-829 stage in practical terms as it is currently applied by the agency.

Response: The flexibility provided for in the regulations and in field guidance will be applied on a case by case basis. Generally, the reasonableness of the time period contemplated by the regulation at 8 C.F.R. § 216.6(c)(1)(iv) will be commensurate with the delay experienced in the job creation.

For example, under the following facts, USCIS would likely find the delay in job creation reasonable. Consider that a Form I-526 petition relies on the creation of retail jobs in a shopping center that is under construction at the time the I-526 petition is adjudicated, but the construction is expected to be completed and fully occupied by the close of the two year period. During the two year period, there are significant and unexpected weather delays in the construction of the shopping center that caused its completion to be delayed for 6 months. The shopping center is completed and the I-829 petition describes the delays and presents evidence that reasonably demonstrates that the shopping center will be fully occupied with the requisite jobs 6 months after the filing of the petition.

Question#:	6
Topic:	field guidance
Hearing:	Promoting Job Creation and Foreign Investment in the U.S.: An Assessment of the EB-5 Regional Center Program
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Question: The current field guidance also indicates that adjudicators should exercise some discretion when reviewing I-526 petitions, and the business plans therein. For example, the field guidance indicates that where a petition does not expressly identify (a) jobs expected to be created and (b) by when such jobs would be created, the adjudicator may take into account economic models and the assumptions that may be drawn from such a model. Given the agency's decision to link job creation to the two-year conditional visa period, will the agency exercise similar flexibility at the I-526 stage as the regulations require at the I-829 stage so as not to hamper beneficial development projects?

Response: USCIS notes that the timing of the filing of a Form I-526 petition is determined by the EB-5 petitioner, not USCIS. It may be that some petitioners opt to file their I-526 petitions prematurely. If the I-526 petition is filed prior to when the investment capital will actually be applied to the project, then the jobs may not be created within the two year period following the EB-5 alien's entry into the U.S. as a conditional permanent resident. EB-5 petitioners can, however, file petitions at the time that the project is ready to commence, in order to give themselves the maximum time to actually show the jobs created as a result of the investment.

As stated in the most recent field guidance, USCIS regulations require all I-526 petitions to demonstrate that job creation will occur within the two year period. The approval of a Form I-526 petition that is not supported by documentation that expressly identifies the number of jobs that the capital investment is expected to create, based upon a realistic and sound business plan, is not in the best interest of the prospective EB-5 alien or the USCIS EB-5 program, as the end result will most likely be the subsequent denial of the individual alien investor's Form I-829 petition. This would ultimately lead to the placing of EB-5 aliens in removal proceedings who had failed to satisfy the program requirements. This outcome would neither serve to enhance the program nor would it benefit the EB-5 aliens, as it would require them to depart the United States years after years of effort to legally and permanently settle in the United States.

Question#:	7
Topic:	legislative changes
Hearing:	Promoting Job Creation and Foreign Investment in the U.S.: An Assessment of the EB-5 Regional Center Program
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Question: What legislative changes to the statute would you recommend be made to provide the agency with tools to be able to accommodate longer build-out periods for projects, or legitimate business-related delays, such that the agency could be confident that the job creation requirements in the statute were being honored?

Response: USCIS does not at this time have legislative proposals for amendments to the EB-5 provisions related to longer build-out periods for projects or legitimate business-related delays. Nevertheless, USCIS welcomes the opportunity to meet with Congress to develop possible legislative changes to address these and other potential areas of improvement related to the EB-5 program.

Question#:	8
Topic:	court case
Hearing:	Promoting Job Creation and Foreign Investment in the U.S.: An Assessment of the EB-5 Regional Center Program
Primary:	The Honorable Arlen Specter
Committee:	JUDICIARY (SENATE)

Question: Please summarize for the Committee the background and current status of the plaintiffs in Chang v U.S., 327 F.3d 911 (9th Cir. 2003), and what steps are being taken by CIS to address their situation.

Response: USCIS is not in a position to comment on a case currently in litigation.

Question#:	9
Topic:	reform
Hearing:	Promoting Job Creation and Foreign Investment in the U.S.: An Assessment of the EB-5 Regional Center Program
Primary:	The Honorable Arlen Specter
Committee:	JUDICIARY (SENATE)

Question: In your estimation, what does the Chang case tell us about the need for reform of our nation's immigration system?

Response: USCIS is not in a position to comment on a case currently in litigation.

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September 22, 2009

Via email: Sarah_Guerrieri@Judiciary-dem.senate.gov

Sarah Guerrieri
Hearing Clerk
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Follow-up questions to July 22, 2009 EB-5 hearing

Dear Ms. Guerrieri:

I am writing to answer the questions Senator Leahy posed in writing after the July 22 EB-5 hearing. I apologize for my delay in replying.

The questions posed to me were:

1. What is your understanding of the background of the *Chang* decision and what steps should be taken to remedy this situation?

2. In your estimation, what does the *Chang* case tell us about the state of our current immigration system and the need for reform of programs like EB-5?

Answer: I am quite familiar with the *Chang* case, as I have been following it since the case first started 10 years ago. A chronology of the case is attached. Two years ago Ira Kurzban, the lead litigator for the plaintiffs, asked me to assist him and the plaintiffs in trying to reach a settlement. I met with attorneys for the plaintiffs and the government before U.S. District Court Judge George King in Los Angeles. Although the government agreed to a settlement in principle before Judge King, the government withdrew from settlement discussions after that meeting.

Although I may be perceived as biased because I tried to assist the plaintiffs, I believe the government should settle or stop litigating the *Chang* case. The U.S. Court of Appeals for the Ninth Circuit held in 2003 that legacy INS acted improperly in retroactively applying new interpretations of the EB-5 program in 1998 that changed the terms of the *Chang* plaintiffs' investments. *Chang v. United States*, 327 F.3d 911, 929-30 (9th Cir. 2003). As the *Chang* court

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noted:

> "The government has never argued that this class of Immigrant Investors did not act in good faith, nor that the efforts they undertook to avail themselves of the EB-5 program were negligible. From [the investors'] perspective, the INS's approving and receiving the benefits of their investments, only to renege on the promise of LPR status once those benefits were garnered, must seem very unfair. It is hard to imagine how the INS has a compelling statutory interest in such an outcome. Congress has not repealed the EB-5 program; it still intends for it to continue. The reputation and integrity of the EB-5 program is ill-served by the proposition that INS approval of an I-526 petition as satisfying EB-5's requirements cannot be relied upon."

Id. at 929.

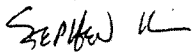
Despite that clear holding, the case still lingers six years later, upsetting the lives of approximately 135 EB-5 investors and their families. If the government attorneys are unwilling to settle the case, a legislative solution may be necessary.

At a broader level, the *Chang* case points out two aspects of the immigration system that need reform. First, Congress and the immigration agency need to adopt clear guidelines so that immigrants know what is expected of them. Part of the problem in the *Chang* litigation was that the EB-5 regulations were (and are) unclear. Ambiguities abound throughout the immigration system. Congress should either exercise more regular oversight over the U.S. Citizenship and Immigration Services (USCIS) to make sure the agency publishes clear rules, or enact clearer rules as part of comprehensive immigration reform.

Second, any new agency and statutory rules should generally apply prospectively, not retroactively. As the Supreme Court has noted, retroactive application of statutes and rules is disfavored. *See, e.g.*, *Martin v. Hadix*, 527 U.S. 343, 352 (1999); *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994). Retroactive application of new rules is unlawful if it violates reasonable reliance, fair notice, and settled expectations. *Landgraf*, 511 U.S. at 270. Unfortunately, the immigration agencies often promulgate new rules or interpretations and then apply them retroactively against immigrants who relied in good faith on the old rules or interpretations. This has occurred in many areas in addition to the EB-5 program. This must stop.

Please contact me at 607-273-4200 x. 318 if you have any further questions.

Sincerely,



Stephen Yale-Loehr
Executive Director
Invest In the USA

Attachment: *Chang* case chronology

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CHRONOLOGY OF *CHANG* LITIGATION

- 1995-96: Approximately 250 immigrant investors and their families placed funds with American Investment Services (AIS) to obtain their residency through the EB-5 program. The AIS investment program provided that individuals would invest in one of several partnerships where funds would be pooled and then reinvested in businesses in compliance with the EB-5 statute. Each investor was required to invest $500,000 that would be placed in the partnerships in the form of cash and a promissory note. Much of the money was intended to preserve jobs troubled businesses, principally in the textile industry in the South. All the investors complied with these requirements. They filed I-526 petitions and all their petitions were approved. As a result, "[t]hey sold their businesses, uprooted from their homelands, and moved to the U.S." *Chang v. United States,* 327 F.3d 911, 928 (9th Cir. 2003).

- 1998: After approval of the I-526s and the grant of conditional resident status to the investors and their families, the legacy INS revised their views concerning the implementation of the EB-5 program. They internally determined that a number of practices, including the use of promissory notes, under certain conditions, were illegal. The General Counsel of legacy INS, at the time, Paul Virtue, determined that INS could not legally apply these changes retroactively because AIS and other investors had detrimentally relied on the government's interpretations in making their investments. Despite this clear legal position, legacy INS went forward and applied the new changes retroactively by issuing a series of decisions beginning with *Matter of Izummi.*

- 1998-99: Because the investors were conditional residents, they were required within two years of obtaining their conditional resident status to filed new petitions (I-829s) asking legacy INS to lift the condition on their residency and make them lawful permanent residents. During this period, legacy INS took no action to revoke the conditional residency of the investors and instead, as reflected in internal memos, decided to accept the investors' I-829 application fees with the plan to deny them after accepting the fees. Because INS' new interpretation made *all investor applications* invalid, AIS, due to its fiduciary duty, stopped all further investments in the underlying businesses. As fiduciaries, they were required to protect the investors' assets and therefore could not continue to invest in businesses that they knew would not yield the investors residency. As a result, many of the business opportunities were lost.

- 1999-2003. The investors filed suit in 1999 and argued that *Matter of Izummi* and the other decisions by INS were improper retroactive applications of the immigrant investor regulations. Instead of conceding the invalidity, the INS waged a vigorous defense to support their actions. The district court judge entered an order denying class certification to the plaintiff investors and sending the individual cases back to INS to determine whether there was detrimental reliance by the investors. The plaintiff investors appealed the judge's decision to the court

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of appeals. In April 2003, the Ninth Circuit in *Chang v. U.S.,* 327 F.3d 911 rejected the government's arguments, found INS' change in position illegal, and noted the hardship suffered by the investors who moved their families to the US and changed their lives as a result of the original regulations.

- 2002. Congress mandated that INS issue new regulations within 120 days that would allow it to adjudicate the investors' I-829 applications. 21st Century Dept. of Justice Appropriations Authorization Act, Pub. L. No. 107-273, Subtitle B. Seven years later, those regulations have still not been published. As a result, the *Chang* investors' applications remain in limbo.

- 2004-06. On remand to the district court, the plaintiff investors amended their lawsuit to include a claim for estoppel. Investors are arguing that DHS should be prevented from denying the removal of their conditional residency and should be required to approve their I-829s because of their conduct in: (1) accepting investor applications that they believed were invalid; (2) accepting fees to adjudicate applications they intended to deny; and (3) leaving investors in legal limbo now for more than 10 years.

- 2006-07. Plaintiffs entered into settlement negotiations with lawyers from the Dept of Justice. The DOJ lawyers agree to a settlement before United States District Judge King. A week later, after talking with their client USCIS, the DOJ lawyers withdrew the settlement.

- 2008-09. As a result of USCIS' actions many of the original plaintiffs and their families have quit the lawsuit and moved back to their home countries. Today, the lawsuit only involves approximately 135 investors and their families. These investors have now been waiting in the U.S. for more than 12 or 13 years to resolve their cases.

- 2008. Because conditional residents who are in the United States for more than five years may apply for citizenship, many of the *Chang* investors and particularly their children, who have now become adults in the U.S., filed for naturalization as a way out of the legal limbo. The USCIS refused to adjudicate the naturalization applications. The plaintiff investors therefore amended their complaint again, this time requesting that the USCIS adjudicate their citizenship applications that, in many cases, have been pending more than one year. The court allowed the amendment and the government has been required to interview the applicant investors and their family members.

- 2008 to the present. Investors weary of the wait also begin to look for other opportunities to become lawful permanent residents. Some children of investors get married to US citizens or try to obtain their residency through work. When they apply to become permanent residents they are told that they cannot get their residency because they are already conditional residents. USCIS is also denying

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every application for citizenship on the grounds that conditional residents cannot be citizens and that their original investments were not valid investments.

- 2009. Most investors have now been in legal limbo for over 12 years. The lawsuit is likely to drag on for two, three or more years regarding estoppel and whether conditional residents can be denied citizenship. After a decision is made in the district court, there will be appeals for several more years. If the plaintiff investors are successful, the government will wind up paying attorneys' fees in the millions of dollars. If the government is successful they will then have to put each investor in a removal (deportation) proceeding where the investor may raise the same issues all over again. In the meantime, the plaintiff investors are being denied the right to obtain residency in other ways on the ground that they are already residents (i.e. conditional residents). On the other hand, they are being denied citizenship on the grounds that conditional residents are *not* lawful permanent residents. One investor, Mr. Bak, for example, has been denied the right to petition for residency through work because he is a conditional resident and then was denied citizenship because he is not a resident. And if there is comprehensive immigration reform, USCIS will take the position that the investors would not be eligible for "earned residency" or "amnesty" because they are legal, conditional residents.

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SUBMISSIONS FOR THE RECORD

Whacom Opportunities Regional Center

1305 11th Street
Suite 304
Bellingham, WA,
USA 98225

July 17, 2009

TO: The Honorable Patrick Leahy
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Leahy,

In October 2006, the United States Customs and Immigration Service designated the Whatcom Opportunities Regional Center (WORC) as a 'Regional Center' under the EB-5 Immigrant Investor Pilot Program. The designation enables a foreign investor to file an application for permanent residency upon investing $500,000 into one of WORC's investment projects.

WORC pools investor funds to develop and operate retirement communities in Whatcom County, Washington. To date, WORC has raised approximately $10 million and has begun development on an active-adult community encompassing 135 independent retirement cottages, two clubhouse/recreational facilities, administrative offices, and 24/7 on demand assisted care services. Over the next 12 months, we expect to raise an additional $12 million, through immigrant investors, and provide personal care and medical services to over 200 senior citizens.

WORC has had a significant economic impact on Whatcom County, a county that has historically experienced high levels of unemployment. WORC's projects have created approximately 150 direct, indirect, and induced jobs in the county, and we expect to create an additional 315 jobs over the coming year.

The infusion of capital in the region has not only revitalized local business, but has filled a local market need – the retirement living industry in Whatcom County has long been under-served.

By all accounts, the EB-5 Program and specifically WORC, has been a successful for Whatcom County. We have received support and encouragement from the Bellingham – Whatcom Economic Development Corporation, the Whatcom Council of Governments, and several business organizations within the county.

Sincerely,

K. David Andersson
President

Attachment 1: Job Creation Letter from Dr. Hodges of the Center for Economic and Business Research at Western Washington University

Attachment 2: Article from the Bellingham Herald – July 17, 2009

Artisan Business Group
2743 South Veterans Parkway, #188
Springfield, IL 62704

July 18, 2009

The Honorable Jeff Sessions
Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Re: EB-5 Program Hearing

Dear Senator Sessions,

I am writing to urge you support a permanent authorization for the EB-5 regional center program.

Serving as a bridge between EB-5 regional centers and investor communities in China and other Asian countries, Artisan Business Group in Illinois and its EB-5 China Marketing/Field Support Center have advised and supported a number of EB-5 Regional Centers that are seeking foreign investment to finance their local business projects and boost economic growth, especially in rural areas, such as dairy farms, turkey farms, meat processing plants, etc. We also assisted many foreign investors in better understanding EB-5 program and investment requirements. However, the current short term reauthorization of the EB-5 regional center program has always caused concerns and worrisome among foreign investors who are investing or interested in investing in the regional center projects; and it has suppressed investor confidence in the program. The economic downturn has made the EB-5 program a valuable economic development tool for many state economies. The U.S. economy benefits from the job creation, the foreign investors may get a good return on their investment and a path to citizenship.

A **permanent authorization** for the EB-5 regional center program will absolutely be an important magnet for attracting more foreign investment; as a result, more American jobs will be created around the country.

Sincerely,

Brian Su

Brian Su, CEO/President
Artisan Business Group

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Jul, 17, 2009

Homestead taps 'immigrant investor' program to sell Ferndale project

JOHN STARK / THE BELLINGHAM HERALD

Homestead Northwest of Lynden has found a buyer for its Correll Commons retirement condo project in Ferndale, tapping into money raised through a low-profile "immigrant investor" program that gives participants a shot at U.S. residency.

In a deal that closed in late June, Correll Retirement LLC paid Homestead $1 million for vacant property that is ready for construction of 26 attached condo units at a site south of Main Street, just west of downtown Ferndale. A related entity, New WORC Development and Management LLC, also paid Homestead about $220,000 for a completed condo unit.

Thirty-two other Correll units, completed earlier by Homestead, are not part of the deal because they already have been sold, said K. David Andersson, who heads the investment groups.

The deal appears to give the financially strapped Homestead some relief.

For at least 20 years, Homestead Northwest and its related companies have helped to finance a growing roster of real estate projects here and elsewhere by recruiting hundreds of area investors attracted by interest payments of 8 percent or more.

When the global economic slump hit, Homestead founder and CEO James Wynstra acknowledged difficulties in letters to his investors, although up to this point the company has not had to deal with foreclosures or lawsuits by investors.

Lisa Guthrie, Homestead's resort development director, said Homestead has been contracted to build the remaining Correll condo units in the months ahead.

"That's work that will help sustain us," Guthrie said.

Andersson, a Bellingham immigration attorney, said the transaction is a good fit for both Homestead and Whatcom Opportunities Regional Center, the federally sanctioned immigrant investor program that he has headed since it began here in 2006. He said it is one of about 40 such programs around the country.

U.S. immigration law provides that under certain conditions, an investor in another country who is willing to make a $500,000 investment in the U.S. economy can get legal U.S. resident status, although the legal path to the so-called EB-5 visa remains lengthy and far from certain.

Among other things, each "regional center" for immigrant investment must present an economic analysis demonstrating that each $500,000 invested in the center's projects will generate 10 U.S. jobs. The Whatcom regional center invests in retirement living facilities and has an economic analysis from Western Washington University indicating that each $500,000 invested in these facilities generates almost 12 jobs.

"EB-5 is essentially a jobs program," Andersson said.

In 2006, the Whatcom center was ready to participate in the 1010 Morse Square high-rise condo project, but the developer could not get the other financing needed to launch it.

"Then we found Homestead," Andersson said.

Andersson's group invested more than $7 million in Correll Commons beginning in summer 2008, Andersson said.

"Today, when the economy is lagging and nobody is building anything, this (investment) program is going to finish a very nice project," Andersson said. "We're creating employment in Whatcom County. ... That is our mandate."

Andersson acknowledged that this may not be the most opportune time to bring new condos onto the market, with other developers' unsold units facing foreclosure here and elsewhere as lenders remain skittish about financing condo purchases. He said his investment group is ready to rent units if sales are a problem.

"The market will tell us what to do," Andersson said.

John Wynstra, son of James Wynstra, said condo sales will pick up if financing problems can be solved.

"There are buyers out there right now who would buy if they could get loans," John Wynstra said.

Wynstra was Homestead's sales manager until recently. He now works for Andersson's investment group.

The approximately two dozen investors in the local program include natives of China, Switzerland, Canada, India, Iran and Korea.

"We really are a United Nations," Andersson said.

Federal law allows as many as 10,000 immigrant investors to get visas under an annual quota system, but last year just 1,700 actually obtained those visas, Andersson said.

Reach JOHN STARK at john.stark@bellinghamherald.com or call 715-2274. Read his Consumer Protection Blog at TheBellinghamHerald.com/blogs.

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William Bissell, P.E. – 1503 North St. – Montpelier, VT 05602

June 18, 2009

Bill Stenger
Jay Peak Resort
4850 Vt Rt 242
Jay, VT 05895

Re: Jay Expansion

Bill:

I just wanted you to know how important my participation in the expansion work at Jay Peak is to my economic health. Although I am one of the smaller fish in the consultant/contractor pond, I still depend upon my consulting income for my livelihood. When I was selected as the Electrical Engineer for the Hotel, Club House and Ice Rink around Christmas, it took away the ever-darkening cloud of recession that had been obscuring the sun. As a small firm, this work will represent a very significant percentage of my annual income during a period that shows little promise in other areas.

Probably more important was this news to my contract draftsman, for whom I represent about 50% of his income. He has fewer assets and a continued income source for him is critical.

I have a little camp on Lake Wiloughby from which I can see Jay Peak. You can rest assured that I will toast to the good luck of your resort as the sun sets behind the mountain this July.

Sincerely yours,

William Bissell, P.E.

(802) 223-9741 Voice (802) 223-9742 Fax

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BLACK RIVER DESIGN
ARCHITECTS
PLC

June 17, 2009

Dear Mr. Stenger,

On behalf of us, our partners and all of our employees here at Black River Design, we would like to acknowledge to you the tremendous difference Jay Peak Resort has made to all of us in these challenging times. Black River Design provides more than 25 professional jobs right here in Central Vermont and a majority of those are working in one way or another on your projects.

As the economy has worsened and many other architectural firms have reduced staff, we have been able to maintain our staff and even add modestly to our payroll. Again, without the Jay Peak projects we would not have been able to do so. Many of our employees have young families and most are the primary earner in their family. The wages they earn are then used to support many other local businesses here in the Barre/Montpelier area. Black River Design was founded nearly 30 years ago in Albany, Vermont, in the heart of the Northeast Kingdom. Over the years we have completed untold projects serving the region from which you draw your own employees. Our most satisfying projects are the public schools where their children learn, the community care centers where their elderly parents live, the bank branches where they keep their savings and borrow money for their homes. We always say "Vermont is a small town" and there is no end to the interconnectedness of all of our endeavors. Jay Peak is absolutely fueling the engine that keeps all of us in northern Vermont moving forward.

We appreciate the confidence and trust exhibited by Jay Peak in Black River Design to help you attain your goals for your resort, your employees and your communities.

Thank you.

Sincerely,

John Hemmelgarn
Partner

Rick Burroughs
Partner

73 MAIN STREET MONTPELIER VERMONT 05602 PHONE (802) 223-2044 FAX (802) 223-1132

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CALEDONIAN-RECORD

Saturday, July 18, 2009

Jay Peak Co-Owner Eyes Bio-Tech Jobs

Mr. Stenger Goes To Washington

Saturday, July 18, 2009

EDITOR'S NOTE: This is the first of two parts about new economic development in Orleans County. The second, in Monday's edition, will explore the $100 million expansion at Jay Peak Resort and its impact on the economy.

JAY - Jay Peak Resort President Bill Stenger wants to create hundreds of high-paying bio-tech jobs in Orleans County.

The jobs at a proposed high-tech manufacturing plant are contingent on a federal program encouraging foreign investment here.

So Stenger is going to Washington, D.C., next week to make sure that program continues.

Stenger couldn't discuss details of his proposal but did say that he is negotiating to bring a multi-million-dollar scientific research and manufacturing facility to a location somewhere in Orleans County.

He estimated that the plant would create several hundred jobs and have a broad impact on this part of the Northeast Kingdom.

A new manufacturing plant, like Jay Peak Resort's $100 million expansion, requires investment capital. Despite the sour economy and tight U.S. capital market, Stenger has successfully lured foreign investors through what's called the EB-5 Visa program to help build Jay Peak Resort into what will be a four-season destination resort.

The resort will become an economic engine of its own in the tourism industry.

Now Stenger says he intends to do the same in the manufacturing sector.

The EB-5 Visa program "could make a difference for Orleans County for the next 50 years," Stenger said.

The EB-5 program is set to sunset in September. The U.S. Senate has voted to support an amendment by U.S. Sen. Patrick Leahy, D-Vermont, to make the EB-5 program permanent.

"I have confidence that it can play a significant role in our economic recovery," Leahy said recently. "But this program must be made permanent if it is to achieve its potential as an economic engine in our communities."

Stenger is sure that Congress will support the program. It creates jobs with little governmental spending.

Even so, he is going to testify in Washington, D.C., Wednesday before the Senate Committee on the Judiciary, chaired by Leahy, about job creation under the EB-5 regional center program.

He will describe the economic hardships in Orleans County and the NEK, and then talk about why the EB-5 program will provide capital where none exists. He has evidence.

"Jay Peak is one of the most successful EB-5 developments in the country," Stenger said, noting that the Jay Peak expansion will create about a thousand jobs at the resort and another thousand indirectly.

Also testifying will be Stephen Yale-Loehr, a Cornell University Law School professor, who likes the EB-5 program.

"It's win-win-win," Yale-Loehr told The New York Times last year. Investors from other countries provide capital, create jobs, and earn temporary residency in the U.S., he said. The green card becomes permanent if the jobs are ongoing.

All 35 investors in the hotel under construction at Jay Peak Resort have received green cards, Stenger said. So do most of those investing in the rest of the expansion.

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Because of its economic situation, all of Vermont except Chittenden County is an EB-5 regional center, Stenger said. There are 22 centers in the U.S.

Stenger worked in the 1990s with Gov. Howard Dean and Leahy on the EB-5 program. Leahy and Gov. James Douglas have continued that partnership.

"I can't say enough about both of them," Stenger said.

Stenger, a Newport City resident, intends to make the EB-5 program really work for this area. What drives him, he said, is the chance to create good jobs for his neighbors.

"I look at what we are doing now. I didn't know that the economic foundation was going to collapse. Am I glad we started back then," Stenger said of his work in the 1990s on EB-5.

That hard work "is coming home," he said.

Related Links

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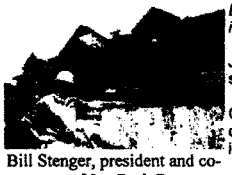
CALEDONIAN-RECORD

Monday, July 20, 2009

Jay Peak Resort Has Impact On Economy

Robin Smith
Staff Writer

Monday, July 20, 2009



Bill Stenger, president and co-owner of Jay Peak Resort, points out features Friday afternoon in the new hotel under construction at the resort, one of the developments in a $100 million expansion project.

EDITOR'S NOTE: This is the second in a two-part series on the impact of foreign investments in Orleans County.

JAY - Robert Conrad and 15 of his employees were hard at work Friday. That's not something that just any contractor can say in this tough economic climate.

Conrad's company, Conrad Construction of Derby, has been involved in the construction of Hotel One at Jay Peak Resort, the first phase of a $100 million expansion fueled by investment at the resort.

Hotel One has risen this year next to the resort's upgraded tram system. Now, workers like Conrad's are swarming all over and in it.

Many of the 57 units already feature gleaming Vermont wood cabinets and complete kitchens, beautiful fireplaces and windows overlooking the mountain's trails or a vista that reaches to Lake Willoughby.

Its main floor is expected to be open by December for the skiers that flock from Canada and the U.S. to Vermont's northernmost mountain, featuring a restaurant, Vermont products store, coffee bar and spa. The rest of the hotel will be open next year.

It's an ambitious project on its own, but is only part of the expansion. An ice arena is expected to begin construction this week. Jay Peak is collecting permits for a golf clubhouse, an open-faced design of wood and glass which is expected to be built in August.

And then the major work begins next spring on the second and larger hotel complex, including indoor waterpark, which will replace the existing Hotel Jay.

"We will essentially make Jay Peak Resort weather proof," Jay Peak Resort President and co-owner Bill Stenger said Friday.

The expansion will create 2,000 jobs, about half at the resort itself and the rest indirect jobs driven by the resort in the neighboring communities.

"These are year-round jobs that mean better lives," Stenger said - chefs, managers, marketing experts, and all those who would make a resort operate successfully.

These people will own homes, support families and feel confident enough in their future to buy new trucks and cars and invest in their own way in their communities, he said.

Economic engine

Hundreds of contractors and subcontractors are already working on the expansion from all across northern and central Vermont.

"Thanks to the continuous expansion and growth of the mountain, we have had the opportunity to supply employment for as many as 25 men at times," Conrad said in a letter to Stenger.

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The jobs have even allowed Conrad to buy a company vehicle to transport his employees to and from Jay Peak, Conrad said.

"Jay Peak is a strong link in a chain of support for our local economy," he said. "Jay Peak has a keen eye for business and supplies the means for this community and our local economy to thrive while others are withering."

That's the kind of reaction that drives Stenger, who has been at Jay Peak Resort for a generation. He and his partners bought the resort from its Canadian owners and have tapped into a foreign investment stream through a federal visa program that is making Jay Peak the economic engine in Vermont's North Country.

The foreign investment program has made Jay Peak Resort's expansion immune to the economic recession.

That source of financial capital is priceless here.

At a Barton forum on economic development, many people said that the Northeast Kingdom has the employee base and the entrepreneurs to do well. What the region lacks, they said, is the ready capital to make things happen.

Stenger said that he wants to tap foreign investors through the EB-5 program to build a hotel on Lake Memphremagog's waterfront in partnership with real estate magnate Tony Pomerleau and create manufacturing jobs as well.

He announced his plan on Friday to bring a science research and product manufacturing plant to Orleans County, creating hundreds of high-paying jobs.

In the meantime, Jay Peak is filling a gap here.

Valuable work

Tim Hardy, owner of Hardy Structural Engineering in Colchester, grew up near Jay Peak and can't wait to make use of it when the expansion is complete.

His firm is doing structural engineering for the expansion.

"Where other engineering firms are cutting hours to their employees due to lack of work, I am asking my employees to work overtime thanks to Jay Peak," Hardy said.

The expansion will not only provide jobs, Hardy said. Word is getting around that this area is the place to be.

"I have been approached by developers thinking of constructing housing and retail buildings in the surrounding towns because they too believe in the vision of Jay Peak and believe that the development at the resort will boost the local economy and bring jobs and people to the area."

John Hemmelgarn and Rick Burroughs, partners at Black River Design architects, say that all 25 professionals at their architectural firm in Montpelier are involved in one way or another in work for Jay Peak Resort.

Their company began in Albany, and so they know the need for good jobs in this area.

They have been able to keep all their employees on board and have even added to their payroll because of Jay Peak's expansion.

"Jay Peak is absolutely fueling the engine that keeps all of us in northern Vermont moving forward," they said.

Related Links

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July 15, 2009

The Honorable Patrick Leahy
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Maryland Center for Foreign Investments (MCFI) EB-5 Regional Center

Dear Senator Leahy:

As you know, the current economic condition in the United States continues to worsen. To stimulate the economy, President Obama and his administration are doing their best to revive our stagnant economy. I am doing my best to represent my state and facilitate opportunities to stimulate economic growth and job creation.

We have a unique opportunity to accelerate job creation with the help of MCFI's planned EB-5 investment into projects such as Westport, a $1.4 billion, 54 acre neighborhood redevelopment project in Baltimore, and Gateway South, a $250 million, 11 acre redevelopment project in Baltimore. Both projects can bring millions of dollars of foreign direct investment to the state of Maryland, and are strongly supported by Maryland Governor Martin O'Malley and Baltimore Mayor Sheila Dixon. We have support from Senator Barbara Mikulski and Senator Ben Cardin as well. These projects will create jobs associated with office buildings, manufacturing, retail stores and restaurants, owner-occupied and rental residences, hotels and short-term condominium rentals, recreational and sports activities, a Sportsplex, a bus station, parking garages, and all of the construction jobs associated with these projects.

The Westport Waterfront Development will include 1,700 residential units, 1.2 million square feet of office space, 500,000 square feet of retail space, and 7,409 off-street parking spaces. The total cost, including escalation in later years, has been estimated at $1.4 to $1.5 billion. It will create an estimated 18,593 permanent new jobs, increase output by $2.236 billion, and raise labor income by $954 million.

Gateway South Development will include up to 1 million square feet of offices, 150,000 square feet of retail space, the Ray of Hope Sportsplex, a bus station, and over 3,000 off-street parking spaces. It will create an estimated 6,286 permanent new jobs, increase output by $772 million in 2008 dollars, and raise labor income by $343 million in 2008 dollars. The "Ray of Hope Center" is a new educational and mentoring center headed by Ray Lewis, currently a linebacker for the Baltimore Ravens, that will help motivate and teach children citywide, while leveraging connections to both business and sports.

MCFI
Maryland Center for Foreign Investment, LLC.
Federally Designated Regional Center

8840 Stanford Blvd
Suite 4000
Columbia, MD 21045
U.S.A.
Office : 1 410 312 9901
Fax : 1 410 312 9907
www.mcfirc.com

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Both Gateway and Westport projects are expected to take dilapidated and outdated industrial space and create new, green building complexes that restore the waterfront wetlands and wildlife habitat while bringing new people and activities to an under utilized part of Baltimore.

The total amount of investments we expect to bring in to the State of Maryland for the next three years are as follows:

1st Year: $75,000,000
2nd Year: $150,000,000
3rd Year: $300,000,000

Ultimately, MCFI will bolster the level of foreign investments into the State of Maryland which will further accelerate this economy with new job creation and growth for the coming years.

