

Getting to the Land of Milk and Honey: How to Improve the EB-5 Visa Regional Center

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Abstract

This paper analyzes the role of Regional Centers within EB-5 visas and recommends several discrete reforms. EB-5 visas are available to immigrant investors, who invest money and create jobs in the United States. Regional Centers provide a pathway for immigrant investors to do so passively, without requiring these investors to assume managerial responsibility in their investments.

Although Regional Centers serve important policy goals, including encouraging investment in rural and high unemployment areas, they also pose unique concerns, including the potential for fraud or abuse. This paper draws from the policy rationales underlying EB-5 visas generally and Regional Centers specifically to recommend several reforms that would further these policy rationales.

I. Introduction

Ishaan Khaana, who was born in India, came to the United States to attend Loyola Marymount University in Los Angeles.¹ After graduating “with a degree in applied information management systems,” Mr. Khaana received an internship offer, and he applied for an H-1B visa to remain in the United States.² Mr. Khaana’s visa application was rejected, however, and he had to return to India.³ Not willing to give up on his dream of working in the tech industry and

¹ Anna M. Simmons, *The Surest Path to a Green Card May be an Investor Visa – At Least for Anybody with \$500,000 to Spare*, L.A. TIMES, Apr. 10, 2018, <https://www.latimes.com/nation/la-na-eb5-visa-explainer-20180410-story.html>.

² *Id.* An H-1B visa is a nonimmigrant visa that allows employers to petition for highly educated foreign professionals in specialty occupations if the employee meets certain requirements. *Fact Sheet: The H-1B Visa Program: A Primer on the Program and its Impact on Jobs, Wages, and the Economy*, AM. IMMIGRATION COUNCIL, (Apr. 2, 2020), <https://www.americanimmigrationcouncil.org/research/h1b-visa-program-fact-sheet>.

³ Simmons, *supra* note 1.

launching a start-up in Silicon Valley, Mr. Khaana pursued another pathway – the EB-5 immigration visa.⁴ Using money he received from his father, Mr. Khaana invested \$500,000 in a Four Seasons Resort development project in Puerto Rico.⁵ With that investment, Mr. Khaana qualified for an EB-5 visa, and he immigrated to the United States.⁶

The EB-5 immigration visa, which provides start-up investors a pathway to legal permanent residency, has been responsible for large inflows of capital into the United States economy.⁷ According to one prominent EB-5 attorney, “Starting in 2008, EB-5 became a powerhouse alternative to bank financing.⁸ \$27.6 billion has been invested to US economy via EB-5.⁹ By rough calculation, about 4 percent of the growth in the private sector can be attributed to EB-5 investments. . . . That’s sizeable. That moves the needle”¹⁰

And yet, the EB-5 visa has been the subject of significant criticism, including that the broad definition of “Targeted Employment Area” is subject to manipulation and that immigrant investors, the Regional Centers, and immigration attorneys are abusing the system.¹¹

The focus of this article is on one of the most controversial aspects of the EB-5 visa: the ability of an immigrant to rely on the EB-5 visa, not by starting his or her own business in the United States, but by instead passively investing in a so-called “Regional Center.”¹² Investment in

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Yugel Losorata, *The EB-5 Visa and the American Dream*, THE MANILA TIMES, Feb. 3, 2019, <https://www.manilatimes.net/the-eb-5-visa-and-the-american-dream/505694/>. Nicolai Hinrichsen is Managing Partner of Miller Mayer LLP Asia EB-5 practice. *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Ron Nixon, *Visa Program Up for Renewal Amid Allegations of Fraud*, N.Y. TIMES, Sept. 11, 2016, <https://www.nytimes.com/2016/09/12/us/politics/visa-program-up-for-renewal-amid-allegations-of-fraud.html>.

¹² *Id.*

EB-5 Regional Centers has increased drastically over the last decade, only intensifying the debate about their role within the EB-5 visa program.¹³

This article proceeds in six parts. Part II introduces the EB-5 immigrant visa, including its history, legislative intent, and evolution since its inception. Part III discusses the role of Regional Centers in EB-5 visas, including the example of the Regional Center located in Idaho, the positions of supporters of Regional Centers, and the criticisms offered by those that oppose Regional Centers. Part IV summarizes the reforms to Regional Centers that scholars and commentators have suggested. Drawing from the preceding parts, Part V provides several discrete recommendations for reform of the EB-5 Regional Center, including increasing efforts to combat fraud and abuse, making the program permanent, and increasing the minimum contribution levels of investors investing in Regional Centers. Finally, Part VI briefly concludes.

II. Background on the EB-5 Visa

This background section on the EB-5 visa proceeds in five parts. Subsection A presents an overview of the EB-5 visa, including the visa requirements and its history. Subsection B discusses the legislative intent underlying the creation of this visa category. Subsection C summarizes changes to the EB-5 visa since its creation in 1992. Subsection D explains the general application process for someone seeking an EB-5 visa. Finally, subsection E discusses the general policy debates surrounding the EB-5 visa.

A. Overview of the EB-5 Visa

The EB-5 visa grants legal permanent residency to individuals who invest a designated amount of money in the United States to start a business.¹⁴ Further, the business must create a

¹³ *Id.*

¹⁴ *EB-5 Immigrant Investor Program*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/eb-5> (last visited Oct. 19, 2019).

minimum of ten jobs in the United States.¹⁵ Legal permanent residency grants the right to live in the United States for an unlimited period.¹⁶ The key statutory language creating the EB-5 visa states:

(b) Preference Allocation for Employment-Based Immigrants. Aliens subject to the worldwide level specified in section 201(d) for employment-based immigrants in a fiscal year shall be allotted visas as follows:

(5) Employment creation.

(A) In general. Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise (including a limited partnership) –

(i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and

(ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).¹⁷

While the EB-5 visa did not come into existence until 1991, there have been pathways for immigrants to obtain permanent residency through investment in the United States since 1965.¹⁸ The early versions of investor visas did not carry the same preferences that the current visa offers.¹⁹ The first investor visa created a visa category but did not allocate any visas to it.²⁰ Applicants for the investor visa were put into the general visa pool with all other non-preference applications.²¹

¹⁵ *Id.*

¹⁶ Immigration and Nationality Act § 101(a)(20), 8 U.S.C. § 1101(a)(20) (2014) [hereinafter “INA”].

¹⁷ See INA § 203(b)(5)(A); 8 C.F.R. § 204.6(c) (2019).

¹⁸ *Report to Congress on EB-5 Investor Visa Program*, FINDLAW, <http://corporate.findlaw.com/human-resources/report-to-congress-on-the-eb-5-investor-visa-program.html> (last updated Mar. 26, 2008).

¹⁹ *Id.* (explaining that investors were originally eligible to immigrate under “non-preference category”).

²⁰ *Id.*

²¹ *Id.* (explaining that non-preference applicants are non-citizens whose application for an immigration benefit did not fit into an established category).

