EB-5 IMMIGRANT INVESTOR PROGRAM—A CHANGING LANDSCAPE

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The employment-based fifth preference (EB-5) Immigrant Investor Program is one of the most controversial and challenging provisions in the Immigration Act of 1990 (IMMACT90).[1] The program's instability, the changing economic environment, and friendlier immigrant investor programs offered by other nations have all led to its underutilization. Of the 130,000 visas allocated between 1992 and 2004, only 6,024 visas were issued to immigrant investors and their dependent family members. Of this group, only 643 investors were successful in removing the conditional requirement and receiving full permanent resident status.[2] However, due to some positive developments in recent years, we now have seen a surge in EB-5 investor petitions and U.S. Citizenship and Immigration Services (USCIS) approval rates. This article aims to review the program's history and recent developments, and show that the program now provides an excellent path to permanent residence for foreign investors and entrepreneurs, and is sure to boost the economy.

THE STATUTORY FRAMEWORK

IMMACT90 was enacted during a different era—one that reflected a relatively prosperous, pro-immigrant period in U.S. immigration history. Congress recognized that "it is unlikely that enough U.S. workers will be trained quickly enough to meet legitimate employment needs, and . . . immigration can and should be incorporated into an overall strategy that promotes the creation of the type of workforce needed in an increasingly global economy."[3]

IMMACT90 allocated 140,000 visas annually to employment-based immigrants, almost tripling the number allocated in prior years.[4] The EB-5 program,

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[1] Immigration Act of 1990 (IMMACT90), Pub. L. No. 101-649, 104 Stat. 4978. INA §203(b)(5).

[2] U.S. Government Accountability Office (GAO) Report to Congressional Committees, "Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors," GAO-05-256 (Apr. 2005), *published on* AILA InfoNet at Doc. No. 05040475 (*posted* Apr. 4, 2005) (GAO Report). Highlights of the GAO Report are reproduced in Appendix E.

[3] H.R. Rep. No. 723, 101st Cong., 2d Sess., pt. 1, at 41 (1990).

[4] L.C. Lee, "The 'Immigrant Entrepreneur' Provision of the Immigration Act of 1990: Is a Single Entrepreneur Category Sufficient?," 12 *J.L. & Com.* 147, 149 (1992).

created for immigrant investors, is the category for the new Employment Creation Pilot Program, aimed at "creat[ing] new employment for U.S. workers and to infuse new capital into the country."[5] To achieve this, Congress allocated approximately 10,000 visas each year for immigrant investors who invest at least $1 million in a business and generate a minimum of 10 new jobs for U.S. workers.[6]

Of the 10,000 visas available annually for immigrant investors, 3,000 visas are reserved for investment in targeted employment areas. Another 3,000 are set aside for investment through the Regional Center Pilot Program.[7] The Pilot Program allows investors to meet the criteria of the 10-minimum job creation by allowing for indirect employment by individuals who invest their capital in a "designated" regional center that promotes economic growth or creates jobs. A regional center is "any economic 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]

Furthermore, if the regional center or individual commercial enterprise is in a targeted employment area, the capital investment is reduced to $500,000.[9] A targeted employment area is an area that, at the time of the investment, is a rural area or an area that has experienced unemployment of at least 150 percent of the national average.[10]

The Regional Center Pilot Program was initially set to expire in 2000, but the Visa Waiver Permanent Program Act of 2000,[11] extended the Pilot Program for three years until September 30, 2003. On the eve of its expiration, Senator Chuck Grassley (R-IA) introduced the Basic Pilot Program Extension and Expansion Act of 2003 to extend the Pilot Program for another five years until September 30, 2008.[12] Thereafter, Senator Patrick Leahy (D-VT) had tried to push for another five-year extension of the Pilot Program and even introduced legislation to make the program permanent; however, on September 30, 2008, just in time to avoid a gap, the Regional Center Pilot Program was extended until March 6, 2009,[13] and then extended again until September 30, 2009.[14] On October 1, 2009, President Obama signed a stopgap bill to extend the program until October 31, 2009. Thereafter, on October 28, 2009, he signed into law the fiscal year (FY) 2010 Department of Homeland Security Appropriations bill, which extended the EB-5 Program through September 30, 2012.[15]

The extensions of the Pilot Program are an important sign of strong bipartisan support and congressional commitment to the Immigrant Investor Program. However, unless Congress makes the Regional Center Pilot Program permanent, the program will continue to be marred with uncertainty and deter potential investors.

REQUIREMENTS AND RESTRICTIONS

Immigrant investor eligibility requires proof that: (1) petitioner has invested or is actively in the process of investing the required amount of capital in a new commercial enterprise; (2) the investment is at risk; and (3) petitioner is or will be engaged in the management of the new commercial enterprise, either through day-to-day managerial control or policy formulation.16 An investor qualifies by initially filing Form I-526, Immigrant Petition by Alien Entrepreneur.[17] After the petition is approved, the investor must apply for adjustment of status in the United

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[5] *See* S. Rep. No. 55 (1989).

[6] The proposed S. 1348 Senate immigration bill would cut overall EB-5 immigrant investor numbers from 10,000 to just 2,800 a year, and EB-5 regional center green card numbers from the current 3,000 to just 1,500 a year. INA §203(b)(5)(A); 8 CFR §204.6.