Sincerely,

Lawrence Chang
President & CEO
Maryland Center for Foreign Investment, LLC (MCFI).

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Suite 4000
Columbia, MD 21045
U.S.A.
Office : 1 410 312 9901
Fax : 1 410 312 9907
www.mcfirc.com

The Honorable Patrick Leahy
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

July 20, 2009

Dear Senator Leahy,

We are respectfully submit the following in support of the U.S. immigrant investor pilot program.

CanAm's regional centers

CanAm, through its affiliates, is the exclusive promoter of four (4) separate regional centers designated under the U.S. immigrant investor pilot program:

Philadelphia Industrial Development Corporation (PIDC) Regional Center, which was designated February 28, 2003.
Pennsylvania Department of Community & Economic Development (DCED) Regional Center, which was designated April 13, 2007.
Los Angeles Film Regional Center in California, which was designated on March 24, 2008.
State of Hawaii Department of Business, Economic Development and Tourism (DBEDT) Regional Center, which was designated October 31, 1995 and for which CanAm was selected by the State of Hawaii to exclusively represent.

Goals of CanAm's regional centers

Three of CanAm's regional centers are partnered with city or state economic development agencies, and for each of those regional centers, the respective agency recommends projects to the regional center. Accordingly, the projects selected are closely aligned with the economic development goals of the respective city or state. Through all four regional centers, limited partnerships are formed in order to offer below-market rate financing to businesses that support the region's general and specific economic development goals.

For example, the PIDC Regional Center, based in Philadelphia, has targeted a number of industries typical of a broad urban zone such as Philadelphia, including many real estate development projects, ranging from trade and manufacturing to professional firms, but has also targeted projects consistent with the city's goal of building its healthcare, educational and scientific research industries. One other key economic development area is to support the city's master plan to convert the decommissioned U.S. naval base in Philadelphia into the "Navy Yard", a mixed-use industrial park featuring office, retail and residential components. In fact, the PIDC Regional Center's first project was the development of a "show space" at the Navy Yard for prospective tenants, which subsequently led to Urban Outfitters, the Navy Yard's first major tenant, relocating its headquarters to five former naval buildings at the Navy Yard. The PIDC Regional Center has also helped finance several other key projects at the Navy Yard, including an expansion by the Aker shipyard, a manufacturer of ocean-going tankers that took

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over the former naval base's shipyard facilities, which could not be easily repurposed for other tenants. In fact, Aker's expansion at the Navy Yard has subsequently attracted additional ship-repair and support companies to relocate to the Navy Yard, revitalizing Philadelphia's shipbuilding industry, which had severely diminished following the U.S. navy's decommissioning of the base more than a decade ago.

The Pennsylvania Regional Center, in addition to several key target industries such as tourism, transportation and technology, also focuses on several manufacturing industries, which are important to the Commonwealth of Pennsylvania's economy. Similarly, the Hawaii Regional Center also includes agriculture and aquaculture projects because of their importance to Hawaii's economy, and prioritizes projects supporting tourism, the leading industry in Hawaii's economy.

CanAm's only-non-governmental regional center, the Los Angeles Film Regional Center, specializes in motion picture and television production projects, and specifically seeks to provide financing incentives for studios to film in Los Angeles County. Several states within the U.S. have legislated tax credit and other financial incentive programs to attract productions back to the U.S., but attempts to legislate similar incentives in California, where the vast majority of the country's production facilities and talent are located, repeatedly failed or have been limited. The continued economic loss to Los Angeles County from these "runaway productions" is particularly important because its economy is so clearly centered around the motion picture and television production industry, accounting for 45% of the U.S. motion picture and television industry employment and economic output. The Los Angeles Film Regional Center, as an economic development vehicle solely to facilitate motion picture and television production in the County of Los Angeles, where all of the major U.S. picture studios are located, will generate tens of thousands of jobs.

How jobs are created through CanAm's regional centers

All four of CanAm's regional centers are approved in their respective designations to use the Regional Input-Output Modeling System (RIMS) II, a series of earnings and employment multipliers issued by the U.S. Department of Commerce's Bureau of Economic Analysis.

CanAm's regional centers use, depending on the particular project, either the "direct-effect" multipliers, which calculate job creation using the actual number of employees hired by a given project, or the "final-demand" multipliers, which calculate job creation using the expenditures by the project within the regional center's geographic boundaries.

For the direct-effect model, the project has to provide government filed employment reports to show the names of the employees hired, how many hours were worked and how much the employees were paid. In addition, the project provides documentation so that USCIS can verify that each employee hired is a legal US worker.

For the final-demand or spending model, the project must provide proof that the funds were spent within the regional center's geographic boundaries. For example, in certain projects for the Los Angeles Film Regional Center, the project will provide an audit report from PricewaterhouseCoopers, the most prestigious accounting firm in the world, detailing how the money was spent as part of the job creation documentation submitted for the I-829 petition for the permanent green card.

For larger and more complex projects, CanAm often uses an economic impact study completed by an independent consulting firm to calculate the job creation impact resulting from the project. In these cases, we identify the underlying criteria and assumptions of the study and require the project to provide documentation that those assumptions were met in order to deem the job

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creation completed. For instance, for a Pennsylvania Regional Center project, in which most of the job creation will be derived from leasing out retail and office space, we will require copies of the signed leases.

Number of Jobs Created

Please find following the statistics for CanAm's regional centers as of July 20, 2009:

	Projects	Investors	Approved	Funds Raised	Jobs
PIDC (Philadelphia) Regional Center	26	628	622	$313,000,000.00	6,280
Pennsylvania Regional Center	3	229	215	$119,000,000.00	2,290
Los Angeles Film Regional Center	2	300	108	$150,000,000.00	3,000
TOTAL	**31**	**1157**	**945**	**$582,000,000.00**	**11,570**

Please note that all investors are alien petitioners seeking EB-5 visa status, and that certain investors' I-526 Petitions that were recently submitted are still pending USCIS approval. Also, please note that funds raised have either been already funded to the project or are in escrow pending execution of final loan documents, and that jobs includes jobs already created and jobs to be created in the near future. Also, please note that the Hawaii Regional Center has not yet issued any projects since it was reaffirmed in October 2008, but CanAm expects to present one in the near future.

How do CanAm's regional centers improve the community/region?

CanAm's regional centers offer below-market rate financing to businesses that support the region's general and specific economic development goals. Because we are mostly partnered with the city or state's actual economic development agency, each regional center's projects directly support the specific economic development plans for the particular city or state. Even the Los Angeles Film Regional Center, CanAm's only-non-governmental regional center, we have the support of the Los Angeles Film Commission confirming the need for financial incentives to bring motion picture and television production back to California. As CanAm's track record indicates, its regional centers have raised almost $600 million in investor funds for more than $2.25 billion in total project costs, creating almost 12,000 jobs for U.S. workers. Please see CanAm's website (www.canamenterprises.com) to see CanAm's track record.

Should you require any additional information regarding CanAm or its regional centers, please feel free to contact me.

Sincerely yours,

54559.028

Tom Rosenfeld
President & CEO

CanAm Enterprises, LLC
Wall Street Plaza, 88 Pine Street, Suite 3120, New York, NY 10005 Tel: (212) 668-0690 Fax: (212) 668-0691

WRITTEN TESTIMONY OF

James Candido

ACCD Regional Center Director

Hearing on:

Promoting Job Creation & Foreign Investment in the United States:

An Assessment of the EB-5 Regional Center Program

Before the

Committee on the Judiciary

U.S. Senate

Washington, D.C.

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As one of the most active regional centers in the country, the Vermont Agency of Commerce and Community Development (VACCD) Regional Center is very interested in seeing the EB-5 Pilot Program extended permanently. VACCD's involvement with the program began in 1997 when we collaborated with Jay Peak Resort to apply for federal designation of our state-wide regional center. Although Jay Peak was our only project at that time, we have since added another project within our Regional Center with the expansion of the Sugarbush Resort. In the last few years we have worked closely with Jay Peak and Sugarbush as they have created hundreds of Vermont jobs and millions in foreign direct investment. These jobs would not have been created without the capital provided by the foreign investors using the EB-5 Pilot Program.

The state of Vermont has been wrestling with the same issues facing many states around the nation in the last few years as a result of the global economic downturn. Some of Vermont's major employers cut their staffing and many long term residents have been forced to leave by economic necessity. Yet, in the middle of this global crisis, we have seen two Vermont ski areas raise enough capital to significantly expand their operations and create jobs. This would not have been possible without the EB-5 Regional Center program.

As the only state-run Regional Center, the VACCD Regional Center designation is an important part of our economic development strategy for the future. The promising job creation benefits from our two current projects has made us ever more diligent in connecting this program to other expanding Vermont businesses.

For the last two years I have traveled throughout Vermont explaining the opportunity and process of the EB-5 program to Vermont businesses. The large number of businesses desperate to expand is very encouraging -- not only in the ski resort industry, but in a vast array of different business sectors. Many of those businesses share a common story -- a product ready to go to market, or a product line needing to expand to meet market demand. These are companies ready to grow and create jobs now. All they need is the capital to make it happen.

Many of the businesses I have met with already have strong track records and completed product lines. In the past many of them would have easily qualified for bank loans or venture capital, but the uncertainty of the current economic times has made securing these funds difficult. That is why the foreign capital provided through this program is so important to Vermont's economic growth.

As the Regional Center Director, I handle frequent calls from potential EB-5 or their representatives. I have also attended functions were I have met with

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these potential investors who see great opportunities in the EB-5 Program, and specifically in the VACCD Regional Center. The incredible demand for this type investment has demonstrated to us the vast potential of the EB-5 Program's opportunities for future business development and significant job creation. It though we are just scratching the surface of the amount of foreign investment the EB-5 Program could bring into the United States -- creating homegrown jobs expanding local businesses.

The core concept of the Regional Center program is creating jobs in rural and distressed areas. I can say with full confidence that the program has done this in Vermont. That being said, there are slight changes to the process that would make the program even more successful and usable:

1. Making the Regional Center Pilot Program permanent would eliminate the uncertainty that many businesses face when looking at this program as an option for capital.

2. Job creation is a critical component of the Pilot Program, and is something we value highly. However, many businesses find it difficult to create the requisite jobs for a project within the 24 months outlined currently in the program parameters. A bigger window for the job creation (such as 5 years) would give companies the ability to responsibly create the same needed job totals. This could also expand the number of businesses that are able to take advantage of the program --some businesses are not able to bring in new staff so quickly (but could within a longer period).

3. An ability to obtain USCIS pre-approval on a project plan would make the process for filing subsequent investor petitions much easier for businesses. Understanding any problems with a project plan before filing an actual I-526 petition is valuable information that many businesses believe will make the process work for efficiently and effectively for all involved. Also, pre-approved general plans would obviate the need for USCIS officers to review each investor petition.

These changes are critical to the EB-5 Program's future success, but the most reason for our testimony is to show the importance of this program to the health of our state. The EB-5 Program is a powerful economic development tool going forward. The experience and oversight of the VACCD Regional Center, as as among the growing number of Regional Centers, show that the EB-5 Program be responsibly effectively administered not only by USCIS, but with the ongoing

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collaborative efforts among Regional Centers and between the Regional Centers USCIS. This extraordinary mutual interest has helped the EB-5 Program fulfill core purpose – to finance new economic development and create many sorely jobs. We see no downside to the EB-5 Program. The past several years show but remarkable success in Vermont and for the Nation as a whole.

Thank you for considering my remarks on behalf of the Vermont Agency of Commerce and Community Development Regional Center.

James Candido

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M&D Regional Center, LLC

July 17, 2009

The Honorable Patrick Leahy
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

RE: Regional Center Pilot Program

Gentlemen:

As a recent regional center applicant, M&D Regional Center, LLC ("M&D") applauds your support for the Regional Center Pilot Program. I firmly believe that the program will be instrumental in the economic recovery of the U.S. and will continue to provide an invaluable source of capital for U.S. businesses long after the U.S. has completed its recovery. In order to provide your colleagues a greater sense of the numerous benefits of the Regional Center Pilot Program, I will briefly describe M&D's projects and the potential impact they will have on the local economy.

Through the Regional Center Pilot Program, M&D is seeking to raise funds for the development of mixed-use projects (real estate projects incorporating retail, residential, and commercial uses) and lifestyle retail centers. M&D already has three specific projects in the pipeline: (i) a mixed-use project located in Lynwood, California, (ii) a mixed-use project in Buena Park, California, and (iii) a mixed-use project in San Bernardino, California. M&D anticipates raising approximately $100 million to $150 million through the Regional Center Pilot Program.

The primary purpose of the Regional Center Pilot Program is to encourage job creation using foreign capital. M&D's projects are projected to generate thousands of jobs. According to the economic studies which accompanied M&D's application for regional center designation, M&D's three projects are expected to generate more than 9,700 permanent jobs and more than 2,100 construction jobs. The aggregate annual gains in labor output and labor income related to the 9,700 new permanent jobs are estimated to exceed $1.1 billion and of $430 million, respectively.

Another goal of the Regional Center Pilot Program is to create jobs in areas with high rates of unemployment. All three of the real estate development projects currently proposed by M&D are located in areas with historically high rates of unemployment and, as a result, have

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M&D Regional Center, LLC

been designated targeted employment areas for purposes of the program. In addition to creating jobs, M&D's projects will help to revitalize these underserved neighborhoods and stimulate further economic development in the region.

In closing, the Regional Center Pilot Program has been effective in achieving its intended purpose of creating jobs in the U.S., a goal which has been made all the important by the current business climate. Moreover, the program has been particularly beneficial during these difficult times by affording U.S. businesses an alternative means to obtain much needed capital. Accordingly, it is vital that the Regional Center Pilot Program be made a permanent program. Furthermore, we support your efforts to improve the program, as particular procedural issues have on many occasions muted the interest of potential immigrant investors.

Very Truly Yours,

Min Chae

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CONRAD CONSTRUCTION, INC.

143 Derby Pond Road
Derby, VT 05829

Phone / Fax (802) 766-4727
conradconstructioninc@gmail.com

June 1, 2009

Dear Bill Stenger,

We would like everyone to know and appreciate how much Jay Peak Ski Resort has done for us!

We would like to take this opportunity to thank you for all the work the mountain has provided for us and our business. Thanks to the continuous expansion and growth of the mountain, we have had the opportunity to supply employment for as many as 25 men at times. Our company and our employee's appreciate the opportunity to have plenty of work during this economic slump. We are ever so mindful of the lack of work, both locally and nationwide. However, Jay Peak has provided us with plenty of work and made it possible for us to prosper when there are so many contractor's without work. The work on the mountain has made it possible for us to purchase a company vehicle for our foreman who is able to pick up men on the way to the mountain. The company vehicle transports several men to the mountain everyday and the car pooling makes it possible for us to be environmentally mindful. Jay Peak makes it possible for us to currently employ 15 men, who in turn are able to support their families and their spending habits. Jay Peak is a strong link in a chain of support for our local economy. Almost every dollar spent supporting our business is in turn spent supporting Northeast Kingdom businesses, from the local mortgage lender, to the automobile dealer. Jay Peak has a keen eye for business and supplies the means for this community and our local economy to thrive while others are withering.

We truly appreciate the difference the Jay Peak Ski Resort makes in the lives of our families. Jay Peak is a treasured customer and we truly appreciate your business. Thank you for everything!

Sincerely,

Robert Conrad

P.S. Please feel free to share this letter of appreciation with all interested parties.

Robert Conrad (President)
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Cell (802) 673-9776

Seldon

The Hon. Senator Patrick Leahy
Chairman, Senate Judiciary Committee
Dirksen Senate Office Building
Washington, DC

July 21, 2009

Via Email

Re: Seldon Technologies, Inc. Comments to the Judiciary Committee Hearing on:
"Promoting Job Creation and Foreign Investment in the United States: An Assessment of the EB-5 Regional Center Program"
Hearing Date: July 22, 2009
Hearing Time: 10:00 A.M.
Hearing Room: Dirksen 226

Dear Chairman Leahy;

As you know, Seldon Technologies, Inc. has developed ground-breaking and unique new filtration products for water, air and fuel. We are proud of the fact that we are leading the way with innovative new water disinfection products to address the number one health hazard the world faces: unclean water. Seldon is appreciative of your keen grasp of the importance of new technology to this country's future. You have been a recognized advocate of the importance of providing clean drinking water to world's population; and a major supporter of efforts to address the health consequences of unclean water.

I am writing to inform you of our work underway to utilize the Vermont EB-5 Regional Center as the vehicle to attract investment capital to our company. We urgently require this capital to expand our manufacturing capability. The current distress in the financial and banking industries make it difficult, if not impossible, to secure funds to expand our early stage company.

Your staff informed me of the EB-5 program several months ago. We are excited about this program. It offers us an approach to investors otherwise beyond our reach. We are working closely with the personnel at the State of Vermont EB-5 Regional Center. We believe this program offers a realistic opportunity to raise investment funds to expand our business.

In September we will present our project for approval by the State and USCIS. Our plan will create 137 direct jobs and approximately 127 jobs in Vermont over the next 4 years. The addition of these high-tech manufacturing and management jobs to Windsor Vermont will have a profound effect on our local economy and this company.

We urge the Judiciary Committee to support your proposals which enhance the EB-5 program. This program must be a permanent program for the foreign investor to have the confidence to invest in an EB-5 project. They need assurance that their investment decision will not be impacted by material changes to this program. Seldon, and company's like ours, need the ability to attract investors without the cloud of uncertainty about the EB-5 program's longevity. We strongly endorse your work to enhance the EB-5 program, so vital to our company's future.

Sincerely Yours

Alan G. Cummings
Chief Executive Officer

Seldon Technologies, Inc. | 7 Everett Lane | P.O. Box 710 | Windsor, VT 05089 USA | 802 674-2444 *phone* 802 674-2544 *fax* www.seldontech.com

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U.S. Senate Committee on the Judiciary

Hearing

"Promoting Job Creation and Foreign Investment in the United States: An Assessment of the EB-5 Regional Center Program"

Prepared Testimony by Michael T. Dougherty
Former Citizenship and Immigration Services Ombudsman

Washington, D.C.
July 22, 2009

Chairman Leahy and Ranking Member Sessions, thank you for the opportunity to appear before the Senate Judiciary Committee to discuss the EB-5 Regional Center Program. During my tenure leading the Office of the Citizenship and Immigration Services Ombudsman (Ombudsman) within the Department of Homeland Security (DHS), I studied the EB-5 Program and made eight formal recommendations to U.S. Citizenship and Immigration Services (USCIS) to improve the Program. USCIS has formally responded to those recommendations. My testimony today will highlight parts of that exchange, and offer additional observations based in part on the Ombudsman's Annual Report to Congress.

I am currently a Strategy and Policy Consultant with the Raytheon Company. I am appearing today in my capacity as a former Ombudsman. My prepared and oral testimony should not be regarded as expressing the views or opinions of the Raytheon Company, its affiliates, or employees.

On March 18, 2009, my office issued a study entitled "Employment Creation Immigrant Visa (EB-5) Program Recommendations." The study was built on research occurring over a period of six months, which included meetings with USCIS officials, line managers and adjudicators, a public-forum teleconference, a variety of meetings with individual stakeholders, and communication with subject-matter experts. I will focus on two themes derived from the study.

Definitive and Comprehensive Rules to Grow the EB-5 Program

In my March 18, 2009 study, I commented that "uncertainty has plagued the EB-5 program from its inception" in 1990. While the Immigration and Naturalization Service (INS) issued "interpretive guidance on key legal issues" in the early years of the EB-5 Program, INS General Counsel later determined that some of the financial arrangements underpinning hundreds of approved applications were inconsistent with the EB-5 statute and regulations. USCIS' Administrative Appeals Office then issued four precedent decisions which altered "previously issued guidance and substituted new and more restrictive interpretations of the law."

In addition to these difficulties, my office reported that,

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> [a]lthough the EB-5 visa category and the Regional Center pilot program have been in existence for over 15 years, many key terms have not been clearly defined by USCIS. Such ambiguity contributes to entrepreneur anxiety and uncertainty about the program, and ultimately to underutilization of this visa category.

My office recommended that "USCIS initiate formal EB-5 rulemaking to advance a new set of rules to replace the combination of existing rules and controlling precedent decisions."

USCIS formally responded to my recommendation on June 12, 2009, stating,

> USCIS acknowledges that the regulations governing the EB-5 Program need to be updated. During the past 20 months the agency was directed to issue several rules that were designated as priorities by the previous presidential administration. USCIS met these challenges despite limited resources, and we are continuing with rulemaking efforts that are agency priorities. USCIS will re-examine its current resources in relation to its ability to promulgate new regulations versus statutory mandates and other existing priority regulations which are currently in progress.

On June 17, 2009, USCIS issued some new guidance to its adjudicators that will benefit EB-5 investors, by defining when the two-year job creation requirement commences, and expanding on the meaning of what constitutes a "full-time" position for job-creation purposes.

It is undisputed that the EB-5 Program needs updated and better defined regulations to allow the Program to live up to Congressional mandates and expectations. It is not clear when such regulations will be produced, due to USCIS' other priorities and limited resources. Given current economic conditions, and the benefits that EB-5 investors can bring to U.S. workers in targeted employment and rural areas, Congress may wish to fund staff positions within DHS' Office of General Counsel specifically dedicated to rulemaking for the EB-5 Program and other critical emergent programs like USCIS transformation.

Consultation and Training to Improve the EB-5 Program

The Government Accountability Office remarked in a 2005 report that "qualifying a person for EB-5 status is one of the most complicated subspecialties in immigration law [because a] sophisticated knowledge of corporate, tax, investment and immigration law are required." Appreciating the complexity of the EB-5 Program for both immigration practitioners and USCIS adjudications staff, I recommended on March 18, 2009 that,

> USCIS should form an EB-5 inter-governmental advisory group composed of selected representatives from the Departments of Commerce, Treasury, State, Labor, and possibly, the Small Business Administration. Without recommending that these agencies have any adjudicatory role in determining the merits of an application or petition, this group should meet regularly to consult with USCIS on Regional Center designations, and to address other business, economic and labor issues which impact the EB-5 Program.

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> Some of the specific matters which the inter-governmental advisory group could provide invaluable insight and assistance with include: the examination of Regional Center submissions for such designation, including the business plan; the financial instruments described; the designation of high unemployment areas; and the validity of "indirect job methodologies" advanced by EB-5 project developers. Additional issues might include: appropriate levels of due diligence related to program integrity; the availability and reasonableness of requesting particular financial documents and/or asset identification; and issues surrounding the path of funds.

In its formal response to the my office's recommendation's, USCIS stated that it "is exploring the possibility of developing an inter-governmental advisory group to discuss operational and policy issues with respect to domestic business, economic, and labor considerations relevant to EB-5 adjudications. USCIS will advise the CIS Ombudsman if a group is convened."

USCIS would likely profit from the expertise of other federal agencies in administering and modifying the complex EB-5 Program. USCIS might similarly engage state agencies that have an interest in the formation of Regional Centers.

While USCIS engages in programmatic-level dialogs with government stakeholders on the EB-5 Program, it is of great importance that its EB-5 adjudications staff at the California Service Center receive the training necessary to readily and accurately evaluate the business and financial documents that support a foreign entrepreneur's immigrant application. USCIS should also consider providing training to its adjudicators on the economic modeling that is frequently submitted by entrepreneurs filing Regional Center investment petitions based on indirect job creation. Modeling is an essential predictive tool that is gaining ground among policy-makers and operators faced with complex problems, but modeling is only as good as the assumptions and variables that go into the construction of the model.

In concluding, I would like to encourage the Committee to consider the Ombudsman's office as a resource: the office is an impartial body of experienced professionals who can engage in targeted research on USCIS issues of interest to the Committee. In conformity with the Homeland Security Act, the Ombudsman annually reports to Congress on the recommendations that it has made to USCIS throughout the year, and summarizes "the most pervasive and serious problems encountered by individuals and employers" who transact business with USCIS. The Ombudsman's office has a broad mandate, and is committed to studying "issues of humanitarian, family, and economic importance across the spectrum of immigration benefits and services," working "cooperatively with government partners to benefit the public." The subject-matter expertise of the Ombudsman's office may be of increased value to the Committee when comprehensive immigration reform returns to the Senate agenda.

I have attached to this prepared testimony a copy of the March 18, 2009 Citizenship and Immigration Services Ombudsman's "Employment Creation Immigrant Visa (EB-5) Program Recommendations," and the June 12, 2009 USCIS "Response to Recommendation 40, Employment Creation Immigrant Visa (EB-5) Program Recommendations." I respectfully request that these documents be made part of the record.

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Office of the
Citizenship and Immigration Services Ombudsman

U.S. Department of Homeland Security
Mail Stop 1225
Washington, DC 20528-1225

EMPLOYMENT CREATION IMMIGRANT VISA (EB-5) PROGRAM RECOMMENDATIONS

March 18, 2009

The Citizenship and Immigration Services Ombudsman, established by the Homeland Security Act of 2002, provides independent analysis of problems encountered by individuals and employers interacting with U.S. Citizenship and Immigration Services, and proposes changes to mitigate those problems.

I. EXECUTIVE SUMMARY

The Citizenship and Immigration Services Ombudsman (Ombudsman) has reviewed the United States Citizenship and Immigration Services (USCIS) policies and processes concerning the Employment Creation EB-5 immigrant visa,[1] and formed several recommendations that USCIS should implement to stabilize and energize the program.

In passing employment creation legislation, Congress sought to attract entrepreneurial immigrants to the United States who would invest capital to create jobs for U.S. workers, and thereby stimulate the economy.[2]

Congress allocates approximately 10,000 immigrant visas per year to the EB-5 category (including derivative visas for the spouses and minor children of investors), although less than 1,000 visas are used annually.[3] This underutilization is caused by a confluence of factors, including program instability, the changing economic environment, and more inviting immigrant investor programs offered by other countries.

In recognition of the present turmoil in the U.S. economy, it is incumbent upon USCIS to take all necessary and appropriate steps to facilitate a healthy, vigorous, and smooth-running employment creation immigrant visa program.

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[1] Immigration and Nationality Act (INA) § 203(b)(5); 8 U.S.C. § 1153(b)(5).
[2] Immigration Act of 1990, Pub. L. No. 101-649 (Nov. 29, 1990).
[3] Between 1992 and 2004, 6,024 EB-5s were issued, which averaged approximately 500 per year. Government Accountability Office, Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors, p. 2 (Apr. 2005) (GAO-05-256). "The bill's supporters predicted that about 4,000 millionaire investors, along with family members, would sign up, bringing in $4 billion in new investments and creating 40,000 jobs [annually]." *See* Al Kamen, "An Investment in American Citizenship; Immigration Program Invites Millionaires to Buy Their Way In," Washington Post, (Sept. 29, 1991).

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For these reasons, the Ombudsman recommends that USCIS:

1. **Finalize regulations to implement the special 2002 EB-5 legislation which offers a certain subgroup[4] of EB-5 investors a pathway to cure deficiencies in their previously submitted petitions.**

2. **Issue Standard Operating Procedures (SOPs) for Form I-526 (Immigrant Petition by Alien Entrepreneur) and Form I-829 (Petition by Entrepreneur to Remove Conditions) that specifically direct EB-5 adjudicators to not reconsider or re-adjudicate the indirect job creation methodology in Regional Center cases, absent clear error or evidence of fraud.**

3. **Designate more EB-5 Administrative Appeals Office (AAO) decisions as precedent/adopted decisions to provide stakeholders, investors, and adjudicators a better understanding of the application of existing USCIS regulations to given factual circumstances.**

4. **Engage in formal rulemaking to further develop rules that will promote stakeholder and investor confidence as well as predictability in adjudicatory processes.**

5. **Form an inter-governmental advisory group to consult on domestic business, economic, and labor considerations relevant to EB-5 adjudications.**

6. **Offer a Special Handling Package option to EB-5 investors for faster adjudication of Forms I-526, I-829, and related applications for a higher fee.**

7. **"Prioritize" the review and processing of all Regional Center EB-5 related petitions and applications to foster the immediate creation and preservation of jobs.[5]**

8. **Establish a program to promote the EB-5 program overseas in coordination with the U.S. Departments of State and Commerce.**

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[4] This subgroup includes only those EB-5 investors whose Forms I-526 (Immigrant Petition by Alien Entrepreneur) were filed and/or approved between January 1, 1995, and before August 31, 1998. *See* 21st Century Department of Justice Appropriations Authorization Act, §§ 11031-37, Pub. L. No. 107-273 (Nov. 2, 2002).

[5] "Priority" processing is authorized by the Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156 (Dec. 3, 2003).

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II. BACKGROUND

Purpose and Terms of the EB-5 Program

Pursuant to INA § 203(b)(5), Congress established the fifth employment-based (EB-5) preference category in 1990 for immigrants seeking to enter the United States to engage in a commercial enterprise that will benefit the U.S. economy and directly create[6] at least ten full-time jobs.[7] The minimum qualifying investment amount is $500,000 for commercial enterprises located within a rural area[8] (or targeted employment area),[9] and is otherwise $1,000,000.[10]

Congress allocated 10,000 immigrant visas annually for this employment-based preference category. Figure 1 depicts actual EB-5 usage from FY 1998 through FY 2007.

[6] A qualifying investment in a new commercial enterprise must create full-time employment for at least ten U.S. citizens, lawful permanent residents, or other immigrants lawfully authorized to be employed in the United States. INA § 203(b)(5)(a)(ii); 8 U.S.C. § 1153(b)(5)(A)(ii); *see also* 8 C.F.R. § 204.6(j)(4)(i) (2008). The investor and his/her immediate family, as well as lawful nonimmigrant employees, are excluded from the ten-person employment calculation. 8 C.F.R. § 204.6(e) (2008). Special rules also allow for making a qualifying investment where the investment serves to maintain jobs that might otherwise be lost in a troubled business (i.e., an existing business over two years old that has incurred a net loss exceeding 20 percent of its net worth during the 12 or 24 month period preceding a Form I-526 petition filing). 8 C.F.R. §§ 204.6(e), 204.6(j)(4)(i)(B)(ii) (2008).

[7] INA § 203(b)(5)(A)(ii); 8 U.S.C. § 1153(b)(5)(A)(ii).

[8] "Rural area" is defined as "any area other than an area within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States)." INA § 203(b)(5)(B)(iii); 8 U.S.C. § 1153(b)(5)(B)(iii); *see also* 8 C.F.R. § 204.6(e) (2008).

[9] "Targeted employment area" means that "at the time of the investment, a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate)." INA § 203(b)(5)(B)(ii); 8 U.S.C. § 1153(b)(5)(B)(ii); *see also* 8 C.F.R. § 204.6(j)(6) (2008).

[10] INA § 203(b)(5)(C)(i); 8 U.S.C. § 1153(b)(5)(C)(i).

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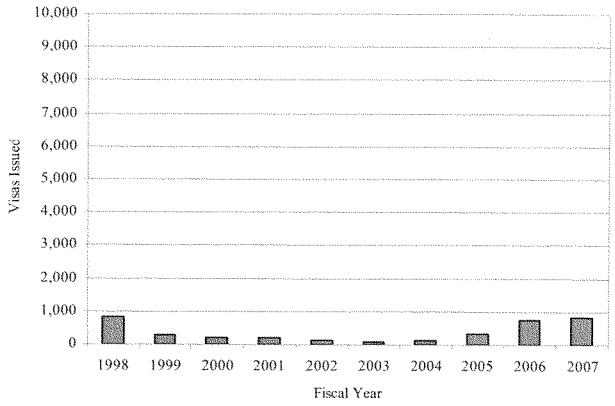
Figure 1: U.S. EB-5 Immigrant Visa Utilization (Principals + Derivatives), FY 1998-2007



Source: DHS Office of Immigration Statistics, "2007 Yearbook of Immigration Statistics," Table 6 at p. 18, http://www.dhs.gov/ximgtn/statistics/index.shtm (accessed Feb. 19, 2009).

A Senate Committee Report stated that the EB-5 provision was "intended to provide new employment for U.S. workers and to infuse new capital in the country, not to provide immigrant visas to wealthy individuals. . . ."[11]

The legislative history suggests that Congress anticipated that as many as 4,000 foreign investors and their families would seek U.S. lawful permanent residence (LPR or "green card" status), bringing in fresh investment funds totaling an estimated $4 billion and creating 40,000 jobs annually.[12]

Pilot Regional Center Program

To encourage use of the EB-5 visa category, Congress established the Immigrant Investor Pilot Program in 1993 and set aside 3,000 of the allocated 10,000 visas for investors who invest within designated "regional centers."[13] This program eventually became referred to as the "Regional

[11] S. Rep. No. 55, 101st Cong., 1st Sess. at 21 (1989).
[12] *See* Al Kamen, "An Investment in American Citizenship; Immigration Program Invites Millionaires to Buy Their Way In," Washington Post, (Sept. 29, 1991).
[13] The original set-aside was 300 visas annually. *See* Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriation Act of 1993, Pub. L. No. 102-395 (Oct. 6, 1992). In 1997, Congress increased the set-aside to 3,000 annually. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act of 1998, Pub. L. No. 105-119 (Nov. 26, 1997). A "regional center" is defined as "any economic

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Center Pilot," and legislation was introduced in 2008 to make the Regional Center Pilot permanent.[14] Under the pilot, foreign investors can pool their investments into Regional Centers which make large investments that create jobs. Regional Center investors are permitted to demonstrate through "reasonable methodologies" that their investment resulted in the creation of ten or more direct or indirect jobs. More specifically, investors within EB-5 Regional Centers are permitted to use statistical formulas and models to demonstrate a correlation between their investment of capital into a specific business and indirect jobs created in other businesses within the greater community. In Regional Center cases, these indirectly generated jobs may be used to satisfy the job creation requirement.