Generally, before the 1980s, the United States' immigration policy focused on preventing illegal immigration and encouraging family reunification.²² Economic and policy developments of the mid-1980s began to change the immigration focus in the United States.²³ Around the same time as the United States' policy shift, other countries such as Canada and Australia began to introduce immigration investment visa programs.²⁴ The early days of these foreign programs were widely viewed as success.²⁵ The Canadian program brought in two to four billion Canadian dollars per year.²⁶

In the late 1980s, the United States began considering substantial immigration reforms, including a preference-based investor visa program.²⁷ The Immigration Act of 1990 established, among other things, new categories for admission into the United States for investors.²⁸ The Immigration Act of 1990 created five employment-based categories.²⁹ These categories allowed visa recipients and their immediate families to obtain Legal Permanent Resident status and, later, United States citizenship.³⁰

Ten thousand visas are allocated annually for the fifth preference category, EB-5 visas.³¹ The visas allocated for this category go to the primary immigrant and his or her derivative family members, generally this includes spouses and children of the applicant.³² While over 10,000 visas

²² Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911.

²³ See Elliot Fertik, Comment, *Reforming the Immigrant Investor Program of the Immigration Act of 1990*, 15 U. PA. J. INT'L BUS. L. 649, 652-53 (1995).

²⁴ *Id.*

²⁵ *Id.* at 652 n.17.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1153(b)(5)); see also 8 C.F.R. § 204.6.

²⁹ Immigration Act, Pub. L. No. 101-649, 104 Stat. 4978.

³⁰ Nixon, *supra* note 12.

³¹ OFFICE OF THE CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, DEP'T OF HOMELAND SEC., EMPLOYMENT CREATION IMMIGRANT VISA (EB-5) PROGRAM RECOMMENDATIONS 1 (Mar. 18, 2009), https://www.dhs.gov/xlibrary/assets/CIS_Ombudsman_EB-5_Recommendation_3_18_09.pdf.

³² Cynthia Lange, *A Legislative History of EB-5 and the Regional Center Program*, EB5 INV. MAG., Aug. 21, 2015.

were allocated for the category, less than 1,000 visas were used annually during the first ten years of the program.³³

B. Legislative Intent

In passing legislation to create employment-based categories, Congress sought to attract immigrants with entrepreneurial desires and the ability to invest capital and create jobs for United States workers.³⁴ A major goal of Congress in creating the fifth employment-based category was to attract investment into rural and high unemployment areas.³⁵ Agency regulations have further supported the desire to incentivize investment in these so-called “Targeted Employment Areas.”³⁶

Congress has also taken additional steps to strengthen this goal. Congress has set aside three thousand EB-5 visas each year for these “Targeted Employment Areas,” and it has reduced the minimum investment amount by half, from one million to, five hundred thousand dollars for investors seeking to invest in Targeted Employment Areas.³⁷

Initially, Congress projected that the investor visa could substantially strengthen the United States economy by “bringing in fresh investment funds totaling an estimated \$4 billion and creating forty thousand jobs annually.”³⁸ Other proponents claimed that the investor visa could bring up to \$eight billion and create one hundred thousand jobs each year.³⁹

³³ OFFICE OF THE CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, DEP’T OF HOMELAND SEC., *supra* note 30, at 1 n.3 (“Between 1992 and 2004, 6,024 EB-5 [visas] were issued, which averaged [out to about] 500 per year.”).

³⁴ *EB-5 Immigrant Investor Program*, *supra* note 13.

³⁵ Fertik, *supra* note 22, at 654, n.22 (stating that the EB-5 program was “intended to create new employment for U.S. workers and to infuse new capital in the country, not to provide immigrant visas to wealthy individuals.”).

³⁶ 8 C.F.R. § 204.6(e) (“Targeted Employment Area means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.”).

³⁷ Immigration Act, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1153(b)(5)(C)(ii)); 8 C.F.R. § 204.6(f)(2).

³⁸ OFFICE OF THE CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, DEP’T OF HOMELAND SEC., *supra* note 30, at 1 n.3.

³⁹ Fertik, *supra* note 22, at 654 (citing Ashley Dunn, *Lure of Visas Fails to Attract Rich Investors*, L.A. TIMES (Dec. 24, 1991)).

The first decade of the investor visa program did not see the success that Congress had envisioned.⁴⁰ More recently, however, following the elimination of several requirements, petitions for the investor visa have increased dramatically.⁴¹ From 2001 to 2015, there was “a 1,250 percent increase in EB-5 visas.”⁴²

C. Changes Since EB-5’s Enactment

In 1992, Section 610 of the Appropriations Act created the Immigrant Investor Pilot Program in an attempt to give immigrant investors the option of qualifying for permanent legal residence by creating jobs indirectly.⁴³ The investor requirements under the Pilot Program are significantly similar to the regular EB-5 program, except that the Pilot Program allows investments with affiliated “Regional Centers.”⁴⁴ The Immigration and Naturalization Service indicated that Regional Centers would include state government agencies as well as private entities.⁴⁵

In 2013, the United States Citizenship and Immigration Services issued a significant agency interpretation, which resolved ambiguity about what qualifies as an acceptable Regional

⁴⁰ OFFICE OF THE CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, DEP’T OF HOMELAND SEC., *supra* note 30, at 7 (explaining that in Fiscal Year 1993, only 583 EB-5 visas were issued).

⁴¹ See U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., NUMBER OF I-526 IMMIGRANT PETITIONS BY ALIEN ENTREPRENEURS BY FISCAL YEAR, QUARTER, AND CASE STATUS 2008-2014 (Nov. 21, 2014), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_performance_data_fy2014_qtr4.pdf.

(EB-5 petitions received: 1,953 in 2010; 3,805 in 2011; and 6,200 in 2012).

⁴² *Current Demand for EB-5 Visas Will Lead to Retrogression in FY-2015, According to Department of State & Other Takeaways from Visa Update Panel*, ASS’N TO INV. IN THE USA BLOG, (Nov. 14, 2014), <https://iiusa.org/blog/current-demand-eb5-visas-lead-retrogression-fy2015-department-state-takeaways-visa-update-panel/>.

⁴³ See Judiciary Appropriations Act, Pub. L. No. 102-395, § 610, 106 Stat. 1828, 1874 (1992) (stating that EB-5 visas will be allocated to an alien investing in “a [R]egional [C]enter in the United States for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.”).

⁴⁴ *Id.*

⁴⁵ *INS Implements New Pilot Program for Immigrant Investors*, 70 INTERPRETER RELEASES 1129, 1130 (Aug. 30, 1993).