[7] 8 CFR §204.6(j)(4)(iii).

[8] 8 CFR §204.6(e).

[9] 8 CFR §204.6(f)(2).

[10] INA §203(b)(5)(B); 8 CFR §204.6(e).

[11] Visa Waiver Permanent Program Act of 2000, Pub. L. No. 106-396, 114 Stat. 1631, §402(a).

[12] President George W. Bush extended the Pilot Program until September 30, 2008, when he signed Senate bill 1685 into law on December 3, 2003.

[13] Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, 122 Stat. 3574.

[14] Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524.

[15] Department of Homeland Security Appropriations Act, 2010, Pub. L. No. P.L.111-83, 123 Stat. 2142.

[16] 8 CFR §204.6. However, the establishment requirement was later eliminated by the 21st Century Department of Justice Appropriations Authorization Act (DOJ Amendments), Pub. L. No. 107-273, 116 Stat. 1758, signed into law on November 2, 2002.

[17] 8 CFR §204.6(a).

States or at a U.S. consulate/embassy overseas.[18] Upon approval, the investor is granted a two-year conditional green card.

During the 90-day period prior to expiration of the conditional period, Form I-829, Petition by Entrepreneur to Remove Conditions, must be filed.[19] In this petition, the investor must demonstrate the stated investment was made or still sustained over the two-year conditional period, and the requisite full-time jobs were created or will be created within a reasonable period of time. Only upon approval of the I-829 petition is the conditional nature of the green card lifted and full permanent residence granted.

Restrictive Interpretation of Regulatory Goals

During the first 15 years, the restrictive interpretation of the regulations drastically limited the types of investment permitted under the program. For example, a purely passive investment of more than $1 million that created at least 10 jobs would be denied for failure to meet the managerial requirement.[20] Likewise, if an investor sought to expand an already existing business that did not result in a substantial change, *i.e*., an increase of at least 40 percent in either the net worth or number of employees, the petition would be denied for failure to meet the establishment requirement.[21] A strict reading of the regulation would mean that if an investor wished to risk $1 million in an existing enterprise that already has 100 employees, he or she had to create at least 40 new jobs with his or her investment, despite the statutory requirement of creating only 10 new jobs, as clearly designated by Congress. These restrictions enormously altered the statutory goals of the EB-5 program and made investment in existing businesses difficult. While a passive investment or an expansion of a business may have met the goals of employment creation and infusion of capital, it would not meet the government's restrictive interpretations and would thereby lose its eligibility under the EB-5 regulations.

Restrictive Standard of Adjudication

Not only did the regulations alter the statutory goals, but the legacy Immigration and Naturalization Service's (INS) restrictive standards of adjudication further stifled the EB-5 program. In 1997, the Office of General Counsel issued an opinion that drastically altered the existing regulations and devastated an already faltering program.[22] The General Counsel's legal opinion prohibited certain types of business arrangements, such as: (1) the use of a down payment of cash with the remainder of the alien's contribution in the form of a promissory note; (2) a multi-year installment plan on a promissory note with a substantial "balloon" payment after the removal of the conditional status of the alien's permanent residence; (3) an option given to the alien to sell his or her investment for a fixed price that may be less than, equal to, or greater than the alien's cash contribution; (4) an option given to the enterprise or limited partnership to buy the investment at a fixed price; (5) a provision that allows or requires the commercial enterprise to place sufficient cash into a bank account to guarantee that funds will be available to repay the alien if the alien exercises an option to sell; (6) the withholding of a portion of the alien's capital contribution for attorneys' and finders' fees and other costs; and (7) a guaranteed return on the cash portion of the alien's investment.[23]

Many of the initial EB-5 applications involved business plans where the creation of a limited partnership was used to pool multiple investors' money to invest in either a new or a troubled business in the United States. Unfortunately, some of these limited partnership agreements were designed to reduce the investor's risk, so that only a small amount of the investment capital actually reached the business enterprise, and much of the investment included promissory notes of collateral where it was clear the actual, designated cash amount was not at risk.[24] Furthermore, the General Counsel's legal opinion also directed legacy INS to use not only these new standards going forward, but to retroactively apply these new standards to previously approved EB-5 petitions at the I-829 stage.

In 1998, the Administrative Appeals Office (AAO) issued a series of opinions (*Matter of Soffici, Matter of Izumii, Matter of Hsiung,* and *Matter of Ho*), collectively known as the "1998 precedent decisions," that not only echoed the 1997 legacy INS

[18] As of the date of this article, U.S. Citizenship and Immigration Services (USCIS) does not permit concurrent filing of the application to adjust status with the I-526 petition.

[19] 8 CFR §216.6.

[20] 8 CFR §204.6(j)(5).

[21] 8 CFR §204.6(h)(3).

[22] D. Hirson and C.I. Mayou, "The Sinking of the Titanic, or the Rising of the Phoenix? An Update on Immigrant Investor Visas," 98-09 *Immigration Briefings* (Sept. 1998).

[23] 75 *Interpreter Releases* 332 (Mar. 9, 1998).