According to the Congressional Research Service, the South Dakota International Business Institute's Dairy Economic Region program (SDIBI South Dakota Dairy) provides an EB-5 Regional Center story that illustrates how the successful implementation of an EB-5 program can positively impact a community.[15] Approved in June 2005, the SDIBI South Dakota Dairy program attracted more than 60 immigrant investors who infused approximately $30 million into the South Dakota economy. Their combined investment was leveraged to secure approximately $90 million in bank financing for various dairy investment projects. These EB-5 investments directly created 240 jobs. Using RIMS II[16] modeling to predict the correlation between monies invested and employment creation, the combined investment also is credited with generating an additional 638 indirectly-created jobs, and over $360 million in additional funds to the region.[17]

According to the SDIBI South Dakota Dairy Director, the "paramount" EB-5 program issue is whether "USCIS [has] sufficient resources to quickly adjudicate EB-5 immigrant visa petitions. If the adjudication process is too long . . . the opportunity cost may make a South Dakota dairy investment unappealing to foreign investors."[18] Similar sentiments were expressed to the

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unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." 8 C.F.R. § 204.6(e) (2008).

[14] *See* S. 2751, a Senate bill co-sponsored by Senators Patrick Leahy (D-VT) and Arlen Specter (R-PA) on March 12, 2008. Although the EB-5 Regional Center Pilot program was not made permanent in the 110th Congress, bipartisan support did exist to ensure that the pilot did not expire at the end of the 2008 fiscal year. A short extension of the Regional Center Pilot (through March 6, 2009) was thus included in the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No 110-329 (Sept. 30, 2008). Following passage of a five day extension, on March 11, 2009, President Obama signed the Omnibus Appropriations Act extending the EB-5 Regional Center Pilot sunset date to September 30, 2009. Accordingly, the 111th Congress may yet again take up the question of extending the pilot, or making the program permanent, later this year.

[15] *See* Chad C. Haddal, "Foreign Investor Visas: Policies and Issues," pp. 31-32, Congressional Research Service (Jan. 29, 2007).

[16] RIMS II is the upgraded version of the original Regional Industrial Multiplier System (RIMS) created by the U.S. Department of Commerce, Bureau of Economic Analysis, and is used in public and private sector project planning as a model to predict regional output, earnings, and employment in specific geographic and industrial settings. *See* "Regional Multipliers from the Regional Input-Output Modeling Systems (RIMS II): A Brief Description;" www.bea.gov/regional/rims/brfdesc.cfm (accessed Jan. 8, 2009).

[17] *See supra* note 15.

[18] *Id.* at p. 32.

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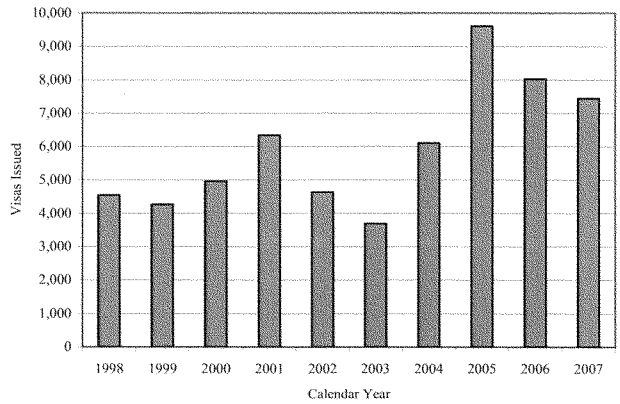
Ombudsman by other stakeholders. They emphasized that the EB-5 program generally, and the Regional Center Pilot particularly, needs stability and predictability to attract foreign investors.

Foreign Competition and Response

It is generally understood that in enacting the EB-5 provisions contained within the Immigration Act of 1990,[19] Congress intended to establish an immigrant investment program to rival those enacted by other countries, specifically Canada and Australia.[20] However, by the time the EB-5 program became law, Canada's Immigrant Investor program was in existence for four years (since 1986). See Figure 2 below for use of this program.

Figure 2: Canada's Immigrant Investor Visa Utilization (Principals + Derivatives), CY 1998-2007



Source: Citizenship & Immigration Canada Facts and Figures 2007: Immigration Overview-Permanent and Temporary Residents, p. 19, www.cic.gc.ca (accessed Feb. 19, 2009).

Under the Canadian program, foreign business persons establish eligibility by proving that they have "two years of business experience," a net worth of at least CDN $800,000, and by affirmatively expressing that they are willing to deposit CDN $400,000 into designated government guaranteed securities for a period of five years.[21] Unlike the EB-5 program, the

[19] *See supra* note 2.
[20] *See* 136 Cong. Rec. 17106, 112 (Oct. 26, 1990) (Senator Paul Simon (D-IL) arguing that the United States should "learn from and build upon the track record and experiences of Governments of Canada and Australia who have had great success in attracting talented people through their investor visa programs.")
[21] *See* Citizenship and Immigration Canada, "Investors;" www.cic.gc.ca (accessed Feb. 18, 2009). Invested funds are used by the federal government to generate new employment opportunities for Canadian citizens, and in turn, the foreign investor is granted permanent resident status, and provided a government promissory note representing a

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Canadian Immigrant Investor program is a passive program: a qualifying investor is not required to open a business, or hire and manage employees. Rather, the investment itself is assumed to spur significant economic activity and create jobs.

Uncertainty Has Plagued the EB-5 Program From Its Inception

Initial delay in the issuance of EB-5 rules, followed by changes in interpretation of the rules, has led to uncertainty in the EB-5 program since inception.

Between 1993 and 1997, the Immigration and Naturalization Service (INS) issued General Counsel interpretive guidance on key legal issues, which was received favorably by several private sector companies specifically formed to develop investment project opportunities for EB-5 investors.

The number of EB-5 immigrant visas issued increased from 583 in FY 1993 to 1,361 visas in FY 1997. However, informal General Counsel guidance in the mid-1990s permitted investors to obtain status without actually committing their entire investment amount to the business.[22]

Concerns of insider access, suspicions of abuse, misrepresentation, and fraud surfaced in the mid-1990s at the same time that the EB-5 program was experiencing its most significant usage. Some of these concerns were later proven in a federal court case leading to convictions for immigration fraud, wire fraud, money laundering, and conspiracy against the principals and officers of an EB-5 investment business then operating as Interbank.[23] The defendants in the case attracted $21 million in investment funds from foreign investors who were seeking to lawfully obtain green card status through the EB-5 program. The fraudulent investment scheme involved the juggling of funds through an offshore financial institution, and the production and use of fake bank statements used in connection with underlying I-526 petitions filings. However,

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debt obligation to return the full CDN $400,000 in five years (without interest). *Id.* There has never been a governmental default on these obligations, and because of their reliability, Canadian financial institutions are willing to partially finance the required investment. *See* Jeffrey S. Lowe, "Canada's Immigrant Investor Program," Research Solutions (Dec. 2007). Interestingly, the qualifying investment may be delayed until as late as the eve of the date of visa issuance. *See* Citizenship and Immigration Canada "Operating Procedure Manual (OP 9 Investors)" at 9.2 (Aug. 8, 2008); www.cic.gc.ca (accessed Feb. 18, 2009). In the ten-year period between 1998 and 2007, according to Citizenship & Immigration Canada, 16,213 principal foreign nationals have invested in direct qualifying funds in Canada. *See* Citizenship & Immigration Canada Facts and Figures 2007: Immigration Overview—Permanent and Temporary Resident, p. 19; http://www.cic.gc.ca/english/resources/statistics/menu-fact.asp (accessed Feb. 5, 2009). Based on the total number of principal foreign nationals and the qualifying investment of CDN $400,000, Canada has benefited from CDN $6,485,200,000 through its Immigrant Investor program.

[22] *See* INS General Counsel Memorandum, "Sections 203(b)(5) (EB-5) and 216A of the Immigration and Nationality Act," HQCOU 70/6.1 & 70/9-P (Dec. 19, 1997). This 1997 Memorandum clarified and provided new guidance disallowing such practices.

[23] *See* U.S. v. O'Connor, 158 F. Supp. 2d 697, 723-38 (E.D. Va 2001).

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none of the individual 216 EB-5 investors were found complicit in the fraud. In fact, most of the foreign investors suffered a total loss of their funds and were not granted green cards.[24]

In 1998, the USCIS Administrative Appeals Office (AAO)[25] issued four precedent decisions[26] that altered the previously issued guidance and substituted new and more restrictive interpretations of the law. These changes caused much concern among current and potential EB-5 investors, and introduced new and significant uncertainties into the EB-5 program.

Figure 3: Changes in Selected EB-5 Legal Guidance

Issue	Pre-1998 AAO Decisions	Post-1998 AAO Decisions
Establishment of "new" enterprise	Business must be created after November 1990	Investor must personally be involved in establishment of business[27C]
Source of funds	General representation and proof of legal generation of fund accepted	Legal generation of funds must be traced with particularity [A,C&D]
Promissory notes	Considered at face value; no limit on duration; need not be perfected; foreign collateral acceptable	Must prove fair market value;[C] duration generally restricted to two years;[C] must be perfected;[B] foreign collateral must be seizable [B] and marketable[C]
Guaranteed returns	Permitted generally	Prohibited[C]
Redemption provisions	Permissible but may not exercise until after two year conditions lifted	Impermissible to enter redemption agreement within two-year conditional period[C]

[A] Matter of Soffici, 22 I&N Dec. 158 (Assoc. Comm'r Examinations 1998).
[B] Matter of Hsiung, 22 I&N Dec. 201 (Assoc. Comm'r Examinations 1998).
[C] Matter of Izummi, 22 I&N Dec. 169 (Assoc. Comm'r Examinations 1998).
[D] Matter of Ho, 22 I&N Dec. 206 (Assoc. Comm'r Examinations 1998).

Following issuance of the AAO's precedent decisions, EB-5 visa applications dropped dramatically. Between FY 1998 and FY 2008, USCIS had an average approval rate of approximately 44 percent, as shown in Figure 4 below.

[24] *See* U.S. v. O'Connor, 321 F. Supp. 2d 722, 725 (E.D. Va 2004).
[25] The AAO is the appellate body within USCIS with primary authority to review most service center decisions.
[26] Matter of Soffici, 22 I&N Dec. 158 (Assoc. Comm'r Examinations 1998); Matter of Izummi, 22 I&N Dec. 169 (Assoc. Comm'r Examinations 1998); Matter of Hsiung, 22 I&N Dec. 201 (Assoc. Comm'r Examinations 1998); Matter of Ho, 22 I&N Dec. 206 (Assoc. Comm'r Examinations 1998). Precedent decisions are those decisions specially designated to provide controlling legal principles and interpretations which are "binding on all Service employees in the administration of the Act." 8 C.F.R. § 103.3(c) (2008).
[27] Congress abolished the establishment criterion though legislative action in 2002 when it passed the 21st Century Department of Justice Appropriations Authorization Act. *See supra* note 4 at § 11036.

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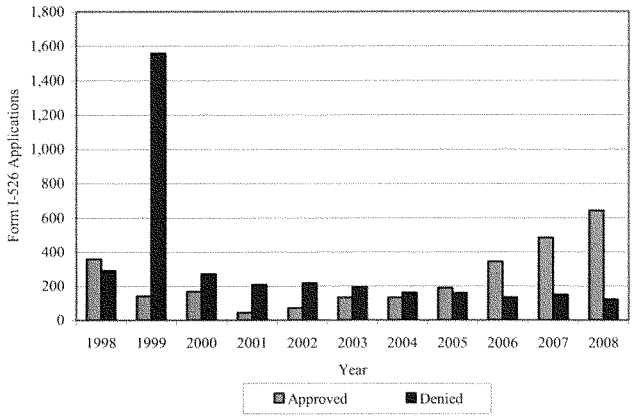
Figure 4: Form I-526 Approvals and Denials by USCIS (Principals Only), FY 1998-2008



Source: USCIS Performance Analysis System Data, as of October 2008.

Many potential investors decided not to go forward with their EB-5 investments and filings. In addition, USCIS took action to remove some existing investors from the United States based on the retroactive application of the principles set forth in the precedent decisions. While most investors lost legal challenges, one group of affected investors did successfully challenge the retroactive application of these decisions in one federal court. In reversing the denials, the court found:

> [Investors] relied on their understanding that their business and investment plans conformed to the requirements of EB-5. They sold businesses, uprooted from their homelands, and moved to the U.S.... [They] sought no guarantee of success, but a contingent promise that, if they held up their end of the bargain ... they would obtain LPR status promised by the EB-5 program. This was not unreasonable.... The reputation and integrity of the EB-5 program is ill-served by the proposition that INS approval of an I-526 petition as satisfying EB-5's requirements cannot be relied upon.[28]

[28] Chang v. U.S., 327 F.3d 911, 928-29 (9th Cir. 2003).

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In 2002, the President signed special legislation that attempted to rectify the situation.[29] However, new regulations needed to implement this legislation remain outstanding, and these cases cannot be adjudicated until final rules are issued. As a result, approximately 700 investors, most of whom are at the condition removal stage, have had their immigration status placed on hold, some since 1995.[30] This long delay has adversely impacted these affected investors (and their derivative family members) who have been unable to fully integrate into the United States.

It is widely believed that the EB-5 program has never truly fulfilled Congress' expectations. Experts may differ on the cause, but citing to input from USCIS officials and immigration attorneys, a 2005 Government Accountability Office (GAO) report attributed:

> ... low participation to a series of factors that led to uncertainty among potential investors. These factors include an onerous application process; lengthy adjudication periods; and the suspension of processing of over 900 EB-5 cases -- some of which date to 1995 -- precipitated by a change in [USCIS'] interpretation of regulations regarding financial [qualifications.][31]

Citing the same GAO report, the Congressional Research Service's 2005 report to Congress on "Federal Investor Visas: Policies and Issues," stated that EB-5 visa underutilization can be traced to:

> [T]he rigorous nature of the LPR investor application process and qualifying requirements; the lack of expertise among adjudicators; uncertainty regarding adjudication outcomes; negative media attention on the LPR investor program; lack of clear statutory guidance; and lack of timely application processing and adjudication.[32]

In 2005, USCIS established an EB-5 unit at USCIS headquarters, the Investor and Regional Center Unit (IRCU),[33] and announced the agency's intention to re-invigorate the EB-5

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[29] *Supra* note 4. Immigrant investors affected by the retroactively applied 1998 AAO decisions were provided an additional two years to demonstrate that they made a supplemental investment, and in combination, that they met the minimum required qualifying investment and created and/or preserved ten jobs.
[30] Information provided by USCIS to the Ombudsman (Jan. 30, 2008).
[31] Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors, p.3 GAO-05-256 (Apr. 2005).
[32] *Supra* note 15 at p. 8.
[33] The IRCU reviews and approves the submissions of applicants seeking Regional Center designation. Applicants are required to provide a "detailed prediction regarding the manner in which the [R]egional [C]enter will have a positive impact on the regional and national economy...." 8 C.F.R § 204.6(m)(3)(iv) (2008). The proposal must be supported by "economically or statistically valid forecasting tools, including, but not limited to, feasibility studies ... and/or multiplier tables." 8 C.F.R. § 204.6(m)(3)(v) (2008). "To show that 10 or more jobs are actually created indirectly by the business, reasonable methodologies may be used. Such methodologies may include ...

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program.[34] In the last few years, the EB-5 immigrant visa category has attracted the interest of high net-worth investors seeking to immigrate to the United States. USCIS reported to the Ombudsman that it received 1,257 Form I-526 petitions in FY 2008.

Despite a recent upswing in EB-5 filings, as discussed below, the Ombudsman has heard from stakeholders that USCIS' decision to consolidate EB-5 adjudications at the California Service Center (CSC)[35] has rekindled concerns within the EB-5 investor community.

Case Processing Procedures

To acquire an EB-5-based green card, an investor must first make a qualifying investment, and then file a Form I-526 petition (and supporting documents) with USCIS. Once the Form I-526 is approved, an investor who is in the United States in lawful nonimmigrant status may file a Form I-485 (Application to Register Permanent Residence or Adjust Status).[36] Upon approval of the Form I-485, the investor is afforded conditional lawful permanent resident status, which is valid for two years.

If the investor is outside the United States when the Form I-526 petition is approved, the U.S. Department of State's National Visa Center will process the EB-5 immigrant visa through the local U.S. consular post with jurisdiction over the place of residence. The EB-5 immigrant visa is used to enter the United States, which commences the two-year conditional lawful permanent resident status.

Regardless of whether the investor adjusted to conditional green card status while living in the United States, or acquired such status through consular processing, approximately 21 months later the investor must file a Form I-829 to remove the conditional status. In addition, petitioners must also provide supporting documents to establish that they have satisfied all EB-5 qualifying conditions. Upon approval, a new ten-year unconditional green card is issued.

Prior to October 1, 2008, EB-5 related Form I-526 and Form I-829 filings were divided between the Texas Service Center (TSC) and the CSC as part of USCIS' bi-specialization initiative. USCIS announced last year that beginning on October 1, 2008, all Form I-526 and I-829 petitions would be adjudicated at the CSC.[37]

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economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment." 8 C.F.R. § 204.6(m)(7)(ii) (2008).

[34] USCIS Interoffice Memorandum, "Establishment of An Investor and Regional Center Unit" (Jan. 19, 2005).

[35] "Change in Filing Location for EB-5-Related Petitions and Applications and Regional Center Proposals," 74 Fed. Reg. 912 (Jan. 9, 2009).

[36] The spouse and minor children of the investor may also file for green card status by filing separate Form I-485 applications.

[37] *Supra* note 35.

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The Ombudsman met with EB-5 product line managers and adjudicators at the TSC and CSC in August 2008 regarding the scheduled consolidation of EB-5 adjudications at the CSC. At that time, there were two EB-5 adjudicators at the TSC, each with over ten years of experience. The Ombudsman learned that neither of these seasoned TSC EB-5 adjudicators would relocate to the CSC to continue work on EB-5 filings. However, these seasoned adjudicators trained ten CSC adjudicators who now supplement the EB-5 unit.

The CSC advised the Ombudsman that it expects the new complement of CSC EB-5 adjudicators to reduce processing times. Final transition of all EB-5 related adjudications and oversight to the CSC, including IRCU functions, occurred in January 2009.

Recent EB-5 Stakeholder Meetings and Feedback

Stakeholders advised the Ombudsman that they are concerned about delays in EB-5 processing times and the impact on existing investors. Specifically, some expressed concern[38] that adjudicators who are new to the complex EB-5 product line may seek to review previously settled guidance, or request new types of evidence from investors.[39]

USCIS met with an EB-5 regional center trade association group in Washington on September 22, 2008. There were four themes highlighted by EB-5 stakeholders at this meeting: program institutionalization, program enforcement, minimization of program risk, and a need to increase program predictability.

Stakeholders believe that USCIS should not re-adjudicate the indirect job creation methodology when reviewing individual Form I-526 and I-829 petitions. Since that meeting, USCIS advised the Ombudsman in December 2008 that the agency is continuing to review I-829s to determine if the originally presented methodology is valid and appropriate, and whether the projected jobs were created or will be created within two years.[40]

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[38] These concerns were raised by individual stakeholders with the Ombudsman in informal discussions in the fall of 2008, and in an Ombudsman-hosted a public teleconference on September 26, 2008, "EB-5 Investor Visas: Opportunities and Challenges."

[39] In the past, the AAO has endorsed a "hypertechnical" review of certain issues, including source and path of funds. *See* Matter of [Redacted], EAC 98 229 50661, Vermont Service Center (AAO Jan. 18, 2005) ("'hypertechnical' requirements for establishing the lawful source of an investor's funds serve a valid government interest....") *citing* a Ninth Circuit decision, Spencer Enterprises, Inc., v. United States, 229 F. Supp. 2d 1025, 1040 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9th Cir. 2003).

[40] USCIS has sent mixed messages on the question of whether and when an EB-5 investor must prove that the qualifying Regional Center investment satisfied the law's job creation requirement. In an October 22, 2008, letter to Senator Patrick J. Leahy (D-VT), Chairman of the Senate Committee on the Judiciary, USCIS stated that a business plan that relies on an indirect job creation methodology, but does not forecast the generation of the jobs within the two-year period that an investor is afforded conditional LPR status, is insufficient. Yet the same letter, citing 8 C.F.R. § 216.6(a)(4)(iv) (2008), states that the regulations do allow some flexibility for USCIS to remove the conditions on an investor's LPR status based upon a showing that the forecasted "jobs will be created within a reasonable time." Note that the cited regulation concerns the adjudication of Form I-829 and in fact does not

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III. ANALYSIS

Based upon the foregoing discussion, EB-5 program administration has historically lacked continuity. For the EB-5 program to realize its full potential, it is essential that USCIS establish a regulatory and administrative environment to promote investor confidence that the program can be relied upon.

Accordingly, the Ombudsman makes the following recommendations to USCIS:

1. Quickly Finalize the Special Legislation Regulations.

USCIS drafted proposed regulations to implement the EB-5 special legislation in 2002,[41] but these proposed rules remain in internal rulemaking review processes with the USCIS Office of Chief Counsel.[42] Adjudicators in the field indicate that they are ready to address these long-pending I-829 petitions to remove condition cases, but need final action on the regulations to move forward. Continued delay negatively impacts adjudicators and USCIS as a whole, as hours of customer service time are spent addressing congressional and direct customer inquiries on these cases. Finalization of these proposed regulations is overdue.

For these reasons, the Ombudsman recommends that USCIS finalize regulations to implement the special 2002 EB-5 legislation which offers a certain subgroup[43] of EB-5 investors a pathway to cure deficiencies in their previously submitted petitions.

2. Do Not Re-adjudicate the Job Creation Methodology Question.

USCIS should issue Standard Operating Procedures (SOPs) for Form I-526 and Form I-829 adjudications that specifically instruct adjudicators that they are not to reexamine the job methodology issue. Repeat questioning, debate, and re-adjudication of complex economic models and analyses used to prove the ten full-time job creation requirement unnecessarily uses USCIS resources and results in adjudication delays. Eliminating this re-examination may result in increased speed and predictability in adjudications, and allow adjudicators more time to focus on other factual matters. The adoption of SOPs should yield greater regularity in process, and consequently, build confidence in EB-5 project developers and attract potential foreign national entrepreneurs.

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specifically state that the investor must prove that the required jobs be created and filled within the two-year conditional LPR period initially granted to the EB-5 investor.

[41] *Supra* note 27.

[42] Information provided by USCIS to the Ombudsman (Jan. 30, 2008).

[43] This subgroup includes only those EB-5 investors whose Form I-526 petition was filed and/or approved between January 1, 1995 and August 31, 1998.

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Developers and investors should be able to rely on the rules applicable at the time they make their investments and expect the government not to revisit those rules when it adjudicates their cases. Accordingly, once the agency reviews the indirect job methodology presented by a developer in its submission seeking USCIS designation as an approved Regional Center, the issue should be considered conclusively established, absent clear error or fraud.

For these reasons, the Ombudsman recommends that USCIS issue Standard Operating Procedures (SOPs) for Form I-526 and Form I-829 that specifically direct EB-5 adjudicators to not reconsider or re-adjudicate the indirect job creation methodology in Regional Center cases, absent clear error or evidence of fraud.

3. Issue More EB-5 Precedent/Adopted[44] Decisions.

Although the EB-5 visa category and the Regional Center pilot program have been in existence for over 15 years, many key terms have not been clearly defined by USCIS. Such ambiguity contributes to entrepreneur anxiety and uncertainty about the program, and ultimately to underutilization of this visa category. AAO issuance of additional precedent/adopted decisions would clarify USCIS' interpretation of key EB-5 terms and policies within specific fact patterns, and assist the business community, investors, and EB-5 adjudicators. For example:

- **Definition of Restructuring.** Current regulations do not define what level of restructuring or reorganization is required to render the purchase of an existing business a "new enterprise" under the EB-5 provisions. The AAO has held that simply buying and changing the legal name and/or the legal form of the business entity alone is insufficient to qualify the business as a "new enterprise."

- **Designation of High Unemployment Area and Effect of Later Changes in Unemployment Rate.** Clarification is needed on which government office(s) is/are appropriate to designate an area as a qualified "high unemployment area." The EB-5 legislation permits a lower ($500,000) threshold investment in areas so defined. In addition, clarification is needed on what impact an improvement in the unemployment rate would subsequently have on an investor who invested in a formerly designated "high unemployment area." The lack of clarity in these matters might cause investors to avoid investing in areas which could otherwise benefit from an infusion of foreign capital and related job creation.

For these reasons, the Ombudsman recommends that USCIS designate more EB-5 Administrative Appeals Office (AAO) decisions as precedent/adopted decisions to provide

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[44] USCIS adopted decisions are AAO decisions that the USCIS Director proactively identifies and considers binding policy guidance on USCIS personnel, and must be followed in all cases involving similar issues. *See generally* Ombudsman Recommendation #20 (FR2005-20).

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stakeholders, investors, and adjudicators a better understanding of the application of existing USCIS regulations to given factual circumstances. The Ombudsman suggests that USCIS issue additional EB-5 precedent/adopted decisions as an interim measure until completion of formal rulemaking, as outlined in Recommendation #4 below.

4. EB-5 Rulemaking Is Needed.

The time is ripe to take a fresh look at how USCIS can best implement congressional intent in establishing the EB-5 category.

Given that four significant EB-5 precedent decisions[45] effectively established extra-regulatory interpretations of law, the Ombudsman further recommends that USCIS initiate formal EB-5 rulemaking to advance a new set of rules to replace the combination of existing rules and controlling precedent decisions.[46]

By engaging in formal rulemaking, USCIS will have a chance to reinvigorate the EB-5 program.

For these reasons, the Ombudsman recommends that USCIS engage in formal rulemaking to further develop rules that will promote stakeholder and investor confidence as well as predictability in adjudicatory processes.

5. Form An EB-5 Advisory Group.

USCIS should form an EB-5 inter-governmental advisory group composed of selected representatives from the Departments of Commerce, Treasury, State, Labor, and possibly, the Small Business Administration. Without recommending that these agencies have any adjudicatory role in determining the merits of an application or petition, this group should meet regularly to consult with USCIS on Regional Center designations, and to address other business, economic, and labor issues which impact the EB-5 program.

Some of the specific matters which the inter-governmental advisory group could provide invaluable insight and assistance with include: the examination of Regional Center submissions for such designation, including the business plan; the financial instruments described; the designation of high unemployment areas; and the validity of "indirect job methodologies" advanced by EB-5 project developers. Additional issues might include: appropriate levels of due diligence related to program integrity; the availability and reasonableness of requesting particular financial documents and/or asset identification; and issues surrounding the path of funds.

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[45] *Supra* note 26.
[46] To avoid further confusion or inequity, the regulations concerning new EB-5 filings should not be made retroactive.

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For these reasons, the Ombudsman recommends that USCIS form an inter-governmental advisory group to consult on domestic business, economic, and labor considerations relevant to EB-5 adjudications.

6. Offer A Special Handling Processing Option To EB-5 Investors.

High net-worth individuals who are willing to risk in excess of $500,000 in an investment in the United States require program predictability. Such entrepreneurs frequently make significant financial decisions in a matter of hours or days, and existing EB-5 case processing timeframes simply do not mesh well with the pace of progress expected in the business world. The Ombudsman notes that this is not a new concern -- the time USCIS takes to adjudicate these filings has been regularly mentioned as a source of difficulty by stakeholders and investors. This issue was specifically raised by stakeholders during a public meeting with USCIS in Washington in September 2004. It also was the subject of an April 6, 2005, letter from House Judiciary Committee Chairman James Sensenbrenner to then USCIS Director Eduardo Aguirre, requesting that USCIS process EB-5 cases more quickly by instituting a premium processing option, as well allowing for concurrent filing.[47] The Ombudsman recognizes that it may be impractical for USCIS to institute the standard 15-day[48] premium processing $1,000 upgrade option[49] for these complex EB-5 filings. However, USCIS may formulate an appropriately priced specialized handling option that is operationally sound (e.g., 60 days).

For these reasons, the Ombudsman recommends that USCIS offer a Special Handling Package option to EB-5 investors for faster adjudication of Forms I-526, I-829, and related applications for a higher fee.

7. "Prioritize" Processing of Regional Center Related Filings.

Section 4 of the Basic Pilot Program Extension and Expansion Act of 2003 states: "[i]n processing [EB-5] petitions ... the Secretary of Homeland Security may give priority to petitions filed by aliens seeking admission under the pilot program...."[50] Timely adjudications are of critical importance to EB-5 investors. Given the current state of the U.S. economy, USCIS should exercise this discretion and "prioritize" Regional Center filings.

Additionally, as a matter of administrative discretion, the Ombudsman suggests that USCIS consider accelerating its review and adjudication of all new applications seeking Regional Center approval and designation. In these difficult times, many communities nationwide could benefit from investments in newly created Regional Centers.

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[47] *Supra* note 15 at p. 26, citing to Chairman Sensenbrenner letter. "Concurrent filing" refers to the ability to simultaneously file Form I-485 along with Form I-526, rather than to file this form sequentially after the Form I-526 is approved. Existing regulations do not currently permit concurrent filing of these forms.
[48] 8 C.F.R. § 103.2(f) (2008).
[49] INA § 286(u); 8 U.S.C. § 1356(u).
[50] *Supra* note 5 (emphasis supplied).

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For these reasons, the Ombudsman recommends that USCIS "prioritize" the review and processing of all Regional Center EB-5 related petitions and applications to foster the immediate creation and preservation of jobs.

8. Actively Promote the EB-5 Program.

Visible support by USCIS of the EB-5 program generally, and the Regional Center Pilot Program specifically, would send a strong signal to entrepreneurs, financiers, and stakeholders that the United States is open for business and intends to welcome immigrant investors. Sending such a signal, in coordination with its adoption of the other recommendations in this study, would likely encourage individuals and interests to look at the EB-5 program.

Just as corresponding immigration components in other countries actively promote their immigrant investor programs globally,[51] USCIS should actively support the U.S. EB-5 program.

For these reasons, the Ombudsman recommends that USCIS establish a program to promote the EB-5 program overseas in coordination with the U.S. Departments of State and Commerce.

IV. CONCLUSION

The underutilization of the EB-5 visa category is principally caused by significant regulatory and administrative obstacles, as well as by uncertainties that undermine investor and stakeholder confidence. Given current economic conditions, by adopting these recommendations USCIS will send a message that it accepts, understands, and will implement Congress' intention that the EB-5 program serve as an employment creation engine for our nation.

[51] Among others, Canada, Australia, New Zealand, Poland, and the United Kingdom have investor programs that offer high net-worth individuals the opportunity for permanent resident status. Some are more active than others in terms of marketing. One of the most active is Canada, where the equivalent organization to USCIS, Citizenship & Immigration Canada (CIC), actively promotes and sponsors initiatives to strengthen its Immigrant Investor Program. In 2004, CIC reported that immigrant investors contributed CDN $211 million in funds that were used to create employment opportunities for Canadians. "Annual Report to Parliament on Immigration, 2005;" http://www.cic.gc.ca/english/resources/publications/annual-report2005/section3.asp (accessed Dec. 22, 2008).

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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

Memorandum

TO: Richard Flowers
Acting Citizenship and Immigration Services Ombudsman

FROM: Michael Aytes /S/ **June 12, 2009**
Acting Deputy Director

SUBJECT: Response to Recommendation 40, Employment Creation Immigrant Visa (EB-5) Program Recommendations

Recommendation

The CIS Ombudsman recommends that USCIS:

- Finalize regulations to implement the special 2002 EB-5 legislation which offers a certain subgroup of EB-5 investors a pathway to cure deficiencies in their previously submitted petitions;

- Issue Standard Operating Procedures (SOPs) for Form I-526 (Immigrant Petition by Alien Entrepreneur) and Form I-829 (Petition by Entrepreneur to Remove Conditions) that specifically direct EB-5 adjudicators to not reconsider or re-adjudicate the indirect job creation methodology in Regional Center cases, absent clear error or evidence of fraud;

- Designate more EB-5 Administrative Appeals Office (AAO) decisions as precedent/adopted decisions to provide stakeholders, investors, and adjudicators a better understanding of the application of existing USCIS regulations to given factual circumstances;

- Engage in formal rulemaking to further develop rules that will promote stakeholder and investor confidence as well as predictability in adjudicatory processes;

- Form an inter-governmental advisory group to consult on domestic business, economic, and labor considerations relevant to EB-5 adjudications;

- Offer a Special Handling Package option to EB-5 investors for faster adjudication of Forms I-526, I-829, and related applications for a higher fee;

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- "Prioritize" the review and processing of all Regional Center EB-5 related petitions and applications to foster the immediate creation and preservation of jobs, and;

- Establish a program to promote the EB-5 program overseas in coordination with the U.S. Departments of State and Commerce.