Center.⁴⁶ In addition to other clarifications, the policy memo established that agency adjudications of a Regional Center status are to be based on a preponderance of the evidence standard, and that agency examiners should give deference to previous determinations.⁴⁷ In addition to adjudication and examination considerations, the policy memo eliminated requirements that Regional Centers be restricted to a particular industry code, economic methodology, or certain geographic areas.⁴⁸ As a result of these changes, the agency has significantly expanded the number of regions available for interested immigrant entrepreneurs.⁴⁹

In 2002, Congress enacted a provision that gave hundreds of investors the ability to reestablish their eligibility for the EB-5 visa.⁵⁰ Under the provision, investors who were able to satisfy the original, pre-1998 requirements, were immediately given Legal Permanent Resident status.⁵¹ Investors who had not yet met the pre-1998 requirements were allowed an additional two years to show the necessary investment and job creation.⁵²

In January of 2005, the agency issued a memorandum titled “Extension of Status for Conditional Residents with Pending or Denied Form I-829” to guide the adjudication of I-829 petitions.⁵³ If the Secretary of Homeland Security determined that the alien met the job creation

⁴⁶ U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., POLICY MEMORANDUM 602-0083, EB-5 ADJUDICATIONS POLICY, 602-0083 (May 30, 2013), https://www.uscis.gov/sites/default/files/archive/EB-5_Adjudications_PM_Approved_as_final_5-30-13.pdf-old.pdf (superseded).

⁴⁷ *Id.* at 13.

⁴⁸ *Id.* at 13-15. The agency now provides only minimal guidance regarding what is and is not an acceptable Regional Center; “the proposed area is contributing significantly to the supply chain, as well as the labor pool, of the proposed project” eliminating the previous requirement that the economic activity “will substantially promote economic growth in the proposed area as a whole.” *Id.*

⁴⁹ Immigrant Investor Pilot Program, 59 Fed. Reg. 17920, 17921 (Apr. 15, 1994) (to be codified at 8 C.F.R. pts. 103, 204).

⁵⁰ 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, §§ 11031-37, 116 Stat. 1758 (2002).

⁵¹ *Id.*

⁵² *Id.*

⁵³ Memorandum from U.S. Citizenship & Immigration Servs., Dep’t of Homeland Sec., Extension of Status for Conditional Residents with Pending or Denied Form I-829, Petitions Subject to Public Law 107-273 (Jan. 18, 2005) (on file with Homeland Security Digital Library).

and capital investment requirements, and there was no material misrepresentation concerning the Form I-829, the Secretary was required to remove the conditional basis of the alien status.⁵⁴

In 2013, the agency issued additional interpretations to ease the requirements to qualify for an EB-5 visa.⁵⁵ First, the agency determined that indirect and construction jobs now qualify as permanent jobs to satisfy the EB-5 requirements.⁵⁶ In addition, the Adjudicator’s Field Manual was updated to provide that “there may be some flexibility concerning the timing of job creation at the Form I-829 . . . stage.”⁵⁷

D. Current EB-5 Process and Requirements

To be approved for an EB-5 visa, an immigrant must complete various requirements. An investing non-citizen must establish that he or she is entering the United States for the purpose of “engaging in a new commercial enterprise.”⁵⁸ The investment must be a benefit to the United States and must create employment for at least ten United States citizens or employment-authorized immigrants.⁵⁹ The investor must be able to prove that the capital to be used was obtained through lawful means.⁶⁰ There is no limitation on the type of enterprise that the non-citizen may pursue.⁶¹

EB-5 petitions are filed with the United States Citizenship and Immigration Services.⁶² The immigrant investor must file an I-526 application.⁶³ If multiple investors are applying, “each

⁵⁴ *Id.*

⁵⁵ U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., *supra* note 45.

⁵⁶ *Id.*

⁵⁷ *Id.* (“[T]his policy recognizes that circumstances can change after an alien secures admission into the United States and the agency chose to implement with some flexibility. 8 C.F.R. § 216.6(a)(4)(iv) Agency regulation states that the petitioning alien has ‘created or can be expected to create within a reasonable time ten full-time jobs for qualifying employees.’”).

⁵⁸ 8 U.S.C. § 1153(b)(5); 8 C.F.R. § 204.6.

⁵⁹ 8 U.S.C. § 1153(b)(5)(A)(ii); *see also* 8 C.F.R. § 204.6(j).

⁶⁰ 8 U.S.C. § 1153(b)(5)(A)(ii); *see also* 8 C.F.R. § 204.6(j).

⁶¹ U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., *supra* note 45.

⁶² *Id.*

⁶³ *See* 8 C.F.R. § 204.6(a).

foreign investor seeking EB-5 status must independently qualify for the EB-5 visa and file a[n] I-526 form.”⁶⁴ The I-526 application requires an immigrant investor to provide personal information, as well as information about the investment project, the composition of the investment, and employment creation.⁶⁵

If the application is approved, the agency grants the immigrant investor a two-year conditional residency status.⁶⁶ Within a 90-day window before the second anniversary of obtaining conditional residency,⁶⁷ the investor may submit an I-829 petition to remove the conditional status of his or her residency.⁶⁸

Because the EB-5 visa is an immigrant visa, the time the non-citizen spends as a conditional resident counts toward the period of lawful permanent residence required to become a naturalized citizen.⁶⁹ The INA allows non-citizens to adjust status from an immigrant to a Legal Permanent Resident, and from a Legal Permanent Resident to a United States Citizen.⁷⁰

The petition for removal of conditions must contain facts and information establishing the following: (1) a commercial enterprise was established by the non-citizen, (2) the non-citizen invested or was actively in the process of investing the requisite capital, and (3) the non-citizen “sustained the actions” described in those two requirements throughout the period of the non-citizen’s residence in the United States.⁷¹ Agency regulations require the non-citizen to provide evidence that the investment has, or will within a reasonable time, created ten full-time jobs for

⁶⁴ See 8 C.F.R. § 204.6(c).

⁶⁵ *Id.*

⁶⁶ INA § 216A(c)(1)(A) (requiring a two-year conditional residency upon an investor whose I-526 form has been approved).

⁶⁷ INA § 216A(d)(2)(A).

⁶⁸ INA § 216A(c)(1)(A).

⁶⁹ INA § 216A(e).

⁷⁰ INA § 245 (2019).

⁷¹ INA §§ 216A(c)(1)(A), 216A(d)(2)(A-C).

United States workers.⁷² The non-citizen’s petition must include an audited financial statement or “other probative evidence” to show that the non-citizen has created a viable commercial enterprise.⁷³

E. Policy Debate About EB-5 Visas Generally

EB-5 visas, generally, have been the subject of significant debate. This subsection highlights the key arguments asserted by proponents and detractors.

1. Arguments in Favor of EB-5 Visas

Proponents of investor visas argue the United States must attract foreign capital if it wishes to remain competitive in the global economy.⁷⁴ Foreign investment is believed to have positive impacts on the United States economy.⁷⁵ These investments not only contribute to the growth and competitiveness of domestic businesses, but they also contribute to the ability to generate large revenues.⁷⁶

The adoption of the EB-5 visa occurred during a time when the United States industries were struggling.⁷⁷ These visas allowed immigrant entrepreneurs the opportunity to have a special role in revitalizing the United States economy.⁷⁸ Similar immigrant investor programs offered at

⁷² 8 C.F.R. § 216.6(a)(4)(iv) (2019).

⁷³ 8 C.F.R. § 216.6(a)(4)(ii)

⁷⁴ See Gary Endelman & Jeffrey Hardy, *Uncle Sam Wants You: Foreign Investment and The Immigration Act of 1990*, 28 SAN DIEGO L. REV. 671, 671 (1991) (explaining lawmakers' motivation not only to stimulate United States economy, but also to compete economically on a global scale).