[24] 8 CFR §204.6(j)(2).

mandate, but that effectively signaled the end of the road for the EB-5 program.[25]

For example, under the initial regulation, a promissory note could be valued at face value, but under the new standard, the promissory note had to be valued at fair market value. Under the old standard, the term of the promissory note was limitless, but under the new standard, the note had to be paid after two years. Furthermore, bank accounts could no longer be used as security.[26]

These decisions applied a restrictive approach and, even worse, retroactively applied the 1998 interpretations to investors who already had received I-526 approvals but were still subject to the two-year conditional residency requirement. As a result, hundreds of I-829 petitions filed by immigrant investors were denied based on the retroactive criteria. Most of the I-526 investor petitions filed after 1998 never had a chance, as investors relied on plausible interpretations of published regulations and invested in what appeared to be lawful investment plans, but ultimately became entangled in the government's restrictive interpretation of the law.

Restrictive Evidentiary Requirements

Consistent with the restrictive standards of adjudication and ever wary of fraud, USCIS requests extensive documentation. To cite a few examples, both I-526 and I-829 petitions require extensive proof that an investment has been made or is in the process of being made and must include evidence that the petitioner's personal capital was placed at risk.[27] USCIS will not recognize investments made directly through a petitioner's incorporated or limited liability business because the corporate assets are not considered the petitioner's personal assets.[28] Furthermore, the investment arrangement cannot be structured to shift the financial risk from the investor to the commercial enterprise.

USCIS also has been particularly concerned about whether the capital used for the investment was obtained through lawful means. The regulations instruct the petitioner to document the source of funds by providing foreign business registration, five years of tax return filings (within and outside the United States), and evidence identifying any other source of capital (*e.g.*, inheritance).[29]

In practice, the petitioner may have to trace the lawful source of funds back by several decades to the origin—which can be a daunting, if not impossible, task. Business in many countries is conducted on a trust basis and parties may agree to a contract with a handshake. This is a common problem with emerging economies that do not have the sophisticated documentary paper trails which U.S. businesses are generally required to possess. Thus, investors from certain countries often do not have credible records of income tax documents. Moreover, even where the investment can be traced to an original source, USCIS continues to use every technical basis to deny cases, leaving some potential investors discouraged from pursuing the EB-5 category because of the rigorous evidentiary requirements for the initial I-526 and the subsequent I-829 petitions.

Another example of unduly strict interpretation affects investors who transfer exactly $500,000 or $1 million, as required, but neglect to calculate the cost of the nominal bank wire transfer fee. USCIS will routinely reject these investors based on such minor technical grounds.

THE LANDSCAPE CHANGES

Several positive developments in the last few years indicate the landscape may be changing, as USCIS begins to approve EB-5 applications. Investors applying through the Employment Creation Pilot Program's regional centers appear to have met with considerably more success recently. This may be due to a perceived preference in adjudication on the part of USCIS, which seems to be approving EB-5 Pilot Program petitions at a substantially higher rate than in prior years. Unfortunately, most of the previously designated regional centers are now defunct, and investors are encouraged to under-

[25] *Matter of Soffici*, 22 I&N Dec. 158, 19 *Immigr. Rep*. B2-25 (AAO June 25, 1998); *Matter of Izumii*, 22 I&N Dec. 169, 19 *Immigr. Rep*. B2-32 (AAO June 13, 1998); *Matter of Hsiung*, 22 I&N Dec. 201, 19 *Immigr. Rep*. B2-106 (AAO July 31, 1998); and *Matter of Ho*, 22 I&N Dec. 206, 19 *Immigr. Rep*. B2-99 (AAO July 31, 1998). All four of these precedent decisions are reproduced in the Appendix materials to this volume.

[26] S. Yale-Loehr, "EB-5 Immigrant Investors: An Overview," *Immigration Options for Investors* 51, 62 (AILA 2006).

[27] 8 CFR §204.6(j)(2); 8 CFR §§216.6(a)(4)(ii), 1216.6(a)(4)(ii). For more on this topic, see C. Lee, "The Meaning of 'At Risk' in EB-5 Investment," elsewhere in this volume.

[28] *See Matter of M–*, I&N Dec. 24, 50 (BIA 1958, AG 1958).

[29] 8 CFR §204.6(j)(3). For more on this topic, see E. Arias & L. Stone, "Navigating the Lawful Source Requirement for EB-5 Immigration," elsewhere in this volume.

take extensive due diligence analysis before applying for EB-5 status.

Judicial Involvement

In May 2001, a California federal district court in *Chang v. United States* chastised the government and ruled that INS could not apply the new standards of adjudication retroactively in connection with approved I-526 petitions.[30] The court held that:

> INS could not "change the rules of the game" by automatically applying its new more restrictive interpretations retroactively to investors who had already received conditional green cards and who are now trying to have those conditions removed. Instead, the agency must allow some investors an opportunity to show how such a retroactive application would hurt them.

Despite this apparent victory for immigrant investors, this decision actually had the effect of curtailing the program. The court ordered that the merits of the retroactivity claim be remanded to the administrative courts for review. Unfortunately, INS refused to hear the retroactivity claims. Even though the parties argued the issue of retroactivity before the district court, the subject was left unresolved.