USCIS Response

1. **Finalize regulations to implement the special 2002 EB-5 legislation which offers a certain subgroup of EB-5 investors a pathway to cure deficiencies in their previously submitted petitions.**

USCIS is actively working to finalize and publish regulations regarding EB-5 investors affected by the 2002 EB-5 legislation. The rule has already been reviewed by the U.S. Department of Homeland Security's (DHS) Office of General Counsel (OGC), and the agency is attempting to streamline the current draft as well as incorporate substantive decisions that are not subject to OGC's review. During the past year or so the agency was directed to issue several rulemakings that were designated as priority rules for the Department of Homeland Security, including rules related to H-1B, H-2A, H-2B, I-9, TN, and T and U Adjustment of Status; therefore, the agency could not finalize this EB-5 rule. USCIS will urge the Department to put this rule on the priority list as many of the investors are in the process of litigating their right to citizenship.

2. **Issue Standard Operating Procedures (SOPs) for Form I-526 (Immigrant Petition by Alien Entrepreneur) and Form I-829 (Petition by Entrepreneur to Remove Conditions) that specifically direct EB-5 adjudicators to not reconsider or re-adjudicate the indirect job creation methodology in Regional Center cases, absent clear error or evidence of fraud.**

USCIS concurs with the intent of this recommendation to the extent that EB-5 adjudicators should not re-adjudicate the indirect job creation methodology for Regional Center cases absent clear error or evidence of fraud. USCIS will, however, continue to review the I-829 petitions to ensure that all measurable variables and assumptions that underlie the indirect job creation methodology have, in fact, been met. For example, an investor may make a proposal to create a shopping center that would be leased to various businesses. At the I-526 stage, the investor may claim that this proposal would result in the hiring of a certain number of employees by the tenant-businesses and that a certain number of indirect jobs would be created as well. USCIS must ensure that the tenant jobs have substantially been filled to support the indirect job count. This is not re-adjudicating the job creation methodology, merely, verification of an assertion previously made during the I-526 stage. In the alternative, if the job creation was based on total expenditure of capital to create the shopping center, USCIS must make sure that the full amount has, in fact, been invested in the job creating enterprise to support the job count.

USCIS regulations provide some flexibility to respond to changed circumstances at the time the I-829 is filed by permitting the conditions to be removed from the alien investor's permanent residence based upon a showing that the jobs will be created within a reasonable time. USCIS has encouraged stakeholders to contact the agency should they have any concerns about how the agency

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has applied the reasonable timeframe standard at the Form I-829 stage. USCIS will confer internally to develop additional training sessions for adjudicators rather than issue SOPs or policy guidance via the AFM for Forms I-526 and I-829.

3. Designate more EB-5 Administrative Appeals Office (AAO) decisions as precedent/adopted decisions to provide stakeholders, investors, and adjudicators a better understanding of the application of existing USCIS regulations to given factual circumstances.

USCIS concurs with the intent of this recommendation, but believes that it is more beneficial to issue new policies through formal rulemaking or policy guidance which would provide examples of certain factual circumstances via the AFM. On occasion, USCIS will certify unique or novel decisions to the AAO for clarification on certain issues. Unfortunately, issuing a precedent decision is a multi-department and time-consuming process.

4. Engage in formal rulemaking to further develop rules that will promote stakeholder and investor confidence as well as predictability in adjudicatory processes.

USCIS acknowledges that the regulations governing the EB-5 Program need to be updated. During the past 20 months the agency was directed to issue several rules that were designated as priorities by the previous presidential administration. USCIS met these challenges despite limited resources, and we are continuing with rulemaking efforts that are agency priorities. USCIS will re-examine its current resources in relation to its ability to promulgate new regulations versus statutory mandates and other existing priority regulations which are currently in progress.

5. Form an inter-governmental advisory group to consult on domestic business, economic, and labor considerations relevant to EB-5 adjudications.

USCIS is exploring the possibility of developing an inter-governmental advisory group to discuss operational and policy issues with respect to domestic business, economic, and labor considerations relevant to EB-5 adjudications. USCIS will advise the CIS Ombudsman if a group is convened.

6. Offer a Special Handling Package option to EB-5 investors for faster adjudication of Forms I-526, I-829, and related applications for a higher fee.

USCIS concurs with this recommendation. USCIS Service Center Operations recently advised attendees at the EB-5 quarterly stakeholders meeting that the agency is committed to offering Premium Processing Service for some or all EB-5 form types in the future. However, because of the complexity of the issues presented by EB-5 petitions, the agency does not believe that it is possible to provide Premium Processing Service for EB-5 petitions under the current statutory scheme.[1] The agency believes that a longer processing time as well as an increase in the premium processing fee may be necessary before EB-5 petitions will be eligible for Premium Processing Service. In

[1] Currently the Premium Processing Service provides a 15 calendar day processing time for an additional cost of $1000.

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addition, the agency intends to meet the targeted cycle times before it pursues adding EB-5 applications to Premium Processing Service.

7. "Prioritize" the review and processing of all Regional Center EB-5 related petitions and applications to foster the immediate creation and preservation of jobs.

USCIS currently prioritizes the review and processing of all Regional Center-affiliated petitions and will continue to do so. Regional Center-affiliated petitions are separated and assigned to specific officers who are trained to complete such specialized adjudications. With the increased number of staff dedicated to the processing of I-526 and I-829 petitions,[2] we fully anticipate that the cycle times will continue to decrease. Recently, we requested that stakeholders include a copy of the Regional Center approval notice when submitting petitions and applications. This will enable our contractor to easily identify the Regional Center cases and segregate them so that they can be worked more quickly.

8. Establish a program to promote the EB-5 program overseas in coordination with the U.S. Departments of State and Commerce.

USCIS believes that this suggested initiative focuses more on high-level promotional efforts rather than operational matters. USCIS is responsible for administering immigration benefits and not necessarily for promoting increased commercial enterprises within the United States. For this reason, USCIS believes that other agencies and departments, such as the U.S. Department of Commerce, would be better suited to promote such a program. However, USCIS may potentially discuss the promotion of the program within the proposed inter-governmental advisory group or in other cross-cutting department panels.

[2] There are currently 16 officers dedicated to adjudicating EB5-related petitions (Form I-526 and Form I-829). There were previously only 2 officers assigned to adjudicating EB5-related petitions.

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Office of the
Citizenship and Immigration Services Ombudsman

U.S. Department of Homeland Security
Mail Stop 1225
Washington, DC 20528-1225

EMPLOYMENT CREATION IMMIGRANT VISA (EB-5) PROGRAM RECOMMENDATIONS

March 18, 2009

The Citizenship and Immigration Services Ombudsman, established by the Homeland Security Act of 2002, provides independent analysis of problems encountered by individuals and employers interacting with U.S. Citizenship and Immigration Services, and proposes changes to mitigate those problems.

I. EXECUTIVE SUMMARY

The Citizenship and Immigration Services Ombudsman (Ombudsman) has reviewed the United States Citizenship and Immigration Services (USCIS) policies and processes concerning the Employment Creation EB-5 immigrant visa,[1] and formed several recommendations that USCIS should implement to stabilize and energize the program.

In passing employment creation legislation, Congress sought to attract entrepreneurial immigrants to the United States who would invest capital to create jobs for U.S. workers, and thereby stimulate the economy.[2]

Congress allocates approximately 10,000 immigrant visas per year to the EB-5 category (including derivative visas for the spouses and minor children of investors), although less than 1,000 visas are used annually.[3] This underutilization is caused by a confluence of factors, including program instability, the changing economic environment, and more inviting immigrant investor programs offered by other countries.

In recognition of the present turmoil in the U.S. economy, it is incumbent upon USCIS to take all necessary and appropriate steps to facilitate a healthy, vigorous, and smooth-running employment creation immigrant visa program.

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[1] Immigration and Nationality Act (INA) § 203(b)(5); 8 U.S.C. § 1153(b)(5).
[2] Immigration Act of 1990, Pub. L. No. 101-649 (Nov. 29, 1990).
[3] Between 1992 and 2004, 6,024 EB-5s were issued, which averaged approximately 500 per year. Government Accountability Office, Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors, p. 2 (Apr. 2005) (GAO-05-256). "The bill's supporters predicted that about 4,000 millionaire investors, along with family members, would sign up, bringing in $4 billion in new investments and creating 40,000 jobs [annually]." *See* Al Kamen, "An Investment in American Citizenship; Immigration Program Invites Millionaires to Buy Their Way In," Washington Post, (Sept. 29, 1991).

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For these reasons, the Ombudsman recommends that USCIS:

1. **Finalize regulations to implement the special 2002 EB-5 legislation which offers a certain subgroup[4] of EB-5 investors a pathway to cure deficiencies in their previously submitted petitions.**

2. **Issue Standard Operating Procedures (SOPs) for Form I-526 (Immigrant Petition by Alien Entrepreneur) and Form I-829 (Petition by Entrepreneur to Remove Conditions) that specifically direct EB-5 adjudicators to not reconsider or re-adjudicate the indirect job creation methodology in Regional Center cases, absent clear error or evidence of fraud.**

3. **Designate more EB-5 Administrative Appeals Office (AAO) decisions as precedent/adopted decisions to provide stakeholders, investors, and adjudicators a better understanding of the application of existing USCIS regulations to given factual circumstances.**

4. **Engage in formal rulemaking to further develop rules that will promote stakeholder and investor confidence as well as predictability in adjudicatory processes.**

5. **Form an inter-governmental advisory group to consult on domestic business, economic, and labor considerations relevant to EB-5 adjudications.**

6. **Offer a Special Handling Package option to EB-5 investors for faster adjudication of Forms I-526, I-829, and related applications for a higher fee.**

7. **"Prioritize" the review and processing of all Regional Center EB-5 related petitions and applications to foster the immediate creation and preservation of jobs.[5]**

8. **Establish a program to promote the EB-5 program overseas in coordination with the U.S. Departments of State and Commerce.**

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[4] This subgroup includes only those EB-5 investors whose Forms I-526 (Immigrant Petition by Alien Entrepreneur) were filed and/or approved between January 1, 1995, and before August 31, 1998. *See* 21st Century Department of Justice Appropriations Authorization Act, §§ 11031-37, Pub. L. No. 107-273 (Nov. 2, 2002).

[5] "Priority" processing is authorized by the Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156 (Dec. 3, 2003).

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II. BACKGROUND

Purpose and Terms of the EB-5 Program

Pursuant to INA § 203(b)(5), Congress established the fifth employment-based (EB-5) preference category in 1990 for immigrants seeking to enter the United States to engage in a commercial enterprise that will benefit the U.S. economy and directly create[6] at least ten full-time jobs.[7] The minimum qualifying investment amount is $500,000 for commercial enterprises located within a rural area[8] (or targeted employment area),[9] and is otherwise $1,000,000.[10]

Congress allocated 10,000 immigrant visas annually for this employment-based preference category. Figure 1 depicts actual EB-5 usage from FY 1998 through FY 2007.

[6] A qualifying investment in a new commercial enterprise must create full-time employment for at least ten U.S. citizens, lawful permanent residents, or other immigrants lawfully authorized to be employed in the United States. INA § 203(b)(5)(a)(ii); 8 U.S.C. § 1153(b)(5)(A)(ii); *see also* 8 C.F.R. § 204.6(j)(4)(i) (2008). The investor and his/her immediate family, as well as lawful nonimmigrant employees, are excluded from the ten-person employment calculation. 8 C.F.R. § 204.6(e) (2008). Special rules also allow for making a qualifying investment where the investment serves to maintain jobs that might otherwise be lost in a troubled business (i.e., an existing business over two years old that has incurred a net loss exceeding 20 percent of its net worth during the 12 or 24 month period preceding a Form I-526 petition filing). 8 C.F.R. §§ 204.6(e), 204.6(j)(4)(i)(B)(ii) (2008).

[7] INA § 203(b)(5)(A)(ii); 8 U.S.C. § 1153(b)(5)(A)(ii).

[8] "Rural area" is defined as "any area other than an area within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States)." INA § 203(b)(5)(B)(iii); 8 U.S.C. § 1153(b)(5)(B)(iii); *see also* 8 C.F.R. § 204.6(e) (2008).

[9] "Targeted employment area" means that "at the time of the investment, a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate)." INA § 203(b)(5)(B)(ii); 8 U.S.C. § 1153(b)(5)(B)(ii); *see also* 8 C.F.R. § 204.6(j)(6) (2008).

[10] INA § 203(b)(5)(C)(i); 8 U.S.C. § 1153(b)(5)(C)(i).

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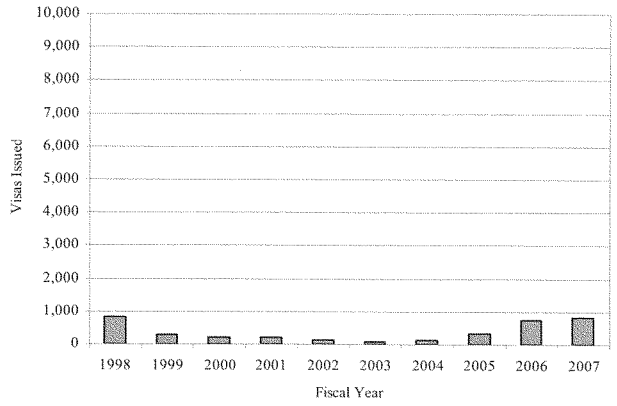
Figure 1: U.S. EB-5 Immigrant Visa Utilization (Principals + Derivatives), FY 1998-2007



Source: DHS Office of Immigration Statistics, "2007 Yearbook of Immigration Statistics," Table 6 at p. 18, http://www.dhs.gov/ximgtn/statistics/index.shtm (accessed Feb. 19, 2009).

A Senate Committee Report stated that the EB-5 provision was "intended to provide new employment for U.S. workers and to infuse new capital in the country, not to provide immigrant visas to wealthy individuals. . . ."[11]

The legislative history suggests that Congress anticipated that as many as 4,000 foreign investors and their families would seek U.S. lawful permanent residence (LPR or "green card" status), bringing in fresh investment funds totaling an estimated $4 billion and creating 40,000 jobs annually.[12]

Pilot Regional Center Program

To encourage use of the EB-5 visa category, Congress established the Immigrant Investor Pilot Program in 1993 and set aside 3,000 of the allocated 10,000 visas for investors who invest within designated "regional centers."[13] This program eventually became referred to as the "Regional

[11] S. Rep. No. 55, 101st Cong., 1st Sess. at 21 (1989).
[12] *See* Al Kamen, "An Investment in American Citizenship; Immigration Program Invites Millionaires to Buy Their Way In," Washington Post, (Sept. 29, 1991).
[13] The original set-aside was 300 visas annually. *See* Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriation Act of 1993, Pub. L. No. 102-395 (Oct. 6, 1992). In 1997, Congress increased the set-aside to 3,000 annually. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act of 1998, Pub. L. No. 105-119 (Nov. 26, 1997). A "regional center" is defined as "any economic

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Center Pilot," and legislation was introduced in 2008 to make the Regional Center Pilot permanent.[14] Under the pilot, foreign investors can pool their investments into Regional Centers which make large investments that create jobs. Regional Center investors are permitted to demonstrate through "reasonable methodologies" that their investment resulted in the creation of ten or more direct or indirect jobs. More specifically, investors within EB-5 Regional Centers are permitted to use statistical formulas and models to demonstrate a correlation between their investment of capital into a specific business and indirect jobs created in other businesses within the greater community. In Regional Center cases, these indirectly generated jobs may be used to satisfy the job creation requirement.

According to the Congressional Research Service, the South Dakota International Business Institute's Dairy Economic Region program (SDIBI South Dakota Dairy) provides an EB-5 Regional Center story that illustrates how the successful implementation of an EB-5 program can positively impact a community.[15] Approved in June 2005, the SDIBI South Dakota Dairy program attracted more than 60 immigrant investors who infused approximately $30 million into the South Dakota economy. Their combined investment was leveraged to secure approximately $90 million in bank financing for various dairy investment projects. These EB-5 investments directly created 240 jobs. Using RIMS II[16] modeling to predict the correlation between monies invested and employment creation, the combined investment also is credited with generating an additional 638 indirectly-created jobs, and over $360 million in additional funds to the region.[17]

According to the SDIBI South Dakota Dairy Director, the "paramount" EB-5 program issue is whether "USCIS [has] sufficient resources to quickly adjudicate EB-5 immigrant visa petitions. If the adjudication process is too long . . . the opportunity cost may make a South Dakota dairy investment unappealing to foreign investors."[18] Similar sentiments were expressed to the

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unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." 8 C.F.R. § 204.6(e) (2008).

[14] *See* S. 2751, a Senate bill co-sponsored by Senators Patrick Leahy (D-VT) and Arlen Specter (R-PA) on March 12, 2008. Although the EB-5 Regional Center Pilot program was not made permanent in the 110th Congress, bipartisan support did exist to ensure that the pilot did not expire at the end of the 2008 fiscal year. A short extension of the Regional Center Pilot (through March 6, 2009) was thus included in the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No 110-329 (Sept. 30, 2008). Following passage of a five day extension, on March 11, 2009, President Obama signed the Omnibus Appropriations Act extending the EB-5 Regional Center Pilot sunset date to September 30, 2009. Accordingly, the 111th Congress may yet again take up the question of extending the pilot, or making the program permanent, later this year.

[15] *See* Chad C. Haddal, "Foreign Investor Visas: Policies and Issues," pp. 31-32, Congressional Research Service (Jan. 29, 2007).

[16] RIMS II is the upgraded version of the original Regional Industrial Multiplier System (RIMS) created by the U.S. Department of Commerce, Bureau of Economic Analysis, and is used in public and private sector project planning as a model to predict regional output, earnings, and employment in specific geographic and industrial settings. *See* "Regional Multipliers from the Regional Input-Output Modeling Systems (RIMS II): A Brief Description;" www.bea.gov/regional/rims/brfdesc.cfm (accessed Jan. 8, 2009).

[17] *See supra* note 15.

[18] *Id.* at p. 32.

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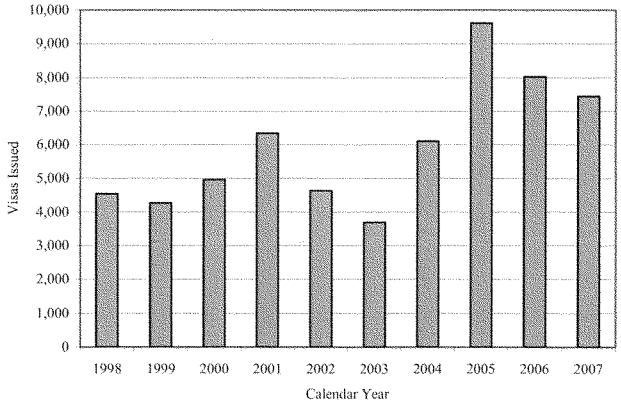
Ombudsman by other stakeholders. They emphasized that the EB-5 program generally, and the Regional Center Pilot particularly, needs stability and predictability to attract foreign investors.

Foreign Competition and Response

It is generally understood that in enacting the EB-5 provisions contained within the Immigration Act of 1990,[19] Congress intended to establish an immigrant investment program to rival those enacted by other countries, specifically Canada and Australia.[20] However, by the time the EB-5 program became law, Canada's Immigrant Investor program was in existence for four years (since 1986). See Figure 2 below for use of this program.

Figure 2: Canada's Immigrant Investor Visa Utilization (Principals + Derivatives), CY 1998-2007



Source: Citizenship & Immigration Canada Facts and Figures 2007: Immigration Overview-Permanent and Temporary Residents, p. 19, www.cic.gc.ca (accessed Feb. 19, 2009).

Under the Canadian program, foreign business persons establish eligibility by proving that they have "two years of business experience," a net worth of at least CDN $800,000, and by affirmatively expressing that they are willing to deposit CDN $400,000 into designated government guaranteed securities for a period of five years.[21] Unlike the EB-5 program, the

[19] *See supra* note 2.
[20] *See* 136 Cong. Rec. 17106, 112 (Oct. 26, 1990) (Senator Paul Simon (D-IL) arguing that the United States should "learn from and build upon the track record and experiences of Governments of Canada and Australia who have had great success in attracting talented people through their investor visa programs.")
[21] *See* Citizenship and Immigration Canada, "Investors;" www.cic.gc.ca (accessed Feb. 18, 2009). Invested funds are used by the federal government to generate new employment opportunities for Canadian citizens, and in turn, the foreign investor is granted permanent resident status, and provided a government promissory note representing a

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Canadian Immigrant Investor program is a passive program: a qualifying investor is not required to open a business, or hire and manage employees. Rather, the investment itself is assumed to spur significant economic activity and create jobs.

Uncertainty Has Plagued the EB-5 Program From Its Inception

Initial delay in the issuance of EB-5 rules, followed by changes in interpretation of the rules, has led to uncertainty in the EB-5 program since inception.

Between 1993 and 1997, the Immigration and Naturalization Service (INS) issued General Counsel interpretive guidance on key legal issues, which was received favorably by several private sector companies specifically formed to develop investment project opportunities for EB-5 investors.

The number of EB-5 immigrant visas issued increased from 583 in FY 1993 to 1,361 visas in FY 1997. However, informal General Counsel guidance in the mid-1990s permitted investors to obtain status without actually committing their entire investment amount to the business.[22]

Concerns of insider access, suspicions of abuse, misrepresentation, and fraud surfaced in the mid-1990s at the same time that the EB-5 program was experiencing its most significant usage. Some of these concerns were later proven in a federal court case leading to convictions for immigration fraud, wire fraud, money laundering, and conspiracy against the principals and officers of an EB-5 investment business then operating as Interbank.[23] The defendants in the case attracted $21 million in investment funds from foreign investors who were seeking to lawfully obtain green card status through the EB-5 program. The fraudulent investment scheme involved the juggling of funds through an offshore financial institution, and the production and use of fake bank statements used in connection with underlying I-526 petitions filings. However,

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debt obligation to return the full CDN $400,000 in five years (without interest). *Id.* There has never been a governmental default on these obligations, and because of their reliability, Canadian financial institutions are willing to partially finance the required investment. *See* Jeffrey S. Lowe, "Canada's Immigrant Investor Program," Research Solutions (Dec. 2007). Interestingly, the qualifying investment may be delayed until as late as the eve of the date of visa issuance. *See* Citizenship and Immigration Canada "Operating Procedure Manual (OP 9 Investors)" at 9.2 (Aug. 8, 2008); www.cic.gc.ca (accessed Feb. 18, 2009). In the ten-year period between 1998 and 2007, according to Citizenship & Immigration Canada, 16,213 principal foreign nationals have invested in direct qualifying funds in Canada. *See* Citizenship & Immigration Canada Facts and Figures 2007: Immigration Overview—Permanent and Temporary Resident, p. 19; http://www.cic.gc.ca/english/resources/statistics/menu-fact.asp (accessed Feb. 5, 2009). Based on the total number of principal foreign nationals and the qualifying investment of CDN $400,000, Canada has benefited from CDN $6,485,200,000 through its Immigrant Investor program.

[22] *See* INS General Counsel Memorandum, "Sections 203(b)(5) (EB-5) and 216A of the Immigration and Nationality Act," HQCOU 70/6.1 & 70/9-P (Dec. 19, 1997). This 1997 Memorandum clarified and provided new guidance disallowing such practices.

[23] *See* U.S. v. O'Connor, 158 F. Supp. 2d 697, 723-38 (E.D. Va 2001).

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none of the individual 216 EB-5 investors were found complicit in the fraud. In fact, most of the foreign investors suffered a total loss of their funds and were not granted green cards.[24]

In 1998, the USCIS Administrative Appeals Office (AAO)[25] issued four precedent decisions[26] that altered the previously issued guidance and substituted new and more restrictive interpretations of the law. These changes caused much concern among current and potential EB-5 investors, and introduced new and significant uncertainties into the EB-5 program.

Figure 3: Changes in Selected EB-5 Legal Guidance

Issue	Pre-1998 AAO Decisions	Post-1998 AAO Decisions
Establishment of "new" enterprise	Business must be created after November 1990	Investor must personally be involved in establishment of business[27C]
Source of funds	General representation and proof of legal generation of fund accepted	Legal generation of funds must be traced with particularity [A,C&D]
Promissory notes	Considered at face value; no limit on duration; need not be perfected; foreign collateral acceptable	Must prove fair market value;[C] duration generally restricted to two years;[C] must be perfected;[B] foreign collateral must be seizable [B] and marketable[C]
Guaranteed returns	Permitted generally	Prohibited[C]
Redemption provisions	Permissible but may not exercise until after two year conditions lifted	Impermissible to enter redemption agreement within two-year conditional period[C]

[A] Matter of Soffici, 22 I&N Dec. 158 (Assoc. Comm'r Examinations 1998).
[B] Matter of Hsiung, 22 I&N Dec. 201 (Assoc. Comm'r Examinations 1998).
[C] Matter of Izummi, 22 I&N Dec. 169 (Assoc. Comm'r Examinations 1998).
[D] Matter of Ho, 22 I&N Dec. 206 (Assoc. Comm'r Examinations 1998).

Following issuance of the AAO's precedent decisions, EB-5 visa applications dropped dramatically. Between FY 1998 and FY 2008, USCIS had an average approval rate of approximately 44 percent, as shown in Figure 4 below.

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[24] *See* U.S. v. O'Connor, 321 F. Supp. 2d 722, 725 (E.D. Va 2004).
[25] The AAO is the appellate body within USCIS with primary authority to review most service center decisions.
[26] Matter of Soffici, 22 I&N Dec. 158 (Assoc. Comm'r Examinations 1998); Matter of Izummi, 22 I&N Dec. 169 (Assoc. Comm'r Examinations 1998); Matter of Hsiung, 22 I&N Dec. 201 (Assoc. Comm'r Examinations 1998); Matter of Ho, 22 I&N Dec. 206 (Assoc. Comm'r Examinations 1998). Precedent decisions are those decisions specially designated to provide controlling legal principles and interpretations which are "binding on all Service employees in the administration of the Act." 8 C.F.R. § 103.3(c) (2008).
[27] Congress abolished the establishment criterion though legislative action in 2002 when it passed the 21st Century Department of Justice Appropriations Authorization Act. *See supra* note 4 at § 11036.

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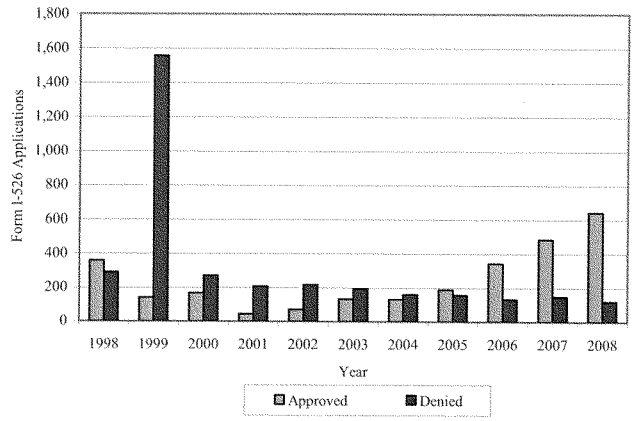
Figure 4: Form I-526 Approvals and Denials by USCIS (Principals Only), FY 1998-2008



Source: USCIS Performance Analysis System Data, as of October 2008.

Many potential investors decided not to go forward with their EB-5 investments and filings. In addition, USCIS took action to remove some existing investors from the United States based on the retroactive application of the principles set forth in the precedent decisions. While most investors lost legal challenges, one group of affected investors did successfully challenge the retroactive application of these decisions in one federal court. In reversing the denials, the court found:

> [Investors] relied on their understanding that their business and investment plans conformed to the requirements of EB-5. They sold businesses, uprooted from their homelands, and moved to the U.S.... [They] sought no guarantee of success, but a contingent promise that, if they held up their end of the bargain ... they would obtain LPR status promised by the EB-5 program. This was not unreasonable.... The reputation and integrity of the EB-5 program is ill-served by the proposition that INS approval of an I-526 petition as satisfying EB-5's requirements cannot be relied upon.[28]

[28] Chang v. U.S., 327 F.3d 911, 928-29 (9th Cir. 2003).

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In 2002, the President signed special legislation that attempted to rectify the situation.[29] However, new regulations needed to implement this legislation remain outstanding, and these cases cannot be adjudicated until final rules are issued. As a result, approximately 700 investors, most of whom are at the condition removal stage, have had their immigration status placed on hold, some since 1995.[30] This long delay has adversely impacted these affected investors (and their derivative family members) who have been unable to fully integrate into the United States.

It is widely believed that the EB-5 program has never truly fulfilled Congress' expectations. Experts may differ on the cause, but citing to input from USCIS officials and immigration attorneys, a 2005 Government Accountability Office (GAO) report attributed:

> ... low participation to a series of factors that led to uncertainty among potential investors. These factors include an onerous application process; lengthy adjudication periods; and the suspension of processing of over 900 EB-5 cases -- some of which date to 1995 -- precipitated by a change in [USCIS'] interpretation of regulations regarding financial [qualifications.][31]

Citing the same GAO report, the Congressional Research Service's 2005 report to Congress on "Federal Investor Visas: Policies and Issues," stated that EB-5 visa underutilization can be traced to:

> [T]he rigorous nature of the LPR investor application process and qualifying requirements; the lack of expertise among adjudicators; uncertainty regarding adjudication outcomes; negative media attention on the LPR investor program; lack of clear statutory guidance; and lack of timely application processing and adjudication.[32]

In 2005, USCIS established an EB-5 unit at USCIS headquarters, the Investor and Regional Center Unit (IRCU),[33] and announced the agency's intention to re-invigorate the EB-5

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[29] *Supra* note 4. Immigrant investors affected by the retroactively applied 1998 AAO decisions were provided an additional two years to demonstrate that they made a supplemental investment, and in combination, that they met the minimum required qualifying investment and created and/or preserved ten jobs.
[30] Information provided by USCIS to the Ombudsman (Jan. 30, 2008).
[31] Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors, p.3 GAO-05-256 (Apr. 2005).
[32] *Supra* note 15 at p. 8.
[33] The IRCU reviews and approves the submissions of applicants seeking Regional Center designation. Applicants are required to provide a "detailed prediction regarding the manner in which the [R]egional [C]enter will have a positive impact on the regional and national economy...." 8 C.F.R § 204.6(m)(3)(iv) (2008). The proposal must be supported by "economically or statistically valid forecasting tools, including, but not limited to, feasibility studies ... and/or multiplier tables." 8 C.F.R. § 204.6(m)(3)(v) (2008). "To show that 10 or more jobs are actually created indirectly by the business, reasonable methodologies may be used. Such methodologies may include ...

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program.[34] In the last few years, the EB-5 immigrant visa category has attracted the interest of high net-worth investors seeking to immigrate to the United States. USCIS reported to the Ombudsman that it received 1,257 Form I-526 petitions in FY 2008.

Despite a recent upswing in EB-5 filings, as discussed below, the Ombudsman has heard from stakeholders that USCIS' decision to consolidate EB-5 adjudications at the California Service Center (CSC)[35] has rekindled concerns within the EB-5 investor community.

Case Processing Procedures

To acquire an EB-5-based green card, an investor must first make a qualifying investment, and then file a Form I-526 petition (and supporting documents) with USCIS. Once the Form I-526 is approved, an investor who is in the United States in lawful nonimmigrant status may file a Form I-485 (Application to Register Permanent Residence or Adjust Status).[36] Upon approval of the Form I-485, the investor is afforded conditional lawful permanent resident status, which is valid for two years.

If the investor is outside the United States when the Form I-526 petition is approved, the U.S. Department of State's National Visa Center will process the EB-5 immigrant visa through the local U.S. consular post with jurisdiction over the place of residence. The EB-5 immigrant visa is used to enter the United States, which commences the two-year conditional lawful permanent resident status.

Regardless of whether the investor adjusted to conditional green card status while living in the United States, or acquired such status through consular processing, approximately 21 months later the investor must file a Form I-829 to remove the conditional status. In addition, petitioners must also provide supporting documents to establish that they have satisfied all EB-5 qualifying conditions. Upon approval, a new ten-year unconditional green card is issued.

Prior to October 1, 2008, EB-5 related Form I-526 and Form I-829 filings were divided between the Texas Service Center (TSC) and the CSC as part of USCIS' bi-specialization initiative. USCIS announced last year that beginning on October 1, 2008, all Form I-526 and I-829 petitions would be adjudicated at the CSC.[37]

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economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment." 8 C.F.R. § 204.6(m)(7)(ii) (2008).