⁷⁵ *Id.*

⁷⁶ *Id.* (discussing the positive effects foreign investments have on the United States economy). Foreign investment generates tax revenue through income, sales, property, and other taxes. *Id.* at 678-79.

⁷⁷ Linda J. Wong, *The Role of Immigrant Entrepreneurs in Urban Economic Development*, 7 STAN L. & POL’Y REV. 75, 76 (1996) (discussing manufacturing and defense spending cutbacks that impacted the Midwest and the West Coast); Nixon, *supra* note 11.

⁷⁸ See Curtis M. Jolly et al., *U.S. Competitive Position and Capital Investment Flows in the Economic Citizen Market: Constraints and Opportunities of the U.S. Investor Program*, 57 AM. J. OF ECON. & SOC., 155 (2008).

the time, such as those in Canada and Australia, were successful and spurred Congress to act.⁷⁹ These investor visas allowed the trading of citizenship for foreign investment relatively cost-free.⁸⁰

2. Arguments Against EB-5 Visas

Some opponents of the investor visas argue the program has not been successful at achieving Congress's stated goals. Opponents point to a Senate Committee Report, which stated the Immigrant Investor program was "intended to provide new employment for United States workers and to infuse new capital in the country, not to provide immigrant visas to wealthy individuals."⁸¹ Similarly, the program has faced criticism from opponents who argue it has had a relatively minor impact on the United States economy, while welcoming wealth with origins that are difficult to trace and potentially unsavory.⁸²

Another major criticism from opponents is the program has arguably become overrun with fraud and abuse.⁸³ Some of these concerns have been vindicated by successful prosecutions of immigrant investors for crimes including immigration fraud, wire fraud, money laundering, and conspiracy.⁸⁴

A well-known example of fraud and abuse related to the EB-5 visa was the 2001 conviction of James F. O'Connor and James A. Geisler, of InterBank, on charges of immigration, tax, and

⁷⁹ See *id.* at 156 (discussing the efforts of competing economies to attract foreign investment); see also *Applying for Permanent Residence – Quebec Selected Business Class Applicants: Investors or Entrepreneurs (IMM 4000)*, GOV'T OF CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-4000-applying-permanent-residence-quebec-selected-business-class-applicants-investors-entrepreneurs.html> (last accessed Oct. 19, 2019) (explaining Canadian foreign investor program. Canada's foreign investment program also exchanges invested funds to generate new employment opportunities for their citizens for citizenship, but under their program, the Canadian government issues a promissory note representing the full amount of foreign investment, creating a debt obligation to return the full amount within five years).

⁸⁰ See Nick Leiber, *The EB-5 Program: Create American Jobs, Get a Green Card*, BLOOMBERG BUS. (Aug. 4, 2011, 2:56 PM), <http://www.bloomberg.com/bw/magazine/the-eb5-program-create-american-jobs-get-a-green-card-08042011.html#p2>.

⁸¹ OFFICE OF THE CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, DEP'T OF HOMELAND SEC., *supra* note 30, at 4.

⁸² Editorial, *It's Time for the Corporate Visa Giveaway to Go Away*, WASH. POST, Sept. 6, 2015 (highlighting the potential for illegally obtained funds coming into U.S. under EB-5 program).

⁸³ Nixon, *supra* note 11.

⁸⁴ See, e.g., *United States v. O'Connor*, 158 F. Supp. 2d 697, 723-29 (E.D. Va. 2001).

wire fraud.⁸⁵ O'Connor and Geisler created a scheme to induce noncitizens who wished to receive a green card through the EB-5 visa to invest in a regional center.⁸⁶ Geisler and O'Connor recruited foreigners by telling clients they could qualify for the program with investments of \$100,000 to \$150,000.⁸⁷ From 1996 to 2000, InterBank filed, under oath, "approximately 335 [false] EB-5 applications."⁸⁸ Each application falsely stated that the noncitizen invested the requisite \$500,000, when in fact, not a single one did.⁸⁹ According to the indictment, virtually all the clients lost their money.⁹⁰ Following a three-week trial, O'Connor and Geisler were convicted on sixty-one counts of conspiracy, money laundering, and fraud.⁹¹ The pair was sentenced to more than nine years of incarceration and ordered to pay restitution to the victims in the amount of \$17,591,365.17.⁹²

III. The Role of Regional Centers in EB-5 Visas

This section on the role of Regional Centers in EB-5 visas proceeds in four parts. Subsection A provides an overview of the role of Regional Centers. Subsection B discusses the example of the Regional Center located in Idaho, including its history, the project for which the Regional Center is currently raising capital, and its operational activities. Subsection C summarizes the positions of supporters of Regional Centers' role within EB-5 visas, while subsection D presents the arguments of its critics.

A. Overview of the Role of Regional Centers

⁸⁵ Courtney Creedon & Jinhee Wilde, *Regional Center Retrospective*, EB5 INV. MAG. (Apr. 20, 2016), <https://www.cb5investors.com/magazine/article/rc-retrospective>.

⁸⁶ *O'Connor*, 321 F. Supp. 2d at 724.

⁸⁷ Brooke A. Masters, *2 Accused of Immigration, Investment Fraud*, WASH. POST (Aug. 12, 2000), https://www.washingtonpost.com/archive/local/2000/08/12/2-accused-of-immigration-investment-fraud/b7478173-023a-402d-b4c8-6ea377dfc7d7/?utm_term=.b0483cb3414a.

⁸⁸ *O'Connor*, 321 F. Supp. 2d at 724.

⁸⁹ *Id.* at 724-25.

⁹⁰ *Id.*

⁹¹ Tom Jackman, *2 Va. Men Convicted of Bilking Immigrants*, WASH. POST (Aug. 17, 2001), https://www.washingtonpost.com/archive/local/2001/08/17/2-va-men-convicted-of-bilking-immigrants/d595bf90-d34d-4eb1-88c9-d964e6dd5d48/?utm_term=.338f2211fa2d.

⁹² *O'Connor*, 321 F. Supp. 2d at 725.

Regional Centers, pursuant to the “Regional Center Pilot” program have frequently received bipartisan support in Congress even though they have never received long-term or permanent implementation.⁹³ A Regional Center is “an organization designated by United States Citizenship and Immigration Services that sponsors capital investment projects for investment by EB-5 investors.”⁹⁴

To become a Regional Center, a business requesting authorization must complete an I-924 form and satisfy the requirements established by the United States Citizenship and Immigration Services.⁹⁵ The evidence that must accompany the I-924 application varies depending on the specific project. In general, however, the applicant must show that it focuses on a particular geographic location, prove that ten full-time jobs will be created by each of the investors, describe its promotional activities, and prove that the Regional Center will be compliant with all EB-5 regulations.⁹⁶

One recent change in the treatment of Regional Centers is in 2017, a federal district court in California held that investments in Regional Centers were “investment contracts” and thus subject to the securities laws.⁹⁷ The court applied the Supreme Court’s test for “investment contracts,” which has three parts: (1) the investment of money; (2) in a common enterprise; (3)

⁹³ See S. 2751, 110th Cong. (2008). Senate Bill 2751 was co-sponsored by Senators Patrick Leahy (D-VT) and Arlen Specter (R-PA) on March 12, 2008. A short extension of the Regional Center Pilot was included in the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No 110-329 (Sept. 30, 2008). Following a five-day extension on March 11, 2009, President Obama signed the Omnibus Appropriations Act extending the programs sunset date to September 30, 2009. In 2009, President Obama extended the EB-5 Immigrant Investor Pilot Program until September 20, 2012, and would later reauthorize a three year extension which extended the program until 2015.