Two years later, on April 29, 2003, the Ninth Circuit Court of Appeals issued its review of *Chang v. United States.*[31] The court held that no further exhaustion of the administrative process was necessary and that it had jurisdiction to review the claims. More significantly, the court performed the retroactivity analysis, noting that the district court's actions were irrational because it "wasted judicial resources by remanding to the INS for it to do what it firmly states it may not and will not do . . . The district court was itself fully capable of doing what it asked the INS to do against its will. The remand was thus an abuse of discretion."[32] The Ninth Circuit determined that retroactive application of the 1998 AAO precedent decisions was impermissible. It further chastised the government, stating:

> INS's approving and receiving the benefits of [immigrant] 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.[33]

Consequently, for those investors caught in the midst of the rule changes, this landmark decision provided the first indication that the 10-year pattern of negative, restrictive adjudication might be drawing to a close based on the appellate court's conclusion that retroactive application of the 1998 precedent decisions was impermissible.

Congressional Involvement

While the federal courts breathed new life into an otherwise moribund program, Congress also tried to revive the program with the 21st Century Department of Justice Appropriations Authorization Act (DOJ Amendments), signed into law on November 2, 2002.[34] This law was specifically designed to reform the program and provide some regulatory guidance. The DOJ Amendments considerably eased the regulations by providing relief to investors left in limbo by the restrictive 1998 precedent decisions, outlining special procedures for investors with I-526 petition approvals between January 1, 1995, and August 31, 1998, and who had filed an adjustment of status application or had applied for an immigrant visa overseas.[35]

Some investor applicants with denied I-829 petitions were given an opportunity to file a motion to reopen, and others with approved I-526 petitions awaiting removal of conditional resident status in the United States were given a second chance at compliance.[36] Even investor applicants outside of the United States with approved I-526 petitions were given an opportunity to return to the United States, if necessary, to obtain adjustment.[37]

The DOJ Amendments eliminated the "establishment" requirement—that EB-5 investors have "established" a commercial enterprise.[38] Instead, investors

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[30] *Chang v. United States,* No. CV-99-10518-GHK (AJWx) (C.D. Cal. May 3, 2001).

[31] *Chang v. United States,* 327 F.3d 911 (9th Cir. 2003). The *Chang* decision is reproduced at Appendix B.

[32] *Id.* at 925.

[33] *Id.* at 929.

[34] 21st Century Department of Justice Appropriations Authorization Act, *supra* note 16.

[35] *Id.* at §§11031–32.

[36] *Id.* at §11031(b).

[37] *Id.* at §11032(c)(2)(B).

[38] *Supra* note 12, at 53.

only needed to show they have "invested" in a commercial enterprise. Thus, immigrant investors who invest in an existing enterprise no longer had to prove they expanded the net worth or the number of employees by 40 percent.[39] This significantly altered the original regulations and eliminated one of the biggest obstacles created by the 1998 precedent decisions. For instance, in *Matter of Izumii*, the AAO determined that the limited partners who had joined the general partnership over varying periods had used these "pooling agreements" to circumvent the establishment of a new business enterprise requirement. Because the DOJ Amendments eliminated the "establishment" requirement, the finding stated in *Matter of Izumii* is no longer applicable.

For advocates of the investor visa program, Congress's decision to eliminate the establishment requirement was seen as a significant positive development. However, soon after those judicial and statutory victories were celebrated, USCIS once again dealt the program another setback. On June 10, 2003, USCIS issued an interim guidance memo confirming that although an "alien entrepreneur is no longer required to establish a commercial enterprise,"[40] the new law does not remove the requirement that the enterprise be "new," as defined in 8 CFR §204.6(e). From this restrictive interpretation, it appeared that the "establishment of a new commercial enterprise" requirement still pertained to those enterprises established prior to November 29, 1990.

Most disturbing, however, is that USCIS has yet to issue conforming regulations to implement the DOJ amendments. Investors remain stuck in the quagmire from the prior confusion and guessing as to how they can extract themselves from the regulatory and adjudicatory mess.

Investors should continue to exercise caution in applying for immigrant investor visas as restrictive adjudications continue. For this reason, most EB-5 investors choose to participate in recently approved Pilot Program-designated regional centers, as they allow for creation of indirect employment, and the alien investor is not required to engage in the day-to-day management of the new commercial enterprise.[41] Also, USCIS appears to be approving Pilot Program cases for designated regional centers at a higher rate than traditional cases. However, the investor is cautioned that the strict reading of the source of the funds issue continues to be rigorously enforced for all cases. Also, with so many new regional centers being established, there are now concerns as to whether some will be economically viable, and if they will be able to meet the requirements to remove the conditional nature of the residency that is granted for an initial two-year period.

THE EFFECTIVENESS OF THE PROGRAM

The Basic Pilot Program Extension and Expansion Act of 2003 mandated that the Government Accountability Office (GAO) study the efficacy of the EB-5 program.[42] The GAO found that despite its turbulent history and negative perception by the government and potential investors, the program has been beneficial to the economy.[43] The 653 immigrant investors who have managed to attain permanent residency have collectively invested approximately $1 billion. This is a small estimate of the total investment in the U.S. economy because it only accounts for just over 10 percent of all EB-5 participants who have invested over a 13-year period. The GAO found that investments were made in various industries, including real estate, hotels/motels, manufacturing, import/export, agriculture, and technology, and across 17 states. However, California was the primary recipient, having drawn 41 percent of the investors.

The GAO concluded that the EB-5 program has a worthy mandate that can be beneficial to the U.S. economy and recommended that DHS issue the long-awaited regulations, thereby providing relief to the hundreds of investors whose status and cases have been in limbo for years. Furthermore, the GAO determined that the regulations will help provide guidance for adjudicators and potential investors.