[34] USCIS Interoffice Memorandum, "Establishment of An Investor and Regional Center Unit" (Jan. 19, 2005).

[35] "Change in Filing Location for EB-5-Related Petitions and Applications and Regional Center Proposals," 74 Fed. Reg. 912 (Jan. 9, 2009).

[36] The spouse and minor children of the investor may also file for green card status by filing separate Form I-485 applications.

[37] *Supra* note 35.

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The Ombudsman met with EB-5 product line managers and adjudicators at the TSC and CSC in August 2008 regarding the scheduled consolidation of EB-5 adjudications at the CSC. At that time, there were two EB-5 adjudicators at the TSC, each with over ten years of experience. The Ombudsman learned that neither of these seasoned TSC EB-5 adjudicators would relocate to the CSC to continue work on EB-5 filings. However, these seasoned adjudicators trained ten CSC adjudicators who now supplement the EB-5 unit.

The CSC advised the Ombudsman that it expects the new complement of CSC EB-5 adjudicators to reduce processing times. Final transition of all EB-5 related adjudications and oversight to the CSC, including IRCU functions, occurred in January 2009.

Recent EB-5 Stakeholder Meetings and Feedback

Stakeholders advised the Ombudsman that they are concerned about delays in EB-5 processing times and the impact on existing investors. Specifically, some expressed concern[38] that adjudicators who are new to the complex EB-5 product line may seek to review previously settled guidance, or request new types of evidence from investors.[39]

USCIS met with an EB-5 regional center trade association group in Washington on September 22, 2008. There were four themes highlighted by EB-5 stakeholders at this meeting: program institutionalization, program enforcement, minimization of program risk, and a need to increase program predictability.

Stakeholders believe that USCIS should not re-adjudicate the indirect job creation methodology when reviewing individual Form I-526 and I-829 petitions. Since that meeting, USCIS advised the Ombudsman in December 2008 that the agency is continuing to review I-829s to determine if the originally presented methodology is valid and appropriate, and whether the projected jobs were created or will be created within two years.[40]

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[38] These concerns were raised by individual stakeholders with the Ombudsman in informal discussions in the fall of 2008, and in an Ombudsman-hosted a public teleconference on September 26, 2008, "EB-5 Investor Visas: Opportunities and Challenges."

[39] In the past, the AAO has endorsed a "hypertechnical" review of certain issues, including source and path of funds. *See* Matter of [Redacted], EAC 98 229 50661, Vermont Service Center (AAO Jan. 18, 2005) ("'hypertechnical' requirements for establishing the lawful source of an investor's funds serve a valid government interest....") *citing* a Ninth Circuit decision, Spencer Enterprises, Inc., v. United States, 229 F. Supp. 2d 1025, 1040 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9th Cir. 2003).

[40] USCIS has sent mixed messages on the question of whether and when an EB-5 investor must prove that the qualifying Regional Center investment satisfied the law's job creation requirement. In an October 22, 2008, letter to Senator Patrick J. Leahy (D-VT), Chairman of the Senate Committee on the Judiciary, USCIS stated that a business plan that relies on an indirect job creation methodology, but does not forecast the generation of the jobs within the two-year period that an investor is afforded conditional LPR status, is insufficient. Yet the same letter, citing 8 C.F.R. § 216.6(a)(4)(iv) (2008), states that the regulations do allow some flexibility for USCIS to remove the conditions on an investor's LPR status based upon a showing that the forecasted "jobs will be created within a reasonable time." Note that the cited regulation concerns the adjudication of Form I-829 and in fact does not

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III. ANALYSIS

Based upon the foregoing discussion, EB-5 program administration has historically lacked continuity. For the EB-5 program to realize its full potential, it is essential that USCIS establish a regulatory and administrative environment to promote investor confidence that the program can be relied upon.

Accordingly, the Ombudsman makes the following recommendations to USCIS:

1. Quickly Finalize the Special Legislation Regulations.

USCIS drafted proposed regulations to implement the EB-5 special legislation in 2002,[41] but these proposed rules remain in internal rulemaking review processes with the USCIS Office of Chief Counsel.[42] Adjudicators in the field indicate that they are ready to address these long-pending I-829 petitions to remove condition cases, but need final action on the regulations to move forward. Continued delay negatively impacts adjudicators and USCIS as a whole, as hours of customer service time are spent addressing congressional and direct customer inquiries on these cases. Finalization of these proposed regulations is overdue.

For these reasons, the Ombudsman recommends that USCIS finalize regulations to implement the special 2002 EB-5 legislation which offers a certain subgroup[43] of EB-5 investors a pathway to cure deficiencies in their previously submitted petitions.

2. Do Not Re-adjudicate the Job Creation Methodology Question.

USCIS should issue Standard Operating Procedures (SOPs) for Form I-526 and Form I-829 adjudications that specifically instruct adjudicators that they are not to reexamine the job methodology issue. Repeat questioning, debate, and re-adjudication of complex economic models and analyses used to prove the ten full-time job creation requirement unnecessarily uses USCIS resources and results in adjudication delays. Eliminating this re-examination may result in increased speed and predictability in adjudications, and allow adjudicators more time to focus on other factual matters. The adoption of SOPs should yield greater regularity in process, and consequently, build confidence in EB-5 project developers and attract potential foreign national entrepreneurs.

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specifically state that the investor must prove that the required jobs be created and filled within the two-year conditional LPR period initially granted to the EB-5 investor.

[41] *Supra* note 27.

[42] Information provided by USCIS to the Ombudsman (Jan. 30, 2008).

[43] This subgroup includes only those EB-5 investors whose Form I-526 petition was filed and/or approved between January 1, 1995 and August 31, 1998.

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Developers and investors should be able to rely on the rules applicable at the time they make their investments and expect the government not to revisit those rules when it adjudicates their cases. Accordingly, once the agency reviews the indirect job methodology presented by a developer in its submission seeking USCIS designation as an approved Regional Center, the issue should be considered conclusively established, absent clear error or fraud.

For these reasons, the Ombudsman recommends that USCIS issue Standard Operating Procedures (SOPs) for Form I-526 and Form I-829 that specifically direct EB-5 adjudicators to not reconsider or re-adjudicate the indirect job creation methodology in Regional Center cases, absent clear error or evidence of fraud.

3. Issue More EB-5 Precedent/Adopted[44] Decisions.

Although the EB-5 visa category and the Regional Center pilot program have been in existence for over 15 years, many key terms have not been clearly defined by USCIS. Such ambiguity contributes to entrepreneur anxiety and uncertainty about the program, and ultimately to underutilization of this visa category. AAO issuance of additional precedent/adopted decisions would clarify USCIS' interpretation of key EB-5 terms and policies within specific fact patterns, and assist the business community, investors, and EB-5 adjudicators. For example:

- **Definition of Restructuring.** Current regulations do not define what level of restructuring or reorganization is required to render the purchase of an existing business a "new enterprise" under the EB-5 provisions. The AAO has held that simply buying and changing the legal name and/or the legal form of the business entity alone is insufficient to qualify the business as a "new enterprise."

- **Designation of High Unemployment Area and Effect of Later Changes in Unemployment Rate.** Clarification is needed on which government office(s) is/are appropriate to designate an area as a qualified "high unemployment area." The EB-5 legislation permits a lower ($500,000) threshold investment in areas so defined. In addition, clarification is needed on what impact an improvement in the unemployment rate would subsequently have on an investor who invested in a formerly designated "high unemployment area." The lack of clarity in these matters might cause investors to avoid investing in areas which could otherwise benefit from an infusion of foreign capital and related job creation.

For these reasons, the Ombudsman recommends that USCIS designate more EB-5 Administrative Appeals Office (AAO) decisions as precedent/adopted decisions to provide

[44] USCIS adopted decisions are AAO decisions that the USCIS Director proactively identifies and considers binding policy guidance on USCIS personnel, and must be followed in all cases involving similar issues. *See generally* Ombudsman Recommendation #20 (FR2005-20).

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stakeholders, investors, and adjudicators a better understanding of the application of existing USCIS regulations to given factual circumstances. The Ombudsman suggests that USCIS issue additional EB-5 precedent/adopted decisions as an interim measure until completion of formal rulemaking, as outlined in Recommendation #4 below.

4. EB-5 Rulemaking Is Needed.

The time is ripe to take a fresh look at how USCIS can best implement congressional intent in establishing the EB-5 category.

Given that four significant EB-5 precedent decisions[45] effectively established extra-regulatory interpretations of law, the Ombudsman further recommends that USCIS initiate formal EB-5 rulemaking to advance a new set of rules to replace the combination of existing rules and controlling precedent decisions.[46]

By engaging in formal rulemaking, USCIS will have a chance to reinvigorate the EB-5 program.

For these reasons, the Ombudsman recommends that USCIS engage in formal rulemaking to further develop rules that will promote stakeholder and investor confidence as well as predictability in adjudicatory processes.

5. Form An EB-5 Advisory Group.

USCIS should form an EB-5 inter-governmental advisory group composed of selected representatives from the Departments of Commerce, Treasury, State, Labor, and possibly, the Small Business Administration. Without recommending that these agencies have any adjudicatory role in determining the merits of an application or petition, this group should meet regularly to consult with USCIS on Regional Center designations, and to address other business, economic, and labor issues which impact the EB-5 program.

Some of the specific matters which the inter-governmental advisory group could provide invaluable insight and assistance with include: the examination of Regional Center submissions for such designation, including the business plan; the financial instruments described; the designation of high unemployment areas; and the validity of "indirect job methodologies" advanced by EB-5 project developers. Additional issues might include: appropriate levels of due diligence related to program integrity; the availability and reasonableness of requesting particular financial documents and/or asset identification; and issues surrounding the path of funds.

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[45] *Supra* note 26.
[46] To avoid further confusion or inequity, the regulations concerning new EB-5 filings should not be made retroactive.

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For these reasons, the Ombudsman recommends that USCIS form an inter-governmental advisory group to consult on domestic business, economic, and labor considerations relevant to EB-5 adjudications.

6. Offer A Special Handling Processing Option To EB-5 Investors.

High net-worth individuals who are willing to risk in excess of $500,000 in an investment in the United States require program predictability. Such entrepreneurs frequently make significant financial decisions in a matter of hours or days, and existing EB-5 case processing timeframes simply do not mesh well with the pace of progress expected in the business world. The Ombudsman notes that this is not a new concern -- the time USCIS takes to adjudicate these filings has been regularly mentioned as a source of difficulty by stakeholders and investors. This issue was specifically raised by stakeholders during a public meeting with USCIS in Washington in September 2004. It also was the subject of an April 6, 2005, letter from House Judiciary Committee Chairman James Sensenbrenner to then USCIS Director Eduardo Aguirre, requesting that USCIS process EB-5 cases more quickly by instituting a premium processing option, as well allowing for concurrent filing.[47] The Ombudsman recognizes that it may be impractical for USCIS to institute the standard 15-day[48] premium processing $1,000 upgrade option[49] for these complex EB-5 filings. However, USCIS may formulate an appropriately priced specialized handling option that is operationally sound (e.g., 60 days).

For these reasons, the Ombudsman recommends that USCIS offer a Special Handling Package option to EB-5 investors for faster adjudication of Forms I-526, I-829, and related applications for a higher fee.

7. "Prioritize" Processing of Regional Center Related Filings.

Section 4 of the Basic Pilot Program Extension and Expansion Act of 2003 states: "[i]n processing [EB-5] petitions ... the Secretary of Homeland Security may give priority to petitions filed by aliens seeking admission under the pilot program...."[50] Timely adjudications are of critical importance to EB-5 investors. Given the current state of the U.S. economy, USCIS should exercise this discretion and "prioritize" Regional Center filings.

Additionally, as a matter of administrative discretion, the Ombudsman suggests that USCIS consider accelerating its review and adjudication of all new applications seeking Regional Center approval and designation. In these difficult times, many communities nationwide could benefit from investments in newly created Regional Centers.

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[47] *Supra* note 15 at p. 26, citing to Chairman Sensenbrenner letter. "Concurrent filing" refers to the ability to simultaneously file Form I-485 along with Form I-526, rather than to file this form sequentially after the Form I-526 is approved. Existing regulations do not currently permit concurrent filing of these forms.
[48] 8 C.F.R. § 103.2(f) (2008).
[49] INA § 286(u); 8 U.S.C. § 1356(u).
[50] *Supra* note 5 (emphasis supplied).

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For these reasons, the Ombudsman recommends that USCIS "prioritize" the review and processing of all Regional Center EB-5 related petitions and applications to foster the immediate creation and preservation of jobs.

8. Actively Promote the EB-5 Program.

Visible support by USCIS of the EB-5 program generally, and the Regional Center Pilot Program specifically, would send a strong signal to entrepreneurs, financiers, and stakeholders that the United States is open for business and intends to welcome immigrant investors. Sending such a signal, in coordination with its adoption of the other recommendations in this study, would likely encourage individuals and interests to look at the EB-5 program.

Just as corresponding immigration components in other countries actively promote their immigrant investor programs globally,[51] USCIS should actively support the U.S. EB-5 program.

For these reasons, the Ombudsman recommends that USCIS establish a program to promote the EB-5 program overseas in coordination with the U.S. Departments of State and Commerce.

IV. CONCLUSION

The underutilization of the EB-5 visa category is principally caused by significant regulatory and administrative obstacles, as well as by uncertainties that undermine investor and stakeholder confidence. Given current economic conditions, by adopting these recommendations USCIS will send a message that it accepts, understands, and will implement Congress' intention that the EB-5 program serve as an employment creation engine for our nation.

[51] Among others, Canada, Australia, New Zealand, Poland, and the United Kingdom have investor programs that offer high net-worth individuals the opportunity for permanent resident status. Some are more active than others in terms of marketing. One of the most active is Canada, where the equivalent organization to USCIS, Citizenship & Immigration Canada (CIC), actively promotes and sponsors initiatives to strengthen its Immigrant Investor Program. In 2004, CIC reported that immigrant investors contributed CDN $211 million in funds that were used to create employment opportunities for Canadians. "Annual Report to Parliament on Immigration, 2005;" http://www.cic.gc.ca/english/resources/publications/annual-report2005/section3.asp (accessed Dec. 22, 2008).

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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

Memorandum

TO: Richard Flowers
Acting Citizenship and Immigration Services Ombudsman

FROM: Michael Aytes /S/ **June 12, 2009**
Acting Deputy Director

SUBJECT: Response to Recommendation 40, Employment Creation Immigrant Visa (EB-5) Program Recommendations

Recommendation

The CIS Ombudsman recommends that USCIS:

- Finalize regulations to implement the special 2002 EB-5 legislation which offers a certain subgroup of EB-5 investors a pathway to cure deficiencies in their previously submitted petitions;
- Issue Standard Operating Procedures (SOPs) for Form I-526 (Immigrant Petition by Alien Entrepreneur) and Form I-829 (Petition by Entrepreneur to Remove Conditions) that specifically direct EB-5 adjudicators to not reconsider or re-adjudicate the indirect job creation methodology in Regional Center cases, absent clear error or evidence of fraud;
- Designate more EB-5 Administrative Appeals Office (AAO) decisions as precedent/adopted decisions to provide stakeholders, investors, and adjudicators a better understanding of the application of existing USCIS regulations to given factual circumstances;
- Engage in formal rulemaking to further develop rules that will promote stakeholder and investor confidence as well as predictability in adjudicatory processes;
- Form an inter-governmental advisory group to consult on domestic business, economic, and labor considerations relevant to EB-5 adjudications;
- Offer a Special Handling Package option to EB-5 investors for faster adjudication of Forms I-526, I-829, and related applications for a higher fee;

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- "Prioritize" the review and processing of all Regional Center EB-5 related petitions and applications to foster the immediate creation and preservation of jobs, and;

- Establish a program to promote the EB-5 program overseas in coordination with the U.S. Departments of State and Commerce.

USCIS Response

1. **Finalize regulations to implement the special 2002 EB-5 legislation which offers a certain subgroup of EB-5 investors a pathway to cure deficiencies in their previously submitted petitions.**

USCIS is actively working to finalize and publish regulations regarding EB-5 investors affected by the 2002 EB-5 legislation. The rule has already been reviewed by the U.S. Department of Homeland Security's (DHS) Office of General Counsel (OGC), and the agency is attempting to streamline the current draft as well as incorporate substantive decisions that are not subject to OGC's review. During the past year or so the agency was directed to issue several rulemakings that were designated as priority rules for the Department of Homeland Security, including rules related to H-1B, H-2A, H-2B, I-9, TN, and T and U Adjustment of Status; therefore, the agency could not finalize this EB-5 rule. USCIS will urge the Department to put this rule on the priority list as many of the investors are in the process of litigating their right to citizenship.

2. **Issue Standard Operating Procedures (SOPs) for Form I-526 (Immigrant Petition by Alien Entrepreneur) and Form I-829 (Petition by Entrepreneur to Remove Conditions) that specifically direct EB-5 adjudicators to not reconsider or re-adjudicate the indirect job creation methodology in Regional Center cases, absent clear error or evidence of fraud.**

USCIS concurs with the intent of this recommendation to the extent that EB-5 adjudicators should not re-adjudicate the indirect job creation methodology for Regional Center cases absent clear error or evidence of fraud. USCIS will, however, continue to review the I-829 petitions to ensure that all measurable variables and assumptions that underlie the indirect job creation methodology have, in fact, been met. For example, an investor may make a proposal to create a shopping center that would be leased to various businesses. At the I-526 stage, the investor may claim that this proposal would result in the hiring of a certain number of employees by the tenant-businesses and that a certain number of indirect jobs would be created as well. USCIS must ensure that the tenant jobs have substantially been filled to support the indirect job count. This is not re-adjudicating the job creation methodology, merely, verification of an assertion previously made during the I-526 stage. In the alternative, if the job creation was based on total expenditure of capital to create the shopping center, USCIS must make sure that the full amount has, in fact, been invested in the job creating enterprise to support the job count.

USCIS regulations provide some flexibility to respond to changed circumstances at the time the I-829 is filed by permitting the conditions to be removed from the alien investor's permanent residence based upon a showing that the jobs will be created within a reasonable time. USCIS has encouraged stakeholders to contact the agency should they have any concerns about how the agency

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has applied the reasonable timeframe standard at the Form I-829 stage. USCIS will confer internally to develop additional training sessions for adjudicators rather than issue SOPs or policy guidance via the AFM for Forms I-526 and I-829.

3. Designate more EB-5 Administrative Appeals Office (AAO) decisions as precedent/adopted decisions to provide stakeholders, investors, and adjudicators a better understanding of the application of existing USCIS regulations to given factual circumstances.

USCIS concurs with the intent of this recommendation, but believes that it is more beneficial to issue new policies through formal rulemaking or policy guidance which would provide examples of certain factual circumstances via the AFM. On occasion, USCIS will certify unique or novel decisions to the AAO for clarification on certain issues. Unfortunately, issuing a precedent decision is a multi-department and time-consuming process.

4. Engage in formal rulemaking to further develop rules that will promote stakeholder and investor confidence as well as predictability in adjudicatory processes.

USCIS acknowledges that the regulations governing the EB-5 Program need to be updated. During the past 20 months the agency was directed to issue several rules that were designated as priorities by the previous presidential administration. USCIS met these challenges despite limited resources, and we are continuing with rulemaking efforts that are agency priorities. USCIS will re-examine its current resources in relation to its ability to promulgate new regulations versus statutory mandates and other existing priority regulations which are currently in progress.

5. Form an inter-governmental advisory group to consult on domestic business, economic, and labor considerations relevant to EB-5 adjudications.

USCIS is exploring the possibility of developing an inter-governmental advisory group to discuss operational and policy issues with respect to domestic business, economic, and labor considerations relevant to EB-5 adjudications. USCIS will advise the CIS Ombudsman if a group is convened.

6. Offer a Special Handling Package option to EB-5 investors for faster adjudication of Forms I-526, I-829, and related applications for a higher fee.

USCIS concurs with this recommendation. USCIS Service Center Operations recently advised attendees at the EB-5 quarterly stakeholders meeting that the agency is committed to offering Premium Processing Service for some or all EB-5 form types in the future. However, because of the complexity of the issues presented by EB-5 petitions, the agency does not believe that it is possible to provide Premium Processing Service for EB-5 petitions under the current statutory scheme.[1] The agency believes that a longer processing time as well as an increase in the premium processing fee may be necessary before EB-5 petitions will be eligible for Premium Processing Service. In

[1] Currently the Premium Processing Service provides a 15 calendar day processing time for an additional cost of $1000.

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addition, the agency intends to meet the targeted cycle times before it pursues adding EB-5 applications to Premium Processing Service.

7. "Prioritize" the review and processing of all Regional Center EB-5 related petitions and applications to foster the immediate creation and preservation of jobs.

USCIS currently prioritizes the review and processing of all Regional Center-affiliated petitions and will continue to do so. Regional Center-affiliated petitions are separated and assigned to specific officers who are trained to complete such specialized adjudications. With the increased number of staff dedicated to the processing of I-526 and I-829 petitions,[2] we fully anticipate that the cycle times will continue to decrease. Recently, we requested that stakeholders include a copy of the Regional Center approval notice when submitting petitions and applications. This will enable our contractor to easily identify the Regional Center cases and segregate them so that they can be worked more quickly.

8. Establish a program to promote the EB-5 program overseas in coordination with the U.S. Departments of State and Commerce.

USCIS believes that this suggested initiative focuses more on high-level promotional efforts rather than operational matters. USCIS is responsible for administering immigration benefits and not necessarily for promoting increased commercial enterprises within the United States. For this reason, USCIS believes that other agencies and departments, such as the U.S. Department of Commerce, would be better suited to promote such a program. However, USCIS may potentially discuss the promotion of the program within the proposed inter-governmental advisory group or in other cross-cutting department panels.

[2] There are currently 16 officers dedicated to adjudicating EB5-related petitions (Form I-526 and Form I-829). There were previously only 2 officers assigned to adjudicating EB5-related petitions.

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Written Testimony of

Ron Drinkard

Director
Alabama Center for Foreign Investment (ACFI)

Hearing on
Promoting Job Creation and Foreign Investment in the United States: An Assessment of the EB-5 Regional Center Program

Before the
Committee on the Judiciary
U.S. Senate
Washington, D.C.

July 22, 2009

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Mr. Chairman and members of the Committee thank you for the opportunity to testify, and I hope my remarks will help you with regards to economic development and job creation.

My name is Ron Drinkard. I am a retired banker and former economic developer. Along with my business partner, Boyd Campbell, we created a Regional Center in Alabama under the EB-5 employment creation visa Program. It is the Alabama Center for Foreign Investment, LLC, and it covers the entire state of Alabama. Through the Center we consult with foreign investors for consideration of investment in Alabama to enhance economic development and create jobs. The Regional Center Pilot Program has been the primary driver in the EB-5 Program, creating thousands of new American jobs over 16 years.

Unlike other types of foreign direct investment, this Program brings not only the initial investment, typically $500,000, and the initial job creation, but also in many cases, brings the investor, which provides additional economic benefits.

As a Regional Center we work very closely with USCIS/DHS. We consider ourselves the most conservative Regional Center in the nation and want to make certain that our Center complies with the rules and methodologies for job creation, as well as all other criteria set forth in the Program.

We have one project that is nearing completion with 10 investors who have already escrowed funds. Six other potential investors have committed to escrow funds when the current I-526 petitions, that have been filed, are approved.

We evaluate projects for consideration of an ACFI Regional Center designated project on a regular basis. Such an evaluation includes our in-house studies, as well as that of a well-respected contract economist and a very experienced contract credit analyst. These two additional studies are performed to make certain that we are not overlooking any aspect of the potential project. Our philosophy is that all parties must be happy for the project to be successful. Those parties include, USCIS/DHS, the investor, the project owner, and ACFI. This Program is difficult enough when all parties are happy, but virtually impossible when any single party involved, is not.

I want to thank the former and current managers of the EB-5 Program in the Office of Service Center Operations within the USCIS Domestic Operations Directorate. They have been very helpful and cooperative in providing information, in reviewing our application to become a Regional Center, and in responding to questions in anticipation of specific projects. I particularly commend Robert Kruszka and two of his associates, Kevin Cummings and Joe Whalen. Every time I have ever asked Robert Kruszka for a meeting, he found time to meet with me. Please understand, however, that I have never wasted his time to chit chat. As a result of that, it is my opinion that he knows that if I ask to meet him, it is to the benefit of some portion of the Program. Prior to Mr. Kruszka's involvement, we had the same experience with his predecessor Morrie Berez.

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It appears to me that we have the best people possible in those positions, but in so many cases, their hands are tied and they may not be able to provide the kind of service that they might otherwise consider.

Consulting with investors for consideration of investment in projects to enhance economic development and job creation is difficult. In fact, it is the most difficult thing I have ever tried to do.

As I previously mentioned, the folks at USCIS do the best job possible, but there are constraints that make it difficult for them to effectively manage the EB-5 Program. In my opinion, there are some changes that could be considered that would make the Program much more user friendly, while still complying with all job creation aspects and first and foremost, security aspects.

We were the 17th Regional Center in the nation and the last count I heard was approximately 49 and approximately another 40 applications pending. Even with the tremendous increase in the number of Regional Centers, we are not anywhere near using the entire 10,000 visas allocated to EB-5. Obviously, Congress envisioned this Program to bring more investment into the United States than has been experienced to this point. In my opinion, the primary reason for which additional visas over and above those allocated are not requested is because of shortfalls in the Program itself.

We all know there are no guarantees with this Program. There is no guarantee that the investor will get a green card and there is no guarantee that the original investment will be returned. Every potential investor knows that and we make certain that it is included in the private placement memorandum. We also strongly recommend that each potential investor consult legal counsel so that there can be no misunderstandings. However, even with an investor knowing the uncertainties, they like --all of us here today-- are going to look at that investment in a similar way.

Our experience has been that their first concern is the green card and the second being the return of their original investment at the end to the five year period, if they are not taking an equity position in the project. Their third concern is any return on that investment during the time those funds are invested in a Regional Center project.

The green card concerns are primarily satisfied by project projections and the results of the econometric model done by our contract economist and the results of the analysis performed by our contract credit analyst. Their second and third concerns are normally satisfied by projected project performance, which is also derived primarily from the econometric model and credit analysis.

Normal business risk to the investor is enhanced dramatically through this Program because there are no guarantees, as previously stated, that they will get a green card or the return of their original investment. However, we must strive to find a balance between economic risk and reward. Your consideration of some changes that in my opinion and experience from running a Regional Center that could benefit the Program are:

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1. Need for Permanent Regional Center Legislation

The primary impediment has been the lack of permanency to the Program. Even with three-year Program extensions, business people are hesitant to invest without knowing if the law will expire before the goals of the investments can be achieved. Recently, extensions have been tied to fiscal continuing resolutions of very short duration. This conveys to potential investors that the government is not fully behind the Program. The most important step toward making employment creation visas successful is for Congress to enact the Regional Center "Pilot Program" permanently into the Immigration & Nationality Act within the EB-5 statute.

2. Need to Overcome Program History

Obviously, another impediment has been the history of the first decade of the Program. A combination of loose informal interpretations and unscrupulous promoters led to a rash of filings for projects that ultimately were found to be non-qualifying, subjecting hundreds of investors to revocation of their immigration status. The Program managers of USCIS have for the last 5 years have tried to build a solid understanding of the parameters for Regional Centers, projects, and source of funds. At first this effort was too dependent on one officer's personal management. During the last couple of years, USCIS has implemented policies in an attempt to review petitions on a much more timely basis. This effort is through an increased number of adjudicators, who are centralized at the California Service Center.

3. Need for Optional Project Approval Process

One thing that would speed the investment and job creation process is to pre-approve Regional Center projects. Today, such a process does not exist. USCIS has however, in my opinion, been diligent in their efforts to allow Regional Centers to respond to additional request for evidence, in such an event where the project does not have all the data necessary for proper consideration. They have even gone so far as to express that the government's goal is an effort to "get to yes," as soon as possible, assuming that all qualifications are met. We are grateful for that spirit and hope that it will continue and expand.

If a process existed whereby project pre-approvals were possible, we could quite possibly and dramatically reduce the time currently required for an adjudicator to review the documentation. Such a process would enable the adjudicator to only concentrate on the documents submitted with regards to the petition itself. Currently, as I understand, each adjudicator has to completely review and analyze all aspects of the project for each investor, to make certain it meets Program requirements, in addition to, the petition, and any other documents that might accompany that petition.

The California Service Center operates on rigid adjudication rules expressly prohibiting the investor from changing any documents to accommodate USCIS concerns expressed

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in requests or decisions. The only recourse for an unapproved project is to have each investor individually challenge the decision by appeal to the USCIS Administrative Appeals Office, which can take many months. The only other alternative of which I am aware, is to have each investor individually change the documents and re-file and wait another 6 months or more for adjudication. Many investors with other options will not choose a model like this and will immigrate to other countries. Gentlemen, these are jobs and dollars that could be enhancing our economy and creating new jobs today.

The current process could be construed as wasting government resources while conveying a tremendous sense of difficulty to the very investors we are trying to attract. If the process could be changed and a Regional Center, after obtaining pre-approval from USCIS could designate a project Regional Center qualified, our government would convey a sense of interest and helpfulness, rather than difficulty.

USCIS could consider, upon project pre-approval, the issuance of a notice of such approval to investors to be filed with their petitions and their evidence of source of funds, etc , etc.

In terms of efficiency, this proposal implies a certain amount of hand holding to Regional Centers and the investment enterprises being considered by the investor. This brief hand-holding will take far less time than is now spent by adjudicators on individual petitions and the adjudicators' individual review of the project that accompanies each petition. In addition, I believe that Regional Centers would be happy to pay a premium fee for each project submitted for the pre-approval process.

It is possible that some Regional Centers have developed certain forms of relatively simple projects that they may deem as not needing pre-approval. If so, perhaps such pre-approval process could be considered as an option, if not a requirement.

I also believe that USCIS should consider additional standards for which an applicant should be considered for Regional Center designation. Personal experience indicates that there is a very broad range in the knowledge of the individuals operating Regional Centers. My partner Boyd Campbell and I spent six months putting together our application/proposal to be considered for Regional Center designation. In doing so, the approximate 466 pages we submitted familiarized the two of us with many aspects of the Program. The additional 3 requests for evidence that we received, probably generated another 100 plus pages. This process allowed us to gain more knowledge about the Program and how it should perform.

My partner is an immigration lawyer with 20 plus years experience and I have 34 years of experience in banking, economic development, and governmental relations. We felt very comfortable that between the two of us we could solve almost any problem pertaining to the EB-5 Program. Not only were we wrong, but two years down the road, we still learn something else important about the Program, virtually every week.

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Additional standards in the designation of Regional Centers, could ensure that every center become as familiar as possible with the entire EB-5 Program. It would seem that some recent designations have been the result of the center's principals hiring someone knowledgeable of the Program to put together the entire application/proposal. In such an event, those individuals simply will not have the necessary knowledge to comply properly within the regulatory environment of the Program. This can only lead to problems that will not only affect that center, but all Regional Centers.

I don't have a solution to what I consider this as being a very real threat to the Program. I do recommend however, that this situation be cautiously approached for some type of standardization of knowledge embedded within those individuals charged with the operation of a Regional Center.

4. Need for More Than 2 Years to Create Jobs

The fourth possible impediment to EB-5 participation is the interpretation of job creation. The most important issue here is the time within which the 10 jobs per investor need to be created and how they need to be shown. Congress allows investors in Regional Centers to show job creation by "reasonable methodologies." It seems that Congress may have borrowed procedures from the marriage fraud context to require investors to come back to USCIS two years after obtaining "conditional" permanent residence and show that they have sustained their investments and fulfilled the EB-5 requirements.

A recent USCIS memo requires that investors show from the outset that they will create the jobs within the two year period of conditional residence and that they show at the end of the two years that the jobs have already been created or that something unexpected has delayed job creation that will be completed within a reasonable period of time. At that junction, ACFI performs another econometric model using actual employment data that is the primary input in determining the additional job creation resulting from those direct jobs.

However, the USCIS interpretation as expressed in the referenced memo, may exceed the statute. This interpretation could be construed to limit the EB-5 Program to small and simple projects. In effect, this interpretation could possibly eliminate larger, more complex investment projects that cannot produce the job requirement within the two-year period. It is my recommendation that such projects of this nature, could be considered on a one-on-one basis by designated individuals at USCIS to determine if such a project should be considered for a time in excess of the current two year requirement.
Mr. Chairman, I am told you previously expressed your concern about this interpretation.

5. Need for Re-evaluation of MSA restriction

Alabama is well suited for the EB-5 Program in that it is 97% rural in land square miles. A rural area qualifies under this Program for the $500,000 investment amount. In addition, we only have 26 cities that have a population in excess of 20,000, which also

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fits well into the rural area category. Unfortunately, we have 28 of 66 counties within the boundaries of a Metropolitan Statistical Area (MSA). The EB-5 statute prohibits the $500,000 investment amount in an MSA. The General Accounting Office has warned Congress that the existence of an MSA is for statistical purposes only and that state and federal Programs should not be restricted by a prohibition on their activities inside the boundaries of an MSA. We recommend that this matter should be re-evaluated.