⁹⁴ Kate Kalmykov & James Cormie, *EB-5 Regional Center*, EB5 INV. (2015), <https://www.eb5investors.com/eb5-basics/eb-5-regional-center> (last accessed Oct. 19, 2019).

⁹⁵ *I-924 Application*, EB5 INV. (Oct. 21, 2016), <http://www.eb5investors.com/eb5-forms/i-924-application> [<https://perma.cc/E7XX-ARKX>].

⁹⁶ *Id.*; see also 8 C.F.R. § 204.6 (listing the regulations which control the EB-5 visa).

⁹⁷ *Sec. & Exch. Comm’n v. Hui Feng*, No. 15-CV-09420, 2017 WL 6551107, at *4-6 (C.D. Cal. Aug. 10, 2017) (holding the EB-5 investments are investment contracts and therefore securities governed by federal securities laws and regulations.).

with the expectation of profits produced by the efforts of others.⁹⁸ The defendants tried to argue that because of administrative fees and other economic realities, investors in Regional Centers do not have the requisite expectation of profits.⁹⁹ The court rejected this argument, focusing on the policy rationale behind the EB-5 program rather than the reality of the transactions at issue.¹⁰⁰

Following this decision, organizations that advise on the EB-5 visa practices recommend that “practitioners should assume that EB-5 investments will be treated as securities subject to state and federal securities law.”¹⁰¹ As a consequence, investments in a Regional Center’s projects may need to be registered as a security at the state and federal level.¹⁰² Failure to register or satisfy a proper exemption to registration as a security may result in a variety of consequences, including being “permanently enjoined from future securities law violations” and being ordered to disgorge commissions.¹⁰³

B. Invest Idaho Regional Center

Regional Centers are located in every state in the United States except South Dakota.¹⁰⁴ According to the United States Citizenship and Immigration Services website, there is one Regional Center located in Idaho.¹⁰⁵ Invest Idaho Regional Center (Invest Idaho) is an approved

⁹⁸ *Sec. & Exch. Comm’n v. Howey*, 328 U.S. 293, 298-99 (1946).

⁹⁹ *Hui Feng*, 2017 WL 6551107, at *4-6.

¹⁰⁰ *Id.*

¹⁰¹ Rikard Lundberg & Tom Krysa, *Shedding New Light on SEC Enforcement: EB-5 Investments as Securities, Unregistered Broker-Dealers and Related Disclosures*, EB5 INV. MAG. (Jan. 9, 2018), <https://www.eb5investors.com/magazine/article/shedding-new-light-on-sec-enforcement>.

¹⁰² *Hui Feng*, 2017 WL 6551107, at *4-6.

¹⁰³ *Id.*; Lundberg & Krysa, *supra* note 100.

¹⁰⁴ *Approved EB-5 Immigrant Investor Regional Centers*, U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers> (last visited Apr. 17, 2020).

¹⁰⁵ There are two Regional Centers listed in the State of Idaho, however, while Invest Idaho Regional Center is located in Boise, Idaho, Pacific Northwest EB-5 Regional Center is located in Bellingham, Washington. *Id.*; INVEST IDAHO, <http://www.eb5investidaho.com/> (last visited Apr. 17, 2020).

Regional Center located in Boise approved to operate on September 1, 2009.¹⁰⁶ The current President and Chief Executive Officer of Invest Idaho is Rod Meyer.¹⁰⁷

According to its website, Invest Idaho is seeking investment opportunities “involving education, mixed use real estate, assisted living facilities, alternative energy & research.”¹⁰⁸ Currently, Invest Idaho is raising funds for Walker Ranch Geothermal, a geothermal power plant that will be located in Idaho.¹⁰⁹ According to Invest Idaho, this will be the “first geothermal power project on public land in Idaho since the 1980s.”¹¹⁰

In addition to raising capital for its various projects, Invest Idaho handles most of the operational responsibilities for its investors. Invest Idaho provides the following aid to its foreign investors: (1) selecting proper projects for their financial needs; (2) navigating the entire EB-5 process; (3) providing resources to assist investors with legal issues, relocation plans, banking, and general understanding about the United States in general and Idaho in particular; (4) managing of all Regional Center EB-5 investor marketing activities; (5) vetting and due diligence, including source of funds validation; (6) tracking and reporting of EB-5 investments and EB-5 investors; (7) filing the United States Citizenship Immigration Service’s Regional Center reporting and compliance; and (8) overseeing of all projects.¹¹¹

C. Supporters of the Role of Regional Centers

¹⁰⁶ *Principal*, INVEST IDAHO, <http://www.eb5investidaho.com/principal-1/> (last visited Apr. 17, 2020).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Projects*, INVEST IDAHO, <http://www.eb5investidaho.com/projects/> (last visited Apr. 17, 2020).

¹¹⁰ Alexander Richter, *BLM Gives Go Ahead for Walker Ranch Geothermal Project in Idaho*, THINK GEOENERGY (Sept. 15, 2016), <http://www.thinkgeoenergy.com/blm-gives-go-ahead-for-walker-ranch-geothermal-project-in-idaho/>.

¹¹¹ *About Us*, INVEST IDAHO, <http://www.eb5investidaho.com/about-us/> (last visited Apr. 17, 2020).

Proponents of Regional Centers point to the successes of the Pilot Program, including the increased use of the Pilot Program since 2014 and the projects that successful Regional Centers have completed.

The early years saw little interest in the Pilot Program from foreign investors, and academics writing on the program called for it to be abolished.¹¹² However, with the removal of the requirement that investors assume a managerial position in their investment, interest began to increase.¹¹³ The ability for passive investment in a Regional Center has made the program attractive to more immigrant investors.¹¹⁴ Investors may provide the capital instead of dealing with the day-to-day operation of an enterprise.¹¹⁵ Increased interest in the EB-5 has generated \$346 million in federal tax revenue.¹¹⁶