ON THE BRIGHT SIDE

As mentioned above, participation in the EB-5 program through the Pilot Program appears to be the

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[39] 8 CFR §204.6(h)(3).

[40] USCIS Memorandum, W. Yates, "Amendments Affecting Adjudication of Petitions for Alien Entrepreneur" (June 10, 2003), 8 *Bender's Immigr. Bull.* 1306 (Aug. 1, 2003), *published on* AILA InfoNet at Doc. No. 03061744 (*posted* June 17, 2003).

[41] Citizenship and Immigration Services Ombudsman "Annual Report 2009" (June 30, 2009), *published on* AILA InfoNet at Doc. No. 09063065 (*posted* June 30, 2009).

[42] The Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944, §5.

[43] GAO Report, *supra* note 2.

best option for prospective investors. By investing in commercial enterprises located within a designated regional center and targeted employment area, the investment amount is reduced to $500,000, and the petitioner does not have to directly prove job creation. USCIS appears to show preference for these types of cases, and there have been several reports confirming the higher rate of approval for investments made under the Pilot Program. This positive development provides greater certainty that both the I-526 and I-829 petitions will be approved, and the investor will eventually succeed in obtaining permanent residence status.

Another positive development occurred in January 2005, when USCIS established within the agency the Investor and Regional Center Unit (IRCU) to provide oversight for policy and regulatory development, field design, case auditing, and training on regional center adjudication. USCIS believes that this will encourage foreign investment and job creation without damaging the integrity of the EB-5 program.[44] IRCU is now known as the USCIS Foreign Trader, Investor and Regional Center Program (FTIRCP) and also oversees the E treaty traders and investors visa programs.

Currently, prospective investors may choose from 49 approved regional centers operating in 21 states.[45] USCIS maintains a public list of all approved regional centers[46] and recently confirmed that another 41 regional center applications are pending at the California Service Center.[47]

JOB CREATION METHODOLOGY

In a further sign that that the government is warming up to the EB-5 investor program, USCIS recently issued two important memoranda clarifying key program questions and stakeholder concerns. Michael Aytes, Acting Deputy Director of USCIS issued the first memo, titled "Response to Recommendation 40, Employment Creation Immigrant Visa (EB-5) Program Recommendations," on June 12, 2009.[48] The memo provides responses to eight issues highlighted by Acting USCIS Ombudsman Richard Flowers concerning the improvements to the immigrant investor program. Among other recommendations, Mr. Flowers had urged USCIS to issue procedures "specifically direct[ing] 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."[49] In response, the Aytes Memo states:[50]

> 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 the full amount has, in fact, been invested in the job creating enterprise to support the job count.

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[44] USCIS Memorandum, W. Yates, "Establishment of an Investor and Regional Center Unit" (Jan. 19, 2005), *published on* AILA InfoNet at Doc. No. 05012663 (*posted* Jan. 26, 2005). The Yates Memo is reproduced at Appendix C.

[45] *See* "Q&As from EB-5 Stakeholders Meeting Hosted by Invest in the USA (IIUSA) and the American Immigration Lawyers Association (AILA)" (June 24, 2009), *published on* AILA InfoNet at Doc. No. 09071362 (*posted* July 13, 2009), at Q&A No. 4.

[46] The list is posted at: *www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=3df2b199cb011210VgnVCM1000004718190aRCRD&vgnextchannel=4f719c7755cb9010VgnVCM10000045f3d6a1RCRD.*

[47] *See* "Q&As from EB-5 Stakeholders Meeting Hosted by IIUSA and AILA," *supra* note 45, at Q&A No. 5.

[48] *See* USCIS Memorandum, M. Aytes, Acting Deputy Director, USCIS, to Richard Flowers, Acting Ombudsman, USCIS, "Response to Recommendation 40, Employment Creation Immigrant Visa (EB-5) Program Recommendations" (June 12, 2009), *published on* AILA InfoNet at Doc 09061770 (*posted* June 17, 2009), and reproduced at Appendix G (Aytes Memo).

[49] *Id*. at 2.

[50] *Id*.

As is apparent, USCIS conceded that the job creation methodology "is an issue"[51] and should not be re-adjudicated in Regional Center EB-5 cases. USCIS also stated that the government's goal is not to re-adjudicate issues "previously decided in instances where circumstances remain unchanged."[52] USCIS further stated that it was in the process of drafting a guidance memo that would clarify which issues should be decided at each stage of the process.[53]

On the other hand, the agency appears to retain the right to review this same methodology at the stage of the I-829 petition to remove conditions. Presently, California Service Center (CSC) adjudicators continue to demand proof of indirect job creation and issue challenges regarding previously cleared methodologies to both I-526 and I-829 petitioners. Furthermore, CSC continues to question the factors and models that formed the basis for gaining approval of Regional Centers every step of the process. Thus, it remains to be seen what impact such half-hearted concessions will have on future EB-5 cases and petition approval rates.