6. Need for Interpretation of 'Capital'

Capital is defined broadly by Congress in the EB-5 statute, but USCIS restricts capital invested in this Program to "personal" funds. This restrictive interpretation ignores real world management of capital by couples, families, and small businesses. We recommend that the definition of capital be expanded to include ownership or control of investors' funds and specifically include family members and sole proprietors.

I conclude my remarks by suggesting to the Committee that, while we have concerns with some aspects of the Program, it remains the absolute best way to enhance our economy nationwide with the creation of jobs at virtually no cost to the U.S. government. We are using foreign funds to do a task that our tax dollars are currently funding. We appreciate your concern and efforts to make the EB-5 Program more viable and user-friendly.

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HARDY
STRUCTURAL ENGINEERING
875 roosevelt hwy, suite 130, colchester, vt 05446
phone: (802) 655.0755 fax: (802) 655.2698
www.hardyse.com

June 24, 2009

Bill Stenger
Jay Peak Resort
4850 VT Route 242
Jay, Vermont 05859

Re: Economic Impact of Resort Expansion

Dear Mr. Stenger

On behalf of Hardy Structural Engineering (HSE), I would like to commend you and your Development Team at Jay Peak Resort on your vision and abilities to lead the ongoing development at the Resort. HSE was retained by Jay Peak to provide structural engineering services for the design of Hotel One that is currently under construction. In addition, we were extremely happy and grateful to have been awarded the structural engineering for Phase 2 of the redevelopment to include Hotel Two, the Clubhouse and the Ice Arena. This is a tremendous volume of work for our office to be retained from a single Client, and this volume could not have come a better time for us in light of the struggling economy and downturn in the amount of construction projects in the local area. Where other engineering firms are cutting hours to their employees due to lack of work, I am asking my employees to work overtime thanks to Jay Peak.

In addition to employing several other design professionals including Architects, Mechanical Engineers, Electrical Engineers, Civil Engineers, etc, the development at Jay Peak is also greatly contributing to the success of local Vendors and Contractors who are the backbone to bringing all of our visions and designs to reality.

The construction phase of the redevelopment is only the first step in revitalizing the local economy. The real impact will be once the development is complete and patrons start flocking to the resort to indulge in and take advantage of the wonderful amenities that you and your Team are bringing to the Resort. With the surge of patrons will also come more jobs for local residents both at the Resort and within the surrounding communities. I have been approached by Developers thinking of constructing housing and retail buildings in the surrounding towns, because they too believe in the vision of Jay Peak and believe that the development at the Resort with boost the local economy and bring jobs and people to the area.

I grew up in the nearby town of Berkshire and went to High School in Richford, so I am no stranger to Jay Peak and the top notch skiing that it provides and am looking forward to enjoying the revitalized Jay Peak with the completion of Phase One and Two and the transformation of Jay Peak into a true Four Season Resort.

Thanks again to you and your Development Team for having the vision and strive to rise above all the negative economic predictions being heard around the world and show people that with hard work and dedication we can overcome.

Best Regards,
HARDY Structural Engineering, LLC

Tim Hardy, PE
Owner

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P.O Box 2098 • Georgia, Vermont 05468

JAMES A. HARRISON, President
JANET A. HARRISON, Vice President

6/23/09

To: Jay Peak/D.E.W. Const.

Subject: Georgia Mtn. Community Wind Project/Jay work project

Attn: Mr. Bill Stenger/Jerry Davis

Mr. Stenger:

First of all, we at Harrison Concrete Const. Inc. would like to take this opportunity to personally thank everyone from the Jay Ski area for the chance to be involved with both the Hotel One project and currently the new concrete water reservoir project. This work could not have come at a better time given the economic climate we are now experiencing.

It has allowed our company to retain key personnel at these challenging times. We, also, will be bidding your upcoming projects, hopefully we can be involved with the jay Ski Area in you new Ice Rink that is to be built this coming summer. On a different note, we would like to offer the Jay Ski Area a chance to become involved in the Harrison families new Georgia Mountain Community Wind project. This green re-newable electrical generation project would seem to fit nicely with your family owned and operated ski area. Please call our office or e-mail us if there would be any interest to become involved.

Again, thanks for the opportunity to serve your concrete construction needs in such a Critical time.

James A. Harrison

(802) 849-6688 FAX (802) 849-9768

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Bay Area Regional Center LLC

July 16, 2009

The Honorable Patrick Leahy
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
United States Senate
Washington, D.C. 20510

The Honorable Jeff Sessions
Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

RE: Extension of EB-5 Immigrant Investor Pilot Program – No Cost Economic Stimulus Measure

Dear Senators Leahy and Sessions:

I am writing to ask that you work to maintain the Senate provision for a permanent extension of the EB-5 Immigrant Investor Regional Center Pilot Program ("Pilot Program") in the Department of Homeland Security Appropriations Conference. The EB-5 program is an important vehicle for large-scale capital investment supporting commercial economic development and job creation in economically weak communities across the U.S. The program is currently set to expire September 30th, 2009.

The recently approved Bay Area Regional Center LLC expects to fund approximately $100,000,000 of investments in 2010 through public / private partnerships in the California Counties of San Francisco, San Mateo, Alameda, Contra Costa, and Solano. Extrapolating from the economic analysis presented to the United States Citizenship and Immigration Services Department (USCIS) in its approved application, the Bay Area Regional Center is expecting to create approximately 2,000 new jobs beginning in 2010 with a total annual economic output of $380,250,000 to support urgently needed redevelopment in cities such as Oakland, Richmond, Pittsburg, and East Palo Alto.

The uncertainty associated with the Congressional renewal of the program is a legitimate concern for foreign investors and Regional Center Administrators alike. A high level of stability must be achieved for the program to fulfill its charter of providing jobs and economic stimulus into economically challenged communities.

It is very important to California's San Francisco Bay Area Region, and to the nation, that the jobs and investments created through the Regional Center program be retained. Your assistance is urgently needed to insist on the Senate language providing permanent authorization for the EB-5

38 Webster St. Second Floor Oakland, CA 94607
510 625 1300 office, 510 625 1502 fax

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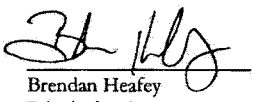
program prior to the current expiration on September 30 2009.

Thank you for your assistance in this important matter.

Sincerely,



Brendan Heafey
Principal

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Statement of Senator Herb Kohl

Promoting Job Creation and Foreign Investment in the United States: An Assessment of the EB-5 Regional Center Program

July 22, 2009

Chairman Leahy, thank you for holding this hearing today to discuss a very important part of our immigration policy – the EB-5 Immigrant Investor Visa Program.

Congress enacted the EB-5 program, which offers visas to certain foreign investors, in 1990, in an effort to attract foreign investment to the United States and to create new jobs for American workers. The program also established EB-5 Regional Centers, including a successful one in Milwaukee, that offer consolidated investment opportunities to potential investors. The program has been reauthorized over the years, and recently there have been efforts to permanently reauthorize the EB-5 visa program. By making the program permanent, we would create certainty for potential and current investors, which would lead to increased confidence in the program, greater investment, and more new jobs for American workers.

The EB-5 program has brought significant investment to many parts of the country, including the Milwaukee Regional Center in Wisconsin. The Milwaukee Immigrant Investment Zone is a success story of the EB-5 program. It has brought millions of dollars in investments, and thousands of urgently needed new jobs, to southeast Wisconsin. Already this year, the Milwaukee Regional Center has approved nine investors – $4.5 million dollars of investment and at least ninety jobs created in Wisconsin – and expects to approve at least 40 more by the end of 2009. This investment and job creation, is crucial to our economic recovery.

Over the past nearly seventeen years, only about 10% of the available EB-5 visas have been used each year, yet they have resulted in more than a billion dollars of investment and more than 20,000 new jobs for American workers. We can only imagine the results we will see once the program is permanent and fully utilized.

The impact of EB-5 investment is spread throughout our nation, especially in economically weakened communities across the United States. Now more than ever, it is important to show our commitment to the EB-5 program and I am pleased that the Senate Judiciary Committee is holding this hearing.

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U.S. Citizenship and Immigration Services

WRITTEN TESTIMONY

OF

ROBERT KRUSZKA
DEPUTY CHIEF
OF
SERVICE CENTER OPERATIONS
U.S. CITIZENSHIP AND IMMIGRATION SERVICES

FOR A HEARING ON

PROMOTING JOB CREATION AND FOREIGN INVESTMENT IN THE UNITED STATES: AN ASSESSMENT OF THE EB-5 REGIONAL CENTER PROGRAM

BEFORE
THE SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMMIGRATION, REFUGEE AND BORDER SECURITY

JULY 22, 2009
PM
DIRKSEN SENATE OFFICE BUILDING
WASHINGTON, DC

INTRODUCTION

Chairman Leahy, Ranking Member Sessions, and other Members of the Committee, I am pleased to be here today to speak with you about various aspects of the EB-5 Immigrant Investor Program. My name is Robert Kruszka and I am the Deputy Chief of Service Center Operations for U.S. Citizenship and Immigration Services (USCIS). I am extremely involved in the management and oversight of the EB-5 Immigrant Investor Program. We want to thank the Chairman and the Committee for their support for this program, especially for the recent amendment to the Department of Homeland Security FY 2010 Appropriations' Bill to make the EB-5 Regional Center Pilot Program permanent.

The purpose of the EB-5 Immigrant Investor Program is employment creation in the United States through the investment of capital by foreign nationals in the U.S. economy for the purpose of creating either new commercial enterprises or to assist existing troubled U.S. businesses. Currently, each foreign investor who participates in the EB-5 Program must invest either $500,000 or $1,000,000 (depending on where the investment is made) into a U.S. enterprise and such investment must create at least 10 full-time jobs for U.S. citizens or immigrants lawfully authorized to be employed in the United States. Under a pilot immigration program first enacted in 1992 and regularly reauthorized since then, some EB-5 visas are set aside for investors in Regional Centers designated by USCIS based on proposals for promoting economic growth. Regional Center Pilot Program investors may establish eligibility by showing indirect rather than direct creation of the necessary jobs. In addition, once a Regional Center is approved, the individual investor still files the necessary petition, but the process is simplified because the business and investment plans have already been reviewed.

OVERVIEW OF THE PROGRAM

Immigrant investors who wish to participate in the EB-5 Program must invest the required minimum amount of capital (either $500K or $1 million) into a new commercial enterprise or troubled business in the U.S. These foreign investors must establish that the investment capital derives from a lawful source, and that the money is both fully invested and at risk in order to qualify. The immigrant investor must file a Form I-526, Immigrant Petition for Alien Entrepreneur. If approved, the alien is granted conditional permanent residence.

Approximately 2 years later, the immigrant investor files a Form I-829, Petition by Entrepreneur to Remove Conditions. At the time of the I-829 adjudication, the investor must demonstrate that the investment business plan was followed, the money remained fully invested in the business, and that at least 10 full-time jobs were created for U.S. workers as a result of the investment.

There are currently a total of 60 approved and active Regional Centers present in 24 different U.S. States inclusive of the District of Columbia. That is up from 23 Regional Centers a year ago.

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CURRENT STATE OF PROGRAM

USCIS has been working to improve the investor program. We recently consolidated all EB-5 related adjudications exclusively at our California Service Center (CSC). Previously, this workload was divided between two centers. CSC now adjudicates all Regional Center Proposals, the petition filed by the individual investor, related applications for permanent residence, and the subsequent application to remove the conditions on their status. USCIS believes that this workload consolidation will result in more consistent and expeditious EB-5 adjudications.

The 2007 immigration application fee rule set an updated fee level for the EB-5 application that ensures full recovery of the costs to process those applications. USCIS officers have also received more comprehensive training in the adjudication of this work.

As a result of these changes, processing times have improved significantly. A year ago it took us an average of 14 months to process a regional center proposal. That now takes 4 months. Similarly, the average processing time for individual investor petitions has dropped from 7 months to 4, and the processing time to remove the conditions on status has dropped from over a year and a half to 6 months.

STATISTICS

In Fiscal Year 2007 (FY 2007), USCIS approved a total of:
473 I-526 petitions.
111 I-829 petitions.

In Fiscal Year 2008 (FY 2008), USCIS approved a total of:
640 I-526 petitions.
159 I-829 petitions.

In Fiscal Year 2009 to date, through the month of May, USCIS has approved a total of:
912 I-526 petitions.
206 I-829 petitions.

Accordingly, it is estimated that at least **$1,012,500,000** (based on $500,000 per alien investor) has been invested into the U.S. economy through the EB-5 Immigrant Investor Program since October 1, 2006. In terms of job creation, based on the number of I-526 approvals since October 1, 2006, it is estimated that an aggregate total of **20,250** jobs have been created for U.S. workers through foreign investment via the EB-5 Immigrant Investor Program.

ONGOING INITIATIVES

At the present time, there is no official application form for Regional Center Proposals and thus no fee is charged for these filings. Adjudications of Regional Center Proposals are highly complex and time-consuming for USCIS personnel and USCIS needs a vehicle to recoup the

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agency cost in performing these adjudications. USCIS has drafted a Regional Center application form which is in the process of being cleared for use. A fee study is also currently underway to determine the appropriate fee to collect for the adjudication of Regional Center Proposals.

USCIS has also drafted informational guidance documents for EB-5 stakeholders, consisting of Application Instructions and Frequently Asked Questions. These documents are presently in the final stages of internal agency review prior to being posted on the EB-5 webpage of the USCIS public website. This guidance will assist stakeholders in preparing Regional Center Proposals and also serve as a handy reference tool on all issues relating to the EB-5 Immigrant Investor Program. The current list of presently active Regional Centers in existence is already posted on the USCIS public website, and contains contact information for the principals of each Regional Center, the name of each Regional Center, the address, the targeted industry clusters which are the focus of each Regional Center, and the geographic scope of each approved Regional Center. This list is updated any time there is a change reported or a Regional Center is either added to or deleted from the list.

While USCIS adjudicators are trained to adjudicate EB-5 Regional Center applications, USCIS is presently in the final stages of hiring an economist to assist with the review of Regional Center Proposals. We believe that the services of an economist will assist USCIS tremendously when reviewing economic models associated with Regional Center Proposals which predict job creation based on investment in specific industry clusters. We also believe that the services of an economist will further speed the adjudication time of Regional Center Proposals.

Recently, USCIS issued clarifying guidance to our field personnel and EB-5 stakeholders advising that the two-year period for job creation will commence six months after the adjudication of the initial application for immigrant investor status. USCIS also clarified that for Regional Center petitions and for purposes of indirect job creation, economic models that rely on certain variables may be considered to show job creation and the amount of investment to determine whether such investment will result in a certain number of indirect jobs. Finally, this recent guidance also states that direct and indirect construction jobs which are created by the petitioner's investment and are expected to last at least 2 years may now count toward the job creation requirement.

CHALLENGES

USCIS notes that historically, the uncertainty of whether or not the program is extended poses operational challenges for USCIS, as well as troubling concern among the EB-5 stakeholder community. In the recent past, when the Pilot Program was scheduled to sunset without further legislative action by Congress, USCIS has had to advise stakeholders of the steps it would take to hold pending Regional Center cases in abeyance for a finite period pending further Congressional action. USCIS has also had to advise EB-5 stakeholders that it would have to reject any future Regional Center Proposals and associated Regional Center I-526 petitions submitted after the sunset date. The uncertainty, as to whether or not the Immigrant Investor Pilot Program will remain a viable vehicle for immigration to the U.S. through investment, hampers marketing efforts by Regional Centers to attract prospective immigrant investors and

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also creates unease and apprehension amongst existing Regional Centers that their business plans will come to fruition. For the reasons stated above, then, if the program is not permanently extended or at a minimum, the President's budget request to extend the pilot program for three more years is not enacted, that would certainly create deep uncertainty among the EB-5 stakeholder community.

Again, we appreciate the Chairman and the Committee's support for this program, and look forward to working with you and other members of Congress on a more permanent solution for indirect job creation in the United States.

Once again, I appreciate the opportunity to be here today. I am happy to answer any questions that you may have. Thank you.

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Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
July 22, 2009

Statement Of Senator Patrick Leahy (D-Vt.),

Hearing On "Promoting Job Creation And Foreign Investment In The United States: An Assessment Of The EB-5 Regional Center Program"

July 22, 2009

The purpose of today's hearing is to examine the EB-5 Immigrant Investor Regional Center Program. This program has been responsible for the investment of hundreds of millions of dollars, and the creation of tens of thousands of jobs in American communities since 1993. The program has paved the way for ski resort expansion in Vermont, dairy operations in Iowa, energy development in Oklahoma and Texas, and the manufacture of hurricane-resistant housing in Alabama. These are just a few examples of projects financed by foreign investment through the Regional Center program, and all indications are that interest in the program is growing.

For years this program has been reauthorized on a temporary basis. Currently, it is set to expire at the end of September. Making this program permanent is a critical first step to its continuing success. That is why earlier this month, I offered, with Senator Sessions' support, an amendment to the Department of Homeland Security Appropriations Act, H.R.2892, to do just that. The amendment was adopted on July 8, and I trust it will become law as part of that bill.

I also remain committed to considering changes to improve the overall program. I have not yet introduced a broader EB-5 bill this Congress, and so I invite the witnesses to suggest improvements to make the program more workable for the agency, for communities and other stakeholders, and for investors who use the program. I hope that this hearing will initiate a dialogue about how Congress, the agency and stakeholders can work together to ensure that the goals of job creation and security can be met, and at the same time make the program as effective and efficient as we can for those who are developing projects in communities around the country. I strongly believe this program has the potential to grow as a meaningful source of positive economic development around the United States.

I thank the U.S. Citizenship and Immigration Services for testifying today, as we all agree that the agency has a crucial role to play in the program's implementation. I also welcome Bill Stenger from Vermont. Bill Stenger recognized years ago the opportunities that the Regional Center program could bring to Vermont. He is expanding Jay Peak, a wonderful ski resort, into a

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year-round resort, in part by attracting foreign investment dollars. In a small State like Vermont, a development project like Jay Peak has an exponentially positive impact on the surrounding community. Sugarbush, another Vermont ski resort -- which I can see from the steps of my farmhouse in Vermont -- also took advantage of the Regional Center program to generate much-needed capital. Just last week, my staff visited with a company in Windsor, Vermont, called Seldon Technologies, the inventors of carbon nanotube water purification systems. Seldon Technologies is considering the EB-5 program as a way to fund domestic manufacturing jobs here in the United States. I also welcome Ron Drinkard of the Alabama Center for Foreign Investment, Stephen Yale-Loehr, who is actively involved in the EB-5 Regional Center program, and Michael Dougherty, a former Ombudsman for USCIS.

Immigration through investment is not unique to the United States. Canada, England, and the rest of the United Kingdom all offer similar programs. In fact, in the current difficult economy, Canada has actively promoted its immigrant investment program around the world. And but for the difficulties Congress has had reauthorizing this program, entrepreneurs in the United States could be doing the same thing with greater certainty. The program must be made permanent in order to give confidence to investors that it is a viable, long-term economic opportunity.

It should surprise no one that citizens of other countries are eager to invest in the U.S. economy. And along with the positive message a healthy and productive program like this sends to investors around the world, the core purposes of the EB-5 Regional Center Program are to generate capital investment and create jobs in communities around the United States. I want to underscore that both of these benefits are accomplished at no cost to taxpayers, and are not reliant on what is currently a very restrictive credit market. Under the program, in order to become a non-conditional lawful permanent resident, a foreign investor must prove the creation of 10 new jobs. The job creation requirement is central to the program, and ensures that foreign investments translate into tangible benefits for Americans.

We can all acknowledge that the issue of immigration is a difficult one. But I view the Regional Center program as less about immigration than about job creation and capital investment in American communities. I know this program is important in Senator Sessions' State, just as it is in Vermont. I hope the Ranking Member and I can work together constructively to make this program a productive and positive part of our broader immigration system.

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July 17, 2009

The Honorable Patrick Leahy
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

RE: PERMANENT STATUS FOR THE EB-5 IMMIGRANT INVESTOR PILOT PROGRAM

Dear Senator Leahy:

I am a Managing Principal of the New York City Regional Center. I write this letter in strong support of making the EB-5 Immigrant Investor Program a permanent vehicle for economic development in our nation's cities and rural communities.

On October 30, 2008, the New York City Regional Center ("NYCRC") was designated as an approved Regional Center by the United States Citizenship and Immigration Services. Encompassing all of Manhattan, Brooklyn, Queens, and the Bronx, the NYCRC is a vital source of funds for large scale projects in New York City that create much needed jobs. On August 15th of this year, the NYCRC will begin seeking foreign investment for **$140 million in public/private projects estimated to create 3,000 new jobs for New Yorkers over the next three years**. All projects are located in areas of high unemployment known as Targeted Employment Areas. In some cases, the NYCRC will provide loans to public entities such as the Brooklyn Navy Yard. In others, the loans will be made to private developers coordinating projects on public property in conjunction with public entities such as the City of New York or the Port Authority of New York and New Jersey.

I have provided a brief summary below of each project the NYCRC will fund:

Project #1: Brooklyn Navy Yard Redevelopment

The Brooklyn Navy Yard, in conjunction with the City of New York, has recently embarked on its largest expansion in over 60 years. The NYCRC will provide funding for a major portion of these redevelopment efforts. The NYCRC will loan $60 million to the Brooklyn Navy Yard Development Corporation to facilitate the construction of two new industrial buildings and a

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broad range of infrastructure improvements. This $60 million will be combined with $58.5 million in City, State, and Federal government funding -- bringing the total project budget to over $118 million. **The project is anticipated to create over 1,300 new jobs and is located in an area of high unemployment.**

Project #2: Steiner Studios Expansion

The NYCRC will provide a $45 million loan to Steiner Studios to complete Phase II of their movie studio project. The total cost of the project is $60 million. Steiner Studios is located in the Brooklyn Navy Yard on city-owned property. Addressing the ongoing, unmet demand for film and television production facilities in New York, Steiner Studios has brought thousands of jobs to New York City and helped to boost its position as a world-class entertainment production center.

The loan will be used to renovate a 250,000-square-foot, WWII-era building. This adaptive reuse will provide critical space for entertainment and media companies as well as additional studio space for film and commercial shoots. The gut demolition of the building is complete and was funded through $3 million in funds from the Brooklyn Navy Yard Development Corporation and $2 million in Federal EDA funding. **The project is projected to create over 1,000 new jobs and is located in an area of high unemployment.**

Project #3: Broadway Marketplace at the George Washington Bridge

The NYCRC will provide a $35 million loan to PA Associates to fund the transformation of the landmark George Washington Bus Terminal located between 178th and 179th Streets into a modern, retail destination and transit center. The $35 million loan will be combined with $40 million of funding from the Port Authority of New York and New Jersey. The project will include a full refurbishment of the Bus Terminal as well 200,000 square feet of new retail for residents of upper Manhattan. **The project is projected to create 700 new jobs and is located in an area of high unemployment.**

Senator Leahy, as New York City's only approved EB-5 Regional Center, the NYCRC is a key partner in the city's efforts to fund multi-year, multi-million dollar redevelopment projects that spur significant job creation in areas of high unemployment. Failure to provide permanent authorization of the EB-5 Immigrant Investor Program will result in the loss of thousands of new jobs and millions of dollars to New York City.

Thank you.

Sincerely,

Paul Levinsohn

Paul Levinsohn, Esq.
Managing Principal

California Global Alliance, LLC

APPROVED USCIS EB-5 REGIONAL CENTER

July 17, 2009

HAND DELIVERED by Stephen Yale-Loehr of IIUSA

The Honorable Patrick Leahy
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Jeff Sessions
Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: EB-5 Regional Center Program

Dear Mr. Chairman and Mr. Ranking Member:

Thank you for your continued support of the United States Citizenship and Immigration Services EB-5 immigrant investor program, as exhibited by your holding upcoming hearings within the judiciary committee on July 22, 2009.

California Global Alliance is one of the newest USCIS approved EB-5 Regional Centers. The Regional Center is based in the Central Region of California and focuses on the support of business opportunities and job creation within the hospitality, senior assisted living, and retail automotive and shopping mall business sectors.

Currently the Regional Center is focusing on the development of what will be the only full-scale luxury AAA, Four Diamond Hotel in this part of California. This project will be built in the city of Fresno and the economic models that have been prepared indicate that the project will generate over 900 jobs within the local and surrounding communities. The development itself will bring in excess of $45 million dollars to the community with many multiples of that number being produced in economic activity by the operation of the facility. This is the type of project that communities need to grow and become reality with the help of the EB-5 program.

CGA is also currently reviewing other potential opportunities within the Regional Center. Ultimately, the success of these projects, through the USCIS EB-5 program, will generate thousands of full time jobs and hundreds of millions of dollars in economic activity within the Central California area.

Your continued interest in the EB-5 program and your efforts to address the issues concerning the program and its supporters are greatly appreciated.

Respectfully yours,

CALIFORNIA GLOBAL ALLIANCE

Michael Lewison/cf

Michael Lewison

ML/cf

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Bill Stenger
Jay Peak Resort
Route 242
Jay, VT 05859-9621

June 26, 2009

Dear Bill,

I haven't run into you lately on our visits to Jay Peak, but I wanted to give you an update on how things are in general with GScf and how this relates to Jay.

As you know, we have been a supplier of flooring and furnishing to Jay for over 10 years.

Though you have always been a valued customer of ours, the importance of your business has been further elevated as a result of the current state of the economy. You are one of our few clients that is, not only weathering this economic storm well, but even expanding during it.

What all this translates to for us here at GScf is that we have managed to retain staff, largely as a result of our continued business with Jay. We recently had the opportunity to lose a well salaried position (through attrition), but given the strength of the business, we directly replaced that position.

Also, the group of subcontractors that we use have been kept busy with the completion on the North Village Townhouses at Jay, and the start of the flooring contract for Hotel One. We have always felt that you enjoyed our being successful, and equally feel the same about Jay's success. We appreciate the opportunities you have captured, which have helped see us through this trying time.

Thank you for all your business thus far and we look forward to continuing to work with you in the future.

Sincerely,

James Mirabella
President, Gscf

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Written Testimonies on

PROMOTING JOB CREATION AND FOREIGN INVESTMENT IN THE UNITED STATES:
An Assessment of the EB-5 Regional Center Program

Before the
U.S. Senate Full Committee on the Judiciary
Washington, D.C. on July 22, 2009

The Honorable Patrick Leahy, Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions, Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

By

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July 22, 2009

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Statement of Thomas P. O'Neill III,
CEO of O'Neill and Associates

Mr. Chairman and distinguished members of the Judicial Committee:

My name is Tom O'Neill and I thank you for the opportunity to testify on behalf of the EB-5 foreign investor, Regional Center Program. I hope I can convey to you the economic value and overall benefits of this program.

As our nation fights through a deep and prolonged economic malaise, we have reached unemployment levels not seen in more than a quarter century. Within our own nine-state northeast region, unemployment in the state of Rhode Island reached an all-time high of 12.4 percent in June, while many other states are approaching record highs.

At the same time, the number of jobs has plummeted at a startling rate. Since the recession began in December 2007, the northeast region has lost over three quarters of a million jobs. Particularly alarming has been the rapid demise of the construction industry as numerous projects have been cancelled, scaled back, or at the very least put on hold. Our technological, construction and manufacturing industries have long been the source of stable, well paying jobs for hard working individuals. Yet, in our Northeast Region alone, we have lost 136,000 construction jobs, a decline of 12.5 percent since December 2007, while manufacturing jobs have declined by 233,000 or 10.6 percent. Many of these jobs will never return.

It is imperative that we revitalize our ailing economy. The EB-5 foreign investor program is uniquely positioned to provide the equity capital needed to develop year-round facilities and create permanent jobs. At the same time, the foreign investor benefits from a green card for themselves and immediate family. These foreign investors are solid, well educated individuals who will continue to positively impact their communities for many years to come.

Through the definition of the targeted employment area (TEA), investors are encouraged to invest in high unemployment or rural areas where the investment need be only $500,000 rather than $1 million. Through this process, the infusion of capital by foreign nationals is likely to be concentrated in the neediest areas, where either new commercial enterprise can be created, or assistance given to troubled U.S. businesses. Investment could take hold in the poverty stricken inner city areas of a New York or Philadelphia, in once vibrant but now struggling industrial cities like Lawrence, Massachusetts, Waterbury, Connecticut, or Trenton, New Jersey, or in rural areas such as the Northeast Kingdom in Vermont or central Pennsylvania.

Mr. Chairman, international migration has long been an integral component in sustaining our northeast economy. Without the inflow of foreign migration we would have experienced population declines during this decade. As we recorded a net loss of nearly 2.5 million individuals moving out of our region to other states, this decline was mitigated by the influx of nearly 1.8 million foreign immigrants over the April 2000 to July 2008 period, or well over 200,000 individuals annually. This foreign inflow easily exceeded the relatively modest overall population increase of 1.3 million. Many workers have left our region due to the lack of viable job opportunities. Seven of our nine states have experienced a net outflow of domestic migration this decade, with only New Hampshire and Maine showing positive domestic migration.

The northeast is the number one region in the country in terms of per capita personal income. The wealth potential of the area is best illustrated by the fact that Connecticut, New Jersey, and Massachusetts are the top three ranking states in the nation and New York and New Hampshire also place in the top ten. Even more impressive is the region's intellectual capacity.

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While Massachusetts has the highest percent of people 25 years and over who have completed a Bachelor's degree, five other northeast states place in the top ten. The region is also home to all eight Ivy League universities and countless other outstanding colleges and universities, as well as world renowned hospitals and cutting edge research and technology.

Despite the many plusses, future economic growth in the region is threatened by the deterioration of an aging infrastructure, aging housing stock, and an overall lack of affordable housing. Three states -- Massachusetts, Rhode Island, and New York -- have over one third of their housing stock built prior to 1940, while most of the other northeast states fall in the top ten. It is here that the infusion of capital through the EB-5 foreign investor program can make serious inroads in jumpstarting much needed construction projects, and getting qualified people back to work where they can earn a meaningful wage, support their families, and maintain their self esteem.

In conclusion, I would also like to address some of the ambiguities and inconsistencies in the targeted employment area TEA definitions:

- Once an area or census tract is designated as a TEA, such an area should be considered eligible as a TEA for at least the potential full two year or until the completion of the project, even if the a state unemployment statistics are updated and the area no longer qualifies as a TEA.
- The definition of "rural" for EB-5 purposes needs to be revised. Some rural areas within a metropolitan statistical area (MSA) cannot be categorized as rural under the USCIS interpretation of immigration regulations. This definition assumes that all areas in an MSA must be considered non rural. Since the MSA definition is a statistical concept, there may be a need to look at other definitions of rural that may more accurately define the concept. For example, the Bureau of the Census generally categorizes persons living in places of less than 2,500 as rural.
- The TEA could be modified to make it easier to encourage EB-5 investment in a community. The program is designed to boost our economy by creating jobs at no public cost and we should try to encourage such investment.

Recently, USCIS granted a regional center designation for the State of Massachusetts to EB-5 Jobs for Massachusetts. I have known William J. Leong for over 2 decades and am familiar with his work in Boston's Chinatown and his role in the creation of the EB-5 program. We are committed to working with the regional center program to provide assistance to qualified regional centers to implement a complete action plan, communicate with government officials, and identify new business opportunities. In Boston, we assisted in helping to secure a TEA for a key development project in Downtown Boston that is a priority of the City and State and is projected to create 4-6 thousand jobs and jump start the local economy.

I appreciate the opportunity to express my views and would be glad to respond to any questions or comments. Thank you.

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Mr. Chairman and Distinguished Members of the Judiciary Committee:

My name is William J. Leong. I am from Boston, Massachusetts and founded the first and only Title VII funded Asian community development corporation (CDC), the Chinese Economic Development Council, Inc. At CEDC we embarked on a major economic development program that secured all types of city, state and federal grants and loans. This led to my joint effort with the late Senator Paul Tsongas to develop Boston's downtown. During the economic downturn of the late eighties, investment capital had dried up but we noted, however, that the Canadian Asian communities seem unaffected. We soon discovered why: development equity capital was flowing in from Asia by investors who obtained citizenship by investing in job-creating projects.

In the fall of 1990 we approached Senator Edward M. Kennedy with the Canadian concept and subsequently provided Massachusetts lawmakers with the job creating arguments to attract immigrant investor capital to the disadvantaged and rural communities of the US. This lead to the inclusion of what has become known as the EB-5 provisions that were included into the Immigration Act of 1990.

Our Congressional delegation then worked with Senator Edward M. Kennedy to promulgate regulations that: defined Targeted Employment Areas (TEAs) to include Department of Labor methodology and; to reduced the required investment amount to $500,000 in TEA's. We initially lost the argument with INS to count construction and subcontracting jobs that led Congress to enact the regional center program in 1993 to force INS to count such jobs. While the regional center pilot program has been in existence for some 15 years, the debate over the kinds of jobs that can be counted has been debated ever since.