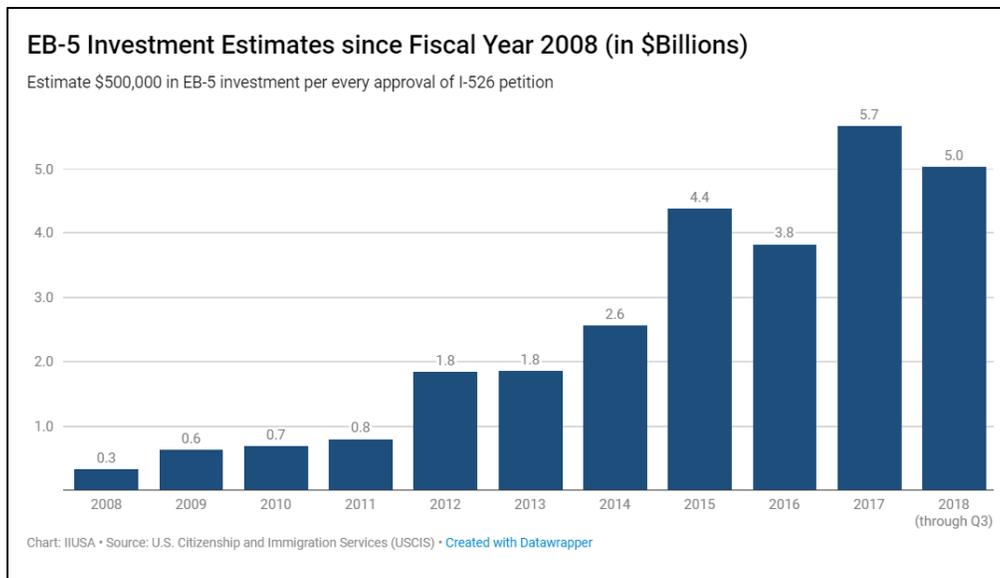
¹¹² See Rick Su, *Immigration as Urban Policy*, 38 FORDHAM URB. L.J. 363 (2010); Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203 (2002); Kathleen Pender, *Feinstein Calls For End to Controversial EB-5 Immigration Program*, SFGATE (Nov. 4, 2015), <http://www.sfgate.com/business/networth/article/Feinstein-calls-for-end-to-controversial-EB-5-6610957.php> [<https://perma.cc/2CAN-K4V6>]; Jerry Markon, *Visa Program for Wealthy Foreigners at Risk of Fraud, Report Says*, WASH. POST (Sept. 8, 2015), <http://www.washingtonpost.com/blogs/federal-eye/wp/2015/09/09/visa-program-for-wealthy-foreigners-at-risk-of-fraud-report-says/> [<https://perma.cc/QR33-WBJ5>]; Editorial, *supra* note 81.

¹¹³ Annie Anjung Lin, *Splitting the EB-5 Program: A Proposal for Employment-Based Immigration Reform to Better Target Immigrant Entrepreneurs and Investors*, 18 CHAP. L. REV. 527, 540 (2015).

¹¹⁴ See U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., FORM I-526, IMMIGRANT PETITION BY ALIEN ENTREPRENEUR AND FORM I-829, PETITION BY ENTREPRENEUR TO REMOVE CONDITIONS AGENCY-WIDE RECEIPTS, APPROVALS, DENIALS FISCAL YEAR(S): 1991-2013 (THROUGH THIRD QUARTER) (2013), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526-I829_performancedata_fy1991-2013_qtr3.pdf (showing the use of the EB-5 visa has grown from just a few hundred per year to over 6,000 in 2012).

¹¹⁵ Anjung Lin, *supra* note 112, at 529.

¹¹⁶ Press Release, Ass'n to Inv. in the USA, IIUSA Announces Results of Economic Study, Confirms EB-5 Regional Center Program Leads to U.S. Job Creation, GDP Growth and Tax Revenue (Sept. 27, 2013), <http://www.prweb.com/pdfdownload/11168367.pdf>; *EB-5 Statistics*, ASS'N TO INV. IN THE USA, <https://iiusa.org/eb5-stats/> (last visited Apr. 17, 2020).



The number of approved Regional Centers has grown rapidly.¹¹⁷ Many Regional Centers are commercial real estate developers who use immigrant investment as an alternative source of funding during times when domestic investment is unavailable.¹¹⁸

This increased interest in the EB-5 visa coincides with the increased interest from China.¹¹⁹ Chinese-born investors were responsible for pushing the growth in interest and claimed a majority of visas until the program reached its cap of ten thousand visas in 2014.¹²⁰ However, in recent years, investor interest in the EB-5 visa has become more diversified, with much of the new interest coming from India.¹²¹

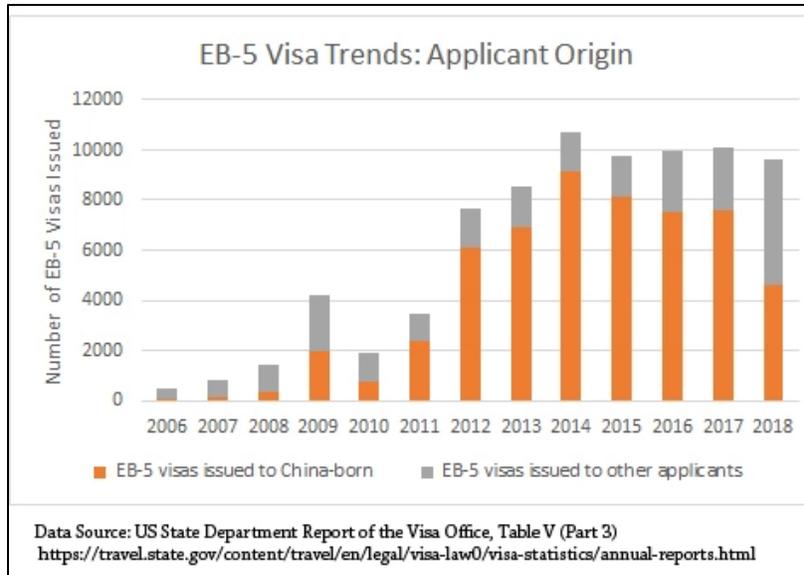
¹¹⁷ U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., FORM I-526, IMMIGRANT PETITION BY ALIEN ENTREPRENEUR AND FORM I-829, PETITION BY ENTREPRENEUR TO REMOVE CONDITIONS SERVICE-WIDE RECEIPTS, APPROVALS, DENIALS FISCAL YEAR(S): 2005-2012, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_I924_I829_performancedata_qtr43.pdf (last updated Oct. 25, 2012) (showing several forms with immigration performance data including recipient, approval, and denial from years 2005 through 2012).

¹¹⁸ James Kelleher et al., *Special Report: Overselling the American Dream Overseas*, REUTERS, (Dec. 22, 2010), <http://www.reuters.com/article/2010/12/22/us-usa-immigration-business-idUSTRE6BL2KJ20101222>.

¹¹⁹ See Suzanne Lazicki, *FY2018 EB-5 Visas by Country*, LUCID PROF. WRITING: EB-5 BLOG (Jan. 7, 2019), <https://blog.lucidtext.com/category/eb-5-statistics/>.

¹²⁰ *Report of the Visa Office 2018*, BUREAU OF CONSULAR AFF., U.S. DEP'T OF STATE, (2018), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/annual-reports/report-of-the-visa-office-2018.html>.

¹²¹ U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., *supra* note 116.



D. Critics of the Role of Regional Centers

Critics of Regional Centers contend that the Pilot Program has failed. They argue that Targeted Employment Areas have been manipulated, that they have led to poorly planned projects, and that the program lacks safeguards to protect its integrity.