Timing of Job Creation

On June 17, 2009, USCIS published a memorandum from Donald Neufeld, Acting Associate Director, USCIS Domestics Operations, titled "EB-5 Entrepreneurs—Job Creation and Full-Time Positions."[54] Under USCIS regulations, I-526 petitions must be accompanied by "a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired."[55] The Neufeld Memo updates the *Adjudicators Field Manual* (AFM), clarifying that "each petitioner must submit a business plan"[56] and that the requirement that the requisite jobs will be created in two years "applies to all Form I-526 petitions, including those filed under the Regional Center Program, [which] rely on indirect job creation to satisfy the statutory employment creation requirement."[57]

The memo acknowledges that USCIS regulations do not specify *when* the two-year period begins for purposes of adjudicating I-526 petitions and that the phrase "next two years" referenced in 8 CFR §204.6(j)(4)(i)(B) "relates to the two-year period of conditional residence."[58] In other words, at the end of the two-year period of conditional residence, the alien investor must demonstrate with his or her I-829 petition that he or she has either "created or can be expected to create within a reasonable period of time" the necessary jobs, in order to have the conditions removed and full residence granted.[59] Thus, USCIS decided to fix the start of the two-year period with respect to the petitioner's job creation obligation since "the officer adjudicating Form I-526 cannot be certain when the period of conditional residence will in fact commence,"[60] among others. In particular,

> USCIS has determined that the average processing times for EB-5 petitioners filing for immigrant visas via consular processing and EB-5 petitioners filing for adjustment of status [to obtain conditional resident status] is approximately six months. Accordingly, in order to best approximate the two-year period of conditional residence the two-year period described in 8 CFR §204.6(j)(4)(i)(B) will be deemed to commence six months after the adjudication of Form I-526. USCIS officers should ensure that the business plan filed along with Form I-526 reasonably demonstrates that *the requisite number of jobs will be created by the alien's investment by the end of the two-year period that commences six months after the adjudication of the petition*.[61] [Emphasis added.]

In essence, USCIS has extended the timing of job creation from two years to two years and six months, which, in turn, means that an I-526 petitioner must produce a business plan detailing how and when the required number of qualifying (full-time[62]) jobs will

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[51] *See* "Q&As from EB-5 Stakeholders Meeting Hosted by IIUSA and AILA," *supra* note 45, at Q&A No. 12.

[52] *Id*.

[53] *Id*.

[54] USCIS Memorandum, D. Neufeld, "EB-5 Entrepreneurs—Job Creation and Full-Time Positions (AFM Update AD 09-04)" (June 17, 2009), *published on* AILA InfoNet at Doc. No. 09061964 (*posted* June 19, 2009) (Neufeld Memo). The memo is reproduced at Appenidx C.

[55] 8 CFR §204.6(j)(4)(i)(B).

[56] Neufeld Memo, *supra* note 54, at 1.

[57] *Id*. at 3.

[58] *Id*.

[59] 8 CFR §216.6(c)(1)(iv).

[60] Neufeld Memo, *supra* note 54, at 3.

[61] *Id*. at 3–4.

[62] The Neufeld Memo clarified that "direct and indirect construction jobs that are created by the petitioner's investment and that are expected to last at least 2 years, inclusive of

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be created within two and a half years of I-526 approval. USCIS assumes, however, that an investor will require, "on average," six months to receive conditional permanent residence either via consular processing or adjustment of status. If either one of these processes takes more than six months (which is not unusual), will the alien still have to meet the job creation requirement "by the end of the two-year period that commences six months after the adjudication of the petition"? Thus, fixing the start of the job creation period, while adding some certainty to USCIS adjudications, may end up creating more uncertainty for EB-5 petitioners. It might additionally have the effect of ruling out EB-5 projects that take longer than two and a half years to create the requisite jobs.[63] Although USCIS has the discretion to approve major projects that are delayed because of circumstances beyond the applicant's control, such as delays in issuing building permits, or where there are less than 10 jobs because an employer unknowingly hires an undocumented worker, but regrettably, we have not seen much favorable exercise of discretion for substantial good faith compliance.

Initial Review of Form I-829 Petitions Where Jobs Have Not Been Created

The Neufeld Memo states that I-829 petitions are "intended to examine whether the alien entrepreneur has satisfied the conditions of his or her admission to the United States."[64] USCIS must determine "whether the alien has invested the requisite capital and created the requisite jobs through that investment."[65] Because USCIS regulations provide that I-829 petitions must be accompanied by evidence that "the alien created or can be expected to create within a reasonable time ten full-time jobs for qualifying employees,"[66] the memo advises that:

> In making the "reasonable time" determination, officers should consider the evidence submitted along with the petition that demonstrates when the jobs are expected to be created, the reasons that the jobs were not created as predicted in Form I-526, the nature of the industry or industries in which the jobs are to be created, and any other evidence submitted by the petitioner. If, after considering the evidence, the officer determines that the jobs are more likely to be created within a reasonable time, Form I-829 should be approved consistent with 8 CFR §2166(d)(1) if the petitioner is otherwise eligible to have his or her conditions removed. If, however, the officer determines that the jobs will not be created within a reasonable period of time, Form I-829 should be denied consistent with 8 CFR §216.6(d)(2).[67]

This portion of the Neufeld memo provides needed flexibility in I-829 adjudications for investments where jobs have not yet been created and directs adjudicating officers to consider various factors in determining whether the required job creation may be shown "within a reasonable period of time."