When the EB-5 law was enacted in 1990, Congress and the public had high expectations. The press applauded the program as competition with Canada for global investors, whose capital "has even given a boost to the Canadian dollar and softened the impact of a particularly nasty recession." Business Week 09.23.91. Barrons 5.10.93, commenting on the regulation said, "Why all the confusing rules?" Investors should be offered pre-approved investment funds to remove all doubt about whether their investment will qualify them to buy them citizenship...immigrants should be offered the chance to buy shares in an investment pool targeting new and emerging growth companies."

To date this program has provided only $1.3 billion in job-creating equity capital to US businesses, while the Canadian program for the same period has provided over $6.5 billion ($USD) to its economy. The management record this program has been reviewed by 3 government agencies and has had extensive press coverage and all indicate that the reason for the low participation by overseas investors is not due the US having a less attractive investment environment, indeed US is still the number one choice of investment destination for the global investors.

In this time of economic crisis, it is incumbent on Congress to recognize that management of this program by an agency that has a different mission, needs augmentation by implementing the recommendations made today and in prepared statements. GAO reported that the "Many difficult and competing demands associated with establishing the new Department of Homeland Security and meeting its mission and management challenges were cited by DHS as a reason the regulations have not been issued.[1]" Management of the EB-5 program, by its own

1 Ibid. GAO, Page 1 Highlights.

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admission "lacked sufficient empirical or theoretical knowledge of business practice.[2]" If, Congress to realize its goal of 10,000 visas and the creation of 30,000+ US jobs annually it must review new options.

The efforts of the new management administrators are to be applauded, as they recognize the past errors and are trying to improve performance; however, the agency has been repeating "That was before my time" for the past 15 years: Congress must be innovative and yet pragmatic in its approach and find ways to augment management of this vital program. This program must be more accessible to local, state and other federal agencies. It cannot be confined to just immigration attorneys. Management of this program must promote and cooperate with other agencies. To date only the Department of Labor has some jurisdiction over parts of the program. More agencies could be considered by Congress to partake in the adjudication process.

Community economic development activists who lobbied for this program to assist disadvantaged and rural communities have been frustrated for nearly 2 decades. Its potential has only been realized in a very limited way. Had this program been maximized since inception, it would have generated over $50 billion in capital investment to the US economy and created over hundreds of thousands of new US jobs.

Since one aspect of the program involves visas, it was placed with the INS/USCIS. At heart, however, this is an economic development program, not a visa-granting program. Therefore, we recommend that Congress heed the recommendations presented herein and consider what necessary action are required to meet the Congressional goal of 10,000 visas annually. Without any cost to the U.S. taxpayer, the program has the potential to:

- Create $10 billion in new investment capital annually;
- Create over 100,000 new jobs annually;
- Create as much as $1 billion in new Federal and State taxes annually and;
- Reduce by 2% the trade deficit with Asia annually.

In conclusion, we recommend that Congress:

- Make the EB-5 regional center program permanent.
- Allow premium processing for EB-5 cases if the USCIS refuses to do so administratively.
- Grandfather TEA determinations for the length of the particular project in which EB-5 investors invest if the USCIS refuses to do so administratively. repeats
- Enact legislation to allow small towns in MSAs to be considered "rural" for EB-5 purposes. repeats
- Consider liberalizing the TEA definition to allow more places to attract EB-5 investments at the $500,000 level. repeats
- Require DHS, DOC and DOS to promote the EB-5 program overseas if the agencies refuse to do so administratively.

Thank you for your consideration

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2 David Martin, a former INS General Counsel, said that in the Wall Street Journal 2.26.99: INS "lacked sufficient empirical or theoretical knowledge of business practice."

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Figure 1 shows that if just 3,000 visas were used in TEAs investing the minimum amount of $500,000, $1.5 billion could be invested annually, creating up to 30,000 jobs.

Figure 1. Potential Annual Results of the EB-5 Program

New Capital Investment:	Amount:	Subtotal:	Total:
Number of set-aside for TEA Investors (1):	3,000		
Investment Amount Per investor:	$500,000	$1,500,000,000	
Fees per Investor (3):	$100,000	$300,000,000	
Total Capital Import:	$600,000		$1,800,000,000
Leverage of equity to debt (3 times):	3		$4,500,000,000
Consumable Spending Import Per Investor(2):	$1,500,000		$4,500,000,000
Total New Capital Investment:			**$10,800,000,000**
Total New Jobs Created:			
Job-Creation from EB-5 required:	10	30,000	
Job-Creation from Leveraged US Domestic Debt:	3	90,000	
Total New Jobs Created:			**120,000**
Reduced US Trade Deficit with Asia:			
Total Investment Capital Import:		$1,800,000,000	
Consumable Spending Import Per Investor:		$4,500,000,000	
Total Capital Import:			$6,300,000,000
Trade Deficit with Asia of $282.5 Billion (2004):			**.022%**
Estimated New Annual Federal and State Taxes:			
Total Job-Creation:			120,000
Average Income per household from jobs created:			30,000
Annual household income:			$3,600,000,000
Estimated Federal & State Taxes from new US workers:	0.25		$900,000,000
Estimated Federal/State Taxes from new Investors (4):	$150,000	$450,000,000	$112,500,000
Estimated New Annual Federal and State Taxes:			**$1,012,500,000**

(1) 3,000 visas set-aside for TEA Investors.
(2) Business Week Reported that such investor to Canada spent an additional $1.5 million on consumables.
(3) Estimated Fees including: Federal processing, legal, due-diligence, placement and, management fees.
(4) Assumes each new investor has annual worldwide income of at least $150,000 in US Taxable Income.

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esi
ENGINEERED SOLUTIONS

June 17, 2009

Mr. Bill Stenger
Jay Peak Resort
4850 Vermont Route 242
Jay, Vermont 05859

Dear Bill:

We at ESI would like to take this opportunity to express how very grateful and delighted we are to be a part of the Jay Peak Family. The work that we do for Jay Peak is a fundamental part of our business and has provided much needed stability through this rough economic period.

Thanks to the vision that has been laid out at Jay, we have been able to hire qualified professionals and pay competitive wages. We recently hired a Vermonter who had previously been forced to leave the state in search of a well paying job. Our work at Jay Peak allowed us to bring him and his talent back to Vermont. Additionally, just this week, we hired another engineer who is not only a Vermonter but is also native to the Jay Peak area.

Jay Peak has provided ESI with the opportunity to both survive the recession and grow through it. Less than a year ago we were a staff of 3; we are now a staff of 5, living in four Vermont communities. In fact, two staff members have recently purchased homes, and ESI itself is looking seriously into purchasing office space. As a company and as individuals, ESI is committed to (and investing in) Vermont. This is only possible with the support of forward thinking businesses such as Jay Peak.

We are looking forward to many years of working with Jay Peak and appreciate the efforts of you and your staff. Thank you for all that you have done for Jay Peak and state of Vermont.

Sincerely,

Jeffrey A. Padgett, P.E.
Principal Engineer
JayPeak-00

ENGINEERED SOLUTIONS, INC. | P.O. BOX 4628 | BURLINGTON, VT 05406 | 802.658.2445 | WWW.ESIVT.COM

MIKE'S ELECTRIC INC.
JAY VERMONT
EFFICIENT QUALITY WORK
1045 Route 242
Jay, VT 05859

PH: 802-988-9678
PH: 802-988-9679

June 23, 2009

To Whom It May Concern:

Mike's Electric, Inc. is a Jay, Vermont based electrical contractor which is benefiting from the ongoing development at Jay Peak Resort. Mike's Electric employs 50+ people, thus supporting 50+ local families, and has often had to travel long distances to find the commercial jobs to keep everyone working. By working locally our employees are home at night, sleeping in their own beds, spending more time with their families and spending their paychecks locally.

Mike's Electric strongly encourages our employees to participate in the Vermont Electrical Apprentice program. Having steady work close to home makes this extensive schooling more realistic for our employees. This increases the skill level and pay rates for our employees.

The past, present and future of Mike's Electric is tied to our local community. We are active members of the community and support local schools, charities and businesses. Local work means local vendors are being supported. As Jay Peak grows, so will Mike's Electric. We are grateful for the opportunity to participate in this exciting venture and look forward to the ongoing work that it will provide.

Sincerely,

Michael Pappalardo,
President and CEO

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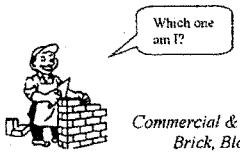

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RICHARD R. RYEA *CHRISTOPHER J. RYEA* *RITCHIE R. RYEA*

June 24, 2009

Mr. Bill Stenger
Route 242
Jay, VT 95859

Dear Mr. Stenger,

We have worked at Jay Peak for the past eight years on all the new condominiums installing firewalls and fireplaces. The project (Hotel One) enabled us to hire additional employees. Between Ryea and Sons relocation and economic hard times, the Hotel One project has been a life saver for us.

The Jay Peak management and DEW Construction has been very pleasant to work with. They are professional, accommodating, and sincerely caring in their business transactions.

We are in great hopes of continuing as their mason contractor on any future projects.

Sincerely,

Richard R. Ryea

Richard R. Ryea
Ryea & Sons Masonry

Waveland Ventures, LLC

July 16, 2009

The Honorable Patrick Leahy
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Re: EB-5 Regional Centers

Dear Senator Leahy and Senator Sessions:

My name is Chet Schwartz and I am a principal in Waveland Ventures, LLC. Waveland has established a subsidiary company, Colorado Regional Center, LLC ("CRC") which will file its application for a Regional Center under the EB-5 program this week. The Colorado Regional Center will cover the entire State of Colorado. We have received the enthusiastic support of Colorado Governor Bill Ritter as well as a number of state governmental officials in the Department of Labor & Employment, the Office of Economic Development and International Trade, and various other economic development agencies and organizations.

Colorado has been spared some of the extreme consequences of the current national and international economic downturn. Nonetheless, Colorado still suffers from higher than normal unemployment rates, serious declines in state tax revenues, and, of course, a serious liquidity crunch caused in part by the lack of credit from traditional banking sources. We have had extensive discussions with a number of developers throughout the state and have identified several projects that would be very workable under an EB-5 scenario. These are projects that would create large numbers of jobs, fill existing needs in the respective communities, and make economic sense for the EB-5 investors. Because the supply of debt financing is so limited, we see the need for increased equity contributions in order to get these projects started. The EB-5 Regional Center program will help to fill this financing gap. For example, one of the first projects that CRC intends to pursue is the development of a 156-room hotel located directly across the street from the new Children's Hospital and the planned Veterans Administration Hospital in Aurora, Colorado. While the new hospitals are state of the art facilities, the area around the hospitals is quite depressed. There are no services of consequence and absolutely no hotel rooms. Because hotels are nearly impossible to finance today, we believe that this will be an ideal EB-5 project. The hotel, which will cost approximately $26 million, will create approximately 200 jobs, will be the catalyst for development of other needed services in this

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www.wavelandventures.com

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area, and will provide an important service to the community. We currently have several other projects around the Denver metropolitan area as well as in the various Colorado ski areas that are under consideration. These projects total over $100 million in development cost and would generate 700-900 jobs. We believe that once we receive our Regional Center designation, we will see many more development opportunities.

We would very much appreciate your continued support of the EB-5 Regional Center program. We believe that the EB-5 Regional Center affords an excellent opportunity for job creation throughout the United States. We would very much like to see the program permanently re-authorized. We hope that you will take this opportunity to make the program more effective by taking the necessary steps to facilitate faster processing for both the Regional Center applications as well as I-526 applications. This would be very helpful in actually timing the raising of investor money to the funding of a proposed development project.

Thank you for your time and consideration.

Very truly yours,
Colorado Regional Center, LLC

By _____
Chester P. Schwartz, Manager

CMB EXPORT LLC *A Federally-Designated Regional Center*
Midwest Executive Offices 4507 49th Avenue, Moline, Illinois 61265 Phone: 309-797-1550 Facsimile: 309-797-1655

July 17, 2009

The Honorable Patrick Leahy
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Leahy,

CMB was granted Regional Center status in 1997. The focus of the CMB investments were closed military bases in California. More particularly six closed military bases namely Mather Air Force Base; McClellan Air Force Base; Sacramento Army Depot; George Air Force Base; Norton Air Force Base; and March Air Force Base. Hence the acronym "CMB" for California Military Base or Closed Military Base.

California bore the brunt of the BRAC military base closures and lost hundreds of thousands of jobs. Communities were devastated with the "main employer" out of business. Patrick Hogan, the president and founder of CMB felt that applying the principals of the EB-5 foreign investor visa program would be a perfect fit for the closed military bases and the communities that surround the bases.

Mr. Hogan knew the foreign national investors would qualify for a $500,000 investment as the communities have huge unemployment numbers. The fact that the military bases have assets, such as airport runways, airport hangers and huge tracts of land that could be developed and other valuable attributes that would attract private investment was a very positive factor. If the former bases were to employ the same number or more people than previously as a military institution the former bases could be engines for job creation and economic growth. This redevelopment activity would also meet the EB-5 requirement of increasing regional productivity. Mr. Hogan also knew all levels of government would want the former military bases to achieve their goals of bringing jobs and economic development into the civilian community through redevelopment thus making the former military bases a productive part of the surrounding region.

The basic requirements of EB-5 could be met by investing in the former military bases. The investment had to be at risk, it had to be a for profit investment, the unemployment rate had to be 150% of the national average for the investment to qualify as $500,000. The project had to increase regional productivity. Each investor had to create at least ten

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new American jobs. The challenge was to build a new business enterprise that would meet or exceed the above EB-5 requirements.

Mr. Hogan traveled the state of California and chose six former military bases for inclusion in his Regional Center. He visited with the various economic development agencies charged with the reuse of the former military bases. The common problem that each former military base had was outdated, obsolete or nonexistent basic infrastructure to attract private enterprise. This lack of adequate infrastructure was a monumental problem to the newly formed redevelopment agencies and the Cities and County governments. Infrastructure is expensive and all the costs are front loaded. How can these communities begin the process of building infrastructure to attract public and private funds? Infrastructure creates jobs! The current stimulus package by our government also has concluded that capital invested into infrastructure building is most effective in creating jobs. Mr. Hogan understood this in 1997 but the challenge was how could he apply the EB-5 funds to create the infrastructure, the basic seeds of all economic growth and job creation?

The Inland Valley Development Agency was formed to oversee the development of the former Norton Air Force Base in San Bernardino, California. The idea to partner with them came about simply because CMB and the IVDA had the same goal – create jobs!!

The challenge for Mr. Hogan and his new CMB Export Regional Center was to meet the qualifications of EB-5 program as a "partner" with government agencies. The structure today of CMB Regional Center investments meet and exceed the basic requirements as set forth by Congress. CMB applied for and received a California Lenders License and formed a Limited Partnership such that the definition of a business enterprise was met. The goal of this enterprise was to make low cost infrastructure investment loans to the government agencies or the former military base master developers for infrastructure building. This way the partnership met the requirements of a business enterprise, a for profit enterprise and the various other EB-5 requirements.

The first CMB investment was a low interest loan to the IVDA. That funding was used, among other things, as the local match requirement for a Federal grant to widen and connect roadways from the former base to the surrounding community as well as the demolition of outdated warehouses. Completing the new road construction and clearing of obsolete buildings created productive developable former military base land with access to basic infrastructure. CMB also made an equity investment into a Canadian manufacturer with the requirement they move the facility to California. The economic RIMS II report completed in the year 2000 stated 1,200 jobs would be created. Today in 2009 there are well past 1,200 jobs attributable to this investment along with new warehouse and other structures built on this basic infrastructure created in 1999-2000.

This is real proof that economic modeling tools such as RIMS II, IMPLAN, REDYN and others can measure economic growth and future job creation.

CMB began in earnest in investing in infrastructure with the former Norton Air Force Base and the former McClellan Air Force Base about October of 2007. As of the half way point of July in 2009 we have invested or raised over $42 million and are expected to complete funding of the current investment projects in a few months which will bring our total foreign investment in the former military bases to over $52 million in less than two years! This $52 million will create well over the 1,040 new American jobs as required by the EB-5 law. Our actual jobs total will be over double the requirement. The investment by CMB and the IVDA into infrastructure allowed private investment and job creation to happen at the former military bases.

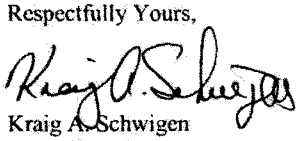
The IVDA, McClellan Park, LLC and CMB have worked together to bring basic infrastructure such as roadways, bridges, sewer, water, flood control and construction of structures. The redevelopment agencies are combining CMB investment funds with private and public funds to complete small and large projects. One such project was the massive Stater Bros. office and distribution center. The IVDA, in order to attract such a massive facility, agreed to build basic infrastructure such as roads, water, sewer, flood control, bridges and other fundamental infrastructure projects to attract Stater Bros. to the former military base. This massive facility is nearly completed and is now operating and is expected to employ up to 2,500 people with an average wage of $38 per hour. This is real growth for a community that has experienced high unemployment (150% of the national average) for approximately the last ten years. CMB provides low cost interest only loans for six years to these infrastructure projects. This six year window allows the investment in infrastructure to begin paying for itself. The time allows TIF revenue to flow to fund the repayment. If you ask the folks at the IVDA they will tell you that the very first infrastructure project would not have happened without the CMB infrastructure investment loan. The 10% matching funds required by the Federal Government were provided by the CMB loan in order to get the Federal grant. As the IVDA officials have said repeatedly they simply did not have the funds to do this on their own.

The CMB Regional Center is a win-win for the United States and the foreign national investor. We get sustainable American jobs, real economic growth and motivated productive new immigrants who buy homes, send their children to school and contribute to our society both culturally and economically with many ultimately becoming U.S. citizens.

I have included some newspaper stories about the success of the partnerships between the Inland Valley Development Agency, McClellan Park and the CMB Export Regional Center that describe the redevelopment of the former military bases. As you read these stories ask yourself could any of that have happened without basic infrastructure? Then

ask how was some of that infrastructure paid for? The CMB Regional Center and the other Regional Centers need stability in the EB-5 program from year to year. If Congress provides us that stability we will be able to do more good work and continue to create **NEW AMERICAN JOBS**.

Respectfully Yours,



Kraig A. Schwigen
Executive Director
For and on Behalf of President Patrick F. Hogan
CMB Export, LLC

Enclosures:
Senator Dianne Feinstein, Fiscal Year 2010 Appropriations Request Form
News Articles on McClellan Park
News Articles and Newsletter on IVDA/SBIAA

June 24, 2009

The Honorable Patrick Leahy
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

Dear Senator Leahy,

Thank you for the opportunity to share our thoughts on the EB-5, Alien Entrepreneur program. We appreciate your continued support of this program as an economic development tool for Vermont and the United States.

The Lake Champlain Regional Chamber of Commerce is Vermont's largest business association. With more than 2,500 members, we are continually looking for the tools and resources to provide our members to assist them. The EB-5 has been a very effective program for many of our members.

I would first like to make some general points on the EB-5 program:

- The EB-5, Alien Entrepreneur program is first and foremost an economic development tool; secondarily, it is an immigration program.
- New businesses and those seeking to grow need capital, which in these times is difficult to find.
- The EB-5 program is becoming increasingly attractive to U.S. enterprises because it may provide this capital.
- If the EB-5 program is to function as intended, it must offer qualifying rules that are realistic in the business world, the rules must be applied consistently and the outcome should be determined quickly.
- USCIS (U.S. Citizenship and Immigration Services) should assist businesses to meet such requirements and the agency should promote the use of the EB-5 program internationally and to businesses and foreigner in the U.S. who may wish to use the program.

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Burlington, VT 05401

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Specific Matters that the EB-5 program requires:

- The Regional Center Pilot Program should be made a permanent program. Businesses in regional centers, such as the state-wide Vermont Regional Center, need to know that they may create and implement their plans without fear that the authorizing legislation upon which they rely will sunset. Investors, too, need the confidence of knowing that if they invest under the EB-5 program they will obtain their Green Cards without the risk that they and their families will have to leave the U.S. while their invested funds remain here.
- To promote predictability in the application of the rules to a specific program, USCIS should institute a project review procedure that results in the approval of a business plan before the enterprise seeks investors. This approach will give investors confidence that their investment will result in the grant of a Green Card once the investment is made. Currently, investors risk the denial of a Green Card after they invest because USCIS finds fault with one or more elements of the business enterprise. This possibility suppresses the use of the EB-5 program and stifles the job creation for U.S. workers.
- Currently, the sum that must be invested is affected, in part, by whether the enterprise is situated in a Metropolitan Statistical Area. If so, the minimum investment must be $1million, unless the rate of unemployment is at or above 150% of the U.S. average. In Vermont, Chittenden, Grand Isle and Franklin counties are in on MSA. This means that an EB-5 project in any community (except the City of Burlington) is forced to seek this sum from investors. If the MSA rule was removed from consideration, such projects could seek $500,000 investments, thus becoming more competitive with other EB-5 projects in the U.S. [Burlington-based projects would still require the higher sum because its population is greater than 20,000.]
- Many immigration petitions are able to be adjudicated in a Premium Processing procedure that expedites the adjudication in exchange for an additional filing fee. EB-5 petitions should be granted the same opportunity. Businesses and investors will be much more attracted to the EB-5 program if they are able to proceed with the "speed of business" instead of the speed of government.

Each of these recommendations will, if followed, increase the number of jobs and dollars in the Vermont and U.S. economy. The Lake Champlain Regional Chamber of Commerce urges the enactment of legislation to implement each of these suggestions.

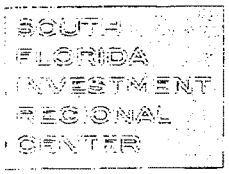
Thank you for your consideration.

Sincerely,

Tim

Timothy P. Shea
Vice President and Congressional Liaison
Lake Champlain Regional Chamber of Commerce

60 Main Street, Suite 100
Burlington, VT 05401



July 17, 2009

The Honorable Jeff Sessions
Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Sessions,

The South Florida Investment Regional Center attracts foreign investment, which is utilized to promote domestic economic activity, job growth, increased export sales and increased domestic capital investment. The South Florida Investment Regional Center promotes business activities that are critically needed in our area given the present state of our regional and national economy. Our mission is to attract $200 million in foreign investment capital on economic development initiatives for the benefit of targeted employment areas in South Florida that will result in the creation of thousands of jobs.

Miami-Dade and Monroe Counties are both considered destinations of choice in this hemisphere. A modern metropolis, South Florida is a true melting pot where people from all over the world are represented.

The current investment alternatives considered by the South Florida Investment Regional Center include hotel construction, agricultural export, tourism and service facility construction. These investment alternatives have been carefully considered in terms of their complimentary nature to the region's economic activities and resources, and also for their appeal to foreign investors.

The EB-5 Program is well poised as an economic development tool to assist local economies, not only through direct capital investment in U.S. businesses but in job creation for U.S. workers at a time when our national economy is experiencing painfully high unemployment. However, in order to maximize the potential of the Regional Center Pilot Program, there are certain changes to the Program that are critically needed at this time. With these changes, the Program will function better, more foreign investment will be attracted to U.S. businesses and result in job creation for U.S. workers. Given the current state of our economy and the potential of the EB-5 Pilot Program, these changes are needed now:

- Permanent Authorization - Short-term reauthorization of the EB-5 Regional Center Program has suppressed investor confidence in the program and led to underutilization. It is critically necessary that foreign investors maintain

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confidence in the Program, thus alleviating fears that the underlying rules pertaining to their investments will not change after they have committed capital.

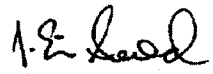
- Need for faster processing times - Premium processing fees tied to faster adjudication of both Regional Center and I-526 petitions are critical in the business calculation of domestic businesses or organizations considering utilizing the Regional Center Program as a source of financing and job creation. The typical processing time of four to nine months is more time than most businesses can wait for committing to a project. Premium processing of the I-526 would help the Program meet the realistic expectations and needs of U.S. businesses. The current lag in the I-526 processing is probably the most likely reason why many domestic businesses that would benefit from this Program do not participate. Ultimately, job growth created through the Program is stymied.

In addition to these significant issues, many other issues were indentified and articulated in the "Recommendations from the USCIS Ombudsman to the Director, USCIS" issued March 18, 2009, which would greatly improve the EB-5 Regional Center Program.

At a time when our national economy is facing great stress, capital markets are tight and unemployment is the highest in this generation, strengthening the EB-5 Program should be a critical priority. This Program attracts foreign investment to U.S. businesses and creates jobs for U.S. workers, which are verifiable through the economic analysis required by the Program's rules.

Senator Sessions, we urge you and your colleagues to give these issues thoughtful consideration and make the necessary changes that would allow the EB-5 Regional Center Program to approach its potential as a successful model for domestic economic development.

Sincerely,



J. Eric Gould
Partner, South Florida Investment Regional Center

cc: The Honorable Bill Nelson, U.S. Senate
The Honorable Mel Martinez, U.S. Senate

TESTIMONY OF

WILLIAM J. STENGER

President of Jay Peak Resort

Jay, Vermont

Hearing on:

Promoting Job Creation & Foreign Investment in the United States:

An Assessment of the EB-5 Regional Center Program

Before the

Committee on the Judiciary

U.S. Senate

Washington, D.C.

July 22, 2009

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Mr. Chairman and Distinguished Members of the Judiciary Committee,

My name is Bill Stenger and I am President and owner of Jay Peak Resort located in Jay, Vermont.

I am very appreciative of this opportunity to meet with you today and share with you my perspective on the significant value the EB-5 foreign investor, Regional Center Program represents to my employees, my community, and the State of Vermont.

My company, Jay Peak Resort, was founded in 1955 as a winter ski resort. It is located three miles from the Canadian Border. Mr. Chairman, as you know, we reside in what I think is one of Vermont's most beautiful regions, a place former U.S. Senator George Aiken called the Northeast Kingdom. Orleans County is in the heart of the "Kingdom."

Jay Peak is one of the most significant employers in Orleans County, a place of great rural agricultural character, with beautiful mountains, streams and lakes, and it also has the most significant poverty and economic challenge of any region in Vermont. Every challenging socio-economic indicator that we measure as a society is greatest in Orleans County. Unemployment, alcohol and drug abuse, school drop-out rate, single-parent childbirth, welfare, foodstamp usage, spousal abuse, Medicare and Medicaid subscription, and treatment for depression are all greater in Orleans County than any other place in Vermont.

However, despite these issues and the most profound economic challenges we have seen in generations in Vermont and the nation, I am very optimistic about the future of our community and its citizens. We are seeing at our facilities the significant creation of the biggest positive life changer a person needs, a job. A job that will sustain them and their families with benefits, and a future that inspires and rewards their economic and human spirit. We are seeing this employment creation at Jay Peak and our surrounding communities in this terribly troubled economy solely because of the EB-5 foreign investor program.

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Over a decade ago in 1997, I had the opportunity to work with you, Mr. Chairman, and then Governor of Vermont Howard Dean to create the Vermont Regional Center and see Jay Peak become its first EB-5 Pilot Project. It was not until late 2004, because of improved C.I.S. efforts and renewed commitment by our State officials led by Governor Jim Douglas, that the program became truly functional from our perspective.

Starting in 2005 this EB-5 Pilot Project has helped our company create and present to qualified foreign investors an opportunity to invest in job creating initiatives at Jay Peak Resort that are, and will, employ many hundreds of direct and indirect citizens of our Northern Vermont communities.

In today's economy, what is strangling the small business community in Vermont and nationally, is the lack of access to capital. Affordable capital is almost non-existent in this marketplace. However, through the EB-5 Regional Center Pilot Program, at Jay Peak we are well on our way to raising over $100 million of equity capital. This capital will help us build year-round facilities that we desperately need in order to be competitive, but also helps us create full-time job opportunities for so many citizens throughout Northern Vermont's highest unemployment communities.

The EB-5 Program is a win-win-win program for all involved. Jay Peak is gaining access to equity capital to create facilities it needs and by doing so scores of quality year-round jobs are created in a rural, high unemployment area where our government wants to see job creation. In exchange for the job creating equity capital investment, the foreign investor benefits from a green card for themselves and immediate family members. I've met personally almost every investor participating in the Jay Peak Program and they are a group of wonderful people, so appreciative of the opportunity to live in, and contribute to, our society. I can tell you, that their equity investment is changing our region in a profound and positive way. Once in the United States, they will continue to contribute as everyone of them are well-educated, successful people, who will be a credit to any community they live in.

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Without the EB-5 source of affordable equity capital, none of this significant economic growth would be taking place at my company. Instead of a distressed Northern Vermont economy getting worse, we are seeing significant signs of economic vitality and optimism in our community.

Although Jay Peak is in the process of employing many hundreds of direct and indirect year-round employees, Jay Peak is a small business in comparison to our national economy. As a matter of fact, with very few exceptions, all of Vermont is made up of small businesses. The EB-5 Regional Center Program is ideal for the small business community.

As I've traveled meeting investors and exploring job creating opportunities for Vermont beyond my own company, I've concluded this program can really help other small businesses in Vermont. I met Alex Choi, President of Bio Heart Korea in Seoul, Korea on an EB-5 trip for Jay Peak in 2006 and in doing so learned about his company, a successful medical research and development enterprise. Over the past two years we have remained in touch and today we are working together on creating a new U.S. Bio-Tech research, development and manufacturing facility and placing the facility in Orleans County, Vermont. Several hundred high paying research jobs will result and the EB-5 Program will be the capital inspiration for this effort.

There are many other small business entrepreneurial people in Vermont and throughout the country that have great job creating ideas and the drive and desire to make those ideas become reality, but they simply lack capital to make it happen. EB-5 equity allows entrepreneurs to be creative and do what they do best, innovate and stimulate the economy.

Mr. Chairman, Stephen Yale-Loehr has made some important suggestions as to how to improve the EB-5 Program and I would like to re-emphasize just a few.

- Congress should make this program permanent so Regional Centers can concentrate on quality, long-term job creating programs. Short term extensions cripple the effectiveness because the projects can't

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plan correctly and potential investors won't have confidence to stick with a program because of its uncertainty.

- U.S.C.I.S. should make every effort to be as efficient as possible with EB-5 case processing so that predictably can become a program asset and not a program concern.

- Allow premium processing for EB-5 cases desiring it.

- Provide Regional Center projects Business Plan Review and pre-approval before an I-526 submission takes place. Once an agreed upon business plan is approved don't require it be revisited unless there is a substantial change.

- Recently U.S.C.I.S. put forth job creation guidelines where certain criteria were to be met within 24 months of the project start. In Vermont with permit challenges and construction weather realities, a 24-month job creation implementation is a near impossibility. Such requirements should be evaluated on a case by case basis where climate and other restrictions can be of impact.

The current leadership at U.S.C.I.S. administering the EB-5 Program is interested and supportive of the EB-5 investor programs and see its economic benefit to the nation. Making this program permanent however, will send a clear message to all involved to embrace making the EB-5 Program even more impactful for all Regional Centers around the country.

Mr. Chairman and Distinguished Committee Members, this country needs all the equity investment it can get right now. The EB-5 Program is a wonderful example of an economic stimulus that is tax free, is not a burden to anyone and has nothing but good benefits for all involved.

Thank you for giving me the opportunity to speak with you today.

Sincerely,

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William J. Stenger
President & CEO
Jay Peak Resort

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Lake Buena Vista Resort LLC

1725 University Drive
Suite 420
Coral Springs, FL 33071
Telephone: (954) 755-7003
Fax: (954) 755-5741

July 16, 2009

The Honorable Patrick Leahy
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Re: EB-5 Regional Center Program

Dear Senators:

Our recently approved Regional Center, the Lake Buena Vista Resort Village and Spa, is a full-service condo/hotel located in Central Florida. As you are aware, the real estate industry has suffered mightily over the last few years, especially in Florida. The credit crisis compounded our difficulties as purchasers at our project could not find financing to close on their units.

The EB-5 Program is a godsend to us by allowing foreigners to invest in our Resort on an all-cash basis in exchange for permanent residency. This investment will allow us to recover financially and expand the Project. Our Regional Center will eventually create over 1,000 jobs, and inject in excess of $100,000,000 into the United States economy.

We want to express gratitude for your support of the EB-5 Program and request its permanent authorization.

Sincerely,

Sam Sutton

Managing Member

Lake Buena Vista Resort

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WESTERN
WASHINGTON UNIVERSITY

An equal opportunity

Center for Economic and Business Research
College of Business and Economics

516 Hig
Bellingham, Washington 982
(360) 650-3909 ☐ Fax (360) 6

July 17, 2009

Whatcom Opportunities Regional Center, Inc.
Suite 301
1305 11th Street
Bellingham, WA 98225

Attention K. David Andersson, Esq.

Dear Sirs:

Re: Job Creation per $500,000 Invested – Retirement Living Facilities in Whatcom Count

We write to confirm that according to the IMPLAN mode, an increase in economic activity of $500,000 in the industry cluster "Homes for the Elderly" should generate 11.9 direct and indirec jobs, along with another 1.2 induced jobs in Whatcom County. This does not include temporary construction jobs where significant new construction or renovations to existing structures are required.