Under the Pilot Program, an urban area with an unemployment rate of at least 150 percent of the national average is a “Targeted Employment Area”.¹²² Critics of the Pilot Program claim that these Targeted Employment Areas have been “broadly defined” in order to manipulate the numbers.¹²³ Senators Grassley and Leahy have expressed concern that “developers had broadly defined these areas by adding a few low-income communities to wealthier neighborhoods so they could use EB-5 funding to build luxury condos, convention centers, and hotels, amounting to what the senators said was economic gerrymandering.”¹²⁴ There is criticism that manipulation has

¹²² *Targeted Employment Area*, EB-5 INV., <https://www.eb5investors.com/eb5-basics/targeted-employment-area>.

¹²³ Nixon, *supra* note 11 (quoting Senators Grassley and Leahy).

¹²⁴ *Id.*

prevented the Pilot Program from truly benefiting the poorer areas that the program was intended to target.¹²⁵

Another criticism of the Pilot Program is that it has resulted in poorly planned projects.¹²⁶

For example, Eric Posner argues:

When we think about investment, the starting point is that investors don't need citizenship or any other inducement to put money into a project when they will earn higher than the market rate of return. So given the risk and other opportunities, someone will invest \$1 million or more in a mall complex or housing development if the expected return is, say, 10 or 15 percent. Many foreigners make such investments, and the vast majority of them make them not to obtain citizenship but to make money.¹²⁷

Mr. Posner further argues that the economic benefit to the United States is insignificant because investors seeking immigrant status account for a fraction of the investment into the United States economy.¹²⁸

A third criticism of the Pilot Program is that it lacks effective safeguards to protect the program's integrity.¹²⁹ In 2014, Inspector General of United States Citizenship and Immigration Services stated that the Service "is unable to demonstrate the benefits of foreign investment into the U.S. economy."¹³⁰ Further, in this same presentation, the Inspector General claimed that United

¹²⁵ See Jonathan O'Connell, *Buying Visas with Investments is Big Business and Congress is Taking Notice*, WASH. POST (June 28, 2015), <https://www.washingtonpost.com/news/digger/wp/2015/06/28/buying-visas-with-investments-is-big-business-and-congress-is-taking-notice/>. These critiques are particularly prevalent regarding rural communities.

¹²⁶ Eric Posner, *Citizenship for Sale: The "Immigrant Investor" Program is Unfair, Ineffective and Way too Cheap*, SLATE (May 13, 2015), <https://slate.com/news-and-politics/2015/05/eb-5-visa-program-for-immigrant-investors-this-path-to-citizenship-is-a-scam.html>.

¹²⁷ *Id.* But see Sec. & Exch. Comm'n v. Hui Feng, No. 15-cv-09420, 2017 WL 6551107, at *14 (C.D. Cal. Aug. 10, 2017) (holding that investments in a Regional Center can qualify as securities).

¹²⁸ Posner, *supra* note 125 (explaining that American investors contribute \$2.5 trillion, foreign investors not seeking immigrant status contribute \$236 billion, and foreign investors seeking immigrant status contribute about \$10 billion).

¹²⁹ *Internal Memo Outlines National Security Concerns with EB-5 Immigration Program*, CHUCK GRASSLEY: UNITED STATES SENATOR FOR IOWA, (Dec. 12, 2013), <https://www.grassley.senate.gov/news/news-releases/internal-memo-outlines-national-security-concerns-eb-5-immigration-program> (original policy memo is no longer available on the website).

¹³⁰ OFF. OF INSPECTOR GEN, DEP'T OF HOMELAND SEC., OAG-14-19, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES' EMPLOYMENT-BASED FIFTH PREFERENCE (EB-5) REGIONAL CENTER PROGRAM 5 (Dec. 2013), <https://www.slideshare.net/jameslavigne311/oig-14-19dec13-report-on-eb5-program>.

States Citizenship and Immigration Services has difficulty ensuring the integrity of the Regional Centers and does not always ensure that Regional Centers fulfill all program eligibility requirements.¹³¹

Finally, there have been allegations of fraud within Regional Centers.¹³² The Securities and Exchange Commission has charged various Regional Centers with fraud, leading to settlements in which the centers agreed to censure without admitting wrongdoing.¹³³ In addition, attorneys involved in using the Pilot Program have expressed a need for “more oversight and transparency” associated with the program.¹³⁴

IV. Proposed Reforms to Regional Centers

Proponents and detractors of Regional Centers have frequently proposed legislative and regulatory changes aimed at strengthening the Pilot Program. An oft-cited reform is to make the Pilot Program permanent. For example, between 2015 and 2018 there were fourteen separate pieces of legislation proposed to extend the Pilot Program’s authorization or make the program permanent.¹³⁵

A second oft-suggested reform is to raise the minimum threshold investment. For example, in a May 2015 article for *Slate*, Eric Posner suggested that the price we charge for citizenship is

¹³¹ *Id.*

¹³² Editorial, *supra* note 81.

¹³³ *Id.*

¹³⁴ Nixon, *supra* note 11.

¹³⁵ EB-5 Immigrant Investor Visa and RC Program Comprehensive Reform Act; American Job Creation and Investment Into Public Works Reform Act of 2017, H.R. 3471; Staff Draft of EB-5 Immigrant Investor Visa and Regional Center Program Comprehensive Reform Act of 2017; Staff Draft of The American Job Creation and Investment Promotion Reform Act of 2017; Invest in Our Communities Act Staff Draft of The American Job Creation and Investment Promotion Reform Act of 2016, S. 727; The American Job Creation and Investment Promotion Reform Act of 2016, H.R. 5992; EB-5 Integrity Act of 2015, S. 2415; EB-5 Integrity Act of 2016, H.R. 4530; Invest in Our Communities Act, S. 2122; To amend the Immigration and Nationality Act, H.R. 3370; American Job Creation and Investment Promotion Reform Act of 2015, S. 1501; American Entrepreneurship and Investment Act of 2015, H.R. 616.

too low.¹³⁶ Draft legislation circulated in early 2018 would have raised the minimum investment levels as follows: (1) “\$1,025,000” for regular investors; and (2) “\$925,000 for projects located in designated priority urban, rural, infrastructure, Base Realignment and Closure (BRAC) or U.S. territory locations.”¹³⁷ In regulations proposed in March 2018, the Department of Homeland Security (DHS) proposed increasing the minimum investment levels to \$1,800,000 for regular investors and \$1,350,000 for “Targeted Employment Area” projects.¹³⁸

A third proposed reform is to increase the number of visas set aside for this program. In January 2017, draft legislation was circulated to increase the set-asides as follows: “[1] 1,450 visas for rural [areas], [2] 1,450 visas for priority urban investments, and [3] 200 visas for infrastructure projects, which require the Job Creating Entity to be a governmental entity.”¹³⁹ Further, the draft legislation contained: (1) changes to job creation requirements which would increase requirements to projects in non-designated areas requiring that they create twelve jobs, and investor for rural, priority urban, United States territories, and projects located within a Base Realignment and Closure reduced to nine jobs; (2) a 120-day “freeze on filings following the date of enactment”; (3) “enactment of the Employment Creation Visa Integrity Fee, an annual Regional Center fee of \$20,000 (or \$10,000 for Regional Centers with less than 20 investors in the preceding fiscal year”);

¹³⁶ Posner, *supra* note 125 (arguing against the Pilot Program, that the same type of investment from foreign entrepreneurs is achievable without incentivizing them with United States citizenship because they are just as likely to be motivated by potential profits in their endeavor).