TEA DESIGNATIONS

Another area of concern is that USCIS continues its position of requiring different investment levels ($500,000 versus $1,000,000) in multi-year projects located within designated "targeted employment areas" (TEAs) where the area's TEA designation is withdrawn but the project is ongoing and requires further investments. USCIS's position is that once the TEA designation is lost, the amount of investment in this same project is $1,000,000. This issue was captured in the June 24, 2009, EB-5 stakeholders meeting:[68]

> Most states update census tracts and counties/cities once a year. Assume that a regional center starts a project in a census tract that is a TEA for the current period but may not be a TEA for the following year. If funding is not 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 at different amounts, based on the sole fortuity of when a state updates its TEA list.
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> *USCIS Answer:* The project location has to qualify as a TEA at the time of filing the I-526, so if

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when the petitioner's I-829 is filed, may now count" as "full-time" jobs. *Id*. at 5.

[63] *See* S. Yale-Loehr, "USCIS Clarifies Key Aspects of EB-5 Program" *available at www.abil.com/articles/USCIS%20Clarifies%20Key%20Aspects%20of%20EB-5%20Program%20(Yale-Loehr).pdf* (last accessed Sept. 11, 2009).

[64] Neufeld Memo, *supra* note 54, at 6.

[65] *Id*.

[66] See 8 CFR §§ 216.6(4)(iv) and 216.6(c)(1)(iv).

[67] Neufeld Memo, *supra* note 54, at 6, 7.

[68] *See* "Q&As from EB-5 Stakeholders Meeting Hosted by IIUSA and AILA," *supra* note 45, at Q&A No. 15.

the area does not qualify then the minimum investment is one million dollars.

Although extremely unfair to EB-5 investors who come to the project perhaps a year later from their predecessors, the above answer implies USCIS's respect for TEA designations by state governments. In fact, adjudicators often question such designations, creating more uncertainty for the program and inconsistency in both regional center and individual petition adjudications. USCIS has finally recognized this concern and appears willing to issue a memo "instructing adjudicators not to question TEA designations."[69] The agency stated that it was not "in the business of questioning the governors or the state designation in this regard."[70]

A larger issue underlying TEA designations is that robust regional center investments and the resulting job growth in a targeted employment may lead to the loss of the area's TEA designation.[71] Basically, the commercial success of a regional center may be fatal to its very existence if the area in which it is located has seen improved economic activity and significant reduction in unemployment rates thanks to EB-5 investments.

EB-5 PROGRAM – STILL THE BEST CHOICE FOR INVESTORS AND ENTREPRENEURS?

Despite the EB-5 Program's turbulent history, it has many advantages over other employment-based immigrant visa classifications. First, it does not require an offer of employment and approved labor certification application. Second, as a historically underutilized program, prospective investors will have immigrant visas immediately available to them and need not wait years for a visa number.[72]

Since the EB-5 Program most closely parallels the EB-1C classification for multinational executives and managers, it is worthwhile to compare the attributes and nuances of the two visa categories. Practitioners should consider the EB-1C classification first, as it does not require a two-year conditional residence period. If the investor is qualified and if the investment can be structured to meet the requirements for EB-1C classification, then the practitioner should prepare and file the Form I-140 petition based on the EB-1C classification and avoid conditional residency.[73] If EB-1C classification is not available, then consider the EB-5 classification.[74]

Characteristics of Investor and Control of the Enterprise

The investor applying for permanent residence based on the EB-5 classification need not have a particular background or any experience at all. Regulations for the EB-5 classification are silent on characteristics of the investor. Successful petitioners have included students, relatively young adults, retirees, petitioners with limited English language ability and no prior investment, managerial, or entrepreneurial skills or experience, and investors with no management experience or entrepreneurial skills.[75]

Not only is the EB-5 petitioner excused from presenting evidence of past experience, but the EB-5 classification, in essence, minimizes the significance of what the investor actually will do in the U.S. enterprise. The EB-5 classification mandates only that the investor will be "engaged" in the enterprise, which can be as minimal as having a role in policy formulation.[76] The investor does not have to be a manager, executive, or even an employee in the business, and does not have to direct and control the business. The EB-5 regulation requires some participation in the management of the enterprise, either day-to-day managerial control or a role in policy formulation.[77] Presumably, an officer or director position would satisfy the requirement to be engaged in the enterprise.

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[69] *Id*., at follow-up Q&A.

[70] *Id*.

[71] 8 CFR §204.6(m)(6).

[72] Visa retrogression is of particular concern for Indian and Chinese-born nationals who are currently subject to five– and nine-year waits in the EB-2 and EB-3 categories, respectively. *See Visa Bulletin* (Mar. 2010).

[73] An added benefit is that the I-140 petition, unlike the I-526 petition, can be concurrently processed with an I-485 application for adjustment of status. Interim Rule, 67 Fed. Reg. 49561 (July 31, 2002), *published on* AILA InfoNet at Doc. No. 02073171 (*posted* July 31, 2002).

[74] For an in-depth analysis of the EB-5 classification as it compares to other visa classifications, *see* L. Stone, "A Comparison of the EB-5 Category with Alternative Immigration Strategies" *Immigration Options for Investors and Entrepreneurs* (AILA 2006). *See also* Exhibit I to this article—a checklist to help determine if an investment would qualify for EB-5 classification.