As you know, we use the IMPLAN input-output model to estimate the impact of businesses mo to the area, layoffs, and other changes. The model is widely recognized and used by a variety o people in government, academia, and the private sector.

I used the IMPLAN input-output modeling software, with data for Whatcom County, to estimat number of jobs that would be created with an increase of economic activity of $500,000 (US) i assisted living facilities in Whatcom County. I used the category in the IMPLAN software for "nursing and residential care facilities." This category is closest to NAICS codes 623311 and 623312, "Homes for the Elderly". Attached hereto as Appendix "A" is a summary of the IMPLAN job output/creation forecast.

I have reviewed the Whatcom Opportunities Regional Center Retirement Living Facility Busin Plan. At Appendix "B" there is a fairly comprehensive listing of real businesses, public and no governmental agencies within Whatcom County which will, as IMPLAN predicts, experience economic expansion and growth through new investment in Retirement Living Facilities in Whatcom County. I have also reviewed the letter from Visiting Angels at Appendix "C" outli the services which are anticipated to be provided to the retirement community at Bryce Park in Lynden, Wa. These two documents are compelling assurance that the IMPLAN econometric forecast reflects how our local economy will actually react to specific investment stimulus.

Sincerely,

Hart Hodges

Hart Hodges, PHD
Director

July 15, 2009

RE: Extension of EB-5 Immigrant Investor Program

Senators Leahy and Sessions,

We have currently submitted an application to the United States Citizenship and Immigration Services, USCIS, to receive approval for regional center designation under the current EB-5 program. The regional center we are currently in the process of forming is the Northern California Regional Center and encompasses the Northern portion of California's central valley.

The Northern California Regional Center has currently identified two potential projects and will begin the first project immediately after USCIS approval. The potential projects target California's dairy industry in the building of a dairy farm and a dairy processing facility. California's dairy industry contributes greatly to the states vibrant economy reaching $61.4 billion in 2007. We are optimistic about the future of the dairy industry, and seek to participate in its development to fulfill a global demand as large economies are emerging from poverty with a growing middle class such as China, India, and Indonesia.

The first project will invest in a large dairy farm in California's Glenn County, and the second project will invest in a dairy processing facility. The amount of jobs created by these two projects is substantial. An economic study using the IMPLAN input-output model cited the dairy farm creating 175 jobs and generating $14,568,500 in foreign investment. The second project is currently in the development stage but could create anywhere from 385 to 3,850 jobs and generate $27 to $270 million in foreign investment.

With the current economic recession, the economy is in need of more jobs and economic development. According to the U.S. Department of Labor, the national unemployment rate has skyrocketed to 8.7% in 2009 and California's unemployment rate has reached 11.1%. The region that is encompassed by the Northern California Regional Center has even higher unemployment noting the California counties of Merced, Fresno, and San Joaquin with unemployment rates of 18.8%, 16.0%, and 15.8% respectively. The Northern California Regional Center can positively affect the economy noting that the first projects selected can provide stable and dependable employment.

We sincerely believe that the EB-5 program can make a positive impact on the economy, and with these economic times, it is needed more than ever. I therefore passionately urge the members of this committee to permit the EB-5 program permanent authorization to help boost job creation throughout the nation.

Sincerely,

Stephen Weststeyn
Northern California Regional Center, NCRC
1777 S. Hewitt Rd.
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Written Testimony of

Stephen Yale-Loehr

Adjunct Professor
Cornell University Law School

Executive Director
Invest In the USA (IIUSA)

Hearing on
Promoting Job Creation and Foreign Investment in the United States: An Assessment of the EB-5 Regional Center Program

Before the
Committee on the Judiciary
U.S. Senate
Washington, D.C.

July 22, 2009

EMBARGOED UNTIL DELIVERY
As Prepared for Delivery

Mister Chairman and Distinguished Members of the Committee:

My name is Stephen Yale-Loehr. I teach immigration law at Cornell University Law School. I am also co-author of Immigration Law and Procedure, a 20-volume immigration law treatise. It is considered the standard reference work for U.S. immigration law. It has been cited by courts more than 400 times, including several times by the U.S. Supreme Court. I also am vice-chair of the business immigration committee of the American Immigration Lawyers Association. I am also of counsel at Miller Mayer, LLP in Ithaca, New York, where I practice immigration law.[1] I am also executive director of Invest In the USA (IIUSA), a trade association of regional centers, city and state economic agencies, individuals and others interested in the EB-5 immigrant investor green card program.[2] I am testifying today in my personal capacity.

Thank you for inviting me to testify about the EB-5 immigrant investor program. I have been following and writing about this program since 1990, when Congress first enacted the EB-5 program.

My testimony first summarizes the history of the EB-5 program and how it operates. Second, I report on the enormous economic impact the current EB-5 regional center program is having. Third, I identify some problems and concerns that hamper the EB-5 program's effectiveness. I conclude with recommendations that would help the EB-5 program achieve its true potential.

History of the EB-5 Immigrant Investor Program

Congress created the fifth employment-based preference (EB-5) immigrant visa category in 1990 for immigrants seeking to enter to engage in a commercial enterprise that will benefit the U.S. economy and create at least 10 full-time jobs.[3] The basic amount required to invest is $1 million, although that amount is reduced to $500,000 if the investment is made in a "targeted employment area," meaning a high unemployment or rural part of the United States.[4] Of the approximately 10,000 numbers available for this preference each year, 3,000 are reserved for entrepreneurs who invest in targeted employment areas.[5] A separate annual allocation of 3,000 visas exists for entrepreneurs who immigrate through a regional center pilot program. According to the U.S. Citizenship and Immigration Services (USCIS), over 90% of all EB-5 investors invest through regional centers, so my testimony will focus on that aspect of the EB-5 program.

The statutory requirements of the EB-5 green card category are onerous. Traditionally, very few people immigrate in this category. The numbers are increasing, however. In fiscal year (FY) 2005, only 346 investors, including their spouses and children, immigrated in this category.[6] In FY 2006

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[1] *See generally* http://www.millermayer.com/Immigration/EB5Investors/tabid/126/Default.aspx.
[2] *See generally* http://iiusa.org.
[3] INA § 203(b)(5), 8 U.S.C. § 1153(b)(5). For a detailed treatment of the EB-5 immigrant investor category, see 3 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration Law and Procedure § 39.07 (rev. ed. 2009).
[4] INA § 203(b)(5)(C)(ii), 8 U.S.C. § 1153(b)(5)(C)(ii).
[5] INA § 203(b)(5)(B)(i), 8 U.S.C. § 1153(b)(5)(B)(i).
[6] Office of Immigration Statistics, U.S. Dep't of Homeland Security, 2007 Yearbook of Immigration Statistics 20 (2008) (Table 6), *at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/ois_2007_yearbook.pdf.

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the number increased to 749 and in FY 2007 increased again to 806.[7] The EB-5 category is one of the only employment-based green card categories that are not backlogged.

The Regular EB-5 Program

Immigration and Nationality Act (INA) § 203(b)(5)[8] provides a yearly maximum of approximately 10,000 green cards for applicants to invest in a new commercial enterprise employing at least 10 full-time U.S. workers. To qualify under the EB-5 category, the new enterprise must: (1) be one in which the person has invested (or is in the process of investing) at least $1 million (or at least $500,000 if investing in a targeted employment area) after November 29, 1990; (2) benefit the U.S. economy; and (3) directly create or save jobs for at least 10 U.S. workers.

The EB-5 Regional Center Pilot Program

To encourage immigration through the EB-5 category, Congress created a temporary pilot program in late 1992.[9] The Immigrant Investor Pilot Program directs the government to set aside 3,000 EB-5 green cards each year for people who invest in designated "regional centers." A regional center is defined as "any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment."[10]

A center seeking USCIS approval must submit a proposal showing how it plans to focus on a geographical region within the United States and to achieve the required growth by the means specified.[11] Under a 2002 law, the USCIS is supposed to approve applications for EB-5 regional center status as long as the applications are based on a general prediction concerning: (1) the kinds of commercial enterprises that will receive capital from investor; (2) the jobs that will be created directly or indirectly as a result of the investment of capital; and (3) the other positive economic impacts that will result from the investment of capital.[12]

The pilot program differs from the regular EB-5 program in that it does not require that the immigrant investor's enterprise itself employ 10 U.S. workers. Instead, it is enough if the investment creates 10 or more jobs directly or indirectly.[13] This program also differs from the regular EB-5 provisions in that it permits private and governmental agencies to be certified as regional centers if they meet certain criteria.[14] This effectively makes regional centers partners with the USCIS to ensure that the EB-5 program operates properly.

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[7] *Id.*
[8] 8 U.S.C. § 1153(b)(5).
[9] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, § 610, 106 Stat. 1828; S. Rep. No. 102-918 (1992).
[10] 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11037(a)(2), 116 Stat. 1758 (2002); § 8 C.F.R. § 204.6(e) (definition of "regional center").
[11] 8 C.F.R. § 204.6(m)(3).
[12] 21st Century Department of Justice Appropriations Authorization Act, *supra* note 10, § 11037(a)(3).
[13] *Id.*
[14] 8 C.F.R. § 204.6(m)(3).

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About 60 EB-5 regional centers have been approved, and another 40 or so regional center applications are pending.[15] EB-5 regional centers now operate in almost every state, and range from aerospace to urban renewal, ski resorts to ethanol plants.

The Economic Impact of the EB-5 Program

In 2003, Congress asked the U.S. Government Accountability Office (GAO) to study the EB-5 program.[16] The GAO report concluded that the program has been underused for a variety of reasons.[17] The report found that even though few people have used the EB-5 category, EB-5 participants had invested an estimated $1 billion in a variety of U.S. businesses.[18]

That amount has dramatically increased in the last five years. For example, here is information from just a few existing or planned regional centers. Additional information is contained in letters from several regional centers attached as an appendix to this testimony.

CanAm Enterprises:

CanAm operates four EB-5 regional centers: the Philadelphia Industrial Development Corporation (PIDC) Regional Center; the Pennsylvania Department of Community & Economic Development (DCED) Regional Center; the Los Angeles Film Regional Center in California; and the State of Hawaii Department of Business, Economic Development and Tourism (DBEDT) Regional Center.

Three of CanAm's regional centers are partnered with city or state economic development agencies. For each of those regional centers, the respective agency recommends projects to the regional center. Accordingly, the projects selected are closely aligned with the economic development goals of the respective city or state.

For example, the PIDC Regional Center has targeted a number of industries in Philadelphia, including many real estate development projects, ranging from trade and manufacturing to professional firms. It has also targeted projects consistent with the city's goal of building its healthcare, educational and scientific research industries. Another key economic development goal is to support the city's master plan to convert the decommissioned U.S. naval base in Philadelphia into the Navy Yard, a mixed-use industrial park featuring office, retail and residential components.

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[15] An official list of approved EB-5 regional centers is at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=3df2b199cb011210VgnVCM1000004718190aRCRD&vgnextchannel=4f719c7755cb9010VgnVCM10000045f3d6a1RCRD. A similar list is also at http://www.millermayer.com/LinkClick.aspx?fileticket=JYnsmgwj6hM%3d&tabid=126&mid=863.

[16] Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, § 5, 117 Stat. 1944.

[17] U.S. Government Accountability Office, No. GAO-05-256, Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors (Apr. 2005), *available at* http://www.gao.gov/new.items/d05256.pdf.

[18] *Id.* at 1.

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The Pennsylvania Regional Center, in addition to several key target industries such as tourism, transportation and technology, also focuses on several manufacturing industries, which are important to the Commonwealth of Pennsylvania's economy.

The Hawaii Regional Center includes agriculture and aquaculture projects because of their importance to Hawaii's economy, and prioritizes projects supporting tourism, the leading industry in Hawaii's economy.

The Los Angeles Film Regional Center specializes in motion picture and television production projects, and specifically seeks to provide financing incentives for studios to film in Los Angeles County.

Here are statistics for CanAm's regional centers as of July 20, 2009:[19]

	Projects	Investors	Approved	Funds Raised	Jobs
PIDC (Philadelphia) Regional Center	26	628	622	$313,000,000	6,280
Pennsylvania Regional Center	3	229	215	$119,000,000	2,290
Los Angeles Film Regional Center	2	300	108	$150,000,000	3,000
TOTAL	**31**	**1157**	**945**	**$582,000,000**	**11,570**

California:

The recently approved Bay Area Regional Center expects to fund approximately $100,000,000 of investments in 2010 through public/private partnerships in several California counties in and around San Francisco. If all the projects go forward, the Bay Area Regional Center will create approximately 2,000 new jobs beginning in 2010 with the total annual economic output of $380,250,000 to support urgently needed redevelopment in cities such as Oakland, Richmond, Pittsburgh and East Palo Alto.

The Northern California Regional Center has currently selected two projects for investment. The first project will invest in a large dairy farm in California's Glenn County. The second project will invest in a dairy processing facility. An economic study using the IMPLAN input-output model predicts that the dairy farm project will create 175 jobs and generate $14.5 million in foreign investment. The dairy processing facility project is currently in the developmental stage, but could create anywhere from 385 to 3,850 jobs and generate $27 to $270 million in foreign investment.

[19] CanAm notes that all investors are noncitizens seeking EB-5 visa status, and that certain investors' I-526 petitions that were recently submitted are still pending USCIS approval. Also, please note that funds raised have either been already funded to the project or are in escrow pending execution of final loan documents, and that jobs includes jobs already created and jobs to be created in the near future. Also, please note that the Hawaii Regional Center has not yet issued any projects since it was reaffirmed in October 2008, but CanAm expects to present one in the near future.

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The California Military Base (CMB) regional center began investing in infrastructure projects at the former Norton Air Force Base and the former McClellan Air Force Base in 2007. As of July 2009, CMB has invested or raised over $42 million and is expected to complete funding of the current investment projects in a few months, which will bring its total foreign investment in the two former military bases to over $52 million. The $52 million is expected to create twice as many jobs as the 1,040 new U.S. jobs required by law.

The recently approved California Global Alliance regional center is focusing its first project on the development of what will be the only full-scale luxury hotel in Fresno, California. The economic models that have been prepared indicate that the hotel will generate over 900 jobs in the local and surrounding communities. The development itself will bring more than $45 million dollars to the community, with many multiples of the number being produced in economic activity by the operation of the facility.

Colorado: The Colorado Regional Center (CRC) has an application pending. Once approved, one of the first projects that CRC intends to pursue is the development of a 156-room hotel located across the street from the new Children's Hospital and the planned Veterans Administration Hospital in Aurora, Colorado, just outside Denver. The area around the hospitals is quite depressed. There are no services of consequence and absolutely no hotel rooms. The hotel, which will cost approximately $26 million, will create approximately 200 jobs and stimulate the development of other needed services in this area.

The Colorado Intercontinental Regional Center (CIRC) has a pending regional center application. CIRC consists of eight rural counties along the Great Divide in Colorado. CIRC's projects will first occur in Lake County, a county with the highest unemployment, smallest population, and second lowest population growth rate of the eight CIRC counties. Direct job creation with its first Timber 2 Homes project, a $42 million capital project, will approach 500 jobs within 5 years and 700 jobs within 10 years. Indirect and induced jobs from this project will add an additional 500 jobs over the project life. CIRC's second project, called AltaColorado Hotel/Spa, a $35 million capital project, will add 600+ direct, indirect, and induced jobs. Collectively these projects will add 1600+ jobs to the local economy. The increase in permanent output would approach $256 million and permanent labor income would increase by approximately $70 million in 2008 dollars.

DC Metro Area: The Capitol Area Regional Center (CARC) has three projects in process or being planned. Cumulatively the three projects will infuse nearly $380 million of construction activity in the DC area, while also creating thousands of jobs and careers from the businesses to be created in the projects.

Maryland: The Maryland Center for Foreign Investment has a pending regional center application to create jobs in Maryland. Its first two planned projects are in Baltimore. The Westport Waterfront Development is a $1.4 billion, 54-acre neighborhood redevelopment project that will create an estimated 18,500 permanent new jobs, increase output by $2.236 billion, and raise labor income by $954 million. The Gateway South Development is a $250 million, 11-acre redevelopment project that will create an estimated 6,286 permanent new jobs, increase output

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by $772 million in 2008 dollars, and raise labor income by $343 million in 2008 dollars. That project will include the "Ray of Hope Center," a new educational and mentoring center headed by Ray Lewis, a linebacker for the Baltimore Ravens, that will help motivate and teach children citywide, while leveraging connections to both business and sports.

New_York: The New York City Regional Center (NYCRC) has three projects in the works. First, the NYCRC plans to provide a $60 million loan to the Brooklyn Navy Yard Development Corporation to facilitate the construction of two new industrial buildings and a broad range of infrastructure improvements. This $60 million will be combined with $58.5 million in city, state, and federal government funding, bringing the total project budget to over $118 million. The project is anticipated to create over 1,300 jobs.

Second, the NYCRC will provide a $45 million loan to Steiner Studios to complete Phase II of their movie studio project. The total cost of the project is $60 million. The loan will be used to renovate a 250,000-square-foot, WWII-era building. This adaptive reuse will provide critical space for entertainment and media companies as well as additional studio space for film and commercial shoots. The project is projected to create over 1,000 jobs.

Third, the NYCRC will provide a $35 million loan to help fund the transformation of the landmark George Washington Bus Terminal located between 178th and 179th Streets into a modern retail destination and transit center. The $35 million loan will be combined with over $40 million of funding from the Port Authority of New York and New Jersey. The project will include a full refurbishment of the bus terminal as well 200,000 square feet of new retail for residents of upper Manhattan. The project is projected to create 700 jobs.

Washington: The American Life Inc. regional center in Seattle, Washington reports that over the last 10 years, over 650 EB-5 investors have invested $325 million in approximately 30 commercial real estate projects in a formerly run-down part of Seattle known as Sodo (south of downtown). Another 390 U.S. investors have invested in the same projects. Overall the Seattle regional center has raised over $450 million in equity for its projects. If the economic forecasts prove accurate, these projects will create over 7,000 direct, indirect and induced jobs in the area. The regional center has revitalized Sodo, converting Seattle's old port region from warehouses and dilapidated commercial buildings to new business properties.

The Whatcom Opportunities Regional Center (WORC) pools investor funds to develop and operate retirement communities in Whatcom County, Washington. To date, WORC has raised approximately $10 million and has begun development on an active-adult community encompassing 135 independent retirement cottages, two clubhouses/recreational facilities, an administrative office, and assisted care services. Over the next 12 months, WORC expects to raise an additional $12 million through immigrant investors to provide personal care and medical services to over 200 senior citizens.

These examples illustrate that although the number of EB-5 investors is small compared to other green card categories, the EB-5 program packs a powerful economic punch. Consider the incredible impact on the U.S. economy if all 10,000 EB-5 green cards were used each year. The math is simple: 10,000 times $500,000 each is $5 billion dollars. That would be enough to build

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the new DHS headquarters building. Yet the economic impact is far greater than that. EB-5 investors invest considerably more in the U.S. economy than the minimum capital required. They do so by buying houses, sending their children to private universities, paying local, state and federal taxes, and investing in our economy both through publicly traded securities as well as in private investments. Their job-producing capacities far outstrip their actual EB-5 investment.

By example, I know of one investor who is bringing over $15,000,000 of family wealth to begin their new life in America. Another is bringing a liquid net worth of nearly $5,000,000. Others are doing the same or simply continuing their careers as senior executives of major US companies.

All of these individuals and their families are truly seeking the American dream of our culture and system of meritocracy and independence. That is the true story of the regional center program.

In addition to the huge economic contribution EB-5 investors themselves add to the economy, their investments in EB-5 regional centers also prime small and large projects that would otherwise not go forward. In the current depressed economy, EB-5 money is filling the gap in the traditional levels of equity to debt. For example, the CARc regional center is poised to prime over $1 billion of real estate investment to transition fallow portions of the real estate market in the District of Columbia. These projects will not only produce thousands of indirect jobs, but also a similar number of careers in our economy. All this occurs at no expense to the U.S. taxpayer.

Problems with the EB-5 Program

The Regional Center Pilot Program Should be Made Permanent

The EB-5 regional center part of the EB-5 program was enacted 15 years ago as a pilot program. It has proven its worth. As stated above, the USCIS estimates that more than 90% of all EB-5 investors immigrate through regional centers. Congress should make the regional center program permanent. Continuing short-term reauthorizations of the EB-5 regional center program have suppressed investor confidence in the program and led to underutilization. Making the program permanent will show investors that the program is here to stay. More investors will invest, creating more jobs and boosting the economy.

I am pleased that the Senate version of the Department of Homeland Security (DHS) appropriations bill for FY 2010 (H.R. 2892) contains permanent authorization for the EB-5 regional center program. I thank Senator Leahy for his tenacity and leadership on this and all other EB-5 issues, and hope that the permanent extension will remain in the final version of the bill.

USCIS Should Process EB-5 Cases More Quickly and Efficiently

The USCIS California Service Center (CSC) processes all EB-5 cases. While EB-5 processing times have improved recently, they are still erratic. One investor in a regional center project may have his or her I-526 petition approved in 2 months, while another investor in the same regional center project may have to wait 6 months.

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The USCIS allows many employment-based green card petitioners in other categories to pay an extra $1,000 for faster processing of their cases. This is known as "premium processing." So far the USCIS has refused to grant premium processing for EB-5 cases. The USCIS claims that EB-5 cases are more complicated than other types of green card petitions. I disagree. More than half the papers filed with an I-526 petition relate to the regional center project in which an investor is investing. Those documents are identical for all investors investing in that project. Once one adjudicator has reviewed those documents, there is no need for other adjudicators to review those corporate documents again, simply because they are filed with another investor's petition. To do so is inefficient. The only thing an adjudicator should review is an individual investor's source of funds. For these reasons, the USCIS should institute premium processing for EB-5 cases.

Similarly, the USCIS could make EB-5 processing more efficient by having just one or two adjudicators adjudicate all EB-5 petitions filed through a particular regional center. That way those adjudicators could become familiar with that regional center and theoretically be able to decide those cases faster.

Similar variances occur in adjudicating regional center applications. The CSC approves some applications promptly, while other applications linger for six months or longer. The USCIS does not even have a form for applying for regional center designation, so potential regional center applicants do not know everything that is required. The USCIS should impose a processing fee and create an application form for EB-5 regional center applications. Money collected from such fees should remain in the EB-5 program to ensure adequate staffing and faster processing.

USCIS Should Provide Greater Certainty on Key Issues

EB-5 regional centers are concerned that there is little certainty in the EB-5 process. For example, even after a regional center's job creation methodology is accepted in deciding the regional center's application, the CSC nevertheless often issues requests for evidence (RFEs) on investors' I-526 petitions for projects in that regional center that question the same methodology and economic reports. People are frustrated that they have to repeatedly prove the same methodology for indirect job creation. As another example, regional centers report that some EB-5 investors in a given project have their I-526 petitions approved without any problems, while other investors in the same project receive RFEs questioning the project's economic methodology.

USCIS should allow regional centers, on an optional, voluntary basis, to submit documents and information relating to a new project in an already approved regional center to the EB-5 headquarters staff or the California Service Center for a "pre-approval" review. Allowing regional centers and USCIS to discuss and resolve key issues in a new project such as economic methodology, timetables, etc. will smooth I-526 processing and provide more certainty for regional centers, USCIS, and investors. It should also help speed up processing times. To make this process as efficient and timely as possible, the USCIS should adopt a more "interactive" approach with regional centers. Instead of issuing successive and lengthy RFEs (a process that can take months), CSC should proactively contact regional centers directly. As the EB-5 Headquarters staff has done in the past, CSC should assume a more cooperative attitude towards

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the regional centers and make itself available to resolve issues quickly. The fact is that all EB-5 projects, whether for a $10 million hotel development or a $100 million movie studio loan, are complex commercial transactions. Since EB-5 funds often supplement other domestic funding sources, regional centers that want to seize a commercial opportunity need to be able to act as quickly as other private sector players, such as banks, private equity funds and entrepreneurs. The USCIS should recognize that it is a partner in the EB-5 program, not an opponent.

USCIS or Congress Should Resolve TEA Ambiguities

The immigration statute defines a targeted employment area (TEA) as a rural area or an area that has experienced high unemployment of at least 150 percent of the national average.[20] The law defines "rural" as an area not within a metropolitan statistical area (MSA) or the outer boundary of any city or town having a population of 20,000 or more.[21] Each state notifies the USCIS which state agency will apply these guidelines, and determines targeted employment areas for that state.[22]

Some TEA issues remain unresolved. For example, most states update their unemployment statistics once a year. Assume that a regional center starts a project in a census tract that is a TEA for the current year but may not be a TEA for the following year. If project funding is not be completed until the second year, when the tract may no longer qualify as a TEA, can EB-5 investors who come into the project the second year nevertheless invest $500,000 rather than $1 million? It makes little sense to require investors invested in a project to invest at different levels based on the sole fortuity of when a state updates its TEA list. The USCIS or Congress should specify that if a project qualifies as a TEA when a project first starts, it remains a TEA until the last EB-5 investor has invested in that project.

Congress or the USCIS should also revise the definition of "rural" for EB-5 purposes. The immigration regulations define "rural" as "any area not within either a metropolitan statistical area (as designated by the Office of Management and Budget) *or* the outer boundary of any city or town having a population of 20,000 or more."[23] Even though the regulation uses the word "or," the USCIS interprets this definition as meaning that an area must be both outside a metropolitan statistical area and have a population of less than 20,000. This means some truly rural areas cannot qualify as TEAs for EB-5 purposes because they happen to be located in a sprawling MSA. If the USCIS refuses to change its interpretation of the definition, Congress should fix the problem legislatively.

Finally, Congress has not revisited the definition of a "targeted employment area" since it created the EB-5 category almost 20 years ago. In light of the current recession, Congress should consider liberalizing the definition of a TEA to allow more cities to encourage EB-5 investments in their communities. One possibility is to adopt the definition used by the Treasury

[20] INA § 203(b)(5)(B)(ii), 8 U.S.C. § 1153(b)(5)(B)(ii).

[21] INA § 203(b)(5)(B)(iii), 8 U.S.C. § 1153(b)(5)(B)(iii).

[22] Some states have websites that can help determine whether a particular area in the state qualifies as a "targeted employment area" for EB-5 purposes. *See, e.g.*, http://www.labor.ca.gov/calBIS/cbfederalvisaprog.pdf (last updated May 2008).

[23] 8 C.F.R. § 204.6(e) (emphasis added).

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Department's New Markets Tax Credit program. That definition works well, and could easily be incorporated into the EB-5 program.

The U.S Government Should Promote the EB-5 Program Overseas

It does little good to have an immigrant investor program if foreign investors don't know about it. Several other countries, including Canada, England, and Australia, have successful immigrant investor visa programs. All of them do a better job promoting their program than the United States does. For example, according to the Congressional Research Service, between 1986 and 2002, the Canadian investor visa program attracted more than $6.6 billion (Canadian) in investments.[24] By contrast, from FY 1992 through FY 2004, EB-5 investor immigrants invested an estimated $1 billion in U.S. businesses.[25] While that is significant, it could and should be a lot more.

The Department of Commerce has foreign commercial service officers overseas, but many of them either do not know about the EB-5 program or lack funds to hold seminars to educate foreign investors about the program. Similarly, many State Department consular officers lack information about the EB-5 program. The Department of Commerce does have an Invest in America program,[26] but it is understaffed and is tasked to promote all foreign direct investment into the United States, not just EB-5 investments.

I agree with the USCIS Ombudsman's recent recommendation that the USCIS should establish an inter-agency taskforce to promote the EB-5 program overseas in coordination with the Departments of State and Commerce.[27] In addition, state economic development agencies and EB-5 regional centers should participate in such an effort. Both have valuable insights that can make trade promotion efforts more effective.

If necessary, Congress should appropriate money for this purpose. The money that Congress spends will be well spent in attracting millions of dollars of foreign investment to this country and creating thousands of jobs for U.S. workers.

The USCIS Should Assist Certain "Stranded" EB-5 Investors

Between 1990 and 1998 many EB-5 investors made their required initial investments and otherwise complied with the applicable requirements. The legacy Immigration and Naturalization Service (INS) approved their applications for conditional permanent resident status. They and their families moved to the United States, enrolled their children in schools, purchased homes, and began their new lives in the United States. Consistent with the terms of the

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[24] Congressional Research Service, No. RL33844, Foreign Investor Visas: Policies and Issues 18 (Jan. 29, 2007), *available at* http://www.ilw.com/immigdaily/news/2007,0306-crs.pdf.
[25] *Id.*
[26] *See* http://www.investamerica.gov.
[27] USCIS Ombudsman, *Employment Creation Immigrant Visa (EB-5) Program Recommendations* 17 (Mar. 18, 2009), *at* http://www.dhs.gov/xlibrary/assets/CIS_Ombudsman_EB-5_Recommendation_3_18_09.pdf. For a summary and analysis of the ombudsman's recommendations, see Carolyn S. Lee, Nicolai Hinrichsen & Stephen Yale-Loehr, *USCIS Ombudsman to the Rescue: Trying to Save the EB-5 Program*, 14 Bender's Immigr. Bull. 657 (June 1, 2009).

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program, after two years the investors applied to the INS to begin the process of becoming unconditional legal immigrants.

In 1998, without notice or opportunity to comment, the INS changed the rules for the EB-5 program, making it more difficult for new investors to qualify. The INS also applied the new, more restrictive rules retroactively to investors who had applied in good faith under the old rules. The INS terminated some investors' lawful status and began actions to deport them and their families. As a consequence of the INS's actions, immigrant investors who consistently acted in good faith and their families were losing their houses, their jobs, their right to be in the United States, and the millions of dollars of investments they poured into the U.S. economy.

In 2002 Congress enacted special legislation to help the stranded EB-5 investors.[28] The law required the agency to issue implementing regulations in 2003.[29] Over six years later, those regulations have still not been published. I understand that one reason for the delay is a class action lawsuit brought by the stranded investors called *Chang v. United States*.[30] The failure of the USCIS to resolve this matter by settling *Chang* and publishing the long overdue regulations hangs like a dark cloud over the entire EB-5 program. Foreigner investors will only participate in the EB-5 program if they are certain that the U.S. government will play by the rules. More importantly, the immigration agency has changed the rules of the game on immigrants in other instances, not just in the EB-5 program. Congress has a responsibility to stop that and right wrongs when possible. We cannot have an immigration agency that unilaterally and retroactively imposes new requirements. Congress has both an opportunity and an obligation to make the stranded EB-5 immigrants whole and send a message to the USCIS not to apply new immigration rules retroactively to people who applied in good faith under the prior rules.

Recommendations to Improve the EB-5 Program

Many of my recommendations are set forth above. To summarize them again:

The USCIS should:

- Process EB-5 cases more quickly and efficiently and increase training of existing EB-5 adjudicators.
- Allow premium processing for EB-5 cases.
- Allow regional centers, on an optional, voluntary basis, to submit documents relating to a new project in an already approved regional center to the EB-5 headquarters staff or the California Service Center for a "pre-approval" review.

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[28] 21st Century Department of Justice Appropriations Authorization Act, *supra* note 10, §§ 11031–37.
[29] *Id.* § 11032(a).
[30] Chang v. United States, 327 F.3d 911 (9th Cir. 2003) (ruling that retroactive application of the 1998 EB-5 requirements is impermissible if the EB-5 applicant was granted conditional residency before the new requirements took effect). *See also* Sang Geun An v. United States, No. C03-3184P (W.D. Wash. Feb. 16, 2005) (following *Chang*).

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- Stop second-guessing regional centers' economic methodologies and business plans after they have already been approved as part of the regional center application.
- Grandfather TEA determinations for the length of the particular project in which EB-5 investors invest.
- Reinterpret the definition of "rural" to allow small cities within an MSA to count as rural.
- Settle the *Chang* case and publish regulations to implement the 2002 law intended to help certain stranded EB-5 investors.

Congress should:

- Make the EB-5 regional center program permanent.
- Allow premium processing for EB-5 cases if the USCIS refuses to do so administratively.
- Grandfather TEA determinations for the length of the particular project in which EB-5 investors invest if the USCIS refuses to do so administratively.
- Enact legislation to allow small towns in MSAs to be considered "rural" for EB-5 purposes.
- Consider liberalizing the TEA definition to allow more places to attract EB-5 investments at the $500,000 level.
- Require DHS, DOC and DOS to promote the EB-5 program overseas if the agencies refuse to do so administratively.

Conclusion

Qualifying a person for EB-5 status is one of the most complicated subspecialties in immigration law. A sophisticated knowledge of corporate, tax, investment, and immigration law are all required. Investors and regional centers must proceed at their peril because of the lack of certainty on many issues.

Nevertheless, things may be looking up for the EB-5 category. More regional centers are being approved every month, and more projects are going forward, injecting money into the US economy and creating jobs for U.S. workers, despite the recession. Congress must maintain a vigilant eye on the USCIS to make sure it administers the program responsibly and efficiently. Congress can also improve the program through legislation.

Thank you. I look forward to answering your questions.

Attachments: Letters from various regional centers

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