¹³⁷ Baker Tilly, *EB-5 New Legislation - Will We See the Day?*, INSIGHTS ARTICLES (Mar. 21, 2018) (defining both Priority Urban Investment Areas and Rural Areas) (“[T]wo of the following three tests must be met [to qualify as a Priority Urban Investment Area]: (I) unemployment rate above 150% of the national average; (II) poverty rate over 30%; (III) Median Family Income (MFI) under 60% of greater of statewide or MSA MFI. Also, each census tract being used in the analysis must meet the requirement, therefore, the census tract that project is located in must meet the requirement . . . “[whereas Rural Areas are] outside boundary of any city or town having a population of 20,000 or more and either (I) outside of a Metropolitan Statistical Area (MSA); (II) Within a county in a MSA with a population density of less than 225 people per square mile; or (III) within a tract greater than 100 square miles with population density of less than 100 people per square mile.”).

¹³⁸ *Id.*, see 8 C.F.R. § 204.5 (2019).

¹³⁹ Tilly, *supra* note 137.

and (4) “increased integrity and compliance measures, along with additional reporting requirements and site visits” from United States Citizenship and Immigration Services.¹⁴⁰

A final proposed reform is to narrow the definition of “Targeted Employment Area” in order to prevent manipulation. In a Senate Committee on the Judiciary hearing from April 2016, Senator Chuck Grassley of Iowa stated:

Gerrymandering the boundaries of Targeted Employment Areas allows very affluent areas to benefit from the lower investment threshold, resulting in little incentive to invest EB-5 funds in distressed or rural areas, as was envisioned by Senators Simon, Gramm and Boschwitz. This is done by drawing the Targeted Employment Area to include a long chain of census tracts linking the affluent area at one end with at least one census tract, perhaps many miles away, which includes low-income residents or subsidized housing.¹⁴¹

V. Recommendations

This paper recommends three incremental reforms in order for the Pilot Program to achieve its policy goals: (1) Congress must take the necessary steps to ensure the integrity of the Pilot Program; (2) Congress should permanently extend the Pilot Program in order to strengthen potential investors’ confidence that it will continue to be available; and (3) Congress should increase the requisite minimum investments in order to reflect the realities of the program. These proposals, if implemented, would further the program’s policy goals of attracting immigrants with entrepreneurial spirits and increasing job availabilities in “Targeted Employment Areas.”

First and foremost, Congress must address the history of integrity issues with the program. Problems include fraud of noncitizens, like that which occurred at Interbank, failure to comply with the securities laws, and gerrymandering of the proposed “Targeted Employment Area.” These instances of fraud and abuse, even if not widespread, are likely to have a negative impact on

¹⁴⁰ *Id.*

¹⁴¹ Prepared Statement by Senator Chuck Grassley of Iowa, *The Distortion of EB-5 Targeted Employment Areas: Time to End the Abuse*” at 29, HOMELAND SECURITY DIGITAL LIBRARY (April 13, 2016), <https://www.hsdl.org/?view&did=798231> (hearing compilation).

potential investor interest in the program and undercut the policy rationales in support of the program.

Second, Congress should pass legislation to make the Pilot Program permanent. Without a permanent extension to the program, immigrants will have no basis for believing that the program will still be available when they are ready to invest. Even if minimum investment levels were to remain at current levels (\$500,000 for investment in a Regional Center and \$1,000,000 for a solo investor), it takes most people time and effort to save up that much capital. Without a permanent extension to the Pilot Program, potential immigrant investors have no assurance that their efforts to save the necessary contribution will lead to an opportunity to participate in the program. As a result, potential investors may choose to invest in other countries whose programs are permanent, such as Canada and Australia. The lack of reliability associated with short-term extensions undercuts Congress's policy goal of attracting immigrants with entrepreneurial spirits through the EB-5 visa, resulting in the loss of valuable tax revenue and job creation. This recommendation is consistent with the fourteen proposed pieces of legislation between 2015 and 2018 discussed above in Part IV.

Third, Congress should increase the minimum contributions required of investors in Regional Centers. Currently, to use the EB-5 visa's main pathway, an individual investor must invest \$1,000,000 and be an active manager of the business. This investment of capital and sweat equity ensures that the investor has a stake in the success or failure of the business. An investor who chooses to invest via a Regional Center, however, is only required to invest \$500,000, and he or she has no managerial responsibilities in the business that is created. Yet, these passive investors receive Legal Permanent Resident status, which includes work authorization, thus affording these

investors an additional source of income if the business that is created through the Pilot Program is unsuccessful.

Because investors in the Pilot Program do not have the sweat equity requirement of other EB-5 investors, the minimum contribution in a Regional Center should be higher—not lower—than the investment level required for solo investors. This increase in initial investment would match the “skin in the game” that other users of the EB-5 visa feel with the managerial requirement.

Therefore, although the traditional EB-5 investment is appropriate at the \$1,000,000 level, Congress should increase the Pilot Program investment to around \$1,350,000. This recommendation is similar to the reforms suggested in proposed legislation that was circulated in early 2018, as well as the proposed regulations set forth by the Department of Homeland Security, in that both of these reforms called for increasing the minimum investment level for Regional Centers.

However, those reforms also called for an increase to the investment requirements of those investing solo, which this paper does not support. The “skin in the game” required of a solo investor and the requirement that they maintain a direct supervisory role over their business should provide them with the ability to invest a lower amount than a person who must only contribute money and does not face these additional burdens.

Finally, although a number of commentators have recommended increasing the number of visas allocated to the EB-5 program or defining “Targeted Employment Area” more narrowly, this paper argues that an incremental approach is preferable. By addressing the integrity of the Pilot Program, allowing it to become permanent, and increasing the buy-in amount under the fifth preference category, policymakers could assess whether the current number of available visas is responsive to demand and whether “Targeted Employment Area” designations are being

manipulated. Targeted and incremental change would strengthen the program through consistent availability and increased minimum investment amounts.

In sum, if the Pilot Program's integrity concerns were addressed, the Pilot Program made permanent, and the initial investment level was increased, the EB-5 visa program would better achieve Congress's policy goals of attracting immigrants with entrepreneurial spirits and creating jobs in "Targeted Employment Areas."

VI. Conclusion

Ultimately, the Pilot Program holds great potential for all involved. It provides a pathway to citizenship for investors who desire to immigrate to the United States, is a benefit to the United States through investment in the United States economy and provides more jobs for United States citizens. If proper changes were implemented, the Pilot Program could successfully fulfill the legislative intent expressed when the Pilot Program was created. Targeted and incremental change would create a stronger and more effective program by adapting to the need of the program as it is, not forecasting how it may be in the future.