[75] Holders of the EB-1C classification, on the other hand, must have worked as an executive, manager, or specialized knowledge employee for an affiliated business.

[76] INA §203(b)(5)(A); 8 CFR §204.6(j)(5).

[77] 8 CFR §204.6(j)(5).

EMPLOYMENT IMPACTS

The EB-5 Program stresses the employment consequences of the investment and, thus, is named the "employment creation" visa category. As noted above, the investment must lead to the creation of at least 10 jobs.[78] The jobs filled by the investor or the investor's immediate family do not count toward meeting the requirement.[79] The jobs must be full-time (*i.e.*, at least 35 hours weekly), although part-time positions can be combined in cases of job sharing.[80] The I-526 petition must demonstrate either that at the time of filing the petition the investment already has created the requisite 10 full-time jobs, or the petition may include evidence of a comprehensive business plan that provides details on how the jobs will be created during the investor's conditional residence period.[81] In contrast, the EB-1C regulations, for instance, do not prescribe the number of employees an enterprise must have to qualify an applicant as "manager," but experienced practitioners know well that USCIS examiners look for depth in company organization charts and are more favorable towards businesses that employ numerous U.S. workers.

For those clients who have sufficient funds to invest, but who do not maintain a multinational business with offices abroad and in the United States, the EB-5 permanent residence classification can be an attractive vehicle to achieve U.S. permanent residence.

BE ENCOURAGED BUT PROCEED WITH CAUTION

Following a decade of turbulence, there have been positive developments for investors who are able to demonstrate the lawful source of funds used for investment in designated regional centers under the Pilot Program. Moreover, Congress has historically expressed support for the EB-5 program. Whenever legacy INS interpreted the regulations restrictively, Congress took action and passed new laws, attempting to soften the blow on immigrant investors. Congress's continuous extension of the Pilot Program reiterates the government's commitment to the EB-5 program. Regrettably, USCIS continues to delay the issuance of final enabling regulations that may help those lost in the labyrinth of restrictive adjudication, leaving previous investors without clear directions as to how to emerge from the quagmire. Hopefully, USCIS will recognize the clear congressional intent and draft regulations that will stabilize and energize a program that has the potential to reduce unemployment and revive the economy.

The Regional Center Pilot Program appears to be the best option for many prospective investors. It now appears that approximately 90 percent of all EB-5 petitions are filed through the Regional Centers.[82] By investing in commercial enterprises located within a designated regional center located in a targeted employment area, the investment amount is reduced to $500,000 and the investor does not have to directly prove job creation but can do so through a combination of direct and indirect jobs. USCIS therefore appears to continue to show preference for these types of cases. There have also been several reports of expeditious approvals, and a higher rate of approval for investments made under the Regional Center Pilot Program. This positive development provides greater certainty for some investors seeking to obtain permanent residence status.

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[78] 8 CFR §204.6(j)(4)(i).

[79] 8 CFR §204.6(e), defining "Qualifying employee."

[80] 8 CFR §204.6(e), defining "Full-time employment."

[81] 8 CFR §204.6(j)(4).

[82] "USCIS Q&A from Stakeholder Session with AILA EB-5 Committee and Invest in the USA" (Dec. 14, 2009), *published on* AILA InfoNet at Doc. No. 10010462 (*posted* Jan. 4, 2010), and reproduced at Appendix H.

EXHIBIT I

The following checklist may be handy in determining whether an investment will qualify for the EB-5 classification:

- The investment must be made after November 29, 1990, the effective date of the enabling legislation.
- Only an individual can make the investment. Allowing for the possible exception where the petitioner owns 100 percent of the investing entity, in most instances, if an entity makes the investment, the immigration benefits will be limited to the L-1 and E-2 visa categories and the EB-1C immigrant classification.
- The investment must be for a for-profit commercial enterprise formed for the ongoing conduct of lawful business.
- Location of the investment is pivotal for the requisite amount of capital and if the investment is in a Regional Center, the task of proving job creation is simplified. In contrast, investment location is irrelevant for seeking EB-1C classification.
- The EB-5 classification stipulates a minimum capital investment of $1 million. As indicated above, if the investment is in a "targeted employment area," the minimum capital that must be invested is reduced to $500,000. Capital that is not cash, such as equipment or inventory, is credited in the amount of its fair market value. Regulations for the EB-5 permanent residence classification do not require considerations of substantiality, proportionality, or marginality, as in E-2 visa practice.
- The petitioner must demonstrate that the invested capital was "obtained through lawful means."[83]
- The investment capital must be at risk. The invested funds may be escrowed pending the approvals of the I-526 petition and immigrant visa, as in E-2 visa practice, to protect the investor. But adjudicators are likely to require firm and detailed evidence of how the escrowed funds will be expended by the enterprise immediately after approval of the I-526 petition and visa issuance.[84]

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[83] 8 CFR §204.6(j)(3).

[84] Legacy Immigration and Naturalization Service (INS) Memorandum, R. Bach, "Immigrant Investor Petitions—Placement of Invested Funds in Escrow and Extension of Time to Withdraw a Held Petition and File a New Petition in its Place" (Aug. 28, 1998), *published on* AILA InfoNet at Doc. No. 98083198 (*posted* Aug. 31, 1998); *see also* 22 CFR §41.51(b)(7); 8 CFR §214.2(e)(12).